ISSN 1813-5099

UNIVERSITY OF DHAKA

The Dhaka University Studies Part-F

JOURNAL OF THE FACULTY OF LAW

Volume 17 Number 2 December 2006

THE DHAKA UNIVERSITY STUDIES
PART-F
VOLUME 17 NUMBER 2
DECEMBER 2006

THE DHAKA UNIVERSITY STUDIES PART-F

Vlume 17 **Number 2** **December 2006**

Manuscripts and editorial correspondence should be addressed to:

The Editor
The Dhaka University Studies, Part-F
Room No. 110, Kazi Motahar Hossain Bhaban
Faculty of Law
University of Dhaka
Dhaka-1000, Bangladesh
Tel: 8613724, 9661920-73/4348/4349
e-mail: lawfac@bangla.net

Two copies of the manuscript, typed 1.5 spaced on one side of A4 paper, must be submitted for publication in the Journal of the Faculty of Law, the Dhaka University Studies Part-F. The length of the paper shall be between 15 to 30 pages. The text must contain appropriate headings, subheadings and authoritative footnotes. The footnotes should be numbered consecutively and typed single spaced at the bottom of each relevant page. Citations conform generally to a uniform system of citation. Thus the style should be as follows:

1. Baxi, Upendra, "Access, Development and Distributive Justice: Access Problems of Rural Population", *Journal of the Indian Law Institute*, Vol. 18 No. 3, pp. 176-205.
2. Baxi, Upendra, *Access, Development and Distributive Justice: Access Problems of Rural Population*, Sage Publications, New Delhi, 1999, at p. 120.
3. Baxi, Upendra, "Access, Development and Distributive Justice: Access Problems of Rural Population" in Wright, Robert (ed.), *Alternative Ways to Justice*, Sage Publication, New Delhi, 1999, pp. 100-125, at p. 120.

Published by the Registrar, University of Dhaka, and printed by Shuchnona, 25/1, Katabon, Nilkhet, Babupura, Dhaka 1205, Phone: 9663805.

Subscription Rates

For Individuals : **Tk. 75; US$** 15 (without postage)
For Organisations : **Tk. 100; US$** 20 (without postage)

Journal of the Faculty of Law

Vlume 17 Number 2 December 2006

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CONTRIBUTORS

Dr. Abdullah-Al Faruque
Associate Professor, Dept. of Law, University of Chittagong

Dr. Md. Anowar Zahid
Assistant Professor, Dept. of Law, D.U.

Md. Khurshid Alam, Assistant Professor, Dept. of Law, D.U.
&
Fowzul Azim, Joint District Judge

Shima Zaman & Gobinda Chandra Mandal
Assistant Professors, Dept. of Law, D.U.

Quazi MH Supan
Assistant Professor, Dept. of Law, D.U.

Dalia Pervin
Assistant Professor, Dept. of Law, D.U.

Mohammad Towhidul Islam
Assistant Professor, Dept. of Law, D.U.

Jamila Ahmed Chowdhury
Lecturer, Dept. of Law, D.U.

Arif Jamil
Lecturer, Dept. of Law, D.U.

REVIEW OF THE CRITERIA AND FORMS OF LEGAL REASONING

Dr. Abdullah Al Faruque

1. Introduction

The relationship between law and reasoning is intuitive one and universally acknowledged. Law, which is frequently narrated as open-textured way, provides scope for multiple interpretation and analysis, and judicial decisions are often reached through practical argumentation. Judges and lawyers apply legal reasoning in one form or another in their day to day affairs in providing solutions to immediate problems before them. In addressing 'legal reasoning', we have to first define the expression 'reasoning'. The expression 'reasoning' is used to mean the process of guiding, deciding, on a given course of action and decision-making process. Thus, the expression 'legal reasoning' can refer to the following three situations "(a) reasoning to establish the existing content of the law on a given issue, (b) reasoning from the existing content of the law to the decision which a court should reach in a case involving that issue which comes before it, and (c) reasoning about the decision which a court should reach in a case, all things considered."[1] In essence, a legal reasoning can be defined as a reasoning that is used for explaining, guiding, interpreting, evaluating laws, legal principles, and norms. According to Martin P. Golding, 'legal reasoning' is used in both broad and narrow sense. In the broad sense, it refers to the psychological processes by which judges reach decisions in the cases that are before them. Such processes are comprised of ideas, beliefs, conjectures, feelings, and emotions. In the narrow sense, according to Golding, legal reasoning is concerned with a judge's decision on questions of law. In the narrow sense of the term, "legal reasoning" refers to the arguments that judges give in support of the decisions they render. These arguments consist of the reasons for the decisions, and the reasons are intended as justifications for the decisions.[2]

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1 Interpretation and Coherence in Legal Reasoning, Stanford Encyclopaedia of Philosophy, May 29, 2001, available at: http://plato.standford.edu/entries/legal-reas-interpret/ (Last visited on 03/06/2005).

2 Golding Martin P., *Legal Reasoning*, Alfred A. Knopf Inc., New York, (1984), p. 1.

Legal reasoning is usually applied in three areas -a. judicial decision-making, b. argumentation in jurisprudence and c. law-making. Thus, legal reasoning is applied to the application of law, in jurisprudential argumentation and creation of law. However, legal reasoning is predominantly associated with judicial application and interpretation of law. Legal reasoning in the common law system places considerable weight on arguments about the consequences of applying legal rules and of judicial decisions.[3] There are three categories of consequences: first, legal consequences, which refer to the effects of a given rule on the body of the law; secondly, logical consequences, which refer to the result of logical development of the rule; and thirdly, the behavioural consequences, which refer to the effect of the rule on how people actually behave in society.[4]

Legal reasoning is different from other kinds of reasoning. For example, it differs from moral reasoning in many ways. However, moral content is a universal requirement of legal reasoning. Legal reasoning also differs from scientific reasoning. While the scientific reasoning is concerned about discovering the truth, legal reasoning deals with normative statements, which are based essentially upon a value judgement made by legislature or a judge that a particular consequence should or ought to follow certain behaviour.[5]

Contour of legal reasoning can be shaped by both formal legal rules and extra-legal considerations. Formal legal rules are main guiding factors for legal reasoning. However, the contour of legal reasoning is not solely determined by legal arguments. Extra-legal considerations like principles of justice, morality, social policy may be applied in legal decision-making process. Thus, strictly legalistic approach to legal reasoning may not achieve the desired social goals that are intended. The purely legalistic approach in legal reasoning had long been refuted by jurists. Indeed, the contours of legal reasoning is profoundly shaped by "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, and even the prejudices which judges share with their fellow-men" [6] These extra-legal considerations are more relevant in reaching decision in a 'hard case' when the applicable law does not

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3 Neil MacCormic, *Legal Reasoning and Legal Theory*, Clarendon Press: Oxford, 1994.

4 Rudden, *Juridical Review*, (1979), 193, 194.

5 Holland, James A. & Julian S. Webb, *Learning Legal Rules*, Fifth edition, Oxford University Press, 2003, p. 331.

6 Holmes, O.H., "The Path of the Law", 10 *Harvard Law Review* (1897), 457.

dictate any particular result. On the other hand, in the 'easy cases', the judge is strictly bound to reach a particular decision because of the existence of a formally valid legal rule, which he must apply.

2. Objectives of Legal Reasoning

As mentioned earlier, legal reasoning is primarily understood in relation to judicial decision. In this sense, a judicial decision must be principled in the sense that it can be justified only by an appeal to a general rule or principle, the applicability of which transcends the case at hand. Through offering legal reasoning, judges justify their decisions to the interested public, which includes the parties to the case, all other people who may be immediately affected by the decision, the legal profession, and the community at large.[7] Legal reasoning in the proper sense denotes a belief in objectivity in finding answers to questions of law that judges can arrive at decisions through applying principles. Thus, legal reasoning always requires principled justifications.[8] Justification, according to John Rawls, "seeks to convince others or ourselves, of the reasonableness of the principles upon which our claims and judgements are founded."[9] Justification also implies that good legal reasoning should be disciplined by the same rules of logic. Logical soundness is one of the important aspects of legal reasoning.[10]

Lon L. Fuller argues that 'judicial activity is predicated on reason'.[11] For Fuller, judicial activity "cannot be predicted or even talked about meaningfully, except in terms of reasons that give rise to it."[12] In producing a reasoned decision, the judge, instead of acting on 'personal predilections', is attempting "to discover the natural principles underlying group life, so that his decision might conform to them."[13]

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7 Golding, supra note 2, p.1.

8 Markovits Richard S., "Legitimate Legal Argument and Internally-Right Answers to Legal Rights Questions," 74 Chicago-Kent Law Review, 415 (1999).

9 Rawls, John, *A Theory of Justice*, Cambridge, Massachusetts, (1971), p. 580.

10 Boukema H. J. M., *Judging Towards a Rational Judicial Process*, W.E.J. Tjeenk Willink, Zwolle-Holland, (1980), p. 98.

11 Fuller, Lon L., "Reason and Fiat in Case Law", 59 *Harvard Law Review* (1946), pp. 376-384.

12 Ibid., p. 386.

13 Ibid., p. 378.

Some writers argue that persuasion rather than justification is the objective of legal reasoning. Chaim Perelman is main proponent of this view. According to him, the decision which is rendered authoritative necessarily entails argumentation which is to be evaluated by the persuasiveness of the reasons given for the decision. He observes that the argumentation, which is the ultimate method of legal reasoning necessarily employs reasons which are ultimately tested by their effect in persuading those whom it addresses. The vitality of a legal opinion as precedent ultimately depends on the effectiveness of the argumentation which it employs. Perelman observes: "Legal reasoning is...but an argumentation aiming to persuade and convince those whom it addresses, that such a choice, decision or attitude is preferable to concurrent choices, decisions and attitudes."[14] For Perelman, legal reasoning is a practical argumentation which aims to persuade rather than to establish truth. The effectiveness of argumentation turns upon the persuasiveness of the reasons given for a decision. The argumentation itself employs a number of techniques and forms of argument to establish its effectiveness. Perelman concludes that the reasons given for the conclusions reached are to be measured by their persuasiveness, not by reference to some established true state of affairs.[15]

However, there is a predominant view that justification as an objective of legal reasoning is more convincing and more acceptable than persuasion.

3. Criteria of Legal Reasoning

Since the purpose of legal reasoning involves justification of a legal decision, it must conform to certain criteria, and relevant legal norms. The following are the criteria that judges must observe in legal reasoning:

3.1 Objectivity and Reasonableness

Legal reasoning in judicial decisions must be based on objective standards and reasonable moral judgement, and must testify to a standard of rational justification. In fact, 'moral requirements' is considered as one of the major criteria of good reasoning.[16]

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14 Chaim Perelman, *Justice, Law and Argument*, Dordrecht 1980, p. 129.

15 Id.

16 Perry Thomas D., *Moral Reasoning and Truth*, Clarendon Press, Oxford, 1976, pp. 76-77.

Requirement of moral reasonableness as the criteria of good reasoning implies the following issues: firstly, a judge must carefully study the case before him, consider the precedents, statutes and legal principles which have been cited to him, and must be attentive to all the facts of the case which may have legal significance. Secondly, a judge must be impartial in the sense that his decision must not be influenced by his personal interest or bias. It also implies that a judge is supposed to disqualify himself from sitting in a case where his personal interests are involved and in deciding cases, he must not give special weight to the interests of his own socio-economic or professional class, or to his own racial or religious group, and so on. Third, he must render reasons for his decisions.[17]

Thus, in order to avoid arbitrariness in their decisions, judges should articulate the reasons for their decisions to justify them. Thus, a reasoned decision also ensures justifiability of a decision. Here justification is concerned with normative aspect of a decision and the truths of logic in tracing the correctness between the conclusion and premises of arguments.[18] Reasoned decisions serve as guidance to other individuals on what the law is and on how their cases are likely to be decided in similar cases. In this way, individuals can adjust their future conduct.[19] According to Neil McCormic, "The reasons they (judges) publicly state for their decisions must therefore be reasons which make them appear to be what they are supposed to be: in short, reasons which show that their decisions secure 'justice according to law', and which are at least in that sense justifying reasons."[20] Reasoned decision is an integral to the sound adjudication and rationality of the legal process.

3.2 Consistency

The judges should be consistent in legal reasoning in the sense that he applies the same reasons that he gives in one case to the deciding of another case which involves a similar set of facts or which raises a similar legal issues.[21] A legal reasoning should be relatively clear,

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17 Ibid, pp. 85-86.

18 Levenbook Barbara Baum, "On Universal Relevance in Legal Reasoning", 3 *Journal of Law and Philosophy*, 1984, p. 1-23.

19 Golding, supra note 2, p. 10.

20 MacCormic, supra note 3, pp. 13-14.

21 Golding, supra note 3, p. 10.

detailed, and objectively comprehensible rules, and to provide an inter-personally trustworthy and acceptable process for putting these rules into effect. The requirement of consistency figures prominently in the discourse of precedent which involves development of law by judges through deciding particular cases, with each decision being shown to be consistent with earlier decision by a court. The central idea of precedent derives from a basis notion of justice that like cases should be treated alike. Principled consistency is the basic rule governing the common law principle of precedent.[22]

3.3 Coherence

Coherence plays an important role in providing integrity in legal reasoning and in guiding judges seeking to interpret the law correctly.[23] Coherence is not mere logical consistency in the decisions rather it is treated as integrity in legal interpretation. It also means that in good legal reasoning the judge tries to consider all the relevant factors in a way that is appropriately dispassionate. As a result of this consideration and reflection, the judge can arrive at a coherent decision.[24]

MacCormick views coherence in terms of unity of principle in a legal system, contending that the coherence of a set of legal norms consists in their being related either in virtue of being the realisation of some common value or values, or in virtue of fulfilling some common principle or principles. In his famous book *Legal Reasoning and Legal Theory*, MacCormic proposes a model of legal reasoning in which it is a necessary condition for a judicial decision to be justified that it have "value coherence" with existing laws. Value coherence depends on application of 'principles.' Principles state some value or policy that guides reasoning. MacCormic recognises that coherence can be a virtue of an entire legal system. He observes:

> ...in arguing from coherence, we are arguing for ways of making the legal system as nearly as possible a rationally structured whole which does not oblige us to pursue mutually inconsistent general objectives.[25]

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22 Bix, Brian, *Jurisprudence: Theory and Context*, 2nd ed. Sweet and Maxwell, 1999, p. 133.

23 Interpretation and Coherence in Legal Reasoning, *Stanford Encyclopaedia of Philosophy*, May 29, 2001, supra note 1.

24 Hermann, Donald H.J., "Legal Reasoning as Argumentation", 12 *Northern Kentucky Law Review* (1985), p. 467.

25 MacCormic, supra note 3.

Joseph Raz also characterises coherence in law in terms of unity of principle. In his view, the more unified the set of principles underlying those court decisions and legislative acts which make up the law, the more coherent law is. Alexy and Peczenik define coherence in terms of the degree of approximation to a perfect supportive structure exhibited by a set of propositions. They provide a list of ten criteria by reference to which coherence thus defined can be evaluated: (1) the number of supportive relations, (2) the length of the supportive chains, (3) the strength of the support, (4) the connections between supportive chains, (5) priority orders between reasons, (6) reciprocal justification, (7) generality, (8) conceptual cross-connections, (9) number of cases a theory covers, and (10) diversity of fields of life to which theory is applicable.[26] Levenbook contends that it is a necessary condition for a judicial decision to be legally justified that it coheres with some part of the established law.[27]

Ronald Dworkin's theory of integrity in adjudication is perhaps the most influential and persuasive one in shaping the notion of coherence in modern time. In his influential book *Law's Empire*, Dworkin argues that justification through legal reasoning can best be provided when the law is viewed as the organised and coherent voice of what he refers to as a 'community of principle' i.e., a community whose members accept that their fates are linked by virtue of the fact that their rights and responsibilities are governed by common principles.[28]

Dworkin's account of integrity in adjudication requires judges to attempt to view the legal system as a whole and coherence should be exhibited in interpreting the law.

Dworkin also argues that the application of legal rules should be impartial in the sense that similarly situated individuals should be treated similarly and the treatment of any given individual should not depend on the identity of the judge. Finally, according to him, legal rules should promote planning, stability, and predictability.[29]

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26 Alexy, R. & A. Peczenik, "The Concept of Coherence and Its Significance for Discursive Rationality", 3 *Ratio Juris* (1990), pp. 130-147.

27 See, Levenbook, B.B., "The Role of Coherence in Legal Reasoning", 3 *Law and Philosophy* (1984), 355-74.

28 Dworkin, Ronald, *Law's Empire*, Hart Publishing, Oxford, (1998), chapter six.

29 Lewis, A. Kornhauser, "A World Apart? An Essay on the Autonomy of the Law", 78 *Boston University Law Review* (1998), p. 747.

4. Different Forms of Legal Reasoning

There are two main forms of legal reasoning: reasoning by analogy which is also called inductive reasoning and deductive reasoning, though judges seldom use these technical vocabularies in their decisions.

4.1 Legal Reasoning by Analogy

Analogical reasoning refers to noting similarities between cases and adapting them to fit new situations. Argument by analogy is common both to judicial decision and statutory interpretation. However, analogical reasoning is frequently used by judges and lawyers in arguing that previous decisions are or are not sufficiently similar to be relevant to the issue in question.[30] In other words, analogical reasoning demands that similar cases should be treated equally.[31] The important significance of analogical reasoning lies in the fact that it introduces a degree of stability and predictability in the interpretation of law. Analogical reasoning is usually used in the development of new law and in learned commentary about the law. Thus, it can also be used in legal reform.

The leading authority on analogical reasoning is Edward Levi, an American jurist who in his famous book, *"An Introduction to Legal Reasoning"*, described the process of analogical reasoning in the following way:

> The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case. The finding of similarity or difference is the key step in the legal process. The determination of similarity or difference is the function of each judge. Legal process is not the application of known rules to diverse

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30 Farrer, John H. and Anthony M. Dugdale, *Introduction to Legal Method*, 3rd ed., Sweet and Maxwell, (1990), p. 80.

31 Maris, Cess W. "Milking The Meter-On Analogy, Universalizability and World Views", in: Patrick Nerhot (ed.), *Legal Knowledge and Analogy*, Kluwer Academic Publishers, Dordrecht/Boston/London, (1991), pp. 71-106.

> facts. But is a system of rules, which are discovered in the process of determining similarity or difference.[32]

The main proposition of Levi's treatment of legal reasoning is that the determination of analogies is a crucial element in such reasoning. Legal reasoning is frequently concerned with whether the case presently before a court is relevant like other previously decided cases. Levi emphasizes that general principles typically do not play a decisive role in answering such questions. Analogy can guide the application of rules in such situations.

According to Raz, a court relies on analogy whenever it draws on similarities or dissimilarities between the present case and previous cases which are not binding precedents applying to the present case.[33] According to him, analogical argument is a form of justification of new rules laid down by the courts in the exercise of their law-making discretion.[34] The test of relevance of similarities is the underlying justification of the rule which forms the basis of analogy. Argument by analogy is essentially an argument to the effect that if a certain reason is good enough to justify one rule, then it is equally good to justify another which similarly follows from it.[35] Analogical arguments establish coherence of purpose with certain parts of the law. However, according to Raz, it is often felt that analogical arguments are inconclusive because there are many incompatible analogies which can be drawn and the courts should choose them on the ground of their inherent moral relevance. [36] According to him,

> there is no point in saying that judges are legally obliged to use analogical arguments. There are no legally agreed standards on how such arguments should be used beyond the general advice that they should be used to establish harmony of purpose between the proposed and established rules and that they should be assigned the weight which it is morally right to give them. Analogical arguments are and should be used according to their inherent moral relevance. There are no special legal requirements concerning their use.[37]

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32 E. H. Levi, *An Introduction to Legal Reasoning*, University of Chicago Press, (1948), p.1.

33 Raz Joseph, *The Authority of Law*, Clarendon Press: Oxford, (1979), p. 202.

34 Ibid, p. 202.

35 Ibid, p. 204.

36 Ibid, p. 205.

37 Ibid, p. 206.

Every legal system employs analogical reasoning in one form or another to justify judicial decisions. For instance, in civil law system, analogical reasoning is used as a tool to fill a gap in legislation or code. In civil or continental legal system, the basic concept of analogical reasoning derives from the fact that codes are enacted to supply guidance on any legal question in the area of law encompassed by the code but it is assumed that legislature inevitably leaves some gaps in a code. Analogical reasoning can be used as a tool to fill such a gap. Thus, it is mainly used as a tool of interpretation of a code.[38]

Analogical reasoning is one of the fundamental principles of common law. In the common law system, the most common form of analogical reasoning is the use of precedent by which court decisions are recognized as a valid source of law. In precedent, judges are required to decide the cases before them according to existing precedents in the domain. It means that when a previously decided case discovers a new rule, it governs similar cases to be decided. The legal basis of the precedent derives from the fact that it was decided on the basis of legal rules and standards, which in turn provides a justification of the application of a particular precedent. Precedent is thus a matter of applying prescribed legal rules and standards.[39] As a result, conclusions drawn by inference from analogy by applying precedent are not causal but the similarities referred to in the legal argument support a normative inference about correct legal outcome.[40] Precedent plays an important role in promoting certainty in the judicial process and predictability in law. In the words of Roscoe Pound:

> The chief cause of the success of our common law doctrine of precedent as a form of law is that it combines certainty and power of growth as no other doctrine has been able to do so. Certainty is insured within reasonable limits in that court proceeds by analogy of rules and doctrines in the traditional system and develops a principle for the cause before it according to known techniques. Growth is insured in that the limits of the principle are not fixed authoritatively once for all but are discovered gradually by a process

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38 See for details, Langenbucher Katja, "Argument by Analogy in European Law", 57 *The Cambridge Law Journal* (1998), pp. 481- 521.

39 White, Jefferson "Analogical Reasoning", in: Patterson, Dennis (ed.), *A Companion to Philosophy of Law and Legal Theory*, Blackwell Publishers, (1996), p. 583.

40 Ibid.

> of inclusion and exclusion as cases arise which bring out its practical workings and prove how far it may be made to do justice in its actual operation.[41]

Analogical reasoning, however, does not necessarily mean that such previous case needs to be precisely on the point with the case to be decided. In other words, analogical reasoning must satisfy the requirement of formal justice that like cases should be treated alike but it does not mean that two cases should be identical.[42] In the circumstance of like cases, the court must decide whether the previous case is sufficiently analogous for its rule to govern the new case to be decided. It may also happen that there is more than one case that arguably applies to the case at hand. In that circumstance, courts must determine which of the previous cases is most similar to the case to be decided.

In common law, analogical reasoning is mainly associated with the invocation of precedent, but courts operating under common law system can also invoke it in interpretation of statutes. For instance, a new statute or provision may be interpreted in the light of the statute that it replaces. Since legislative supremacy is basic principle of common law, the court can not draw conclusions which the legislature did not intend. Under the common law system, in interpreting law, a judge or commentator may draw analogies between the two pieces of legislation in order to derive similarity in outcome that the statutes seek or similarity in policy considerations underlying their adoption.

As far as use of analogical reasoning in interpretation of statutes is concerned under the common law system, in Raj's account, it involves interpreting the purpose and rationale of existing legal rules. According to him, analogy is used in law-making to show harmony of purpose between the existing laws and a new one. It is also used in interpretation of laws on the assumption that the law-makers intended to presume harmony of objective and their acts should be interpreted to preserve goals compatible with those of related rules.[43]

Many scholars have noted that analogies may be either formalistic or realistic. A formalist analogy is one based upon the similarities between the facts of the cited case and the facts of the case under

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41 Pound, Roscoe, *The Spirit of the Common Law*, Marshall Jones Company, (1921), p. 182.

42 Ibid, p. 584.

43 Ibid, pp. 208-209.

consideration. On the other hand, a realist analogy is based upon the similarities between the values served by the rule of law from the cited case and the values that are at stake in the case at hand.[44] In fact, realistic form of legal reasoning is closely related to the notion of legal realism. Legal realism, which is also called policy analysis, or practical reasoning, emerged from the British school of utilitarianism and the American philosophy of pragmatism. Legal realism is a method of legal reasoning that determines what the law is, not by invoking categorical legal principles, but rather by considering the law's probable consequences. It demands that law should be interpreted not by referring to text, but by inquiring into the underlying purposes of the law. The courts should not seek a literal definition of the terms of the law, but should rather seek to fulfil the values that the law is intended to serve.[45]

The guiding principle of realistic reasoning has been expressed by Benjamin Cardozo, in the following way:

> ... when there are two existing rules of law that arguably apply by analogy to the present case, legal realists choose between them by determining which rule better achieves the underlying purposes of the law in the case. This is realistic analogical reasoning. But what if neither of the existing rules precisely serves the values that are at stake in the case under consideration? In these circumstances, it is necessary to construct a new rule of law, taking into account all of the values and interests that will be affected by the new rule. Legal realism is the identification, interpretation and creation of rules of law in light of the intended purposes, underlying values and likely consequences of the law.[46]

The reasoning by analogy also closely resembles "inductive reasoning". In general, the process of inductive reasoning involves making a number of observations and then proceeding to formulate a principle which will be of general application.[47] Inductive reasoning starts with observations of the facts and arrives at general conclusion. Thus, inductive reasoning is a process of reasoning by example. However, inductive reasoning cannot be conclusive. Inductive

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44 Wilson, Huhn "The Stages of Legal Reasoning: Formalism, Analogy, and Realism" 48 *Villanova Law Review*, (2003), p. 305.

45 Ibid, p. 305.

46 Cardozo, B. *The Nature of the Judicial Process*, (1921), p. 21.

47 Mcleod, Ian *Legal Method*, 5th ed., Palgrave Macmillan, (2005), p. 10.

reasoning is not about proof, but it is purely about justification.[48] The inductive reasoning fundamentally differs from the deductive form of reasoning. The difference between induction and deduction is primarily the difference between providing justification for and proof of an outcome. According to one author,

> The difference between deductive and inductive reasoning is that deductive reasoning is a closed system of reasoning, from the general to the general or the particular. In an inductive argument, the premises only tend to support the conclusions, but they do not compel the conclusion. Judges are involved in a type of inductive reasoning called reasoning by analogy. This is a process of reasoning by comparing examples.[49]

Thus, induction is closely related to analogical reasoning because both rely on the use and interpretation of prior experience. In inductive reasoning, lawyers and judges find a general proposition of law through surveying of relevant statutes and case laws.

4.2 Deductive Reasoning

In deductive reasoning, logical conclusion is drawn from major premise and minor premise. The process of deductive reasoning involves stating one or more propositions and then conclusion is reached by applying established principles of logic.[50] Deductive reasoning is only applicable once a clear major premise has been established.[51] According to a learned commentator, deductive reasoning is of limited use in legal reasoning because this form of reasoning leaves no space for examining the truth or otherwise of the premises.[52] Deductive arguments only hold true of factual propositions, not of norms.[53] As any mode of evaluative argument in deductive reasoning must involve, depend on, or presuppose, some ultimate premises which are not themselves provable, demonstrable or confirmable in terms of further or ulterior reasons.[54] According to

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48 Holland James A. & Julian S. Webb, supra note 5, p. 323.

49 Sharon, Hanson *Legal Method and Reasoning*, 2nd edition, Cavendish Publishing: London, (2003), p. 218.

50 Ian Mcleod, supra note 47, p. 11.

51 Farrer and Dudale, supra note 30, p. 79.

52 Sharon Hanson, Supra note 49 p. 216.

53 Harris, J.W. *Legal Philosophies*, 2nd ed., Butterworths, London, (1997), p. 213.

54 Ibid, p. 21.

Dworkin, the deductive method is suitable in a legal system that follows strict, formal, rules for the solution of conflicts between rules. Thus, deductive legal reasoning establishes a formal logic through a process of identification or adoption of basic premises from which determinate legal conclusions can be deduced. However, even a pure deductive reasoning can provide justification of a judicial decision sometimes if the major premise is an established rule of legal system, the minor premise consists of proven facts, and then conclusion arrived must be true and can be normatively justified. [55]

5. MacCormick's 'Consequence-based Reasoning'

Professor MacCormick in his influential book titled *Legal Reasoning and Legal Theory* gives a theory of reasoning which is called 'consequence based reasoning'- which is largely concerned with the justification of rules in law. MacCormic argues for consequence based reasoning as the preferred form of legal reasoning. In essence, MacCormic presents an argument in favour of the view that purely deductive reasoning is possible in justification of a judicial decision. MacCormic contends that in cases where deductive reasoning can not justify judicial decisions, courts may apply non-deductive arguments based on the ideas of consistency, coherence and consequences in fashioning a rule or principle of law to resolve the case. He suggests that judges may look, or should look, to the policies underlying the outcome of the precedent and the case under consideration. MacCormic contends that two factors in particular may be considered by a judge when justifying his decision. The first is the extent to which a proposed decision will cohere with existing principles and authorities: the greater the inconsistency with the existing legal framework that will result from a proposed decision, the less likely it is to be adopted. The second concerns the broader consequences of the decision for potential litigants, the legal system and indeed the role of law in society. Here the main issue is whether the consequences should be acceptable in terms of justice or common sense.[56]

MacCormic's account for 'consequence' based reasoning is a kind of practical reasoning, which is the application by individuals of their reason to decide in situations of choice. MacCormic contends that,

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55 Harris J.W., Supra note 53, p. 215; Richard Warner, "Three Theories of Legal Reasoning", 62 *Southern California Law Review* (1989), p. 1523.

56 Farrer and Dugdale, supra note 30, p. 81.

within the limits set by the requirements of formal justice, consistency and coherence, legal reasoning is essentially consequentialist. MacCormic identifies consequences of three types: first, there are considerations of corrective justice-'for every wrong there ought to be a remedy'. Second, there are considerations of 'common sense'- a judicial expression which denotes the perceptions of community moral standards. Third, there are considerations of public policy. According to him, "Consequence-based reasoning is a common feature of judicial decision-making, often appearing in the guise of 'policy consideration.' Policy consideration typically concerns the expected effects of legal rules."[57] Thus, consequence based reasoning should be desirable in terms of corrective justice, community morality and public policy.

The 'consequence based reasoning' propounded by MacCormic is normative one and necessity of such reasoning arises when deductive justification is not possible. The consequence based reasoning, however, should be consistent and coherent with the rest of the legal system and existing principles.

6. Legal Reasoning in 'Hard Cases'

Before embarking on analysis on reasoning in hard cases, we should highlight the distinction between 'easy case' and 'hard case.' Generally, in 'easy case', the decision follows from a legal rule, a description of the facts of the case and other legal norms. In the 'hard' cases, formal rules of law can not help to reach a correct decision. In hard cases, judges often exercise discretion in reaching decision and legal reasoning in hard cases is inextricably linked with the underlying philosophy of judicial discretion. In reaching decision in hard cases, judges may refer to common sense, the supposed view of a reasonable man or they may refer to notions of justice and fairness.[58] Coherence also plays an important part in the legal justification of a judicial decision in a hard case.[59] In generally, in the hard case scenario, where no applicable precedent exists, judges resort to principles to develop new rules. According to Rolf Sartorius, in a hard

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57 Cane, Peter, "Consequences in Judicial Reasoning", in: Horder Jeremy (ed.), *Oxford Essays in Jurisprudence*, Fourth Series, Oxford University Press, 2000, p. 42.

58 Farrer , John H. and Anthony M. Dugdale, supra note 30, p. 82.

59 Levenbook, supra note 27.

case, all substantive reasons for a legal decision are supplied by legal principles or by extra-legal principles from them.[60]

H. L. Hart expounds theories of 'easy case' and 'hard case' for the first time and distinction between them are relevant to his proposition of judicial discretion. According to Hart, in easy cases like in routine cases of legal rules, judges do not exercise discretion. In that type of case, the rule is applied as a matter of routine, as a deductive syllogism leading to a unique rule.[61] On the other hand, in hard cases e.g., in case of indeterminacy, inconsistency, or ambiguity in law, judges can decide such cases only by adding determinate content to the law and by engaging in "creative judicial activity". According to him, in case of 'hard cases', judge exercises discretion in proper sense in applying his legal reasoning.

One of the convincing theories on legal reasoning in 'hard cases' has been propounded by John Bell. According to him, the judges make value choices in hard cases and in doing so they give political direction to society. In justifying the choices they make, judges often have to recourse to policy arguments. Such policy arguments propose a strategy for resolving similar disputes in the future.[62] He defines policy arguments as "substantive justification to which judges appeal when the standards and rules of the legal system do not provide a clear resolution of dispute."[63] Such substantive justifications can be both ethical and non-ethical. Ethical reasons justify a result by showing that it will conform to some ethical standard, such as, fairness. Non-ethical reasons justify a decision by showing that it advances some accepted goal, such as greater wealth for the community or a better environment. However, he contends that policy arguments do not have to be used in every case, which comes before a judge. They are confined to 'hard cases', where there is no settled answer. He characterises judicial discretion as 'judicial creativity' which can be given any of the three senses. Firstly, all interpretation and rule-definition is 'creative' in the sense that the

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60 See, Sartorius, "The Justification of the Judicial Decision", 78 *Ethics* (1968), pp. 171-87.

61 See also George P. Fletcher, *Basic Concepts of Legal Thought*, Oxford University Press, (1996), pp. 56-57.

62 Bell, John, *Policy Arguments in Judicial Decisions*, Clarendon Press: Oxford, (1988), p. 22.

63 Ibid, pp. 22-23.

judge has to state something, which has not been expressed before. Secondly, 'creativity' may be defined as making a choice of the values to be applied where there is no consensus on what is the appropriate standard for the situation in question. In a third, more restricted sense, 'creativity' may apply to situations in which the judge simply gives effect to his personal views where there is no settled legal answer to the question before him.[64] Bell gives emphasis on second sense of judicial discretion in the form of creativity and considers it as the most appropriate circumstances in which judicial discretion can be exercised.[65]

He continues: "Policy arguments do not have to be used in every case which comes before a judge. They are confined to 'hard cases', those where the settled legal standards do not provide a clear answer."[66] In the decisions reached in 'hard cases', the reasons given by the judges reflect not only his own perception of the job he performs in society, but also what is expected of him by his audience. In formulating justification of his reasoning, the judge approaches his task in the light of his social function.[67]

Dworkin proposed theory of adjudication for 'hard cases', which is mainly based on analogical reasoning. According to him, judges are obliged to solve all legal cases on the basis of a total analogy of all the existing statutory and common law rules. Such a total analogy is necessary to yield the best theory of political morality which best justifies all existing statutory and common law rules and which entails a legally binding correct solutions to all 'hard cases'.[68] However, Dworkin makes a distinction between arguments of principle and arguments of policy in relation to hard cases. Dworkin suggests that judges do not decide cases on the basis of policy in the sense of giving effect to particular social or economic goals and such policy in this sense must be left to the legislature. Rather judges decide cases on the basis of principle in that they seek to give effect to rights that protect interests of individuals.[69]

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64 Ibid, p. 30.

65 Ibid, p. 31.

66 Ibid, p. 24.

67 Id.

68 See Dworkin, Ronald *Taking Rights Seriously*, Cambridge: Massachusetts, 1977.

69 John H. Farrer and Anthony M. Dugdale, supra note 30, p. 83.

Dworkin asserts that his distinction between principles and policies affords a description of how judges decide cases and gives a normative account of how they should decide cases. He puts forwards his arguments against judicial reliance on policy on two premises: first that judges are not responsible to the electorate and therefore, should not make law; and second, because judicial decisions have retroactive effect it is unfair to the losing party to base a decision on newly made law. Dworkin argues in favour of 'principle' as a guiding force in 'hard cases' on the ground of consistency in judicial reasoning. According to him, judges are expected to decide with "articulate consistency." They are supposed to decide like cases alike and to base particular decision on reasons they would be willing to apply to other cases that the reasons cover. In Dworkin's view, decisions based on policy may not require such consistency.

7. Conclusion

Legal reasoning is frequently found in the interpretation and application of law or legal norm in a particular case. An acceptable form of legal reasoning must fulfil the requirements of both formal legal rules and moral considerations. The legal reasoning must also be persuasive, consistent and coherent to make a decision rationally constructed and integrated. The integrity of legal principles is central to coherent set of legal reasoning.

Amongst the various forms of legal reasoning, argument by analogy is most commonly used one which is applied in both judicial decision and statutory interpretation. Analogy plays a great role in legal reasoning to make the decision coherent and consistent. In this way, analogical reasoning promotes legal certainty and predictability in judicial decisions. The process of analogical reasoning involves determination of likeness between the previous case and the case in hand and determination of *ratio decidendi* of the previous case and its application to the case in hand. On the other hand, deductive reasoning is relevant only in the case of clearly established statutory rules or case law, rules and principles. Analogical reasoning, however, can not solve the problem of indeterminacy of law that give rise to 'hard cases.' Legal reasoning in 'hard cases' involves weighing of extra-legal principles and public policy considerations. Legal reasoning in 'hard cases' involves the creation of new norms which are necessary to fill up the gaps in law which can occur due to vagueness or ambiguity of the statute or established legal norms.

ROLE OF THE EUROPEAN COURT OF JUSTICE IN THE EUROPEAN INTEGRATION PROCESS: A POLITICO-LEGAL GLIMPSE

Dr Md. Anowar Zahid

1 Introduction

After the Second World War European leaders, especially former British Prime Minister Winston Churchill, dreamt of European integration. They wanted to base the integration in economic area first with the ultimate aim of political unity.[1] Since coal and steel industry was the cause of war between France and Germany, the leaders tried to bring these two powers together and to put coal and steel under their common authority. Accordingly they established the European Coal and Steel Community (ECSC) in 1951 by a treaty[2] with the

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1 This was in fact the proposal of the erstwhile French Minister, Schuman's Plan who received encouragement from Jean Monnet in formulating his plan. Hence it is called "Monnet-inspired Schuman Plan": Werner Feld, Book Review (Merry and Serge Bromberger, *Jean Monnet and the United States of Europe*- tr. Elain P. Halperin, New York: Cward-McCann, 1969) 11 JCMS 158.

2 Treaty Instituting the European Coal and Steel Community (ECSC Treaty), signed on 18 April 1951 at Paris, No. I: 3729, (1957) 261 UNTS 140. It came into force on 23 July 1952 with validity for 50 years (until 23 July 2002), 261 UNTS 140 at p. 143. The signatories to the treaty were Belgium, Netherlands, Luxembourg, Italy, Germany and France. They 'resolved to substitute for historical rivalries a fusion of their essential interests; to establish, by creating an economic community, the foundation *of a broad and independent community among peoples long divided by bloody conflicts; and to lay the bases of institutions* capable of *giving direction to their future common destiny.*': Preamble to the Treaty (emphasis added), 261 UNTS 140 at 143. 'The European Coal and Steel Community has fully accomplished this task. It has made a key contribution to bringing about and consolidating peace in Europe and promoting political and economic integration, thereby laying the foundations for further progress towards European unification.' 'Opinion of the Committee of the Regions of 13 April 2000 on the 'Expiry of the ECSC Treaty' (hereinafter 'Opinion of the committee of regions'), O.J. C226, 08/08/2000 p. 50 (para 1.2).. In this respect the role of the High Authority, the executives of the ECSC, is of particular importance. 'It had set out the institutional principles, it provided a bold initial impulse for European integration by pooling Member States' production of coal and steel, and it created a climate of trust between former enemies on the basis of economic co-operation in a specific sector, which became a model of political farsightedness.': Henriette C. Pience, Book Review, (Dirk Spierenburg and Raymond Poidevin, *History of the High Authority of European Coal and Steel Community: Supranationality in Operation*, London: Weldenfeld & Nicholson, 1994, (1995) *ECL Rev.* 16(2) 130 at 130.

purpose of creating a common market in coal and steel. This is the first European supranational organization,[3] which was later followed by another two organizations in 1957, one in the atomic energy area, called the European Atomic Energy Community (Euratom)[4], and the other in areas outside these two, called the European Economic Community (EEC)[5]. Of these three the ECSC expired on the 23 July 2002,[6] the Euratom has a moderate record of success[7] and, the EEC, later called EC, has been continuing as the most successful one. In 1992 the EC forsook its only-economic character and became a political organization by extending its scope to political affairs. It changed its name to the European Union (EU). This change took place by the Treaty of Maastricht (called EU Treaty).[8] A further change occurred in 2004 when the EU adopted a Treaty to establish a European Constitution replacing the previous treaties (i.e., EEC Treaty of 1957 and EU Treaty of 1992).

As said above, today the EU is a new phase of the original EEC, composed of 25 Member States (also called EC, Community, in this paper). It has been carrying the original character of supranational

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3 A supranational organisation may be defined as an independent entity composed of a number of States to which powers have been transferred from national level. :Stephen Weatherill, *Law and Integration in the European Union* Oxford: Clarendon Press, 1995, at p. 10.

4 This was established by the European Atomic Energy Community (Euratom). 298 UNTS 167. This Treaty was signed on 25 March 1957, 298 UNTS 3 at p. 5. It came into force on 1 January 1958, 298 UNTS 167 at p. 169.

5 This was established by the European Economic Community Treaty. 298 UNTS 11. The EEC Treaty was signed on 25 March 1957, 298 UNTS 3 at p. 5. It became operative on 1 January 1958, 298 UNTS 11 at p. 11.

6 'Expiry of the ECSC Treaty', visited at http://europa.eu.int/comm/energy/en/ecsc-treaty.html on 24 March 2004.

7 Woodliffe John, 'Making sense of art. 37 of the euratom treaty' (Case Comment on *Saarland* v *Ministry for Industry, Posts and Telecommunications and Tourism*, September 24, Case 187/87 [1988] ECR 5013), (1989) EL Rev. 14(2) 101 at 101.

8 The Treaty was signed on the 7 February 1992. For the draft of the Treaty, see (1984) *OJ* C77/33. For the text of Treaty, see Belmont European Policy Centre, *The New Treaty on European Union*, v. 1 (Boulevard Charlemagne, Belgium: Belmont European Policy Centre, 1991) at p. 75. This treaty and the EC Treaty were amended by the Treaty of Amsterdam in 1997 by way of simplification, eliminating the obsolete text and renumbering their articles. For the amended texts of the two treaties after Amsterdam, see Rudden Bernard and Derrick Wyatt (ed.) *Basic Community Laws*, 7th ed. (Oxford: Oxford University Press, 1999) at pp. 97-113 and at pp. 3-95 respectively.

organization operated under its Constitution. It is 'neither a federation nor a confederation of States. It is an ensemble *sui generis* which has characteristics of both'.[9] It has three organs: legislative, executive and judicial organs. The European Commission drafts legislation, and the European Parliament and the European Council pass them as laws, which apply to the Member States. The European Court of Justice (ECJ, hereafter also called European Court, Community Court and Court), originally established under the ECSC Treaty in 1952, interprets those laws. Besides, it (a) gives judgement on particular Member State's failure to comply with the EU law, (b) annuls any EU law that is illegal, and (c) deals with complaints against any Community institution like the Commission, Parliament and Council.[10] It is composed of one judge per Member States so that all national legal systems are represented. To render efficient service the full Court does not normally sit. Usually a chamber of three, five or 13 judges sits at one time. Attached to it there is a Court of First Instance created in 1989. It helps the Court by giving rulings on certain types of case, in particular competition law cases and also individual, company and some organization cases.[11] However, as indicated in the title of this paper, the ECJ's role is not limited to the above; it contributes to the EU's integration programme. In doing that it indirectly plays a role, passive though, in European politics. In this paper three aspects of the ECJ's contributions throughout the Community's life, indicated below, would be overviewed

First, the main objective of the Community is economic integration, political integration being the secondary one.[12] To attain that goal it devised a concept of "common market", which envisaged unfettered[13]

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9 Santer Jacques, 'Some reflections on the principle of subsidiarity', in European Institute of Public Administration (EIPA), *Subsidiarity: The Challenge of Change* (Maastricht: EIPA, 1991) pp. 19-30, at pp. 26-27.

10 <http://europa.eu/institutions/inst/justice/index_en.htm>

11 *Ibid.*

12 '(T)o promote throughout the Community a harmonious, *development of economic activities* (economic goal), a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and *closer relations between the States belonging to it* (political goal)'. The Rome Treaty of 1957 (hereafter EC Treaty), art. 2, 298 UNTS 11 at p. 15. (emphasis added).

13 See EC Treaty, arts. 3(a) and 3(c), 298 UNTS 11 at p. 16 (present arts. 3.1(a) and 3.1(c)).

movements of goods,[14] persons,[15] services[16] and capital[17] within the Community under equal conditions of competition.[18] The materialisation of these freedoms requires harmonisation of the national laws[19] so that no discrepancies remain between such laws, which might distort the equal conditions of competition. But harmonization of hundred per cent area of laws is not possible nor is desirable on specific grounds like health, safety and environmental protection. As an alternative to harmonization and in the interest of integration the ECJ invented, by way of interpretation in the famous case of *Cassis de Dijon*[20], a new method called "mutual recognition". This method requires '(r)ecognition by a state of the validity on its own territory of rules made by one or more other states'.[21] This is a remarkable contribution of the ECJ.

Second, harmonization of laws requires legislation by the centre (meaning the central legislative bodies, viz. Commission, the Parliament and the Council) to bind the periphery (meaning the Member States). There are some specified areas (called "exclusive competence") where only the centre is entitled to legislate. In other areas (called "Subsidiary" or "shared competence") Member States may legislate unless the centre pre-empts that right in view of "comparative expediency" based on the nature of the subject to be legislated upon. Pre-emption of this right sometimes gives rise to

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14 EC Treaty, arts. 9-37, 298 UNTS 11 at pp. 18-29 (present arts. 23-31).

15 *Ibid.* arts. 48-51, 298 UNTS 11, at pp. 36-37 (present arts. 39-48).

16 *Ibid.* arts. 59-66, 298 UNTS 11, at pp. 40-42 (present arts. 49-55).

17 *Ibid.* arts. 67-73, 298 UNTS 11, at pp. 42-44 (present arts. 56-60).

18 See EC Treaty, art. 3(f), 298 UNTS 11 at p. 16 (present 3.1(g)) This has been confirmed by the European Court of Justice (ECJ) in *Commission* v *Council* (case C-300/89) [1991] ECR I-2867 at 2899.

19 See EC Treaty, art. 3(h), 298 UNTS 11 at p. 16 (present art. 3.1(h). In this context it is relevant to mention that in the EC Treaty three different terms, namely "to approximate", "to coordinate"(art. 44(2)(g)) and "to harmonize" have been used in a synonymous sense with the same objective of abolishing obstacles to interstate movement of person, good, capital and services. : Hans Claudius Ficker, 'The EC Directives on company law harmonisation' in Clive M. Schmitthoff, (ed.), *The Harmonisation of European Company Law* (London: UKNCCL, 1973), pp. 66-82 at pp. 67-68.

20 *Rewe* v *Bundesmonopolverwaltung fur Branntwein (Cassis de Dijon)*, case 120/78, [1979] ECR 649.

21 Gondrand, *Eurospeak- A User's Guide: The Dictionary of the Single Market* (London: Nicholas Brealey Publishing, 1992) at p. 196.

contention between the centre and the periphery, which attracts again the jurisdiction of the Court. Determining comparative expediency is a political task, which the ECJ should not, jurisprudentially speaking, undertake. Still it does.

Last, the ECJ also contributes by way of interpretation of the EU Treaty and laws, mainly Regulation[22] or Directive,[23] from a teleological perspective. By this perspective it interprets laws in such a way that the integration goal of the EU is facilitated.

The following discourse would depict the ECJ's contributions to the EU's integration with the purpose in mind that national courts, such as Bangladesh judiciary, may gather lessons from the ECJ and apply those in dispensing justice and also can contribute to nation-building.

2. Devising "Mutual Recognition" as a Method of Integration

In *Cassis de Dijon*[24] the plaintiff imported French wine that contained 15%-20% of alcohol. The concerned German authority barred him from importing this sort of wine on the ground that it had to contain minimal 25% of alcohol as provided for by German law. There was no Community Directive requiring such a minimum alcohol content in wine. Therefore, it was contended that in absence of any Community rules German prohibition amounted to a quantitative restriction to free movement of goods within the Community according to art. 30 of the EC Treaty (EU Treaty art. 28). The ECJ upheld the contention. It said that German restriction could have been accepted if it were necessary 'to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.'[25] In other words, the Court, for the first time, established that in absence of Community law goods produced and marketed legally in a Member State must be recognised in other Member States unless it contravenes mandatory requirements rules.[26] Thus the ECJ

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22 A Regulation is law that is binding as it is and directly applicable in the national jurisdictions of the Member States.

23 A Directive is a law that lays down the basics of a particular matter and the Members States implement it by incorporating in national laws.

24 *Supra* note 20. Of course the "seeds" of the *Cassis de Dijon* formula was sown five years ago in *Dassonville*, case 8/74, ECR 837.: Barents Rene, 'New developments in measures having equivalent effect', (1981) 18(3) *CML Rev.* 271 at p. 296

25 *Ibid.*, at p. 662.

26 *Ibid.*, at p. 664.

innovated "mutual recognition" as a new method of the Community integration. And it did this when only-harmonization proved to be an inadequate method of integration. Until then there were many areas of law unharmonized and free movement of goods, labour, capital and services remained limited.[27] The ECJ judgment led the Commission to adopt a policy proposal[28] to the Council as a supplementation to the *1969 General Programme on the Removal of Technical Barriers to Trade*.[29] Before this it wrote to the governments and EC Parliament on the impact of the said judgement.[30] Ultimately mutual recognition as a method of integration came into being in the EC integration process.

Since *Cassis de Dijon* judgment harmonization and mutual recognition are two methods of the EU integration. Mutual recognition has, however, extra merits over harmonization. It is cheap, simple and speedy: '(w)hile harmonisation requires costly and time-consuming negotiation among nations to achieve a consensus on mutually acceptable standards, mutual recognition achieves a similar effect more rapidly and without the associated costs'.[31] For example, in securities regulation its basic purpose is 'to keep the amount of supplemental information as small as possible.' [32] To exemplify more specifically, recently partially replaced by the "Passport" Prospectus Directive[33] the Admission of Securities and Information Directive (AID)[34] contained mutual recognition provisions. According to it

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27 Weidenfeld Weiner, "Upheaval in Europe" in Weiner Widenfeld and Wolfgang Wessels, *Europe from A-Z: Guide to European Integration*, Luxemburg: Office for Official Publications of the EC, 1997, pp. 7-20, at p. 12.

28 OJ C253.

29 (1969) OJ C76.

30 Bull. EC 7/8-1980 at p. 13.

31 Quentin Hay, "Trans-Tasmania mutual recognition: A new dimension in Australia-New Zealand Legal Relations" (1997) 3(1) *Int TLR* 6 at 6.

32 Manuel Lorenz, "EC Law and Other problems in Applying the SEC Proposal on Multinational Offerings to the UK", 21(3) *Int Law.* 795, at p. 819.

33 Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC.

34 Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the Admission of Securities to Official Stock Exchange Listing and on Information to be Published on Those Securities, [2001] OJ L184/1 (hereafter AID).

when multi-jurisdictional listing of securities was sought and the listing particulars were approved in the issuer home country or in any other country chosen by it, they must have been recognised, subject to necessary translation, by the host States.[35] There was no need of further approval of the competent authorities in the host States nor could those authorities ask for further information to be included in the listing particulars except information particular to the markets of those States concerning, for example, income tax system, paying agents of the issuer.[36] The competent authorities that recognised listing particulars did so even if partial exemption or derogation had been granted by the approving competent authorities subject to the conditions that such exemption or derogation and the conditions therefor are recognised in the recognising States' laws.[37]

3. Determining Legislative Competence of the Centre and the Periphery

a. Exclusive Competence

As already mentioned, the Community has two 'blocks of competence':[38] exclusive and subsidiary competences. The Community may adopt a directive in either capacity. Before formal decision for adopting a directive, the Community needs to determine the area of competence depending on its subject matter. The EU Constitution Treaty enlists the following as coming within the ambit of the centre's power:[39]

(1) customs union;
(2) the establishing of the competition rules essential for the internal market functioning;
(3) monetary policy for Member States whose currency is the euro;
(4) the conservation of marine biological resources under common fisheries policy;
(5) common commercial policy; and
(6) conclusion of international agreement.

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35 *Ibid.*, art. 38(1).

36 *Ibid.*

37 *Ibid.*, art. 38(2).

38 'Subsidiarity Principle', 1992 *EC Bull.* (10) 116, at p. 119.

39 EU Constitution Treaty, articles I-13.

The European Court of Justice (ECJ), with a teleological[40] approach to the interpretation of the Treaty, has confirmed the Community's exclusive legislative power and at the same time upheld the Member States' power in this regard. Member States can legislate in this area with prior authorization of the Community so that there remain no 'legal gaps.'[41] In *Donckerwolke*[42] it held the common commercial policy as a matter of exclusive competence of the Community[43] and said that a Member State act, even if it is a mere formality, 'capable of hindering, directly or indirectly, actually or potentially, intra-Community trade' is prohibited by the Treaty.[44] '(M)easures of

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40 Interpreting a legal provision taking into consideration the socio-politico and economic objectives of it is simply known as teleological interpretation. The ECJ takes this approach in the interpretation of the EC Treaty provisions 'in part, by declaration of general principles of law, but also, and of no less importance, by the Court's recognition that specific provisions of the Treaty had to be fleshed out either to make those provisions work effectively or to adapt them to the different situations existing at various stages of the Community's development' Slynn Gordon *Introducing a European Legal Order* (London: Stevens & Sons/Sweet & Maxwell, 1992) at 41. As to why the ECJ does so, one of its former Presidents explains as follows:

> The principle of the progressive integration of the Member States in order to attain the objectives of the Treaty does not only comprise a political requirement; it amounts rather to a Community legal principle, which the Court of Justice has to bear in mind when interpreting the Community law, if it is to discharge in a proper manner its allotted task of upholding the law when it interprets its task of upholding the law when it interprets and applies the Treaty. How else should the Court of Justice carry out this function which it has been assigned except by an interpretation of Community law geared to the aims of Treaty, that is to say, one which is dynamic and teleological.

H. Kutscher, 'Methods of interpretation as seen by a Judge at the Court of Justice', Judicial and Academic Conference, September 17-28 (1976)', Court of Justice of the European Communities, at p. 37, cited in Slynn, above, at p. 43. In this connection, for the role of law and the Court of Justice in the integration process, see Joseph Weilee, "Community, member states and European integration: Is the law relevant?" (1982) 21 *JCMS* 39, and Christian Pennera, 'Beginnings of the Court of Justice and its role as a driving force in European integration', (1995) 1:1 *JEIH* 11.

41 Mengozzi Paolo, *European Community Law*, transl. Patrick Del Duca, The Hague, London and Boston: Kluwer Law International, 1999, at p. 75.

42 *Donckerwolcke* v *Procureur De La Republique*, (1976) ECR 1921.

43 *Ibid.* at p. 1937.

44 *Ibid.* p. at 1935. Similarly in *The Queen, ex parte Centro-Com Srl.* v *H.M. Treasury and Bank of England* Case 124/95, [1997] ECR I-81where the United Kingdom refused to release funds from a British bank to a non-Member State as payment

commercial policy of national character', which are not detrimental to the market integration, are, as the Court continued, *'only* permissible...by virtue of *specific authorization* of the Community.'[45] Such prior authorization is a must even if it is not expressly required by the Community legislation.[46] Further, even where the Community fails to take any legislative measure with respect to a particular matter of exclusive competence, that will not be an excuse for the Member States to act of their own; they must seek the Community's approval upfront. Thus in *Commission* v. *United Kingdom*[47] in absence of the Community action relating to conservation of fisheries, the United Kingdom took measures in this matter. The ECJ held the UK measures invalid and observed that Member States are not 'entitled to exercise any power of their own in the matter of conservation measures in the waters under their jurisdiction. The adoption of such measures ... is a matter ...of Community law'.[48]

b. Subsidiary Competence

The Principle of Subsidiarity

It has been indicated before that the centre (the Community) and periphery (the Member States) may legislate or take administrative actions in subsidiary area, the area falling outside of the exclusive competence. The principle of sharing legislative power in this area is known as the principle of subsidiarity enunciated in Article I-14 of the EU Constitution Treaty (Article 5 of the EU Treaty).[49] According to

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for goods exported from Italy instead of itself, the ECJ held the British action violative of the common commercial policy, even though the alleged measure was taken by virtue of national competence in matters of foreign and security policy.

45 *Ibid.* at p. 1937. (emphasis added).

46 *Bulk Oil* v. *Sun International*, (1986) E.C.R. 559.

47 (1981) ECR 1045.

48 *Ibid.* at p. 1073.

49 The principle of subsidiarity was not in the original EC Treaty in an explicit form. art. 5 of the Treaty establishing the Coal and Steel Community impliedly provided for the application of the principle when it said, 'the Community shall exert direct influence upon production or upon the market only when circumstances so require'. For a conceptual and historical aspect of the principle, see Schoutheete, *supra* note 2 at pp. 41-44. However, it was inserted in art. 3b (now art. 5) by the Maatristch Treaty. The preamble and art. 1 (ex art. A) of the Treaty of European Union speak about this principle in a wider political sense. The phrase 'closeness to the citizen' gives a democratic motif and does not limit only to the division of power between the centre and periphery. Compared to

this article the Community shall exercise its powers (both exclusive and subsidiary) within their associated limits. In this respect it will be guided by the need of attaining the objectives assigned to it by the Treaty. This is known as the principle of conferred powers. Second, the article prescribes that the Community is entitled to exercise subsidiary powers with regard to a particular matter when its objective cannot be sufficiently achieved by the Member States, and given its scale or effects that objective can better be achieved by the Community. This is called the 'comparative efficiency' test. In applying the efficiency test the Community will examine the following factors:

> The effect of the scale of the operation (transfrontier problems, critical mass, etc.), the cost of inaction, the necessity to maintain a reasonable coherence, the possible limits on action at national level (including the cases of potential distortion where some Member States were able to act and others were not able to do so) and the necessity to ensure that competition is not distorted within the common market.[50]

Last, it requires that the Community action must be proportionate to the need of achieving the Treaty objective (principle of proportionality). Any action beyond necessity is invalid.

Politicality and Justiciability of Subsidiarity

The principle of subsidiarity is a political concept as it involves the assessment of comparative efficiency of a proposed action, which is a subjective matter. While the Community deems the objectives of the proposed action can be better achieved by its legislation, the Member State(s) may differ and *vice versa*. For example, the Community adopted Directive 76/160 concerning quality of beach water. It was alleged that the Community had breached the subsidiarity principle by issuing the directive. Water quality is a common concern of the Europeans and, therefore, 'the provisions concerning water for bathing should be extended by the Community measures to improve quality....'[51]. Broadly speaking, this represents 'an effective means of

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this art. 5 contains 'a narrower and more legalistic idea'. Grainne de Burca, "The principle of subsidiarity and the Court of Justice as an institutional actor", (1998) 36(2) *JCMS* 217 at p. 219. Besides, with regard to the present context of market integration art. 5 is relevant to discuss.

50 "Susidiarity Principle", *supra* note 38.

51 [1975] OJ C128/13 at p. 13.

realizing the Community's quality objectives of an improved standard of living and harmonious a development of economic activities.'[52] Thus compared to Member States the Community was in the right position to intervene.[53] Another example of the centre-periphery political tussle is that the French car manufacturers were encountering difficulties in their business because they had to produce yellow-headlight cars for the French market and simultaneously white-headlight cars for non-French markets. On their request for a Community provision making white headlights mandatory for vehicles, the European Council adopted a Directive accordingly effective from 1 January 1993.[54] The desirability of this Directive is questioned in that the subsidiarity principle should allow the manufacturers to produce cars with headlights of any colour. Besides the foregoing, the efficiency test may give different results at different times and thus may be subject to question. For example, environment or terrorism[55] was not a matter of Community concern at the beginning of the Community, but today the Community intervention in these areas can hardly be questioned.[56]

As subsidiarity is prone to give rise to conflict between the centre and the periphery, how can this conflict be settled? Is subsidiarity justiciable?[57] Politicians and political scientists favour its justiciability while lawyers and jurists oppose it. For example, the European Council said that 'interpretation of this principle, as well as review of compliance with it by the Community institutions are subject to control by the Court of Justice.'[58] Former President of the European Council, Jacques Santer, defined it as a politico-legal concept and said, 'the subsidiarity principle is a rule of reference whose observance

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52 *Ibid.* at p. 14.

53 Schouheete, Philippe de Schoutheete, *The Case for Europe- Unity, Diversity, and Democracy in the European Union*, London: Lynne Rienner Publishers, 2000, at p. 49.

54 Council Directive 91/663 [1991] OJ L366/17.

55 The Commission has recently adopted the Proposal for a Council Framework Decision on Combating Terrorism, COM (2001) 521 Final.

56 Schoutheete, *supra* note 53, at p. 46.

57 Here "justiciability" means determinability by the Court of Justice whether the principle of subsidiarity is breached by the Community or the Member States.

58 Conclusions of the Edinburgh European Council, Annex I to Part A, *EC Bull.* 12-1992, 1.15.

should be ensured by a judge- the Court of Justice'.[59] Lawyers oppose the politicians' view, such as Lord Mackenzie-Stuart, former Chief Justice of the European Court of Justice. He said, 'To decide whether given action is more appropriate at Community level, necessary at Community level, effective at Community level, is essentially a political topic. It is not the sort of question that a Court should be asked to decide.'[60]

After the principle has been inserted into the Treaty, there is no point to debate if it is justiciable or not. The ECJ has to resolve the legal aspects of a susidiarity question,[61] but not its political aspect, namely whether the objective of the Community act or national legislation can be *better or sufficiently* achieved at the Community or national level.[62] Such a matter falls within the discretionary powers of the Council and Commission. The Court can only determine whether the Council or Commission has committed a manifest error or misuse of powers or has clearly exceeded the limits of its discretion.[63] If beyond these limits the Court goes to look into whether the objective of an impugned action/measure taken by the Council and Commission could be better or sufficiently achieved at the Member State level, that 'would interfere with the legislative process by replacing the institutes' discretion by its own view'.[64]

However, so far in a few cases the ECJ has just touched upon the principle of subsidiarity. Its scope has not been fully explored.[65] In *United Kingdom* v *Council*[66] the United Kingdom sought judicial

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59 Santer Jacques, "Some reflections on the principle of subsidiarity", in European Institute of Public Administration (EIPA), *Subsidiarity: The Challenge of Change* (Maastricht: EIPA, 1991) pp. 19-30, at p. 26.

60 Mackenzie-Stuart, 'Assessment of the views expressed and introduction to a panel discussion', in *Subsidiarity: The Challenge of Change, ibid.*, 37-41 at pp. 40-41.

61 Toth A.G., 'Is subsidiarity justiciable?', (1994) 19 EL Rev.268, at p. 281.

62 *Ibid.*, at pp. 282-283.

63 *Ibid.*, at 282-284. A.G. Toth, "A legal analysis of subsidiarity" in David Keeffee and Patrick Twomey (ed.), *Legal Issues of the Maastricht Treaty* (London, New York, Chichester, Brisbane, Toronto and Singapore: Wiley Chancery Law, 1994), at p. 48.

64 Toth, "A legal analysis of subsidiarity", *ibid.*

65 Iglesias Gil Carlos Rodriguez, "Reflections on the general principles of community law", (1998) 1 *CYELS* 1,at p. 15.

66 Case C-84/94, [1996] ECR I-5755.

review of the Working Time Directive[67], based on Article 118a (now Article 138), which provided, among others, for a maximum working time. It submitted, *inter alia*, that Article 118a should have been interpreted in the light of the subsidiarity principle because 'the extent and nature of legislative regulation of working time vary very widely between Member States'.[68] It also argued that the legislature had not fully considered or sufficiently exhibited that the result intended to be obtained by the Directive (protection of health and safety of workers) was such as could not be attained by measures by Member States. The Court pointed to that once the Council had deemed it necessary to take measures for the protection of health and safety of the workers by harmonising the working time, that would suffice to meet the subsidiairity test.[69] Thus it did not apply the comparative efficiency test, rather relied on whether the legal conditions had been fulfilled. This is further clear from the following words: '(I)t is not the function of the Court to review the expediency of measures adopted by the legislature. The review exercises under Article 173 (later Article 230) must be limited to the legality of the disputed measure.'[70] Thus in *Bosman*[71] a sporting associations made rules effecting transfer fees for players moving from one club to another. The ECJ held the rules incompatible with Article 48 (now Article 39) of the EC Treaty which provides for free movement of workers. German Government pleaded that sport was, in effect, similar to culture diversity of which must be respected by the Community under Article 128(1) of the EC Treaty (Article 151(1) of the EU Treaty). It also argued that since sporting associations enjoyed freedom and autonomy under national law, the Community (which includes the Court) intervention should, with regard to the subsiadiarity principle, be limited to what was strictly necessary. The Court refuted the sport-culture similarity argument on the ground that football player's engagement in the given case involved remuneration and hence it was an economic activity coming within the purview of Article 48 of the EC Treaty (Article 39, EU Treaty). It dismissed the next argument in that private organisation's

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67 Council Directive 93/104/EC (1993) OJ L307.

68 Case C-84/94, [1996] ECR I-5755, at p. 5808.

69 De Burca Grainne, "The principle of subsidiarity and the Court of Justice as an institutional actor", (1998) 36(2) *JCMS* 217, at p. 223.

70 *Supra* note 68, at 5802 .

71 Case 415/93, [1995] ECR I-4921.

freedom to adopt rules should not go so far so that it hampers the rights (of free movement) conferred by the Treaty. In other words, the Court seemed to interpret that the transfer fees had impeded free movement of workers and, therefore, were subject to abolition. In this case the Court avoided expediency test and held on to determining the legality of the sporting federation's rules. Thus from the reading of the above cases it can be gathered that invoked to employ the subsidiarity principle the ECJ has so far applied the legality test instead of expediency test. Of course, at the same time it made law by way of interpretation keeping constant view on the teleology of integration.

However, the Court's approach towards subsidiarity is not above question. For example, with regard to its judgement in *Bosman* Burca comments as follows:

> Arguably, the Court might more satisfactorily have addressed the subsidiarity issue along the lines suggested in Article 3b (now Article 5), by looking at the aim which would be served by giving Article 48 (now Article 39) a particular kind of interpretation and whether that aim was best pursued, this way, by the Community.[72]

This statement suggests that the Court should have applied the comparative efficiency test, but this is not a judicial task to accomplish. The legislature is the right authority to do it. By doing so the Court is trying to preserve its identity distinct from the legislature. In this consideration the Court cannot be condemned for not resorting to the expediency test.

Further Burca criticises the Court's law making function. He comments that '(t)he outcome in *Bosman* was not self-evident from the text of Article 48.'[73] In other words, he seemed to mean that the Court's ruling to the effect of abolishing the transfer fee was a far-fetched innovation by the Court, which could only be done by the legislature. But, as he argues, the ECJ as a judicial institution[74] does

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72 Burca, *supra* note 49, at p. 228.

73 *Ibid.*, at p. 227. The author compares the Court's interpretation of art. 48 (now art. 39) of the EC Treaty with that of the provision of movement of goods in, among others, Case 8/74, *Dassonville* [1974] ECR 837; Case 120/78, *Cassis de Dijon* [1979] ECR 649 and Cases C-267 and 268/91, *Keck & Mithouard* [1993] ECR I-6097.

74 Burca delineates the characteristic features of the Court as a judicial institution distinct from the legislature. The Court of Justice is distinct from the legislature principally in respect of its composition, manner of functioning and legitimacy of its role. Unlike the legislature the members of the Court are appointed and thus

not equate to a political institution and, therefore, cannot make laws.[75] At the same he acknowledges the role of the Court's law making as the Community's constitutional court.[76] The contradiction between the non-legislative character on the one hand, and the law-making capacity of the Court on the other, has made it difficult to answer whether and how the subsidiarity should be dealt with by it.[77] In order to remove the tensions and difficulties in the functioning of the ECJ within the EC constitutional framework the author has suggested for laying circumscriptions on its interpretative authority.[78]

4. Interpretation of Community Constitution and Laws

Being the constitutional court the ECJ interprets the EU Treaty, which is its constitution. It also interprets the EU legislation that includes Regulations and Directives. The main feature of its interpretation is that it takes, as noticed above, a teleological approach to facilitate Community integration. In this doing it has laid down some leading principles, which are treated as the cornerstones of the Community constitutional framework. In the following those principles may be discussed to highlight the ECJ contributions in this respect.

Primacy of the Community Law

If a Member State's law conflicts with the Community law, which one will prevail? There is no Treaty provision in this regard. In *Costa* v *ENEL*[79] the ECJ settled this issue. In this case Italian Law No. 1643 of 6 December 1962 and the presidential Decrees in execution of that Law infringed Articles 102, 93, 53 and 37 of EEC Treaty of 1957. The effect of the impugned law was to create discrimination between the

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do not represent the people. These are the institutional constraints of the Court. Second, the Court works under 'textual constraints (such as are imposed by the Treaty) and practical constraints (the limits of the adjudicative forum)' which require it to 'adhere to a mode of reasoning and a set of considerations which differ from that which is open to the Community legislature when it explains why one particular policy choice is to be preferred over another'. Third, 'the legitimacy of the judicial role- generally based on its autonomy, independence, impartiality and expertise- has a different foundation from the legitimacy of political institutions.' This may be called value constraints. *Ibid.*, at p. 232.

75 *Ibid.*, at p. 232.

76 *Ibid.*, at p. 232.

77 *Id.*

78 See *ibid.*, at pp. 232-234.

79 *Costa* v *ENEL*, Case 6/64, [1964] ECR 585.

nationals of Member States with regard to trading in goods, and thus breached the those Treaty provisions. An Italian Court sought a preliminary ruling from the Community Court on the status of the said law. The Court attached primacy to Community law and, therefore, declared the national law ineffective. It provided rationale behind the ruling as follows:

> By contrast with ordinary international treaties, the EEC Treaty has created its own legal systems which, on entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.
>
> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.[80]

Thus the Community law is independent of and supreme over the domestic law of the Member States, be it the national constitution.[81] As such the Community law is directly applicable in the national jurisdiction.[82] The Community supremacy is not limited to the Treaty provisions; it rather extends to Community Regulations, and, in particular cases, to Community Directives.[83] Therefore, for example, a UK court is obliged to override a rule of national law that is not commensurate with the Community law, and the Parliament should bring necessary amendments to the law to comply with the Community Directives.[84]

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80 *Ibid.*, at p. 593.

81 *Internationale Handelsgesellschaft*, Case 11/70, [1970] ECR 1125 at 1134.

82 *Simmenthal*, Case 106/77, [1978] ECR 629. Direct applicability means that "rules of Community law must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force." *Simmenthal*, above, at p. 643.

83 Robert M MacLean (ed.), *Law of the European Union*, 2nd ed. (London: Old Bailey Press, 1999), at p. 94.

84 *R* v *Secretary of State for Transport, ex parte Factortame Ltd.*, [1990] 3 CMLR 375 at p. 380. Judicial recognition and application of the direct effect principle has ascribed the Community law the 'status of quasi-federal law.' Eric Stein, "Lawyers, judges, and the making of a transnational constitution" (1981) 75 *AJIL* 1 at p. 24.

The Principle of Direct Effect

The principle of direct effect or direct applicability connotes that the Community law may be directly applicable into the national jurisdictions of the Member States. The effect can either be vertical or horizontal. The former means that individuals can invoke the Community provisions against the State. And the latter enables an individual to invoke the Community law against an individual. The direct efftect principle has been established by the Community Court in *Van Duyn*.[85] This case concerned the freedom of movement for workers. A woman of Dutch nationality received an employment as the Secretary with the "Church of Scientology" in England. The UK Government considered the activities of the organization socially harmful, but not unlawful and, therefore, refused her entry to England to take up the position. The UK Court of Chancery invoked the Community Court for an interpretation of Article 48 of the then EEC Treaty and Article 3 of Directive 64/221. Article 48, dealing with freedom of movement of workers, provided for abolition of discrimination on the ground on nationality with regard to to imployment, remuneration and other conditions. It asked if these two provisions had direct applicability in the Member States, in the prsent case in the UK. The Directive provision allowed Member States to take special measures concerning the movement and residence of foreign nationals on the ground of national policy and security *exclusively* based on personal conduct. But the woman was not refused entry because of her personal conduct. This attracted the Directive provision, which did not have any exception.[86] As such the Community Court ruled it to be directly applicable in the Member States. Plus the woman was refused to take up the employment, whereas British nationals were allowed to work the alleged church. This was a discrimination among EC nationals and hence attracted

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With the prospective adoption of the EU Constitution the Community law will have federal status and direct effect.

85 *Van Duyn*, Case 41/74, [1974] ECR 1337.

86 In the similar line it was held in another Case that whenever the provisions of a directive appear, as far as their subject-matter is concerned, to be *unconditional and sufficiently precise*, those provisions may be relied upon before the national courts by an individual against the State where that State has failed to implement the directive in national law by the end of the period prescribed or where it has failed to implement the directive correctly: *Agricola*, [1996] ECR I-4373, at 4400. (emphasis added).

Article 48 of EEC Treaty, which imposed an obligation on the Member States and left no discretion on them. Therefore, it was directly applicable in the Member States. As such the woman had a right to invoke both provisions against the UK in its national courts. The same principle was also enunciated in *Van Gend en Loos*,[87] which is quoted as follows:

> [T]he Community constitutes a new legal order of international law ... the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of the Member States, Community law therefore not only imposes obligation on individuals, but is also intended to confer upon them rights which becomes part of their legal heritage.[88]

In another case a Directive containing an 'unconditional and sufficiently precise' was held to have direct effect even though it (Directive) was not interposed in the domestic law before the implementation deadline had expired.[89] Thus it has become a trend of the day in the EC legislative practice that the binding effect of directives are not limited 'as to the result to be achieved', rather they impose specific obligations on the Member States so that legislative measures incorporating them into national laws become redundant.[90] They lay down the provisions in so detailed fashion that the Treaty requirement of the Member States' choosing the form and methods of implementation has become meaningless.[91] In this manner 'the dichotomy (between regulation and directive) is increasingly uncertain'.[92]

The rationale behind the direct effect provision lies in the fact that if the individual rights conferred by a directive do not receive legal protection in the national courts independent of their implementation, the Member States may undo its purpose by not executing it within the time-limit. In this way the Member States may try to benefit out of

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87 [1963] ECR 1.

88 *Ibid.* at p. 12. This case was later referred to in *Defrenne* v *SABENA*, Case 43/75, [1976] ECR 455.

89 *Pubblico Ministero* v *Ratti*, Case 148/78, [1979] ECR 1629.

90 Francis G. Jacobs, "General editor's foreword" in Sacha Prechal, *Directives in European Community Law- A Study of Directives and Their Enforcement in National Courts* Oxford: Clarendon Press, 1995, at p. v.

91 *Id.*

92 *Id.*

their own fault,[93] which is necessary to be prevented.[94] Thus in *SACE*[95] where under Articles 9 (EU Treaty art. 23) and 13(2) (later repealed) of the EC Treaty exacting charges having an effect equivalent to customs duties on imports were clearly and precisely prohibited. Later a timetable of the abolition of such charges was set by Directive No. 68/31. Italy levied customs duties on the plaintiff, which brought an action before the President of the Tribumale, Brescia, claiming repayment of the money it had paid as customs duties to Italian State. The President sought the ECJ's opinion as to whether the Treaty provision and the Directive had direct effect in Italian legal system. The ECJ answered in the affirmative and observed:

> Directive No 68/31, the object of which is to impose on a Member State a final date for the performance of a Community obligation, does not concern solely the relations between the Commission and that State, but also entails legal consequences of which both the other Member States concerned in its performance and individuals may avail themselves when, by its very nature, the provision establishing this obligation is directly applicable.[96]

In this case the Court postulated the principle that in assessing the effect of a directive 'it is necessary to consider not only the form of the measure at issue but also its substance and its function in the system of the Treaty.'[97]

Principles of Conferred Powers, centrality and Cooperation

The Community is entrusted with the responsibility to establish an internal market [98] (simply another version of common market). To this end Article 308 of the[99] EC Treaty (ex Article 235) has entrusted the Community with a blanket power to legislate on any necessary matter

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93 Mengozzi, *supra* note 41, at p. 128.

94 *Marshall*, Case 152/84, [1986] ECR 723, at p. 749.

95 *SACE* v. *Italian Ministry of Finance*, Case 33/70, [1970] ECR 1213.

96 *Ibid.*, at p. 1223.

97 *Id.*

98 EC Treaty, art. 14.

99 Art. 308, EC Treaty, provides:

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this (EC) Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Community and after consulting the European Parliament, take the appropriate measures.

even if the EC Treaty does not specifically provide for it.[100] This provision was being very loosely used 'as a 'competence to round-off the Treaty' as a whole'.[101] The German Federal Constitutional Court observed that Article 308 had limits inasmuch as the very sovereign powers exercised by the Community under this Article was conferred for limited purposes only.[102] Therefore, the EU Treaty could not be extended by interpretation, which could be done only by amendment by Member States.[103] The ECJ's following opinion can be said to be the final seal on the limited purview of Article 308:

> That provision (present Article 308), being an integral part of institutional system based on the system of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article 235 cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.[104]

While Article 308 empowers the Community to take measures to fulfil its objectives absent any express or implied powers in the Treaty, Article 10 of the EC Treaty (ex Article 5, EC) imposes an obligation on the Member States to extend cooperation to the Community so that the Community action can be put into practice. [105] In other words, the

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100 But 'art. 235 (now art. 308) could not be used to adopt provisions that would effectively amend the (EC) Treaty.' (1996) *AJIL* 664 at p. 665 referring to the Court of Justice.

101 *Brunner and others* v *The European Union Treaty*, [1994] 1 CMLR 57 at p. 105.

102 *Id.*

103 *Id.*

104 Opinion 2/94, 'Opinion pursuant to art. 228(6) of the EC Treaty (Accession by the Community to the Convention for the protection of human rights and fundamental freedoms), [1996] ECR I-1759 at p. 1788. For comment on this opinion, see Juliane Kokott and Frank Hoffmeister, 'European Union- accession of the Community to the European convention on human rights – competence of the Community under art. 235 of the Treaty establishing the European Community- need to amend the Treaty ', (1996) 90 AJIL 664.

105 Art. 5, EC Treaty, reads thus:

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the (EC) Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measures which could jeopardise the attainment of the objectives of this (EC) Treaty.

Member States must incorporate the Community law in the domestic law because the Community is the supranational authority. The reverse aspect of the principle is that the Community must 'cooperate loyally with the member States'.[106] A version of the Community cooperation may be non-interference in the Member States' action based on subsidiarity. Thus the interpretation of Articles 308 and 10 has perfectly delineated the Community power scope of making law and mutual cooperation between the centre and the Member States.

5. Conclusion

The foregoing discussion shows that the ECJ interprets the Community constitution and law, provides directions to the Community when it is in real need, and determines legality issues of subsidiarity. In doing all these it always adopts a teleological approach to serve the Community goal of integration. Its judgments on the primacy of Community law, for instance, fortified the foundation of the Community as a supranational organization: '(w)ithout that basic hierarchy, disintegration would follow. Even one breach in the dam would be too many, for one fissure would inevitably breed others.'[107] The direct effect of Community law established by the Court judgments has further strengthened that foundation by ensuring enforceability of people's individual rights available under Community law in national courts. In this way the two doctrines have preserved 'the Community from ruin',[108] which was likely to have resulted from the absence of any hierarchical order in the Community legal system.

Thereafter the ECJ accelerated the integration process by inventing the method of mutual recognition in the *Cassis de Dijon*. This case boosted the Commission to initiate legislative process aimed at removing technical barriers to Community trade.[109] Thus the Court sometimes stirs 'political water'[110] and the Commission floats boat in that water

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106 *Brunner* v *The European Treaty*, [1994] 1 CMLR 57, at p. 99.

107 Weatherill, *Law and Integration in the European Union*, Oxford: Clarendon Press, 1995, at p. 104.

108 Kuper Richard, *The Politics of the European Court of Justice*, London: Kogan Page, 1998 at p.xi.

109 *Supra* note 29.

110 Alter Karen J. and Sophie Meunier-Aitsahalia, "Judicial politics in the European Community- European integration and the pathbreaking *Cassis de Dijon*", (Jan. 1994) 26 CPS 535 at 557. In this connection for the judicial politics in Europe in general, see Shapiro Martin and Alec Stone, "The new constitutional politics of Europe", (Jan. 1994) 26 *CPS* 397

to complete the journey of law-making: 'the Court (is) able to push out the boat of integration and steps on toes in the process in ways the Commission could never dare to do.'[111]

However, the Court does not indulge in determining comparative expediency of any matter falling within the subsidiary competency of the Community inasmuch as it is a political task. It of course exploits its power of legal interpretation to the fullest possible extent, where necessary, to promote the common market objective. In this way it influences the Community politics. This should be appreciated in consideration of the fact that the ECJ, being the Community Court and also being composed of sensible human beings, should not remain unmoved by the need of the Community especially when the legislature fails to act. In this form 'judicial politics in the EC is here to stay, a fact that European politicians have recognized.'[112]

The ECJ sets example for non-EU states and regions to follow. For example, the Bangladesh Supreme Court can use the teleological interpretation as a tool to serve the ultimate aim and objective of the Constitution or any legislation. It can also indirectly influence or activate, by way of interpretation of laws, the legislature to move toward useful lawmaking. Aside from this, the EU is a model of regional integration despite various sorts of diversities among the Member States, such as social, cultural, economic, legal and political. The SAARC can receive lessons from this and proceed toward, at least, economic integration in the South Asian region. To facilitate this it can establish a SAARC Court that may create a SAARC legal order borrowing principles and techniques from the EU, in particular the ECJ, such as primacy, subsidiarity, and direct effect principles.

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111 Kuper, *supra* note 108, at p. 60.

112 Alter Karen J., Sophie Meunier-Aitsahalia, "Judicial politics in the European Community European integration and the pathbreaking *Cassis de Dijon*", (Jan. 1994) 26 *CPS* 535, at p. 558.

LAW OF BANKRUPTCY IN BANGLADESH: A LEGAL EXAMINATION

Md. Khurshid Alam & Fowzul Azim

***Capitalism without bankruptcy is like Christianity without hell.*- Frank Borman**[1]

1.1 Introduction

Bankruptcy is a very old legal concept. In general, bankruptcy or insolvency means inability to meet one's debt or obligation.[2] Bankruptcy is a proceeding by which possession of the property of a debtor is taken for the benefit of his creditors, generally by a Receiver appointed by the Court. Upon realization, subject to certain priorities, the property is distributed rateably among the creditors. A bankruptcy proceeding is a proceeding in personam.[3]

Over the years, with the expansion of trade and commerce, the law of bankruptcy has changed, evolved and developed a lot. Now-a-days, bankruptcy touches not only students of law, legal experts or lawyers, but also economists, bankers, investors, business administrators and many others. There are two types of bankruptcy, bankruptcy of individuals and corporate bankruptcy. This article focuses mainly on bankruptcy of individuals.

In 1997 in Bangladesh the Bankruptcy Act[4] was enacted, which deals with bankruptcy of individuals only. Ten years have already passed. It is high time to examine the effectiveness and shortcomings of this law, based on the available data, analyses, and reported cases. This article is just an exposition on these issues.

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1 U.S. astronaut and business executive, <www.quotationsbook.com/author/866.>

2 Attorney-General of British Columbia v Attorney-General of Canada AIR 1937 PC 95, 168 IC 64 (in a technical sense, it means the condition or standard of inability to meet debts or obligations upon the occurrence of which the statutory law enables the creditor to intervene with the assistance of a Court to stop individual action by the creditors and to secure administration of the debtor's assets in the general interest of the creditors).

3 Pacific International Line (Pvt) Ltd v Vijayalashmi Ammal AIR 1991 NOC 20 (Mad), (1990) 105 Mad LW 175.

4 Act No. X of 1997.

2.1 Historical Background

The Hebrew or Jewish Scriptures provide that in every fifty years on the eve of 'Holy year' or 'Jubilee Year' the Jews were exempted from all sorts of debts and all the debt-slaves were freed. Later this humanitarian provision was founded in the Bible, by which the debtors were exempted after every seven years.[5] In ancient Greece, if someone failed to re-pay his debts, he along with his family, became the subject of 'debt-slavery'. The unfortunate family could not get rid of this slavery until and unless the debt was re-paid by physical labour. In some cities of ancient Greece, the duration of 'debt slavery' was fixed to five years.

The word bankrupt has been derived from two latin words *'bancus'* meaning table and *'ruptus'* meaning broken, denoting 'the wreck or break-up of a trader's business.'[6] In ancient Rome, whenever a businessman fell into financial crisis, his creditors went to the local authority and lodged a complaint on oath. After investigation, the magistrate decided whether it was possible to repay the loan from the business or the property of the debtor. If it was found possible, the magistrate would employ a third party called *'curator bonorum,'*, meaning a 'trustee' or a 'receiver'. The trustee then took control over the business of the debtor and conducted routine works. If it was found impossible to bring back solvency, then the trustee in open market would break the table on which the debtor used to conduct business and would proclaim the financial crisis of the debtor. Thus on the basis of the event of breaking one's business, the concept of *'bancus ruptus'* originated. By closing the business of the debtor and by selling his property in auction, the trustee re-paid the debt. The fate of the poor debtors, who had no property, was even worse. They along with their family were sold as slave. At that time the bankruptcy law was applied only to individuals and businessmen, who were in financial crisis.

In medieval Britain, there was evidence of existence of some forms of bankruptcy process. In 1542, for the first time modern statute on insolvency was enacted in England, to protect the creditors from the fraudulent activities of the debtors. When the claims of the creditors were proved, and the debtors were not in a position to repay the debt,

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5 The Bible, verse 15: 1-2.

6 www.catholicencyclopedia.com.

the debtors were sentenced to jail. As a result, the jails in England were over-crowded, which turned into a national crisis. In 1570, a complete bankruptcy law was enacted during the reign of King Henry VIII. Regulations were made to re-pay the creditors by selling the property of the debtors and various forms of physical punishment, including cutting of ear, were also incorporated. In 1705, by enacting a new law, provisions for capital punishment for fraudulent or non-cooperative debtors were introduced.

In American colonies from the very beginning English Bankruptcy law was applied. The present American bankruptcy law is the result of political impact, as well as, economic consideration. American constitution empowered the Congress with the power to introduce uniform laws on Bankruptcy in nineteenth century.

2.2 Bankruptcy legislation in Indian sub-continent and Bangladesh

In the British-India, there was no comprehensive law on bankruptcy.[7] In 1848 for the first time Indian Insolvency Act was enacted, based on the English bankruptcy laws.[8] The basis of the Indian insolvency law is the Roman principle of 'cessio bonaram'.[9] Later, two separate bankruptcy laws were enacted. The Provincial Insolvency Act (1907) was followed by the Presidency-Towns Insolvency Act (1909).[10] The Act of 1907 was replaced by the Provincial Insolvency Act (1920).[11] The provisions of both the statutes were similar, though the Presidency-Towns Act contained provisions for official assignee, procedure of the court and limitation provisions, in details.[12] Both the

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7 India being an agriculture based country, there was no necessity for a system of insolvency law and there was also no native law on this topic, *SK Aiyar, Law of Bankruptcy*, 5th edn, 1993, p. 3.

8 See the Presidency-Towns Insolvency Act 1909: statement of object and reasons.

9 The term means 'surrender of all his goods by the debtor, for the benefit of his creditors, in return for immunity from process.' For details, see Black's Law Dictionary (1997). See also District Board, Bijnor v Mohammad Abdul Salam AIR 1947 All 383 (1947) All LJ 408, (1947) All WR 318.

10 Act No. III 1909.

11 Act no. V of 1920. The necessity of two separate enactments have largely disappeared as trade and commerce are no longer centred in the Presidency-Towns anymore. The Law Commission of India reviewed the law of insolvency and recommended the consolidation of the law into a single comprehensive legislation, which has not been materialized yet. For details, see Law Commission of India, 26th Report.

12 Report of the Advisory Group on Bankruptcy Laws, India, 2001, p. 11.

statutes excluded corporations for insolvency proceedings.[13] After independence of Bangladesh, the Presidency Towns Insolvency Act (1909) was renamed as the Insolvency (Dacca) Act (1909) and was made applicable within the Municipal limits of Dacca.[14] While, the Provincial Insolvency Act (1920) was renamed as the Insolvency Act (1920) and was made applicable outside the Municipal limits of Dacca.[15]

In 1997 the Bankruptcy Act[16] was enacted by consolidating the earlier two Acts,[17] and under section 119, both the Insolvency (Dacca) Act (1909) and the Insolvency Act (1920) were repealed. Now, we have one bankruptcy law which is applied all over Bangladesh. At the same time Bankruptcy Rules 1997 have been framed. Again, in 1997 two separate Bankruptcy Courts were established in Dhaka and in Chittagong.[18]

2.3 Corporate bankruptcy and UN model law

Although this article mainly focuses on bankruptcy of individuals, it is felt that without making any brief reference to corporate bankruptcy, cross-border bankruptcy and the United Nations model law on cross-border insolvency, this discussion will remain incomplete.

i) **Corporate bankruptcy**

This refers to the financial crisis of corporate entities, rather than individual businessmen. Corporate restructuring is a genuine treatment of this ailment, which is done either by a compromise / arrangement with the creditors, or under the company law by reduction of share capital or, by winding up (members' voluntary winding up, creditors' voluntary winding up or winding up by the court etc.).

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13 Vide section 107 of Act of 1909 and section 8 of Act of 1920.

14 Preamble to Act of 1909.

15 Preamble to Act of 1920.

16 Act no. X of 1997.

17 This may be considered as a Bangladeshi innovation, something which has been suggested by the Law Commission of India, 26th Report, which to date has not been initiated in India.

18 Ministry of Law, Justice and Parliamentary Affairs, Justice Section 4, Memo No. 785- Justice 4/5-tree -5/97, Dated 31/12/1997.

ii) Cross-border bankruptcy

This concept originated from corporate bankruptcy. Now-a-days, due to the expansion of international trade and commerce throughout the world, the same company operates business in more than one country, either through branches, agencies, franchises, subsidiaries or joint collaborations. One of these branches may fall into financial crisis. Very often situations arise comprising of any or many of the following issues:

a) If a branch of an enterprise located in one country becomes insolvent, should creditors in that country be allowed to initiate insolvency proceedings while the enterprise as a whole is still solvent?
b) If the enterprise as a whole is solvent, should there be separate proceedings in the various countries where its branches are located? ...
c) Alternatively, should there be a single procedure, based in the country where the head office or place of incorporation is situated? ...
d) Should there be a single liquidator or administrator, or one for each country where the enterprise has a place of business or assets?
e) Should the liquidator or administrator appointed in one country be able to recapture assets fraudulently transferred by the debtor to another country?"[19]

The answers to these questions are not uniform as the domestic laws of various countries are not the same. 'This diversity of approach creates considerable uncertainty and undermines the effective application of national insolvency laws in an environment where cross-border activities are becoming a major component of the business of large enterprises.'[20]

(iii) UNCITRAL Model Law on Cross-Border Insolvency

In order to harmonise the laws of corporate bankruptcy of one country with that of the other, the United Nations

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19 Report of the Advisory Group on Bankruptcy Laws, India, 2001, p. 40.

20 Ibid.

Commission on International Trade Law (UNCITRAL) adopted the Model Law on Cross-Border Insolvency (1997). The Preamble[21] provides that 'the purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
b) Greater legal certainty for trade and investment;
c) Fair and efficient administration of cross-border insolvencies that protects the interests;
d) of all creditors and other interested persons, including the debtor;
e) Protection and maximization of the value of the debtor's assets; and
f) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

The Model Law applies in the following cases where:[22]

a) assistance is sought in a state by a foreign court or a foreign representative in connection with a proceeding under the domestic law of a state;
b) assistance is sought in a foreign state in connection with a proceeding under the domestic law of a state;
c) a foreign proceeding and a proceeding under the domestic law of a state in respect of the same debtor are taking place concurrently; or
d) creditors or other interested persons in a foreign state have an interest in requesting the commencement of, or participating in, a proceeding under the domestic law of the state.

Later, in 2004 the Legislative Guide to enactment of UNCITRAL Model Law on Insolvency was adopted.[23]

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21 Preamble of UNCITRAL Model Law of Cross-Border Insolvency (1997).

22 Article 1(1) of UNCITRAL Model Law of Cross-Border Insolvency (1997).

23 Vide resolution 59/40 of the UN General Assembly.

We should note that the Bankruptcy Act 1997 deals with bankruptcy of individuals only. On the other hand, with the expansion of trade and commerce in Bangladesh, corporate bankruptcy has become a regular phenomenon and this matter is dealt with by the company law. Again, in the near past international bankruptcy law has attained a new dimension, with the development of concepts like cross-border insolvency and the formulation of the UNCITRAL Model Law on Cross-Border Insolvency. As an UN member state, Bangladesh has responsibility to implement the model law. So, it is high time for the incorporation of a comprehensive corporate bankruptcy code, which will also include cross-border insolvency. The question is how comprehensive the bankruptcy code should be and whether it should also include individual bankruptcy, so as to make it a complete bankruptcy code. We feel that studies should be carried out to find answer to these questions.

3.1 An Overview of the Bankruptcy Act 1997

The Bankruptcy Act came into force on 1st August 1997.[24] In *Yunus Mia vs. Bangladesh Krishi Bank*,[25] it was held that the Bankruptcy Act, 1997 is a special law and if a man is declared bankrupt virtually he meets social death and therefore the provisions of Bankruptcy Act and rules thereunder must be strictly construed and followed. Again in *KM Aktaruzzaman vs. Agrani Bank and Others*,[26] it was observed by the High Court Division that the Bankruptcy Act 1997 is a special law which has created a special liability and therefore, this special law must be construed very strictly.

3.2 Objects of law of bankruptcy

The Bankruptcy Act has been designed to give relief to a debtor from the pressure of his creditors. The Act protects the debtor from arrest or detention for any debt. The purpose of the law is to ascertain the debts owed by a debtor, take possession of all assets and distribute them amongst all his creditors equitably.[27]

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24 Vide SRO No.162- Ain/97.

25 54 DLR (2002) 123.

26 57 DLR (2005) 57.

27 Mahabir Prasad v Shivanandan Sahay AIR 1934 Pat 514, 152 IC 277, (1934) 15 Pat LT 502. See also Amulya Mohan Bysack v K. Moinuddin AIR 1941 Cal 505, (1941) ILR 1 Cal 318, 196 IC 170.

A detail analysis of the Bankruptcy Act would reveal that the Act has two broad objectives: Firstly, it safeguards, as far as possible, the interests of creditors, by distributing the sale proceeds of the property of the debtor equitably among the creditors. If there were no bankruptcy laws, the debtor might have wasted his properties, or might have preferred one creditor to another. Since the Receiver distributes properties ratably, each creditor is sure of getting at least some thing. Lastly, it also protects the interests of debtors. After completion of distribution of bankrupt's properties, except certain specified debts, all other unpaid debts are cancelled and debtor's disqualifications relating to bankruptcy are removed. On becoming free from past obligations and disqualifications, the debtor gets a fresh start in life. He can engage in trade or service and get on with his life.

3.3 Constitution and power of the Bankruptcy Court

Under the Bankruptcy Act, the District Court acts as the Bankruptcy Court and the District Judge acts as the Bankruptcy Judge to deal with and dispose of the bankruptcy proceedings within the territorial jurisdiction of the Court. The District Judge may authorize any Additional District Judge to deal with and dispose of any bankruptcy proceedings.[28] We mentioned earlier that in 1997 the Government established two Special Bankruptcy Courts in Dhaka and in Chittagong, headed by Additional District Judges.

The Court has full power to decide all questions arising in a bankruptcy proceeding. Every decision given by a court shall be final and binding.[29] It must operate as res judicata as between the debtor's estate on the one hand and all claimants against him and all persons claiming through or under them or any of them, on the other hand.[30] Such court has inherent powers to make necessary orders in order to meet the ends of justice and to prevent abuse of process of court.[31] However, when a tribunal commits an error of law in deciding an

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28 Section 4 of the Act of 1997.

29 Section 5 of the Act of 1997.

30 *Sinna Subba Goundan v Rangai Goundan* AIR 1946 Mad 141, 224 IC 16, (1945) 2 Mad LJ 384. See also *Jakku Pappamma v Official Receiver*, Guddappah AIR 1943 Mad 230, 207 IC 574, (1942) 2 Mad LJ 778.

31 *Ishar Das v Fatima Bibi* AIR 1934 Lah 468, (1934) ILR 15Lah 698, 153 IC 993.

issue raised by it, it acts beyond its jurisdiction and such decision of the Tribunal can be quashed under writ jurisdiction.[32]

3.4 Act of bankruptcy

An act of bankruptcy is some act of the debtor which shows that he is financially embarrassed. These acts presuppose those acts, which in the public eye, shake the credit of a debtor and are likely to cause a scramble amongst the creditors for the debtor's assets.[33] These acts may be either voluntary or involuntary and may be classified into three kinds, namely those which arise from the debtor's dealing with his property, those which arise due to personal acts or defaults of the debtor, and those which arise from a particular condition of the debtor's affairs showing him to be bankrupt.[34]

Under the Act, an act of bankruptcy is deemed to have been committed,[35] if the debtor transfers property kept in his name, in the name of his wife or children to a third person for the benefit of his creditors generally,[36] or if he transfers property kept in his name, in the name of his wife or children with the intent to defeat his creditors[37] or if he transfers property or mortgages, pledges, hypothecates or creates charge thereon, which would be void as a fraudulent preference,[38] if he was adjudged a bankrupt, or if, with the intent to defeat his creditors, he refrains from communicating with his creditors, or submits fraudulently to an adverse decree, judgement or order,[39] or if his property has been sold in execution of a decree for payment of debt,[40] or if he files a plaint for being adjudged bankrupt,[41] or if he gives notice to his creditors that he has suspended

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32 *Abdur Rashid Chowdhury v Additional District Judge and Others* 56 DLR 573.

33 Charakula Venkatakrishnayya v Talluri Malakondayya AIR 1942 Mad 306, 199 IC 793, (1942) 1 Mad LJ 38.

34 *Yenumula Malludova v Peruri Seetharathnam* AIR 1966 SC 918, [1966] 2 SCR 209.

35 Section 9 of the Act of 1997.

36 The expression 'creditor generally' means all creditors and not a particular class of creditors: *Nazir Mohammad Khan v Murthuza & Sons* (1967) 1Mys LT 196.

37 Re David & Adlard [1914] 2KB 694.

38 *Hiralal v Firm Shriram Surajbhan Glass Bangle Merchants* AIR 1961 MP 15.

39 *Sulaiman Hajee Mohamed Bros v Hajee Ahed Hajee Essak* AIR 1937 Rang 16, 167 IC 96.

40 *Re Gopal Das Aurora* AIR 1926 Cal 640, 94 IC 793 (1925) 30 Cal WN 112.

41 Kanai *Lal Nandy v Tinkari* De AIR 1933 Cal 564, 145 IC 429 (1933) 30 Cal WN 173.

payment of his debt, or if he is imprisoned in execution of the decree for the payment of debt, or if one or more creditors having a valid and matured debt against the debtor for an amount of not less than Tk. 500,000 has / have served on the debtor a formal demand requiring the debtor to pay the debt or to give security for it and within 90 days the debtor failed to comply with the demand.

3.5 Bankruptcy proceedings

Under the Act, if a debtor commits an act of bankruptcy, a plaint may be presented by one or more eligible creditors or by the debtor, and the Court may make an order adjudging the debtor a bankrupt.[42] The persons subject to bankruptcy proceedings[43] are either any person, who is domiciled in Bangladesh, or who generally carries on business in Bangladesh, or who within a year before filing of the plaint, resided in or had a house or place of business in Bangladesh.[44] On the other hand, the institutions exempted from bankruptcy proceedings[45] are either any Government organization, including the Parliament and a judicial body, or any charitable or religious body, or any statutory body, whose principal object is not financial gain, or any autonomous body established by or with the financial assistance of the Government.[46]

The creditors are entitled to file a plaint to initiate bankruptcy proceeding,[47] if they can prove firstly, that they are eligible creditor,[48], secondly, that the aggregate amount of debt amounts to Tk. 500,000, thirdly, that there is a *prima facie* case that an act of bankruptcy has been committed and lastly, that the plaint is filed within one year from the date of commission of act of bankruptcy. On the other hand,

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42 Section 10 of the Act of 1997.

43 Section 11(1) of the Act of 1997.

44 These provisions are wide enough to include a lunatic, if the bankruptcy proceeding is for his own benefit [Re Lee (1883) 23 ChD 216; See also *Ex parte Cahan* (1879) LR 10 ChD 183], married woman etc.

45 Section 11(2) of the Act of 1997.

46 It appears that these institutions are either parts of the Government or they serve the society at large. For the greater interest of the society these exemptions are justified.

47 Section 12(1) of the Act of 1997.

48 According to section 2(39) of the Act, "eligible creditor" means a creditor or creditors who, individually or jointly, raised a claim for a matured debt of at least Tk. 500,000 by sending a formal demand.

the debtor is entitled to file a plaint,[49] if he can prove firstly, that he is unable to pay his debts, lastly, that his debts amounts to Tk. 20,000, or that he is under arrest or imprisonment in execution of a decree for non-payment of debt, or that an order of attachment in execution of a decree has been made against his property at the time of filing of plaint.

We believe that the amount of debt of Tk. 20,000, entitling the debtor to file a plaint to declare him a bankrupt, is too small in today's context. This amount should be increased to at least Tk. 250,000, which is half the amount required for creditors.

When an order of adjudication is made, the bankrupt must assist in the realization of his property and the distribution of the proceeds thereof among the creditors. The property of the bankrupt, except the exempted property, vests in the Receiver, or where no Receiver has been appointed, in the Court,[50] and becomes divisible among the creditors. The property so vested is known as the Estate. No creditor can, during the pendency of the bankruptcy proceedings, have any remedy against the exempted property of the debtor and the Estate or institute any civil suit or any legal proceeding, except with the leave of the Court.[51] The order of adjudication does not affect the right of any secured creditor and is deemed to have taken effect from the date on which the plaint was presented.[52] After making an order of adjudication, the Court appoints a receiver. Appointment of receiver is one big problem is. Since the receiver has to bear the initial costs of proceedings, it is really difficult to get a person, who is interested to work as a receiver. No firm has developed yet which is resourceful and at the same time efficient in property management. We believe that the post of receiver should be made more lucrative in order to get people to act as receiver.

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49 Section 13(1) of the Act of 1997.

50 The operation of this rule is automatic. Thus if a bankrupt has an interest in certain prospects, that interest vest in the Receiver by operation of law: *Hira Lal v Shankar Lal* AIR 1939 Cal 116, 180 IC 683 (1938) 42 Cal WN 695. However, any property acquired by a bankrupt after adjudication does not vest in the Receiver until he takes measures to that effect: *N Mohamed Hussain Sahib v Chartered Bank*, Madras AIR 1965 Mad 266, (1964) ILR 1 Mad 1012 (1965) 2 Comp LJ 37.

51 *Fatechand Tarachand v Parashram Maghanmal AIR* 1953 Bom 101.

52 Section 31 of the Act of 1997.

Any Court, in which a suit or other proceeding in relation to a claim for money or other property is pending against a debtor shall, on proof that an order of adjudication has been made against him, transfer it to the Court which has made the order of adjudication.[53] The Court may, by order, nullify the transfer of any property of the debtor, within fifteen years immediately proceeding the date of the order of adjudication, if the Court is satisfied that the transfer was made to defeat any debt owed by the debtor. The nullification, however, shall not be applicable to a transfer for a proper value consisting of goods, or a transfer of property acquired by way of inheritance or a transfer made, at any time within six years immediately proceeding the date of the order of adjudication, in favour of a person, who proves that at the time of transfer the debtor was able to pay, without the aid of the transferred property, all the claims made in the bankruptcy proceedings. Where an order is made nullifying a transfer, the property shall form part of the Estate.[54] A fraudulent preference is void if it could be proved firstly, that the debtor was unable to pay his debts at the time of transferring any property, or making any payment, or incurring any obligation in relation to any property, or allowing himself to be affected by a judicial proceeding in favour of a creditor, secondly, that the transfer, or payment, or obligation, or the proceeding has the effect of giving any preference to that creditor, or surety, or grantor in relation to the debt due, and lastly, the debtor is adjudged bankrupt on a plaint presented within one year after the date of such transfer, or payment, or obligation, or initiation of proceeding.[55] Upon the application of the Receiver, the Court shall nullify the transfer, or payment, or obligation, or judicial proceeding[56] and thereupon the Receiver shall recover the property transferred or the payment made.

A bankrupt is disqualified for election as a member of Parliament or of a local authority or other statutory body or sitting or voting in the proceedings thereof, for appointment as a Judge, Magistrate, Justice or any other office in the service of the Republic or acting as such, for

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53 Section 33(1) of the Act of 1997.

54 Section 60 of the Act of 1997.

55 Section 61(1) of the Act of 1997.

56 Section 62 of the Act of 1997.

appointment as Receiver or acting as such and for obtaining loan from bank or financial institutions. These disqualifications shall cease when the order of adjudication is annulled or the Court makes an order of discharge of the bankrupt.[57] The bankrupt may apply to the Court for protection from arrest or detention for any debt, and the Court may after giving notice and reasonable opportunity of hearing to the creditors, make an order for such protection of the debtor.[58] An order of adjudication does not operate automatically as a protection to the bankrupt.[59] A protection order is a privilege to be granted or withheld, as the court in its discretion, may determine.[60]

The exempted property of a debtor, which cannot to be taken over by the Court, includes tools used by the debtor himself, wearing apparel and household furnishing and other like accessories of himself, spouse and children and debtor's un-mortgaged dwelling place of homestead, the area of which is not exceeding 2500 square feet of land in the urban area, or 5000 square feet of land in the rural area. It should be noted that the total value of tools, wearing apparel and household furnishing etc. shall not exceed Tk. 300,000.[61]

It appears clearly that the provisions relating to exempted properties have been designed to protect the interest of the debtor. When everything is over, the debtor still has something to move on with his life.

We note that the Bankruptcy Act does not contain any provision relating to Alternative Dispute Resolution. It is high time to explore the possibility of including such provisions.

3.6. Disposal of estate and discharge of bankrupt

While disposing of the Estate, in the first phase, the administrative expenses, including the necessary expenses incurred by the Receiver,

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57 Section 94 of the Act of 1997.

58 Section 35(1) of the Act of 1997.

59 *P M Hamid v Mohamed Sheriff* AIR 1935 Rang 415 (1935) ILR 13 Rang 623, 159 IC 936.

60 *Re Gopal Das Aurora* AIR 1926 Cal 640, 94 IC 793 (1925) 30 Cal WN 112: The debtor must apply to the court to grant him privilege of protection against arrest that the court would do only if circumstances of case justify it; a protection order, once granted, cannot be refused or cancelled.

61 Section 32 of the Act of 1997.

and thereafter the Receiver's fee shall be paid. In the second phase the debts to be paid in priority to other debts[62] are all taxes and debts due to the Government, all wages or salaries not exceeding Tk. 2000 due to any clerk, servant or labour, all bank debts, all unsecured claims, and any subordinate claim. In the last phase interest, calculating from the date on which the debtor is adjudged bankrupt, at a rate of not exceeding 6% per annum on all debts included in the schedule are to be paid.[63]

After disposal of the estate, the Court may make an order of discharge[64] and such order shall have the effect of discharging the bankrupt from all claims, debts and liabilities (provable debts). Such order, however, shall not discharge him from any debt due to the Government, or from any debt or liability incurred by means of fraud or fraudulent breach of trust, or from any debt or liability in respect of which he has obtained forbearance by any fraud to which he was a party or from any liability under an order of maintenance given under Section 488 of Code of Criminal Procedure 1898 or the provisions of the Family Courts Ordinance 1985.[65]

3.8 The Bankruptcy Court, Dhaka

We mentioned earlier that two bankruptcy courts have been established in Dhaka and in Chittagong. The following table shows the 10-year performance record of the Bankruptcy Court, Dhaka (1997-2007):[66]

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62 Debts paid in priority rank equally between themselves and must be paid in full, unless the property of the bankrupt is insufficient to meet them, in which case they must abate in equal proportions between them.

63 Section 75 of the Act of 1997.

64 Section 47 of the Act of 1997.

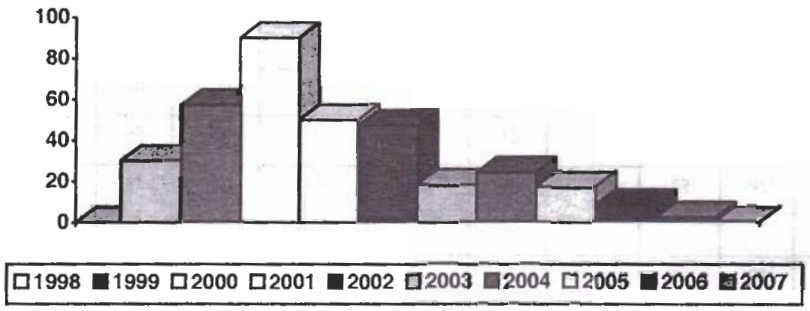
65 Section 51of the Act of 1997.

66 These data has been personally collected from the suit register of the Bankruptcy Court, Dhaka.

	Year	Total Filing	Total Disposal	Decree	Dismissed	Dismissed For Default	Withdr awn	Stayed	Pending	Com ment
	1	2	3	4	5	6	7	8	9	10
1.	1998	30	18	07	02	01	007	07	06	
2.	1999	57	47	24	02	00	19	08	04	
3.	2000	90	79	37	18	00	22	11	01	1 Trans fer
4.	2001	50	42	24	15	01	02	06	02	
5.	2002	47	40	30	04	05	01	01	06	
6.	2003	18	14	04	03	04	03	02	02	
7.	2004	24	18	10	05	01	02	00	06	
8.	2005	17	09	03	02	01	01	00	09	1 Trans fer
9.	2006	08	02	00	00	00	001	00	06	1 Trans fer
10.	2007	02	00	00	00	00	00	00	02	
Total	10 Years	343	269	139	51	13	58	35	44	
Note: Column no. 2 contains the aggregate of column no. 4 to 10.										

A careful analysis of the table of statistics reveals that in total 343 cases have been lodged, of which 269 cases have been disposed of and 58 cases have been withdrawn. In an average, only 34 cases have been lodged per year. At present 44 cases are under trial and 35 cases are stayed by order of higher court. 7 cases of 1998, 8 cases of 1999 and 11 cases of 2000 are stayed till now. Stay order for an indefinite period works as an impediment to the quick disposal of the cases. It also frustrates the litigants. We feel that provisions should be incorporated in the Bankruptcy Act, so that the bankruptcy proceedings can not be stayed for an indefinite period. There should be a timeframe within which bankruptcy proceedings should be completed.

Chart of number of cases filed from 1998 to 2007



An examination of the above chart reveals that since 2003, filing rate of new cases in the Dhaka Bankruptcy Court has declined gradually. In most of the cases, complainants in the bankruptcy court are either a bank, or a money lending institution. Since the introduction of Artha Rin Adalat Ain 2003[67], where the petitioner has a choice of filing petition either under the Act of 1997 or the Ain of 2003, he is opting for the Ain. The recovery rate of Artha Rin Adalat is also quite satisfactory. It won't be incorrect to say that Artha Rin Adalat is acting as an impediment to realize the full potentials and benefits of the Bankruptcy Court. These two courts are operating parallel to one another. Artha Rin Adalat Ain creates liability on the mortgaged property of the debtor, while the bankruptcy law brings the debtor into a legal compulsion by creating liability on the total property of the debtor. We believe that the Bankruptcy Act 1997 and Artharin Adalat Ain 2003 should be co-ordinated, so that they complement one another. Instead of two laws and two courts, possibility should also be explored for one law and one court, which will serve the objectives of both the Acts of 1997 and 2003.

4.1 Recommendations and Conclusion

Based on the foregoing discussion, the following aspects / issues are proposed to make the Bankruptcy Act 1997 more useful and effective:

- Studies should be carried out to explore the possibility of incorporation of a complete bankruptcy code, which will

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67 Act No. VIII of 2003.

include individual bankruptcy, corporate bankruptcy and UNCITRAL Model Law on Cross-Border Insolvency.

- The amount of debt of Tk. 20,000, entitling the debtor to file a plaint to declare him a bankrupt, is too small in today's context. This amount should be increased to at least Tk. 250,000, which is half the amount required for creditors.
- The post of receiver should be made more attractive by offering attractive remuneration.
- Possibility should be explored for the introduction of provisions relating to Alternative Dispute Resolution in the Bankruptcy Act.
- Provisions should be incorporated in the Bankruptcy Act, so that the bankruptcy proceedings can not be stayed for an indefinite period. There should be a time frame within which bankruptcy proceedings should be completed.
- The Bankruptcy Act 1997 and Artharin Adalat Ain 2003 should be co-ordinated, so that they complement one another. Instead of two laws and two courts, possibility should be explored for one law and one court, which will serve the objectives of both the Acts of 1997 and 2003.

We may conclude that the evolution of bankruptcy law reveals that the law which once was a sword for the creditor has now become an armour for the debtor. This law is now being evaluated from humanitarian and ethical points of view. Bankruptcy law in Bangladesh is still lagging behind the international standard. It is a crying need to update our bankruptcy law to face the challenges of the new millennium.

Number of cases

Careful analysis of the above data for the last ten years shows that altogether 343 cases were filed during this period. On the other hand number of cases filed exceeded 50 three times i.e. in the year 1999, 2000, 2001(58, 90, and 50 respectively). It is noteworthy that the jurisdiction of this court is within the Dhaka city, where most of the Banks and the financial institutions are being working. However we don't have any statistics about the cases filed under the previous act that is "The Insolvency Act, 1920". Therefore it is not possible to have a comparative analysis between the positions under these two Acts.

But from the scarcity of reported cases regarding insolvency act in the Law Journals it is revealed that in the past this act has not been practiced that much. Most provably peoples are not that aware about the provisions of recovery and payment of debt under this act. On average 34 cases were filed each year throughout this period. This number is not sufficient to justify the need for a specified court.

Disposal

Statistics of disposal of cases during this period reveals that among the 343 cases 269 were disposed. Year wise picture is much more important. In the first year that is in 1998, 17 cases were disposed among the 30 cases filed. The statistics of the disposal compare to the cases filed in the years in which number of cases filed were the highest i.e. 1999, 2000, and 2001 is even more fascinating. For example in the 1999, 45 cases were disposed among the 57 cases filed. Similarly in the year 2000, 77 cases among 90 and in the year 2001, 42 cases among 50 were disposed. So from the year wise statistics of disposal we can come to a conclusion that it is possible to resolve the disputes under the "The Insolvency Act" within one year.

Result

Now let's have a look at the results of the cases filed under this law. Statistics of the cases which were disposed after full trail are given in the 4th and 5th columns of the above table. Among the 343 cases the plaintiffs obtained decree in the 139 cases and 51 cases were dismissed. Year wise analysis is interesting enough. In the year 1999, 02 cases were dismissed in contrast to the 24 cases where the plaintiffs obtained decree. In the year 2000, 37 cases were ended with decree and 18 cases were dismissed. Result shows that in this court the success of the plaintiffs are satisfactory.

Withdrawn, Stayed and Pending

During the ten years under consideration altogether 58 cases were withdrawn. In each year at least some cases were withdrawn by the plaintiffs. During the withdrawal plaintiffs used to refer to different procedural mistakes. Responsibility lies on the filing and the conducting lawyers. The main reason behind the withdrawal of 58 cases is lack of efficient lawyers, who failed to deal the Bankruptcy proceedings properly. Besides number of stayed cases are 35. These

cases were stayed mainly during the period from 1998 to 2003. Proceeding of most of the cases were stayed vide the order of the higher court. Being aggrieved by different interim order parties used to seek relief in the higher court. As a result the proceedings of the original case remain stayed. By this process 07 cases filed in the year 1998 have been stayed for last 10 years. If the cases remain stayed for long time parties become frustrated and the objectives of the law failed as well. By limiting the scope of seeking relief in the higher court against the interlocutory order and the provision of stay for an indefinite period we might find out a solution to this problem.

From the statistics we can also see that altogether 44 cases are pending. The duration of the trial of the 06 cases filed in the year 1998 is about 10 years. It is unfortunate that these 06 cases are not disposed within ten years, whereas 17 out of 30 cases were disposed within that year (1998). The reasons behind these long pending cases are- different interlocutory petitions of the parties, time prayer, delay in submitting- all books of accounts, inventories of property, list of creditors and debtors, and statements of due debts in the court and different complexities regarding appointment of receiver. Appointment of receiver is a big problem. Since the receiver has to bear the initial cost it is really difficult to get a person who is interested to work as a receiver. No such firm has developed yet, which is enriched with people, who are efficient in property management. Problem of long delay in the trial of cases may be resolved by reducing the scope of time petition, fixing time in the case of submission of interim issues like accounts of the debtors, appointment of receiver etc.

Since 2003, filing rate of new cases in the bankruptcy courts has declined gradually. In most of the cases, complainants in the bankruptcy court are either a bank, or a money lending institution. Generally it is agreed that due to the introduction of Artha Rin Adalat Ain 2003[68], filing of cases under the Bankruptcy Act 1997 has reduced and the activities of the Bankruptcy Court have become limited. At the same time, the recovery rate of loans through Artha Rin Adalat is quite satisfactory. Artha Rin Adalat is definitely acting as an impediment to realize the full potentials and benefits of the

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[68] Act No. VIII of 2003.

Bankruptcy Court. These two courts are operating parallel to one another. Artha Rin Adalat Ain creates liability on the mortgaged property of the debtor, while the bankruptcy law bring the debtor into a legal compulsion by creating liability on the total property of the debtor. There is a tendency on the part of businessmen of our country to take loan from several banks and not to repay them. In this case under the Bankruptcy law, it is possible to settle or recover the loan taken from all the banks. While, under the Artha Rin Adalat Ain different banks are to file different cases in the Artha Rin Adalat to recover their loans, which is time consuming and complicated. So, there are advantages and disadvantages of both the courts.

WTO DISPUTE SETTLEMENT PROCEDURE: A NEW ERA IN THE DISPUTE SETTLEMENT SYSTEM

Shima Zaman
&
Gobinda Chandra Mandal

1. Introduction

Increasing international economic interdependence is obviously becoming a growing challenge to governments that are frustrated by their limited capacities to regulate or control cross-border economic activities.[1] Many things trigger this frustration including interest rates, various fraudulent or criminal activities, product standards, consumer protection, environmental issues and prudential concerns for financial services.[2] The agreement establishing the World Trade Organization at Uruguay Round is the most important effort to address these issues. And undoubtedly, the Dispute Settlement Understanding Rules for resolving the international trade disputes is the significant feature of the WTO.

The WTO's Dispute Settlement Understanding (DSU) evolved out of the ineffective means used under the GATT (General Agreement on Tariffs and Trade) for settling Charter of the International Trade Organization (ITO). By the time of the start of the Uruguay Round Negotiation the effectiveness of GATT dispute settlement system was disagreements among members. The US Congress rejected the idea of setting up of an International Trade Organization on a par with the International Monitory fund (IMF) and the World Bank. The original GATT dispute settlement system comprised rudimentary remnants of a more thorough framework contained in the defunct Havana very seriously questioned. The prime allegations were the propensity of the contracting parties to ignore the findings of the panel and the tendency of the nations to block or delay every stage of the dispute resolution system resulting in a stalemate in a number of high profile

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1 Jackson John H., *The World Trading System: Law And Policy of International Economic Relations* (1989).

2 Croley Steven P.; John H. Jackson, "WTO Dispute Procedures, Standard of Review, and Deference to National Government", *The American Journal of International Law*, vol. 90, No.2. (Apr., 1996), pp. 193-213.

trade disputes. Several trade disputes between the European Union (EU) and the United States of America were initiated under the GATT settlement system but remained unsettled. This reflects the failure of the GATT system resulting in increasing non-confidence on the effective working of the system itself.

The World Trade Organization (WTO), and its procedures for settling trade disputes between members, has attracted considerable attention recently. Much of the attention can be attributed to prominent and contentious disputes between the United States and European Union on issues such as bananas, beef, and steel, as well as notable legal rulings that challenged U.S. environmental laws intended to protect dolphins and endangered turtles.[3] To some,

> The WTO provides an integrated dispute settlement system. The same procedures apply to disputes regarding trade whether these are goods or services, or the trade related aspects of intellectual property protection. The dispute settlement system plays a central role in the security and predictability of the multilateral trading system. It is a rule oriented system which favors mutually agreed solutions, and is designed to secure the withdrawal of inconsistent measures.[4]

In this paper an effort will be made to provide an outline of the working of GATT and WTO dispute settlement mechanisms, the compliance of the findings, the drawbacks of both of the systems and the concerns of the developing countries.

2. The GATT Dispute Settlement System

The GATT was established in the wake of the ITO's failure and contained a more limited array of measures derived from the Havana Charter for the settlement of disputes between its contracting parties. From its inception, the General Agreement on Tariffs and Trade (GATT) has provided for consultations and dispute resolution among GATT Contracting Parties, allowing a party to invoke GATT dispute articles if it believes that another's measure, whether violative of the GATT or not, has caused it trade injury. Because the GATT does not set out a dispute procedure with great specificity, GATT Parties over

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3 The dispute over the protection of Dolphins (*United States – Restrictions on Imports of Tuna*) actually began in the early 1990s under the General Agreement on Tariffs and Trade (GATT).

4 Stanton Gretchen Heimpel, Senior Counsellor, Agriculture and Commodities Division, World Trade Organization, The WTO Dispute Resolution System

time developed a more detailed process including *ad hoc* panels and other practices. The procedure was perceived to have certain deficiencies, however, among them a lack of deadlines, the use of consensus decision-making (thus allowing a Party to block the establishment of panels and adoption of panel reports), and laxity in surveillance and implementation of dispute settlement results. The GATT dispute settlement system was based on Articles xxii and xxiii. Article xxii deals with consultation and article xxiii deals with nullification or impairment.

2.1. GATT Article XXII: Consultation

This article obliges the contracting parties to engage in consultation in the event of a dispute among them. It further extends the scope of obligation of consultation by including the scope of mediation by third parties of the staff of the GATT Secretariat. In the case of the failure of the consultation and mediation process the plaintiff may have recourse to Article xxiii. Article xxii runs as follows:

> **Para.1.** Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.
>
> **Para.2.** The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1. (WTO, 1999)[5]

2.2 GATT Article XXIII: Nullification or Impairment

The entire GATT dispute resolving mechanism and dissatisfaction about GATT revolves this article. It is the centre of the GATT dispute settlement system. The first part of the articles deals with the circumstances under which the GATT rules may be violated and the second part concerns the means of redress for contracting parties in the case that their benefits under GATT are nullified or impaired.

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[5] *WTO The Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge: Cambridge University Press, 1999.

Para.1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of:

a) the failure of another contracting party to carry out its obligations under this Agreement, or

b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

c) the existence of any other situation.

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned.

Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

Para. 2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time ... the matter may be referred to the CONTRACTING PARTIES. [They] shall promptly investigate any matter so referred to them and shall make appropriate recommendations ... which they consider to be concerned, or give a ruling on the matter as appropriate ... If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concessions or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Director-General to the Contracting parties of its intention to withdraw from this Agreement. (WTO, 1999)

Paragraph 1(b) deals with what are referred to as non-violation nullification or impairment complaints, that is, there has been no

specific violation of GATT provision. "This played an important role in dealing with government measures that distorted the outcomes of previous negotiations and paragraph (c) is, effectively, a 'catch all' provision."[6]

The main features of the second paragraph of article xxiii are:

- The dispute settlement system can be invoked on the grounds of nullification or impairment of benefits as expected under the Agreement and does not depend upon any actual breach of legal obligation.
- The power of the GATT is established, not only to investigate and recommend action but also, to rule on the matter.
- The GATT is empowered to authorize contracting parties to suspend GATT obligations to other contracting parties.

However, Article XXIII and the procedures developed in its interpretation contained a number of deficiencies in the eyes of those who favored a more adjudicative dispute settlement model. "Historically, the United States has been the most litigious member of the multilateral trading system. Aspects of the GATT dispute settlement that effectively denied the United States its GATT day in court, therefore, have particularly frustrated U.S. complainants".[7] For example, under the old GATT system, any contracting party could 'block' the creation of a panel by not agreeing to its formation. A single contracting party's ability to 'block' panel formation was based on the notion that if one contracting party did not agree, consensus was destroyed. Similarly, even where a panel had been formed and the parties had litigated the dispute before the panel; a single contracting party could 'block' the adoption of the panel report, which gave the losing party the ability to veto an adverse ruling. Again, the underlying notion was that all GATT actions, even the adoption of a panel report, had to be done by consensus. There are, of course, no analogous rules in the laws of the GATT members themselves. National laws universally require defendants to respond to

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6 Robert Read, 'Trade dispute settlement mechanisms: The WTO dispute settlement understanding in the wake of the GATT', Lancaster University Management School Working Paper 2005/012.

7 Economic Research Service/USDA, Agriculture in the WTO/WRS-98-4/December 1998, pp. 38.

accusations, and no legal system permits a losing defendant to veto an adverse verdict. Nonetheless, this was GATT dispute settlement before the Uruguay Round. The main shortcomings of GATT dispute settlement system are:[8]

- The relevant Articles were brief and did not specify clear objectives and procedures, such that settlement relied upon the creation of ad hoc processes.
- Ambiguity concerning the role of consensus, leading to the 'blocking' of adverse decisions.
- Delays and uncertainty in the dispute settlement process, given that there was no right to a panel and no hard time constraints on any aspect of the proceedings.
- Delays in and partial non-compliance with, panel rulings.

Due to these shortcomings GATT failed to resolve disputes in most of the cases that ended up with the establishment of WTO DSU. However, the GATT dispute settlement process survived for such a long-term may be, because of the long-term commitment of its members to maintaining GATT framework.

3. WTO Dispute Settlement Understanding

The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which went into effect on January 1, 1995, continues past GATT dispute practice, but also contains several features aimed at strengthening the prior system.

Prior to the commencement of the Uruguay Round negotiations, there was a general consensus among the GATT Contracting Parties that the dispute settlement system required reform. This was stated very clearly in the Punte del Este Declaration:

> To assure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations.[9]

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8 Supra note 6.

9 GATT *Ministerial Declaration, Punta del Este*, Geneva: GATT, 1986.

The two approaches of the declaration seems to be that the EU, Japan and other developing countries wanted to put a restriction on the frequent use of unilateral sanction by U.S.A while U.S.A was looking for a rule oriented automatic system for smooth, less time consuming process.[10]

Whatever be the individual aspirations behind the demand of improvements in the GATT dispute settlement system, the establishment of the WTO dispute settlement system, to some extent, proves to be a more effective and substantial dispute resolving procedure.

3.1 The Main Provisions of the WTO Dispute Settlement Understanding:[11]

The Dispute Settlement Understanding (DSU) establishes rules and procedures that manage various disputes arising under the Covered Agreements of the Final Act of the Uruguay Round. All WTO member nation-states are subject to it and are the only legal entities[12] that may bring and file cases to the WTO. The DSU created the Dispute Settlement Body (DSB), consisting of all WTO members, which administers dispute settlement procedures. It provides strict time frames for the dispute settlement process and establishes an appeals system to standardize the interpretation of specific clauses of the agreements. It also provides for the automatic establishment of a panel and automatic adoption of a panel report to prevent nations from stopping action by simply ignoring complaints. Strengthened rules and procedures with strict time limits for the dispute settlement process aim at providing security and predictability to the multilateral trading system and achieving a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements. The basic stages of dispute resolution covered in the understanding include consultation, good offices, conciliation and mediation, a panel phase, Appellate Body review, and remedies.

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10 Stoler, A.L. "The WTO dispute settlement system: Did we get what the negotiations wanted?", paper presented at the International Bar Association Conference, Future Directions in WTO dispute Settlement, Geneva, 16 March, 2006 mimeo.

11 The full text of the Dispute Settlement Understanding is available at <http://www.wto.org/wto/dispute/dsu.htm>.

12 WTO member means any state or separate custom territory possessing full autonomy in the conduct of its external commercial relations that has accepted or acceded to the WTO (for example Chinese Taipe).

3.1.1 Consultation

If country 'X' believes that another member is not complying with its obligations under a WTO agreement that is to have "infringed upon the obligations assumed under a Covered Agreement"[13] it may request consultations. In case of a request for consultation the respondent generally respond within 10 days and enter into consultation within 30 days. If the dispute is not settled within 60 days from the date of receipt of the request to consult, the complainant may request a panel. However the complainant may request an early panel if the respondent fails to respond within 10 days or enter into consultation within 30 days or if the disputants agree that the consultations have been unsuccessful.

3.1.2 Good Offices, Conciliation and Mediation

Article 5 is concerned with the provisions of good offices, conciliation and mediation procedures to resolve trade dispute between the parties. Unlike consultation in which "a complainant has the power to force a respondent to reply and consult or face a panel",[14] the good offices, conciliation and mediation are voluntary measures that depend on the mutual understanding of the parties. No specific rules or any specific time frame is mentioned. Any party may initiate or terminate them at any time.

The scope of good offices, conciliation and mediation reinsures that the WTO DSU gives importance on the fact that the parties involved in the dispute must come to a solution no matter what is the procedure. If consultation, good offices, conciliation and mediation fail to settle the dispute, the contracting party may request the formation of panel.

3.1.3 Establishing a Dispute settlement Panel (Arts. 6, 8, 12, 15)

Where a panel has been requested, the DSB[15] must establish it at the second DSB meeting at which the request appears as an agenda unless at that meeting the DSB decides by consensus not to establish a panel.

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13 Dillon Jr., Thomas J. "The World Trade Organization: A new legal order for world trade?", *Michigan Journal of International Law* 16 (1995), p. 381.

14 Ibid., p. 382.

15 "The DSB is simply a special meeting of the General Council in its dispute settlement role and is composed of all General Council Members present at the DSB meeting"(Dillon, Jr., supra note 13, p. 363). The DSB oversees the application of the DSU.

Panels shall be composed of well-qualified governmental and/or non-governmental individuals with a view to ensuring the independence of the members, and whose governments are not the parties to the dispute, unless the parties to the dispute agree otherwise. Three panelists compose a panel unless the parties agree to have five panelists.

The Secretariat proposes nominations for panels that the parties shall not oppose except for compelling reasons. If the parties disagree on the panelists, upon the request of either party, the director-general in consultation with the chairman of the DSB and the chairman of the relevant council or committees shall appoint the panelists.

The panel's working procedures usually involve the submission of written arguments and evidence by the parties, and two meetings at which the parties may present oral arguments and questions to each other (Art. 12). In addition, the panel provides an opportunity for interested third parties to submit their written and/or oral arguments. Besides, the panel may seek information from any source that they consider pertinent. For example, in considering disputes alleging violation of the Agreement of the Application of Sanitary and Phytosanitary Measures (the SPS Agreement),[16] the panel should seek advice from relevant technical and scientific experts. These experts are to be selected in consultation with the parties to the dispute, and their advice may be sought either on an individual basis or through the establishment of an expert review group.

After considering written and oral arguments, the panel issues the descriptive part of its report (facts and argument) to the disputing parties. After considering any comments, the panel submits this portion along with its findings and conclusions to the disputants as an interim report. Absent further comments, the interim report is considered to be the final report and is circulated promptly to WTO Members. A panel must generally circulate its report to the disputants within six months after the panel is composed, but may take longer if needed. The period from panel establishment to circulation of the report to all Members should not exceed nine months. In practice, panels have increasingly failed to meet the six-month deadline.

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16 Article 11.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures.

Within sixty days after the report is circulated to the members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adapt the report

3.1.4 Appellate Body Review

The DSB establishes a standing Appellate Body to hear the appeals from panel cases. It is often argued that "with the adoption of DSU for the first time in GATT practice it is possible to appeal against panel reports".[17] The Appellate body shall be composed of seven members, three of whom shall serve on any one case.[18] Those persons serving on the Appellate Body are to be "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered Agreements generally".[19] This body shall consider issues of law covered in the panel report and legal interpretations developed by the panel. However, the members of the Appellate Body do not serve for life rather the members have only four years term.

The appeal can be made by any of the parties to the dispute and has to be submitted to DSB within a period of sixty days. Within 60 days of being notified of an appeal (extendable to 90 days), the Appellate Body must issue a report that upholds, reverse, or modifies the panel report. An appellate report is to be adopted by the DSB, and unconditionally accepted by the disputing parties unless the DSB decides by consensus not to adopt it within 30 days after circulating it to members.

3.1.5 Implementation of Panel and Appellate Body Reports

Thirty days following the adoption of the panel and any Appellate Body reports the member, who has lost a dispute, must inform the DSB how it will implement the WTO ruling. However, if it is impracticable to comply immediately with the ruling the member will have a reasonable time to do so. That period will be either the time that proposed by the member and approved by the DSB; or absent approval, the period mutually agreed by the disputing parties within

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17 For details see, Petersman E.U., *The GATT/WTO Dispute Settlement System*, London, The Hague and Boston, 1997, pp. 186.

18 See Art. 17, para. 1: "Persons serving on the Appellate Body shall serve in rotation."

19 See ibid., para. 3.

45 days after the date of adoption of the report; or failing agreement, the period determined by binding arbitration.

3.1.6 Compensation and Suspension of Concessions

If defending party fails to comply with the WTO recommendations and rulings within the compliance period, the party must, upon request, enter into negotiations with the prevailing party on a compensation agreement within 20 days after the expiration of this period; if negotiations fail, the prevailing party may request authorization from the DSB to retaliate. If requested, the DSB is to grant the authorization within 30 days after the compliance period expires unless it decides by consensus not to do so. The defending member may request arbitration on the level of retaliation or whether the prevailing member has followed DSU rules in formulating a proposal for cross-retaliation; the arbitration is to be completed within 60 days after the compliance period expires. Once a retaliatory measure is imposed, it may remain in effect only until the violative measure is removed or the disputing parties otherwise resolve the dispute.

3.1.6 Arbitration (Art. 25)

Members may seek arbitration within the WTO as an alternative means of dispute settlement to facilitate the solution of certain disputes that concern issues that are clearly defined by both parties. Those parties must reach mutual agreement to arbitration and the procedures to be followed. Agreed arbitration must be notified to all members prior to the beginning of the arbitration process. Third parties may become party to the arbitration only upon the agreement of the parties that have agreed to have recourse to arbitration. The parties to the proceeding must agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any member may raise any point relating thereto.

4. Achievements of the WTO DSU

> The WTO Dispute Settlement System is a remarkable achievement. The WTO has succeeded in creating a frequently used compulsory dispute settlement system producing binding results that can be enforced. Nowhere else in international law are all these characteristics combined.[20]

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20 Supra note 10.

The main areas where the WTO DSU offers improvements are, first, a contracting party may no longer block the formation of a panel because the rule-requiring consensus has, in effect, been stood on its head. The rule contained in article 6 effectively makes dispute settlement automatic upon the filing of the complaint because; after all, there can be no consensus not to establish a panel without the complaining party. Thus, the new rule maintains the traditional GATT notion of consensus decision-making, but makes it meaningless in practice. The new 'automatic' rule effectively marks a move from the consensus model to the litigious model.[21] Similarly, a single party can no longer block panel reports. Adoption of panel reports is now automatic within 60 days from when the report is circulated unless a party has appealed; and, in cases of appeal, automatic after the completion of the appeal process. Moreover the DSU makes it clear that the function of the panels is to decide.

The function of panel is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, "a panel should make an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making recommendations or in giving the rulings provided for in the covered agreements".[22]

Most importantly it has established a unified settlement system that covers all the WTO agreements.

5. Criticisms of the Existing WTO DSU

With all its achievements WTO DSU has raised several issues concerning the smooth and effective functioning and involvement of the members, in the process.

5.1 Sequencing

The problem that has become known as 'sequencing' results from a conflict in the provisions of the Dispute Settlement Understanding dealing with the time available to a Member, whose measure has been found to be inconsistent, to bring that measure into conformity – and with the time within which the successful complaining Member must act to secure its remedy if the measure is not brought into conformity.

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21 Supra note 7, at pp. 39.

22 Article 11 of the WTO DSU.

This issue first manifested itself during the compliance phase of the U.S.-EC dispute over the EC's banana import regime. Article 22 of the DSU allows a prevailing party to request authorization to retaliate within 30 days after a compliance period ends if the defending party has not complied. Article 21.5 provides that disagreements over the adequacy of compliance measures are to be decided using WTO dispute procedures, 'including whenever possible resort to the original panel'; the compliance panel's report is due within 90 days and may be appealed. The DSU does not integrate Article 21.5 into Article 22 processes, nor does it expressly state how compliance is to be determined so that a prevailing party may pursue action under Article 22.

Some Scholars have identified the possible solution to this sequencing problem. According to them, an exchange of letters between the parties delaying the suspension of concessions requirement until after the determination as to whether the steps taken by the Member concerned do or do not bring its measure into compliance.[23] While this ad hoc, case-by-case approach has solved the immediate problem, it also highlights a larger truth about the WTO's weakness of its rule-making function as compared to its adjudicating function.[24] Despite the fact that no Member has an interest in perpetuating the sequencing problem in the DSU, and despite the fact that every Member confronted with the problem, whether as complainant or as defendant, has agreed to an ad hoc solution, the Members collectively have been unable to amend the DSU to fix it.

5.2 Compositions, Function and Competency of the WTO Panels

Membership in the WTO panel is generally made up of trade lawyers and the WTO secretariat. Besides, DSB does also provide the panel with the ability to call on outside experts as needed.[25]However reliance of the DSU on the part-time non-professional experts has raised concerns among the Members. The one reason may the rapid growth in the number of cases and the consequent workload. In the

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23 For details see, Palmeter David and Petros C. Mavroidis, *Dispute Settlement In the World Trade Organization: Practice and Procedure*, Cambridge University Press, 2004.

24 Ehlermann Claus-Dieter, "Six Years on the Bench of the 'World Trade Court' – Some Personal Experiences as a Member of the Appellate Body of the World Trade Organization," 36(4) *Journal of World Trade* 605 (August 2002).

25 Article 13; Appendix 4 of the DSU.

first 11 years of the WTO's existence (1995 through 2005, inclusive), 335 consultation requests were made, an average of slightly more than 30 per year.[26]

The question is whether the huge volume of cases can be resolved by the part-timer only. Many suggest there should be a permanent body composed of experts for that purpose.[27]

Another question is, to what extent WTO panels and the Appellate Body have competence to decide legal questions not directly relating to a covered agreement.[28] A particular question may involve questions of general public or private international law in addition to questions of interpretation of GATT or other covered agreement. The dispute brought by the European Community against the United States concerning the US Helms-Burton legislation imposing economic and diplomatic sanctions on persons and companies that 'traffic' with certain property in Cuba. "This dispute concerns not only legal question arising under the GATT, such as the scope of the article xxi 'Security Exceptions', but also questions of general public international law, such as whether the US legislation exceeds norms relating to jurisdiction, economic coercion and non-intervention".[29] Do the DSB have the authority to resolve the questions not directly related to covered agreement? Article 11 of the DSU authorizes the panels and the Appellate Body to make other findings as will assist the DSB in making the recommendation or in giving the ruling provided for in the covered agreements. But this is an implied power that needs improvements.

5.3 Equity of Remedies and the Developing Countries

The founding principles of the GATT and WTO multilateral framework are non-discrimination, reciprocity and transparency. Nevertheless, the WTO DSU is argued to be biased in favor of the leading industrialized countries, notably the EU and the United States, at the expense of developing countries.

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26 website:<http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.>

27 Foe details see, Cottier, T. 2003. "The WTO permanent panel body: A bridge too far?", 6(1) *Journal of International Economic Law*, pp. 187-202.

28 As **Article 2** of the DSU clearly states the principal covered agreement is the **General Agreement on Tariffs and Trade (GATT) 1994.**

29 Schoenbaum Thomas J.: "WTO Dispute Settlement: Praise and suggestions for reform," 47(3)*The International and Comparative Law Quarterly*, Jul., 1998, pp. 652.

"Of the 235 cases brought to the WTO between 1995 and 2001, some 66 percent were initiated by industrialized countries and 34 percent by the developing countries. The least-developed countries however, were not involved in any cases at all".[30]

And the recent date on the cases brought to the WTO up to April 10, 2007 reiterates almost the same cases. The table below will give a glimpse of this statement.[31]

Countries	No. of cases as complainant	as respondent
USA	88	99
European Union	76	58
India	17	19
Pakistan	03	02
Srilanka	01	---
Bangladesh[32]	01	---

The reason may be the greater economic and political leverage in international trade matters, the greater resources at their disposal to fight complex and costly cases and their greater propensity for selective but substantial retaliatory action.

And in reality if this is the reason the developing country will never be able to get the benefit of this system. In terms of equity between members, it is clear that rights of retaliation, while available to all members are generally not feasible for all except the major economies.[33]

However, though in a small scale, the developing countries are trying and using the DSB to resolve trade dispute but the least developed countries are constrained by the financial and intellectual resources required fighting DSU cases, whether as plaintiffs or respondents. And the less use of the WTO DSU by the least-developed countries, no doubt, is a cause for some concern.

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30 Park, Y.D., and Panizzon, M. (2002), "WTO dispute settlement 1995–2001: A statistical analysis", *Journal of International Economic Law*, vol. 5, no. 1, pp. 221-44.

31 World Trade Organization, rue de Laussane 154, ch-1211 Geneva 21, Switzarland.

32 Bangladesh was complainant against India in 2004 (DS 306) concerning certain anti-dumping measures imposed by India on import of batteries from Bangladesh. The dispute was settled at the consultation centre.

33 Joan, H., "WTO Dispute Settlement: Managing the agenda after Seattle", paper present at the Fifth Annual Conference on the International Trade Education and Research of the Australia APEC Study Centre, Melbourne, 26-27 October 2000.

Suspension of concession in the form of retaliation is often considered as an effective mode of compliance of the DSB decision under the WTO system. Even the developed countries believe that a much stronger suspension system should be introduced to deal with non-compliance. It is often presumed that the inability of an individual state to block the panel formation and also the suspending of the concession is another step to compel the defying state. But it still remains a question. The most developed countries like USA, EU etc, can only take retaliation measures. The developing countries and the least developed countries are not in a position to impose such sanctions against the powerful members of the WTO due their lack of resources. Besides national law plays a vital role in such actions. Thus in the WTO in many cases only the major states can use sanctions and the weaker one comply with the WTO mainly out of fear of sanctions.

It does not mean that the developing countries do not have any way out. To remain in the WTO is not compulsory. The states which feel that WTO is no more beneficial to them they can withdraw themselves from the WTO. And if a large portion of its members decides to quit WTO it will become a threat to the existence of the WTO. When the existence of WTO is under threat the desires of the states, which opted to benefit from the WTO, will be under threat. It is important to note that the withdrawal from WTO is not that simple. Because it might be damaging to members of developing and least developed countries, stopping tariff on the withdrawal member's export and flight of foreign investment. Even then the combined effort from the developing and least developing countries may bring some changes in the strategies of the most developed countries. So it is very important to make a balance between the members so that no one feels threatened by the members having strong financial strength.

6. WTO and Private Party Access

Under Article xxiii of GATT 1994, a WTO member has 'standing to sue' if it 'should consider' that its right to a trade benefit is being nullified or impaired. Restrictive conditions are also absent from the DSU, which only cautions members to bring complaints if a dispute proceeding would be 'fruitful'.[34] Thus WTO members have broad discretion to bring case. In the Banana case the Appellate Body upheld the right of the United States to complain to the DSB about EC import

[34] DSU, Art. 3:7.

restrains on bananas, although the United States is not a banana exporter.[35]

Thus the interpretations of the Articles and the practices of the DSB makes it clear that the third parties have no direct access to WTO dispute settlement procedure but can raise a question before the WTO DSB if it can successfully persuade a WTO member. The rights of the third parties are virtually left with the discretion of the member state. Although there are no WTO standards to determine when a WTO member may raise a private party's case, such criteria do exist under municipal laws in certain countries. Examples of this are, in the United States, section 301 of the Trade Act of 1974 and, in the European Union, Council Regulation (EC) no.3286/95.

"Perhaps, access by private parties to the WTO would not create difficulties rather would bring several advantages including : reducing trade tensions, building support for the WTO and encouraging the resolution of the problems by objective means rather than through economic and political tugs of war".[36]

However, it is also desirable that the WTO members in raising a third party question will act reasonably, so as not to make the DSU ineffective or meaningless.

7. Conclusion

The dispute settlement system is crucial to ensure the implementation of the WTO agreements. And it has become the most active and productive dispute settlement system in the entire field of public international law. It is remarkable because 150 states agreed to subject themselves to the compulsory jurisdiction of tribunals whose decisions are final. At present there are 31 observer governments including Russian Federation, Ukraine, Iraq, and Iran. Some opines that the success of the WTO dispute settlement mechanism has surpassed expectations. But this is not always the reality. It is true that the WTO DSU is a significant improvement over its GATT predecessor. The WTO Agreements are agreements among sovereign states and the enforcement of panel decisions depend ultimately on the willingness of the member countries to play by the rules, to accept judgments even adverse judgments, where dispute arise. The question

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35 Supra note 29, p. 653.

36 Ibid, p. 655.

is no more confined in whether the members have an effective means to vindicate their rights rather whether members whose practices have been successfully challenged under the improved dispute settlement procedures will live up to their obligations.

> In many ways, the DSU provisions on remedies, especially the temporary measures of compensation and suspension, are deeply flawed, and even dysfunctional. WTO members are questioning whether they really contribute to the effectiveness of the system, especially as regards their usefulness in promoting the critical and central goal of compliance, which maximizes the broader security and predictability goals of the institution.[37]

From the analysis of the WTO dispute Settlement System it is easily understandable that few changes have to be brought to make the system more accurate, effective and acceptable to all of its members which include: establishment of panels and the Appellate body, encouraging the use of non adjudicative dispute settlement procedure, clear authorization of the panels to decide issues of public international law, introducing some mechanisms to ensure the compliance of the panel decision by all members irrespective of their political and financial status.

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[37] Jackson John H., "International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to 'Buy Out'?", 98(1) *The American Journal of International Law*, (Jan., 2004), pp. 123.

A RIGHTS-BASED ASSESSMENT OF MICROFINANCE AS A POVERTY ALLEVIATION TOOL

Quazi MH Supan

Microfinance[1] - defined as efforts to improve poor people's access to loans and saving services - has been described as the fastest-growing and most widely recognized anti-poverty tool.[2] Microfinance spread quickly across the globe because few other tools promise to fight poverty as effectively.[3] As of December 31, 2005, 3,133 microcredit institutions, from all over the world, have reported reaching 113,261,390 clients, 6681,949,036 of whom were among the poorest when they took their first loan. Of these poorest clients, 84.2 percent, or 68,993,027, are women. Eight hundred forty-seven of these institutions submitted an Institutional Action Plan to the Microcredit Summit Campaign in 2006. Together these 847 institutions account for 88 percent of the poorest clients reported. Assuming five persons per family, the 81.9 million poorest clients reached by the end of 2005 affected some 410 million family members.[4]

The human rights impact of microfinance is unknown. A human rights impact assessment of a given microfinance institution is yet to be seen. Amidst this darkness, a distinct stream of microfinance, led by Grameen Bank, claims microcredit as a human right. The object of

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1 The shift in terms from microcredit to microfinance is recent. This shift reflects the acknowledgment that saving services, and not just loans (credits), may help to improve wellbeing of the poor. See Zeller, Manfred and Sharma, Manohar (2000) *Many borrow, more save, and all insure: Implications for food and micro-finance policy*, in Food Policy, Vol. 25, pp. 143-167; MacIsaac, Norman (1997), The Role of Microcredit in Poverty Reduction and Promoting Gender Equity: A Discussion Paper, Report to CIDA; Morris, Gayle A. and Richard L. Meyer (1993), "Women and Financial Services in Developing Countries: A Review of the Literature, Economics and Sociology, Occasional Paper No. 2056, The Ohio State University.

2 Schreiner, Mark (2003), "A Cost-Effectiveness Analysis of the Grameen Bank of Bangladesh", Center for Social Development, Washington University in St. Louis.

3 Morduch, J. (1999), "The Microfinance Promise" *Journal of Economic Literature*, 37(4): 1, pp. 569-614.

4 Daley-Harris, Sam (2006), *State of The Microcredit Summit Campaign Report 2006*, The Microcredit Summit Campaign, Washington DC, USA, p. 2.

the present article is not to question the validity of this claim rather it will assess microfinance as a poverty alleviation tool from a rights-based perspective. In doing so, in the first section of the article, I will generally introduce microfinance as a poverty alleviation tool and then select a model of microfinance for assessment. The second section will select a few rights-based features that will constitute a yardstick to assess the selected microfinance model from a rights-based perspective and examine the selected model accordingly. In the third and last section, I will consider the rights-based challenges that the selected model of microfinance in particular, and other MFIs in general, may face.

1.1. Microfinance as a poverty alleviation tool

The idea of informal microfinance originated in Bangladesh, which is one of the LDCs. Within a very short span of time the idea was borrowed and applied in many poor countries, mainly LDCs. This is because for most of the LDCs, economic development is synonymous with rural development.[5] Still the majority of people are entrapped in the quagmire of poverty and backwardness. If rural development policy is to bring serious and sustained amelioration to the lives of the millions of the people living in the countryside, a significant part of the resources to promote rural development must come from the rural area itself. And from this realization the idea of microcredit programmes were introduced as a means of rural resource mobilization.[6]

From the recent development experience of many LDCs, some commentators suggest that microcredit has opened up a window of opportunity to break the vicious circle of poverty and create 'virtuous circles' of growth and welfare.[7] As such, sustainable local community development and the role of microcredit in rural development are currently high-priority subjects in most LDCs. Providing the poor

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5 Hung, Chi-Kan Richard (2001), "From South to North: A Comparative Study of Group-Based Microcredit in LDCs and the United States" in Carr Jim and Zhong Yi Tong (eds.), *Replicating Microfinance in the United States*, Washington, D.C.: Fannie Mae Foundation, chapter 8.

6 W. Blair Harry (ed.) (1989) *Can Rural Development be Financed from Below? Local Resource Mobilization in Bangladesh*, University Press Limited, Dhaka.

7 Masanjala, W.H. (2002) Can the Grameen Bank be replicated in Africa? Evidence from Malawi, *Canadian Journal of Development Studies*, 23(1), pp. 87-104; Mosley, P. and Rock, J. (2004) Microfinance, labour markets and poverty in Africa: A study of six institutions, *Journal of International Development*, 16(3), pp. 467-500.

with access to financial services is one of many ways to help increase their options, incomes and productivity. In many countries, however, traditional financial institutions have failed to provide this service.[8] Microcredit and co-operative programmes have been developed to fill this gap. Their purpose is to help the poor become self-employed and thus escape poverty. Many of these programmes provide credit using social mechanisms, such as group-based lending, to reach the poor and other clients, including women, who lack access to formal financial institutions. With increasing assistance from the World Bank and other donors, microfinance is emerging as an instrument for reducing poverty and improving the poor's access to financial services in low-income countries.

In the 70s and the early 80s, certain NGOs of Bangladesh proposed microcredit as a means to increase productivity by creating employment and developing human capital.[9] Since the poor did not have much access to institutional credit, it was thought that it will open a way to generate self-employment opportunities for the poor. Many critics opposed that idea on many grounds, for example, microfinance supported small enterprises have no sustained impact on the poor,[10] it makes the poor economically dependent on it,[11] and it may not be cost-effective.[12]

Many countries have established microcredit programmes with explicit objectives of reducing poverty by providing small amounts of credit to the poor to generate self-employment in income-earning activities. Bangladesh is a leader among low-income countries offering microcredit. Using group-based approach to lending, the

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8 Adams et al. (eds.) (1983), *Limitations of Cheap Credit in Promoting Rural Development*, Washington, D.C., World Bank, Economic Development Institute.

9 Hossain, Akhtar (1996), *Macroeconomic Issues and Policies: The Case of Bangladesh*, UPL, Dhaka.

10 See for example, Bouman, F. J. A. and Otto Hospes (1994), *Financial Landscapes Reconstructed: The Fine Art of Mapping*, Boulder, Colo.: Westview Press.

11 Adams, Dale W. and J. D. von Pischke (1992), *Informal Finance in Low Income Countries*, Boulder, Colo., Westview Press.

12 Vogel, R. (1984), *The Effect of Subsidized Agricultural Credit on Income Distribution in Costa Rica*, Adams, D.; D. Graham and J. D. von Pischke (eds.) (1984), *Undermining Rural Development with Cheap Credit*, Westview Press, Boulder; Ravallion, M. and G. Datt (1995) Is Targeting Through a Work Requirement Efficient? Some Evidence from Rural India, van de Walle, D. and K. Nead (eds.), *Public Spending and the Poor: Theory and Evidence*, Johns Hopkins University Press, Baltimore.

country's small-scale microcredit programmes provide more credit that do traditional financial institutions in rural areas.

1.2 Selected Model of microfinance

For the purpose of this article I will select the Grameen Bank microfinance system as a model. The Grameen model is the primary and original model of microfinance and most of the MFIs in the world today are either clones or replications of Grameen model or inspired by the Grameen model. Grameen Bank, founded by Professor Muhammad Yunus in 1976 as a project and transformed into specialized bank in 1983, is the best-known microcredit programme.[13]

The bank's group-based lending scheme has two important features that attract the poor: borrowers are allowed to deal with a financial institution through a group and members self-select their own group. Group-based lending also reduces Grameen Bank's default costs by exerting peer pressure to repay loans. It also allows Grameen Bank to pool resources and diversify the risks of lending across communities and groups, thus enabling it to provide loans at an affordable price.

Table A: Amount of Loan Disbursed by Four Major MFIs in Bangladesh[14]

MFIs	Amount (in million US$)	Total clients (in million)
Grameen (as of February 2006)	3699.187	5.77
ASA (as of December 2005)	2077.87	5.99
BRAC (as of December 2005)	2084.08	5.08
Proshika (as of December 2005)	446.88	2.77

Grameen's group-based lending approach is the guiding principle for more than 750 NGOs operating small-scale microcredit programmes in Bangladesh. Three other large NGOs providing microcredit programmes are ASA,[15] BRAC and Proshika with about 20 million

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13 Both the Grameen Bank and its founder Professor Muhammad Yunus won Nobel Peace Prize in 2006 "for advancing economic and social opportunities for the poor, especially women, through their pioneering microcredit work".

14 Ministry of Finance (2006), *Bangladesh Economic Review 2006* (Bangla Version), Finance Division, Ministry of Finance, Government of Bangladesh, Dhaka.

15 ASA has been called the most efficient MFI in the world, able to lend at a cost of US 3.5 cents per dollar lent. See Sam Daley-Harris (2005) State of The

members among themselves. All these three NGOs are clones of Grameen. Till December 2004 a total 721 registered NGOs disbursed 338630.56 among 16.20 borrowers. The overall repayment rate has been shown as 98.79%.[16] This shows the rapid growth of microfinance programmes in Bangladesh. Currently around 25 million people in Bangladesh have access to microfinance services under Government of Bangladesh supported programmes, more than 750 NGOs including Grameen, BRAC, Proshika, and ASA. Of these 86 per cent are women. Most of the disbursements have been in rural areas, less than two per cent being directed at urban areas. Grameen transplants operate in other parts of Asia,[17] United States,[18] Europe,[19] Africa, [20] and Latin America.[21]

1.3. Basic features of the Grameen model

Grameen has been credited with addressing structural determinants of poverty, the economic and social status of women, and sources of vulnerability in ways that have eluded other approaches.[22] Non-

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Microcredit Summit Campaign Report 2005, The Microcredit Summit Campaign, Washington DC, USA, p. 12.

16 Credit and Development Forum (CDF) (2004), *CDF Statistics 2004*; see also Credit and Development Forum (1998), *Microfinance Statistics of NGOs and other MFIs*, Volume 6, June 1998, Credit and Development Forum, Dhaka.

17 Hulme, D. (1990), "Can the Grameen Bank be replicated? Recent experiments in Malaysia, Malawi, and Sri Lanka" *Development Policy Review*, 8, pp. 287-300; Wall Street Journal (1998), "Microcredit Arrives In Africa, but Can It Match Asian Success?", Sept. 29, Section A., p. 1.

18 Conlin, M. (1999), "Peer-group micro-lending programs in Canada and the United States" *Journal of Development Economics*, Vol. 60, pp. 249-69; Taub, R. P. (1998), "Making the Adaptation Across Cultures and Societies: A Report on an Attempt to Clone the Grameen Bank in Southern Arkansas" *Journal of Developmental Entrepreneurship*, Vol. 3, No. 1, pp. 53-70.

19 Rogaly, B.; T. Fisher, and E. Mayo. (1999), *Poverty, Social Exclusion, and Microfinance in Britain*. London: Oxfam.

20 Binswanger, Hans P.; and Pierre Landell-Mills (1995), *The World Bank's Strategy* for Reducing Poverty and Hunger: A Report to the Development Community, Environmentally *Sustainable Development Studies and Monograph 4*. Washington, D.C., World Bank; Khandker et al. (1995), "Grameen Bank: Performance and Sustainability, World Bank Discussion Paper 306, Washington, D.C., World Bank".

21 Thomas, J. J. (1995), "Replicating the Grameen Bank: the Latin American Experience" *Small Enterprise Development*, 6(2), pp. 16-36.

22 See for example, Fugelsang, Andreas and Chandler, Dale (1993), *Participation as Process — Process as Growth: What We Can Learn from Grameen Bank Bangladesh*, Revised edn., Grameen Trust, Dhaka; Hashemi, S. M., Schuler, S. (1997),

governmental organizations on four continents have now replicated Grameen's model with hopes of spreading the vision.[23]

The Grameen model emerged from the poor-focused grassroots institution. The model starts with setting up a bank unit up with a Field Manager and a number of bank workers, covering an area of about 15 to 22 villages. The manager and workers start by visiting villages to familiarize themselves with the local milieu in which they will be operating and identify prospective clientele, as well as explain the purpose, functions, and mode of operation of the bank to the local population. Groups of five prospective borrowers are formed; in the first stage, only two of them are eligible for, and receive, a loan. The group is observed for a month to see if the members are conforming to rules of the bank. Only if the first two borrowers repay the principal plus interest over a period of fifty weeks do other members of the group become eligible themselves for a loan. Because of these restrictions, there is substantial group pressure to keep individual records clear. In this sense, collective responsibility of the group serves as collateral on the loan.[24]

Grameen's credit delivery system has the following features:[25]

1. *It promotes credit as a human right.*
2. *There is an exclusive focus on the poor.*

Exclusivity is ensured by:

- establishing clear eligibility criteria for selection of targeted clientele and adopting practical measures to screen out those who do not meet them

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"Sustainable Banking with the Poor: A Case Study of Grameen Bank", JSI Working Paper No. 10, JSI Research and Training Institute, Washington, DC.

23 Morduch, Jonathan (1999), "The Role of Subsidies in Microfinance: Evidence from the Grameen Bank" *Journal of Development Economics*, Vol. 60, pp. 229–248.

24 For detailed discussion on Grameen methodology, see Fugelsang, Andreas and Chandler, Dale (1993), op. cit.; Gibbons, S David and Kasim Sukor (1994), *Banking on the Rural Poor*. Dhaka: Grameen Bank.

25 The current Grameen loan delivery system is known as Grameen II which has replaced Grameen's previous system known as Grameen I or classic Grameen. For a discussion on the differences between the two, see Rutherford, Stuart; Maniruzzaman, Md; Sinha, S K; Acnabin & Co (2004), *Grameen II At the end of 2003: A 'grounded view' of how Grameen's new initiative is progressing in the villages*, MicroSave, Dhaka, Bangladesh.

- in delivering credit, priority has been increasingly assigned to women[26]
- the delivery system is geared to meet the diverse socio-economic development needs of the poor.

3. Borrowers are organized into small homogeneous groups.

Such characteristics facilitate group solidarity as well as participatory interaction. Organizing the primary groups of five members and federating them into centres has been the foundation of Grameen Bank's system. The emphasis from the very outset is to organisationally strengthen the Grameen clientele, so that they can acquire the capacity for planning and implementing micro level development decisions. The Centres are functionally linked to the Grameen Bank, whose field workers have to attend Centre meetings every week.

4. Special loan conditionalities which are particularly suitable for the poor.

These include:

- very small loans given without any collateral
- loans repayable in weekly instalments spread over a year
- eligibility for a subsequent loan depends upon repayment of first loan
- individual, self chosen, quick income generating activities (IGAs) which employ the skills that borrowers already posses
- close supervision of credit by the group as well as the bank staff
- stress on credit discipline and collective borrower responsibility or peer pressure
- special safeguards through compulsory and voluntary savings to minimise the risks that the poor confront
- transparency in all bank transactions most of which take place at centre meetings.

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[26] Realising that the women are particularly vulnerable, and at the same time careful investors with high repayment rates, Grameen has moved gradually towards lending mainly to women. See Khawari, Aliya (2004), "Microfinance: Does it hold its promises? A survey of recent literature", HWWA Discussion Paper, Hamburg Institute of International Economics, Hamburgisches, p. 10.

5. Simultaneous undertaking of a social development agenda addressing basic needs of the clientele.

This helps to:

- raise social and political consciousness of the newly organized groups
- focus increasingly on women from the poorest households, whose urge for survival has a far greater bearing on the development of the family
- encourage their monitoring of social and physical infrastructure projects - housing, sanitation, drinking water, education, family planning, environment, etc.

6. Design and development of organization and management systems capable of delivering programme resources to targeted clientele.

The system has evolved gradually through a structured learning process that involves trials, errors and continuous adjustments. A major requirement to operationalize the system is the special training needed for development of a highly motivated staff, so that the decision making and operational authority is gradually decentralized and administrative functions are delegated at the zonal levels downwards.

7. Expansion of loan portfolio to meet diverse development needs of the poor.

As the general credit programme gathers momentum and the borrowers become familiar with credit discipline, other loan programmes are introduced to meet growing social and economic development needs of the clientele. Besides housing, such programmes include:

- credit for building sanitary latrines
- credit for installation of tube-wells that supply drinking water and irrigation for kitchen gardens
- credit for seasonal cultivation to buy agricultural inputs
- loan for leasing equipment / machinery.

The underlying premise of Grameen is that, in order to emerge from poverty and remove themselves from the clutches of usurers and middlemen, landless peasants need access to credit, without which they cannot be expected to launch their own enterprises, however small these may be. In defiance of the traditional rural banking postulate whereby 'no collateral (in this case, land) means no credit',

the Grameen Bank experiment set out to prove successfully that lending to the poor is not an impossible proposition; on the contrary, it gives landless peasants the opportunity to purchase their own tools, equipment, or other necessary means of production and embark on income-generating ventures which will allow them escape from the vicious cycle of 'low income, low savings, low investment, low income'. In other words, the banker's confidence rests upon the will and capacity of the borrowers to succeed in their undertakings.

The success of the Grameen philosophy of fostering an effective entrepreneurial culture among the very poor has been a notable success in Bangladesh. As a result, Grameen has been encouraged (and found itself with the resources) to expand beyond providing credit. Struck by the plight of self-employed handloom workers in Bangladesh, whose products were being marginalised by bigger-scale suppliers, Grameen stepped in with a scheme whereby they act as brokers for these individual producers, lending them a presence and clout on the international market they would otherwise lack.

2.1. The Yardstick

The basic features of a rights-based poverty reduction strategy are closely interrelated and it is very difficult to identify them separately to examine their relevance to a particular poverty reduction strategy. To constitute a yardstick for the purpose of the present article, I will select those features which correspond to some Grameen claims - these are: explicit recognition of national and international human rights normative framework, empowerment of the poor and poverty reduction based on the principles of non-discrimination and equality with specific attention to the needs of the extreme poor and the vulnerable.

Table B: Rights-based Query for Grameen Model

Issues	Grameen claims	Rights-based query
Rights	Credit is a human right.	• Is there any explicit recognition of national and international human rights normative framework? • Does it recognize interdependence of rights? • Is Grameen accountable?
Poverty	It has positive	• Is it based on the principles

Issues	Grameen claims	Rights-based query
reduction	economic impacts and reduces poverty.	of non-discrimination and equality? • Does it address the extreme poor and the vulnerable? • Does it reduce income poverty?
Empowerment	It has positive non-economic impacts (social benefits) and it empowers the poor.	• Do these social benefits help the poor to enhance their capabilities?

2.2 Rights-based assessment of the Grameen Model

2.2.1 Explicit Recognition of National and International Human Rights Normative Framework and Accountability

The Grameen intervention may have positive impacts on human rights, which will be discussed later in this section, but these impacts are, as I will argue, incidental. The Grameen model does not have any reference to national and international human rights normative framework. The concept of human rights is simply absent from Grameen's official literature. For example, the sixteen decisions of Grameen[27] address various socioeconomic and environmental issues including food, health, education, shelter, safe water and sanitation - but these issues has not been defined in terms of human rights. Grameen's method of action,[28] Grameen features,[29] Grameen manuals, and even the Grameen Bank's Annual Reports do not have any reference to human rights. The phrases 'human right' or 'rights' do not appear anywhere in Grameen Bank's Annual Report 2004.[30] Moreover, it does not have any reference to Millennium Development Goals. The Grameen's website refers to human rights only once to

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27 Grameen Bank (2006), "The 16 decisions of Grameen Bank", Available online at: http://www.grameen-info.org/bank/the16.html, last visited 5 January 2006.

28 Grameen Bank (2002) "Method of Action", available online at: http://www.grameen-info.org/bank/moa.html, last visited 5 January 2006.

29 Yunus, Muhammad (2003), "What is Microcredit?" Available online at: http://www.grameen-info.org/mcredit/index.html, last visited 26 January 2007.

30 Grameen Bank (2004) *Grameen Bank Annual Report 2004*, Dhaka, Bangladesh.

mention Grameen's belief that credit should be accepted as a human right.[31]

Defining socioeconomic issues in terms of rights is one of the steps to be taken for a rights-based approach.[32] Stephen Marks states:

> "Issues of health, education, food, shelter, labor, vulnerability, marginalization, equity, gender, and similar matters are constant concerns of the development practitioner. The International Covenant on Economic, Social and Cultural Rights has formulated them all in normative terms. The challenge is to learn the similarities and differences in the understanding of these issues in the contexts of development planning and implementation, on the one hand, and human rights, on the other."

Thus, it is evident that the Grameen Bank is isolated from current development and human rights discourse. From Grameen's failure or unwillingness of defining socioeconomic issues in terms of rights, it can be said that Grameen does not fulfil the rights-based criterion of explicit recognition of national and international human rights normative framework.

Instead of establishing any direct link with human rights, it proposes credit as a human right. A human right is, by essence, unconditional. It is a right that every human being has, no matter what, an *ex ante* possession that cannot be negotiated. However, access to Grameen credit is always conditional and always negotiated through obligatory savings, repayment history, viability of business plan, etc. It is a contractual process that includes rights and imposes obligations on both parties. In doing so, Grameen not only isolates itself from the human rights regime, it also takes credit to a distant island where the inhabitants are entitled to only one right: right to credit.

The poor need not only credit; they have other priorities - food, health, education, and shelter. Defining one need in terms of human rights and leaving other priorities just as needs, and not as rights, hurts one of the cardinal principles of international human rights law, i.e., indivisibility and interdependence of rights.

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31 Yunus, Muhammad (2007), "What is Microcredit?" Available online at: http://www.grameen-info.org/bank/WhatisMicrocredit.htm, last visited 5 April 2007.

32 Marks, Stephen P. (2003) *The Human Rights Framework for Development*: Seven Approaches, François-Xavier Bagnoud Center for Health and Human Rights.

In his Nobel lecture, Professor Yunus says:

> ***Poverty is Denial of All Human Rights***
>
> Peace should be understood in a human way in a broad social, political and economic way. Peace is threatened by unjust economic, social and political order, absence of democracy, environmental degradation and absence of human rights.
>
> *Poverty is the absence of all human rights.* The frustrations, hostility and anger generated by abject poverty cannot sustain peace in any society. For building stable peace we must find ways to provide opportunities for people to live decent lives.[33] (italics mine)

Thus, Grameen sees poverty as a denial of all human rights and as the absence of all human rights. And Grameen intends to put poverty into museums through realization of 'right to credit' and other incidental realization of human rights that might ensue therefrom. Accepting poverty as a violation of human rights and leaving human rights out of sight in a poverty reduction strategy is deceptive. Since Grameen does not have any reference to universally accepted human rights norms except that Grameen proposed the 'right to credit', one might think poverty is a violation of the 'right to credit' and become suspicious about the real intention behind it. Or, it may well be another attempt to gain high moral ground to compete in the tough competition for scarce resources.[34]

Accountability derives from obligation and obligation derives from explicit recognition of national and international human rights normative framework. The Grameen model does not promote credit as a human right to accept legal or any obligation. This is evident from the fact that one of the features of Grameen credit is that it is not based on any collateral or legally enforceable contracts. It is based on "trust", not on legal procedures and system - in the case of a violation of this trust or if someone eligible to get credit is refused, Grameen cannot be held accountable. In fact, Grameen does not provide any accountability mechanism to its clients - if someone worsens his

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33 Yunus, Muhammad (2006), "We can put poverty into museums", Nobel lecture presented at the Nobel Peace Prize ceremony on Dec 10, 2006 in Oslo; for the full text of the lecture, see the Daily Star Vol. 5 No. 903, December 11, 2006.

34 Peter Uvin thinks, for many, rights talk in development gives moral ground to compete for scarce resources. See Uvin Peter (2006), *Human Rights and Development*, Kumarian Press, 2004, see especially, chapter 6: "A Rights-Based Approach to Development".

poverty situation investing Grameen credit or if a group of non-Grameen people are marginalized due to strong presence of Grameen, Grameen does not offer any remedy. Grameen does not consider its impacts on the welfare of non-participants who may be affected by direct spillovers and through general equilibrium impacts on prices.[35]

2.2.2 Social Benefits and Empowerment

The clients of Grameen and its clones are in a better position to enjoy some basic human rights better than ever. These include right to food, education, health and shelter. For example, a study finds that a 1 percent increase in cumulative disbursement to a woman increases the likelihood of school attendance of daughters by 1.9 percent and of sons by 2.8 percent.[36] Using the same data from this study researchers found that a 10-percent increase in disbursement to women increases the average arm circumference of daughters by 0.45 cm and of sons by 0.39 cm and increases the average height of daughters by 0.36 cm and of sons by 0.50 cm.[37]

Grameen does not supply family-planning services; still it increases the use of contraception. In identifying the reasons for this phenomenon, it has been argued that perhaps members vow to keep their families small, and loan officers may prefer members with few children because they believe that children increase default risk.[38] Another study[39] finds that Grameen does not affect contraception. There is an argument that social benefits from increased contraception are perhaps unquantifiable and such social benefits are probably

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35 For a brief discussion on socioeconomic impacts of Grameen, see Morduch, Jonathan (1999), "The role of subsidies in microfinance: evidence from the Grameen Bank" *Journal of Development Economics*, Vol. 60, 1999, pp. 229-248.

36 Pitt, M. M. and Khandker, S. R. (1998), "The impact of group-based credit programs on poor households in Bangladesh: does the gender of participants matter?" *the Journal of Political Economy*, Vol. 106. No. 5.

37 Khandker, S. R., and Pitt, M. (2003), *The Impact of Group-Based Credit on Poor Households: An Analysis of Panel Data from Bangladesh*, World Bank, Washington, D.C.

38 Latif, M.A. (1994), "Programme Impact on Current Contraception in Bangladesh" *Bangladesh Development Studies*, 22(1), pp. 27-61; Schuler, S.R., and Hashemi. S. M. (1994), "Credit Programs, Women's Empowerment, and Contraceptive Use in Rural Bangladesh" *Studies in Family Planning*, 25(2), pp. 65-76.

39 Pitt, M. M., and Khandker, S. R. (1996), "Household and Intrahousehold Impacts of the Grameen Bank and Similar Targeted Credit Programs in Bangladesh", Discussion Paper No. 320. Washington, D.C.: World Bank.

overstated.[40] However, on aggregate level, Grameen increases the demand of women for formal health care.[41] Indeed, Nanda claims that a given investment in microcredit has the same effect on the usage of formal health care as that same investment would have if used to establish of health clinics.[42]

It is sometimes assumed that microfinance has a special ability to empower women, but Johnson states:

> Microfinance, no more than any other intervention, is not blessed with the ability to right the power imbalances which result from inequalities in the way society treats men and women.[43]

Although microfinance often targets women and although women often use microfinance, product design rarely addresses gender-specific aspects of the use of financial services.[44] A very few microfinance programs have developed concrete ways to meet the distinct demands of poor women for saving services.[45] Otherwise, microfinance's success so far has been to supply production loans to women who run tiny businesses. Properly designed microfinance may help women to accumulate assets and thus to become more empowered to fulfil their gender specific responsibilities and to resist cultural patriarchy. Asset accumulation may help to empower women to resist oppression through a better fallback position outside of

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40 Pitt, M. M.; Khandker, S.R., McKernan, S. M.; and Latif, M. A. (1999), "Credit Programs for the Poor and Reproductive Behavior in Low-Income Countries: Are the Reported Causal Relationships the Result of Heterogeneity Bias?" *Demography, 36(1)*, pp. 1-21.

41 Nanda, P. (1999), "Women's Participation in Rural Credit Programmes in Bangladesh and Their Demand for Formal Health Care: Is There a Positive Impact?" Health Economics, 8, pp. 415-28.

42 Ibid.

43 Johnson, Susan (1999), "Gender and Microfinance: Guidelines for Good Practice", manuscript, p. 1.

44 Johnson, Susan and Kidder, Thalia (1999), "Globalization and gender: Dilemmas for microfinance organizations", *Small Enterprise Development*, Vol. 10, No. 3, pp. 4-15.

45 The ***SafeSave*** in Bangladesh and the ***Bank Rakyat Indonesia*** are often cited as the best saving services examples for poor women. These efforts are not gender-specific, but they do combine some of the strengths of informal and formal savings mechanisms. See Rutherford, Stuart (2000) *The Poor and Their Money*, Delhi: Oxford University Press; Robinson, Marguerite S. (1994), "Savings Mobilization and Microenterprise Finance: The Indonesian Experience" in Otero María and Elisabeth Rhyne (eds.) *The New World of Microenterprise Finance*, West Hartford: Kumarian, pp. 27-54.

marriage.[46]Savings may decrease the disadvantage of women in the market and may increase their bargaining power in the household.[47] The mere receipt of loans need not empower women financially or socially.[48] Some research suggests that expanding women's access to economic opportunities and resources does not always make them less vulnerable to domestic violence.[49] Kantor[50] and Dunn and Arbuckle[51] also find that increased success in business due to microfinance may reduce women's say in some household decisions.

Several studies have pointed out that women in credit programmes do not always retain full control over their loans, and that they may not be the managers of the funded enterprises.[52] Women do not necessarily benefit from loans disbursed in their names, especially when their growing need for cash to repay debts creates additional tension in the household. It is in this context, Goetz and Sen Gupta argued that such programmes are exploiting rather than empowering women. [53]

Grameen may be different from other traditional MFIs in this respect. Some aspects of Grameen's programme design aim to address this power imbalance. The Grameen model responds to women's responsibilities for market production and household reproduction

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46 Vonderlack, Rebecca M. and Schreiner, Mark (2002), "Women, Microfinance, and Savings: Lessons and Proposals" in *Development in Practice*, Vol. 12, No. 5, pp. 602-612.

47 Kabeer, Naila (2001), "Conflicts over Credit: Re-evaluating the Empowerment Potential of Loans to Women in Rural Bangladesh", *World Development*, Vol. 29, No. 1, pp. 63-84.

48 Johnson, Susan and Kidder, Thalia (1999), op. cit., at p. 6.

49 Schuler, Sidney Ruth, Hashemi, Syed M, and Badal, Shamsul Huda (1998), Men's violence against women in Bangladesh: undermined or exacerbated by microcredit programmes? in *Development in Practice*, Vol. 8, No. 2, pp. 148-157.

50 Kantor, Paula. (2000), *Are Economic Outcomes Enough? Incorporating Empowerment Outcomes into a Definition of Microenterprise Success: Evidence from India*, manuscript, University of Madison, Wisconsin.

51 Dunn, Elizabeth and J. Gordon Arbuckle, Jr. (2000), *The Impacts of Microcredit*: A Case Study from Peru, *Assessing the Impact of Microenterprise Services*, Washington, D.C.: United States Agency for International Development.

52 Rahman, Aminur (1999), *Women and microcredit in rural Bangladesh: Anthropological study of the rhetoric and realities of Grameen Bank lending*. Boulder, CO; Oxford: Westview Press.

53 Goetz, Anne Marie and Gupta, Rina Sen (1996), "Who Takes the Credit? Gender, Power, and Control over Loan Use in Rural Credit Programs in Bangladesh", *World Development*, 24:1, pp. 45-63.

and also responds to issues of cultural patriarchy and domestic violence.[54] It allows women to maintain independent savings. This boosts their freedom and bargaining power within the household, and cushions the shock of divorce or abandonment. Grameen has a low drop-out rate which signals that average social benefits are positive.[55] Several qualitative studies[56] find that Grameen and/or its clones empower women. Professor Sachs observes:

> Perhaps more amazing than the stories of how microfinance was fueling small-scale businesses, were the women's attitudes to child rearing...Here was a group where the average number of children for these mothers was between one and two children...This social norm was new, a demonstration of a change of outlook and possibility so dramatic that Dr. Rosenfield [...] dwelt on it throughout the rest of his visit.... he remembered vividly the days when Bangladeshi rural women would typically have had six or seven children.[57] (bracketed omission mine, others original)

This positive influence of microfinance has been acknowledged in the UNDP Human Development Report:

> *Virtuous cycles and female agency.* Improved access to health and education for women, allied with expanded opportunities for employment and access to microcredit, has expanded choice and empowered women. While gender disparities still exist, women have become increasingly powerful catalysts for development,

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54 Kabeer, (2001), supra note 47.

55 Rahman, A. (1999), "Micro-credit Initiatives for Equitable and Sustainable Development: Who Pays?" in *World Development*, 27(1), pp. 67-82.

56 Amin, R. Becker, S. and Bayes, A. (1998), "NGO-Promoted Microcredit Programs and Women's Empowerment in Rural Bangladesh: Quantitative and Qualitative Evidence" in *Journal of Developing Areas*, 32(2), pp. 221-36; Hashemi, S.M., S. R. Schuler, and A.P. Riley (1996) "Rural Credit Programs and Women's Empowerment in Bangladesh" in *World Development*, 24(4), pp. 635-53; Larance, L.Y. (1998), "Building Social Capital From the Center: A Village-Level Investigation of Bangladesh's Grameen Bank", Center for Social Development Working Paper 98-4. Washington University in St. Louis.

57 Sachs, Jeffrey (2005) *The End of Poverty*, The Penguin Press, pp. 13-14; for similar views and acknowledgments, see Dunford, Christopher (2002) *Building Better Lives: Sustainable Integration of Microfinance with Education in Child Survival, Reproductive Health, and HIV/AIDS Prevention for the Poorest Entrepreneurs* in Sam Daley-Harris (ed.), Pathways Out of Poverty: Innovations in Microfinance for the Poorest Families, Bloomfield, CT, USA: Kumarian Press, Inc., pp. 90-91.

> demanding greater control over fertility and birth spacing, education for their daughters and access to services.[58] (italics original).

These remarkable findings, together with Professor Sachs' earlier comment, indicate a change in outlook and possibility among microfinance clients. Grameen aims to change the social and economic structure of rural Bangladesh. To do this, it emphasizes on, in addition to financial discipline,[59] physical discipline: members must sit in straight rows, salute, chant, and sometimes do calisthenics.[60] The vows that members recite also instill discipline in that they foster a break from some social norms that perpetuate misery in rural Bangladesh. For example, the resolutions praise small families, prohibit dowry and child marriage, promote gardens, extol education, and exhort members to drink clean water and to use latrines. Perhaps the most important non-financial service of Grameen is social intermediation[61], creating social capital as a by-product of meetings. In rural Bangladesh, social capital is scarce because *purdah* norms isolate women. Grameen meetings provide a socially accepted excuse to gather and to talk. The impacts are both psychological and economic; not only do women feel less isolated, but they also strengthen their support networks beyond their kin groups.[62] They also offer women a chance to gather in public and to hear their first names spoken with respect.[63] "These findings suggest that the social implications of microcredit lending can be as powerful as - or even more powerful than - the economic implications."[64]

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58 UNDP (2005), *Human Development Report 2005*, p. 46.

59 For details on Grameen 'discipline', see Khandker et al. (1995), op. cit.

60 Hashemi, S.M. (1997), "Building up Capacity for Banking with the Poor: The Grameen Bank of Bangladesh" in H. Schneider (ed.) *Microfinance for the Poor?*, Paris: OECD, pp. 109-28.

61 Edgcomb, E., and L. Barton. (1998), *Social Intermediation and Microfinance Programs: A Literature Review*, Washington, D.C.: Development Alternatives, http://www.mip.org/pdfs/mbp/social.pdf, last visited 3 January 2003.

62 Larance, L.Y. (2001), "Fostering Social Capital through NGO Design: Grameen Bank Membership in Bangladesh" in *Journal of International Social Work*, 44(1), pp. 7-18 at 16; Larance, L.Y. (1998), "Building Social Capital From the Center: A Village-Level Investigation of Bangladesh's Grameen Bank", Center for Social Development Working Paper 98-4. Washington University in St. Louis.

63 There is another side of such empowerment: husbands sometimes beat their wives over conflicts related with Grameen, see Rahman, A. (1999), op. cit.; and Schuler et al. (1998), op. cit.

64 Larance (1998), supra note 62.

2.2.3. Economic Impacts

Many studies have affirmed the positive impacts of Grameen Bank in increasing incomes and asset ownership.[65] Two major statistically representative sample surveys confirming the micro-level findings may be mentioned here. The first one, undertaken in the mid-1980s by Mahabub Hossain,[66] reports that Grameen Bank had contributed to making member household incomes 43 per cent higher than control group incomes. The Bank had contributed to generating new employment for a fifth of its members and increased the average level of employment from 6 working days to 18 working days per month. Working capital for Grameen Bank supported enterprises of members was shown to have nearly a four-fold increase within about 2.25 years. About 87 per cent of members had reported making investments in housing, education and sanitation. Grameen had an economic impact in the community also. Through increasing employment and incomes of members, Grameen had a positive impact on agricultural wages. The average wage rate in Grameen villages was shown to have increased by 19 percent relative to non-Grameen villagers.

The second study was based on an intensive survey conducted by the World Bank in the early 1990s. The results indicate that, on an average, it takes about five years for programme participants to rise above the poverty line and about eight years to reach a situation where they do not require loans from targeted credit programmes. Targeted credit also helps increase assets, savings, and net worth of households. More importantly, by promoting a shift from land-based activities to non-traditional economic activities, targeted credit programmes promote productivity increases and employment generation in the rural economy. The study documents that because of Grameen, overall levels of employment increase, labour-force participation among women increases and self-employment increases.[67] A later impact assessment study suggests that microcredit programmes such as those of the Grameen Bank, BRAC have been found to be conducive to reducing the extent and depth of poverty

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65 Helen, Todd (1996), *Women at the Centre: Grameen Bank Borrowers after One Decade*, Dhaka, UPL.

66 Hossain, Mahabub (1988), "Credit for Alleviation of Rural Poverty: The Grameen Bank in Bangladesh", Research Report 55, Washington DC, International Food Policy Institute.

67 Khandker, et al. (1995), op. cit.

and have managed to sustain household welfare on a longer-term basis.[68]

Pitt and Khandker found that annual household expenditure increased by US$18 for each additional US$100 of cumulative disbursement. They also found that non-land assets of women increased by US$27 for each additional US$100 of cumulative disbursement.[69] Khandker et al. (1998) find that the presence of a Grameen branch increases the average wage in a village by 14 percent and increases production per household by 50 percent.[70]Using the same data, McKernan finds that participation in Grameen increases average monthly profits from self-employment from about $45 to about $80.[71]

Thus for example, moderate poverty has been found to be appreciably lower (62 per cent) among Grameen Bank members than among non-members who fulfil the eligibility criteria (72 per cent) [72]. In addition, in villages not covered by any credit programmes, moderate poverty is found to be higher among those who are eligible (66 per cent) for microcredit programmes.[73]

In spite of these encouraging trends, no significant variation has been observed in the incidence of poverty between members and those fulfilling eligibility criteria in villages not covered by credit programmes, the headcount ratio for extreme poverty among eligible

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68 Mustafa, S. et al. (1995), *Beacon of Hope: An Impact Assessment Study of BRAC's Rural Development Programme*, Dhaka, BRAC, (unpublished).

69 Pitt, M. M. and Khandker, S. R. (1998), op. cit.

70 This result is contested, see Sharma, M.; and M. Zeller (1999), Placement and Outreach of Group-Based Credit Organizations: The Cases of ASA, BRAC and PROSHIKA in Bangladesh" in *World Development*, 27(12), pp. 2123-36; Ravallion, M.; and Q. Wodon (1997), "Banking on the Poor? Branch Placement and Non-farm Rural Development in Bangladesh" in *Review of Development Economics*, 4(2), pp. 121-39.

71 McKernan, S. M. (2002), "The Impact of Micro-Credit Programs on Self-Employment Profits: Do Non-Credit Program Aspects Matter?" in *Review of Economics and Statistics*, 84(1), pp. 93-115.

72 The criteria to be fulfilled in order to be eligible for loans at entry point include: landownership not exceeding 0.5 acres of cultivable land; value of assets not exceeding the value of medium quality land; main occupation is wage labour; must belong to a group.

73 Khandker, S. R. and O.H. Chowdhury (1996), "Target Credit Programmes and Rural Poverty in Bangladesh", World Bank Discussion Paper No. 336.

non-members in villages covered by Grameen Bank stands at 17, which is very high compared to all other groups.[74]

This confirms other findings[75] that point out that microcredit programmes in general, have not been successful in reaching the poorest of the poor. Thus microcredit's story has been described as a story of 'microsuccess' in increasing incomes and economic welfare of the clients but 'macro-failure' in reducing the overall poverty situation.[76]

2.2.4. Non-discrimination and Equality and Provisions for the Vulnerable

The Grameen model does not require subsidy now. However, some of its clones in Bangladesh, and most MFIs worldwide, rely on subsidies - some hugely and some partly. The MFIs that require huge subsidies are described as unsustainable. Again, even Grameen may need subsidy if it targets the extreme poor. Therefore, to retain sustainability, there is a trend among MFIs to reduce amount of subsidy. They do it through programme design and such programme design, as I will argue in this section, is not based on twin principles of non-discrimination and equality.

The subsidy issues are closely related to sustainability of microcredit programmes. Hashemi examines sustainability of microcredit programmes at different levels: member level, branch level and programme level.[77] He suggests that sustainability at the member level is linked to multiple income and employment-generating sources with the help of microcredit. Unless microcredit increases the income level and the well-being of the target beneficiaries, its sustainability would be in jeopardy. With regard to branch and programme level sustainability, he feels that microcredit programmes should adopt a system of monitoring levels of subsidy so that they could gradually reduce and eventually eliminate subsidy.[78]

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74 Khandker, S. R. (2005), "Microfinance and Poverty: Evidence Using Panel Data from Bangladesh" in *The World Bank Economic Review*, Vol. 19, No. 2, pp. 263–286. Khandker, S. R.; and Pitt, M. (2003), op. cit.

75 Hashemi, S. M., Schuler, S. (1997), op. cit.

76 Hossain, Mahabub (1988), op. cit.; Khandker et al. (1995), op. cit.

77 Hashemi, S. M. (2000), "Microcredit in Rural Development: Beyond Safety Netting to Poverty Alleviation" in CIRDAP, *Fighting Poverty with Microfinance*, CIRDAP, Dhaka.

78 Ibid.

There are complementarities between clients' and institutional sustainability. For example, MFIs that serve a large number of clients may achieve economies of scale that contribute to their sustainability. But there may also be trade-offs. If MFIs try to serve very poor clients, i.e., improve their depth of outreach and impact on the poor, average loans and savings deposits will be small and costs will be high, so sustainability may be difficult to achieve.[79] This has prompted some analysts to fear mission drift,[80] because MFIs that strive for sustainability may avoid serving poorer clients. The objective of institutional sustainability is one of the most fundamental changes in the paradigm shift from directed agricultural credit to market-oriented microfinance. While this objective is difficult to achieve, there are a few highly successful "flagship" institutions. For example, the *unit desa* system of Bank Rakyat Indonesia (BRI) serves several millions of rural clients and has been so successful that each year the equivalent of millions of dollars in profits and surplus funds are transferred to bank headquarters to finance urban operations.[81] BancoSol in Bolivia is an example of an NGO that successfully converted itself into a specialized bank for the poor and currently manages a portfolio of over US$ 75 million. Nevertheless, less than one percent of all MFIs have reached the ability to cover all costs and mobilize funds on a commercial basis. That is one reason why some MFIs are beginning to mobilize voluntary savings aggressively rather than rely exclusively on donors or government funds. Some are experimenting with leasing, insurance, and other financial services to attract more clients and increase revenues. The intention is that by offering more services desired by the poor, MFIs will also contribute more to poverty alleviation.

Every microcredit programme faces severe problems and dangers. The most crucial and recurring problem a microcredit programme faces is the problem of the default of repayment. Although Grameen and some of its clones have been able to keep their repayment rate

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79 Conning, J. (1999), "Outreach, Sustainability and Leverage in Monitored and Peer-monitored Lending" in *Journal of Development Economics* 60, pp. 51-77.

80 Hulme, D. and P. Mosley. (1996), *Finance against Poverty*. Volume 1. Routledge, London.

81 Parhusip, Uben and H. Dieter Seibel (2000), "Microfinance in Indonesia: Experiments" in Linkage and Policy Reform in J. Remenyi and M. Quiñones, Jr. (eds.), *Microfinance and Poverty Alleviation: Case Studies from Asia and the Pacific*, Pinter, New York, pp. 153-179.

satisfactory, a significant number of organisations in Bangladesh could not. Increase in default rate means increased subsidy, increased subsidy makes an MFI unsustainable. There are various institutional, non-institutional, geo-environmental and market related reasons behind default. It is pertinent to briefly examine the most common reasons[82] behind default to understand why MFIs deliberately exclude certain groups of people from being their clients.

Institutional and market related factors: Among the institutional factors, short time for group formation, lack of staff efficiency and skill, irregular group functioning, high credit ceiling, competition among NGOs to reach clients are important.

A period of 3-4 months is allowed to form 15-18 groups with 5-25 group members. The field worker gets 90-120 working days to make an assessment of 300-360 group members, that is, he has to cover 3-4 members per day. This allotted time is often too short for the proper formation of groups. The field workers are found to make haste and form groups without proper assessment. Thus non-target members such as women from well-off families, minor/unmarried girls, old/permanently ill women, etc. are also included in the group. They do not or cannot conform to the rules of the group or implement income-generating activities.

Often the selection criteria and instructions put in the MFIs' manuals are not followed properly. As a result, non-target members are included. They include more than one member from the same household, members who are already clients to another MFI, floating members or members who do not have any permanent address, woman members having no experience in income-generating and totally dependent on their husbands and habitually idle people.

Extending loans to more than one member of the same family is a violation of the rules of the most MFIs. It becomes difficult for two members of the same family to implement two different projects. The loan amount ultimately lies with one person. As the amount becomes large, they face difficulty in paying the installments. Sometimes it happens that one client pays the installment, but the other makes default. Their attendance gradually becomes irregular, which deeply

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82 The reasons for default discussed here are collected from Proshika, ASA, BRAC and Grameen manuals.

influences the other members. Due to irregularity and lack of discipline, the environment of creating default emerges.

Being an important part of group functioning, attendance plays a vital role in the smooth operation of the group activities. Irregular attendance or absence from the group makes the group members isolated. The practice weakens mutual relationship among the fellow members creating adverse effect on group solidarity. The members who remain absent from the group meetings cannot be motivated on developmental issues. Due to ignorance and isolation proper implementation of the group objectives is hampered and they fail to generate the expected income. Thus lack of group feelings and income lead the irregular group members to become disinterested and disoriented in group activities. They do not hesitate to disobey the rules and regulations of the group and make default.

Sometimes the ceiling of credit is too high to manage in a proper way. The volume of interest rises with the volume of credit. As the clients cannot invest the total amount in IGAs, they spend the unutilized money for other non-productive purposes.

Due to limited facility of marketing in the local area the clients have to transport their produced goods to other areas, which is not cost-effective. Sometimes they sell their products at a lower price. They are deprived of fair price for their commodities. All these result in income decrease.

The market oriented factors are deeply rooted in governance matters. MFIs alone cannot resolve this problem. It requires government intervention and sound market strategies. Demand constraints are important issues that call for intelligent judgement of local absorptive capacity. This line of argument was advanced by Osmani.[83] Based on the experience of IRDP in India he argued that if programmes in Bangladesh were to massively expand their credit operations, the credit funded microenterprises would face demand constraints for their product.

The institutional default reasons are comparatively easy to resolve. This calls for a better financial portfolio management, adherence to financial discipline and reduction of the number of risky ventures. There is, therefore, a strong case for capacity building and skill

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83 Osmani, S. R. (1989), *Limits to the Alleviation of Poverty through Non Farm Credit*, Dhaka, The Bangladesh Development Studies.

upgradation of human resource development of the clientele and the project staff by undertaking series of training programmes. Grameen and its biggest clones like ASA, BRAC and Proshika seem to have overcome this hurdle.

Non-institutional and Geo-environmental reasons: Non-institutional reasons include lack of cooperation from family, less family income, family disorder, inability to invest loan, migrating tendency of the clients, natural calamities, etc.

The female members in the family are dependent on the male members. And socially there is a huge imbalance in decision making power. Less or no cooperation from the male members makes it impossible for them to implement IGAs. Without male members' help they cannot purchase raw materials or sell their goods in the market. When problems arise few or no family members stand by them. Sometimes husbands cannot tolerate empowerment of their wives and they willfully take away money.

Sometimes the group members who have no other earning member in the family cannot maintain the family with the profits from their IGAs only. After meeting the needs of the family, it becomes very difficult for them to pay the installments. Thus to cover the deficit they have to spend from the capital and then a moment comes when the project ceases to operate. They even sell manual labour, but with a very low wage they cannot cope with the situation.

Often the nature of utilization of credits plays an important role behind default. Lack of proper planning makes if difficult for group members to utilise the credit amount in a profitable way. Instead of utilising the money in IGAs, many clients spend money on unproductive things like marriage, family functions, treatment, etc. Most of the defaulters spend the money to meet regular family expenses. Sometimes, the credit amount is taken away by the husband and the wife fails to invest the amount in the IGA and generate income to make repayment.

Many members fail to generate income due to their inability to select a profitable IGA. Very often the clients are keen to get more than one loan disbursed by other NGOs. It increases the volume of credit amount and the number of installments. The landless poor, who are mostly women, do not have the capability to utilise a big amount in IGAs. Instead of investing the money they spend it in making payment for previous loans and meeting family expenditure. Some

clients invest the amount in more than one project, but ultimately cannot control the capital. As a result, they fail to generate the expected income to repay. Many clients can not repay due to ill health.

Some group members who are temporary residents of the area migrate to another place. Their attendance in the group meeting is irregular. In some cases, they keep their intention concealed and suddenly leave the place. During natural calamities, employment opportunity in the area decreases. Especially, during floods, many of the group members leave the place and take shelter in other places where employment opportunity is available. They can neither attend the weekly meeting nor can they pay the installments.

In the lean season, particularly the two months preceding the harvesting season commonly known as *monga*,[84] rural poor families face acute scarcity. With the decrease of employment opportunity, income of the family also decreases. Due to difficulty in meeting family expenditure the group members find no other way than to spend the loan capital.

The most non-institutional reasons are inherent in poverty and the geo-environmental factors are reasons of poverty. Any attempt to exclude these clients to retain high recovery rate will be anti-poor. In fact MFIs will have to put their endeavor to tackle this deliberate exclusion of socially excluded, vulnerable and ultra poor people. This is where a right-based approach does not fit micro intervention.

Some of the main causes for this shortcoming include: self-exclusion of the poorest - the group self-selection process - location, because the very poor are often concentrated in difficult to access regions, which increases the credit delivery cost for the institution - attitude of the target beneficiaries, because in some areas that are highly vulnerable to ecological disasters, the poor have become dependent on humanitarian relief.[85]

The outreach of the MFIs is very limited. They deliberately target people who are less likely to default. People below the poverty line or extremely vulnerable groups are excluded as a part of the programme design. One of the basic problems of microcredit is hitting the right

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84 A local Bangla word used in the northern part of Bangladesh, it means seasonal famine.

85 See Figure V (A).

target. This is very important because many deserving people remain outside the microcredit programme.

In this aspect, the Grameen model is not different from other MFIs. The main shortcoming of the Grameen model is its calculated and deliberate exclusive participation method. To maintain cost-effectiveness[86] and sustainability Grameen and its clones cannot go below the poverty level. In other words it judges its prospective clients on the basis of their ability to repay. This approach is suitable for a commercial business oriented bank, but as a poverty alleviation tool this position is not tenable. Thus, despite good empowerment trends, the Grameen model of microfinance cannot be said to be a rights-based poverty reduction intervention. Grameen may empower those who participate in the process and all do not have the right to participate in the process.

The logic of microcredit – the 'ability' and the 'willingness' of the clients to repay the loan – dictates the screening and selection of beneficiaries. This is certainly discriminatory to the extreme poor. If microfinance is claimed to be a poverty alleviation tool, and at the same time, if it has to discriminate, by programme design, between poor and the extreme poor, it cannot be said that such a programme is based on equality.

Thus, an antipoverty program like Grameen, which is successful at reaching the poor, may exclude those most in need of assistance, the vulnerable poor. The forces that make some poor households vulnerable may also make them greater risks for microcredit providers and this may explain why microcredit programs are unsuccessful at reaching the vulnerable and marginalized poor.[87]

To try to ensure that credit does not go to less poor people, women from households with total assets worth more than the value of one acre of land are not permitted to join or to take loans. In Bangladesh, those with no land have not benefited from NGO-based rural finance.[88] In such a densely populated setting, imposing a ceiling of

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86 Schreiner, Mark (2001), "A Cost-Effectiveness Analysis of the Grameen Bank of Bangladesh" in *Journal of Microcredit*, June 2001.

87 Amin, Sajeda Rai, Ashok S. and Topaz, Giorgio (2001), "Does Microcredit Reach the Poor and Vulnerable? Evidence from Northern Bangladesh", Working Paper No. 28, Center for International Development at Harvard University.

88 Ibid.

one acre of land in order to prevent loans being allocated to better-off people does not necessarily mean that the poorest are included.

In an attempt to evaluate whether microcredit programs such as the popular Grameen Bank reach the relatively poor and vulnerable in two Bangladeshi villages,[89] researchers find that while it is successful at reaching the poor, it is less successful at reaching the vulnerable. Their results also suggest that it is unsuccessful at reaching the groups most prone to destitution, the vulnerable poor.[90] To add to this, Grameen's coverage in the areas largely populated by the indigenous people is very low. A subsidized MFI, Ashrai has started microfinance activities for this population.[91]

However, only 24.5% of the services of the microfinance institutions go towards the extremely poor.[92] Both demand and supply-side factors systematically exclude the extremely poor through a process of peer screening and self-exclusion. They do this because of the institutional interests of microfinance institutions. The extreme poor are more marginalized by the peer screening mechanism. A group comprises of five persons selected by the members themselves from among their peer group. This self selection serves as a screening and monitoring mechanism replacing the need for collateral and keeping transaction costs low. Hashemi and Morshed argue that this self selection screens out the non-poor in that the small loans and identification of the banks with the poor discourage the wealthier strata of the society from joining and also keep out those who would not be able to make repayments in that their peers can better judge who is reliable and who is not.[93] Schreiner and Morduch remark:

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89 They use a unique panel data set with monthly consumption and income data for 229 households before they received loans. See Amin, Sajeda; Rai, Ashok S.; and Topaz, Giorgio (2001), op. cit.

90 Copestake, J. (2002), "Inequality and the polarising impact of microcredit: evidence from Zambia's Copperbelt" in *Journal of International Development*, 14(6), pp. 743-55.

91 Matthews, Brett and Dr. Ahsan Ali (2002), "Ashrai: A Savings-Led Model for Fighting Poverty and Discrimination" in *Journal of Microfinance*, Volume 4, Number 2, 2002, pp. 247-60.

92 Hasan, Mohammed Emrul (2003), "Implications of Financial Innovations for the Poorest of the Poor in the Rural Area: Experience from Northern Bangladesh" in *Journal of Microfinance*, Vol. 5, No. 2, pp. 101-117.

93 Hashemi, S. M.; and Morshed, L. (1997), "Grameen Bank: A case study" in Wood, G. D. and Sharif, I. A. (eds.), *Who needs credit? Poverty and finance in*

> One purpose of joint-liability groups is to shift some of the work of screening and enforcement from the lender to the group. In the Third World, this means that group members are self-selected. Memberships tend to form among people who already know each other, and members screen-out bad risks because they do not want to repay the debts of their fellow group members. Furthermore, groups form among people who interact often outside the context of their microfinance loan because these links decrease the transaction costs of enforcement and increase the effectiveness of social or economic sanctions in the event of delinquency.[94]

However, Grameen and its clones are reviewing their screening mechanism and taking new measure to avoid this discrimination. Grameen's goat-leasing programme and struggling members (beggar) programme[95] and BRAC's initiative of Income Generation for Vulnerable Group Development (IGVGD) Programme[96] are good examples of these innovations.

3. Towards a Rights-based Microfinance and Challenges

The Grameen model is widely considered one of the world's most successful microfinance models. Following Grameen's path, three NGOs in Bangladesh showed remarkable success: ASA, BRAC and Proshika. The expansion of NGO-managed credit in Bangladesh

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Bangladesh, Zed Books Ltd, London, pp. 217-230 at p. 220. See also Khawari, Aliya (2004), op. cit.

94 Schreiner, Mark and Jonathan Morduch (2001), *Replicating Microfinance in the United States: Opportunities and Challenges*, Washington University in St. Louis, p. 14. (manuscript).

95 Yunus, Muhammad (2005), *Grameen Bank's Struggling (Beggar) Members Programme*, Grameen Bank, Dhaka, available online at: http://www.grameen-info.org/bank/BeggerProgram.html, last visited 23 January 2007.

96 BRAC offers a development package of group formation, food aid, skill training, credit support, income-generating activities, mobilization of savings, supervision, monitoring and follow-up to ensure that the IGVGD group attains reasonable degree of socio-economic improvement. It may be noted here that the microcredit is neither the first nor the best intervention; it just starts with the food aid for the poorest of the poor. Skill training and capacity building in the livestock production, such as poultry, is undertaken. The sum of first loan of assistance for the IGVGD members is much smaller compared to the loan size of normal microcredit clientele. BRAC takes special steps to mainstream them, within two years, into its Rural Development Programmes (RDP). This gradual approach seems to be working well, which could be studied and replicated by other NGOs and other development agents.

attracted a flood of international aid to the country.[97] To some extent, Grameen and its clones in Bangladesh improved the human rights conditions of its clients. Reports of the success of the Grameen model have led to rapid growth in funding for microfinance.[98] In an effort to alleviate poverty, donors started supporting replication programs in numerous countries, including the United States. The International Fund for Agricultural Development (IFAD) of the United Nations was the first major supporter of the Grameen model and has subsequently assisted capacity-building in many replication programs.

The Philippines was one of the first countries to replicate the Grameen model on a large scale. The replication program was found donor funded and donor-driven. When Agricultural Credit Policy Council (ACPC) of the Philippines examined its experience with 27 replicators, there were mixed conclusions. The repayment performance was impressive, averaging a rate of 96.8%, but the overall picture was dismal. Internal resource mobilization appeared to be minimal. Interest rates were inadequate and administrative costs exorbitant, amounting to 47% of every peso lent and 170% of every peso saved. The operational self-sufficiency ratio averaged 0.24. Noting that 'excessive brokering of low-cost funds may discourage savings mobilization,' ACPC warned that 'any attempt ... to replicate or expand ... should be carried out with great caution.'[99] The replicators were not sustainable, nor did they reach a significant number of poor people, in a country with over 800 rural banks and 3,000 credit cooperatives.[100]

In 1996, the Asian and Pacific Development Centre (APDC), an intergovernmental body of Asian-Pacific countries based in Kuala Lumpur, carried out an assessment of MFIs in 11 of these countries, with the support of UNDP. Included in the study were seven donor funded MFIs from the Philippines, six of which used the Grameen technique. By the end of 1995, the situation of the sample replicators

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97 Rutherford, S. (1997), "Informal financial services in Dhaka's slums" in Wood, G. D.; and Sharif, I. A. (eds.), *Who needs credit? Poverty and finance in Bangladesh*, Zed Books Ltd, London, pp. 351-370.

98 Schreiner Mark (2003), op. cit.

99 Agricultural Credit Policy Council (ACPC) (1995), *An evaluation of the Grameen Bank replication project in the Philippines*. Manila: ACPC.

100 Seibel, H. D. (1998) "Grameen Replicators: Do They Reach the Poor, and are They Sustainable?", Paper presented at the Second Seminar on Development Finance, Frankfurt, Germany: IPC.

had improved generally, but the gap between good and poor performers had widened. Transaction costs per peso lent ranged from 0.19% to 1.30%, the operational self-sufficiency ratio from 0.08% to 1.34%, and the full financial self-sufficiency ratio (adjusted for subsidies received and for inflation) from 0.07% to 1.18%.[101]

Grameen's replications in the USA also failed to repeat its success. Arkansas's Good Faith Fund[102] is a symbol of this general failure. Good Faith Fund was a donor driven replication and relied heavily on external funds and failed disastrously.[103]

According to the limited evidence available, with the exception of a very few, Grameen replicators are unsustainable and consequently are unable to reach a significant number of poor people. It appears that the Grameen approach has no magic formula and no best practice or unique and optimal solution that may be applied around the world in order to alleviate poverty. Perhaps no such optimal solution or best practice ever existed, or may ever be found. The answer lies in social capital that Grameen model possesses. Social capital is defined here, in the context of microfinance, as the shared normative system of a group or an organization that shapes people's capacity to work together and produce results according to the group's or organization's purpose. The specific norms of a group or an organization are, in turn, rooted in the more general norms and values of a society or a sub-sector.[104]

Such social capital cannot be replicated; it needs to be achieved through a long process of commitment in broader social development goals and evolution. Grameen model shows the path only. Grameen model does not provide an optimal solution to the problem of how to

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101 Getubig, I.; Remenyi, J.; and Quiñones, B. (eds.) (1997), *Creating the Vision: Microfinancing the Poor in Asia-Pacific*, Kuala Lumpur: Asian and Pacific Development Centre; Quiñones, B.; Seibel, H. D.; and Llanto, G. M. (1999), *Social capital in microfinance: The case of the Philippines*. Kuala Lumpur: Asian and Pacific Development Centre.

102 The Good Faith Fund was founded in 1988 as a replication of Bangladesh's Grameen Bank. It was created under the supervision of Chicago's Shorebank Corporation and with funding from the Winthrop Rockefeller, MacArthur, Mott, and Ford Foundations. See Taub, R. P. (1998), op. cit.

103 Mondal, Wali I.; and Ruth Anne Tune (1993), "Replicating the Grameen Bank in North America: The Good Faith Fund Experience" in. Wahid, Abu N.M (ed.), *The Grameen Bank: Poverty Relief in Bangladesh*, Boulder: Westview, pp. 225-234.

104 Quiñones, B.; Seibel, H. D.; and Llanto, G. M. (1999), op. cit.

provide financial services to the poor to enhance their options and choices. There are certain good practices which essentially form an integral part of Grameen social capital:

- high moral commitment of leaders, based on values enforced through training;
- peer selection and peer enforcement, precluding adverse selection and moral hazard;
- credit discipline, including weekly installments, rigid insistence on timely repayment, and repeat loans of increasing amounts, contingent on repayment performance;
- deep integration with the clients based on the acquired local knowledge;
- flexibility to integrate other poverty and development issues like basic health, reproductive health, family planning, primary and adult education, child marriage, environment, etc.;
- local rural bank status;
- innovative approach to reach the ultra poor;
- deposit mobilization from the poor and non-poor through differentiated products with attractive interest rates;
- demand-driven, differentiated loan and insurance products which cover all costs and risks; and
- client differentiation through different-size loan and deposit products.

Thus, the donors were unmistakably wrong to think that Grameen and its clones' successes can be repeated regardless of geographic boundaries and economic, social, cultural and political differences in societies. In the early 1990s, Hulme cautioned that Grameen was not a blueprint but rather a source of broad lessons which must be adapted to local contexts.[105] Grameen Bank is not a formal bank. Its vision is banking for the poor and mission is to provide comprehensive financial services to empower the poor to realize their potential and break out of the vicious cycle of poverty.[106] In doing so the Bank has

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105 Hulme, D. (1990), op. cit.

106 Grameen Bank (2004), op. cit.

invented a unique idea of joint liability by peer pressure[107] which is deeply rooted in the local social and moral values. Being a client of Grameen one can feel it is his own bank. Professor Yunus felt the needs of the poor from the grass-roots and wanted to deliver for and by the people. Here, the Bank and the clients can entertain, which is also an important aspect of poverty reduction, ownership. By encouraging to replicate the model, the donors have seriously undermined the concept of ownership. It also discourages the evolution of local informal lending practices and development of other cooperative societies. Vinelli agues: "a 'one-size- fits-all' model discourages experimentation, innovation, and learning, an ironic fate for a movement that grew out of these values."[108]

At this point, the donors assumed that the only institutions capable in the long-run of reaching large numbers of poor people are those that mobilize their own resources and cover the costs from their income. From this assumption the donors became increasingly concerned about the viability and sustainability of the Grameen replicators.[109] The current donor emphasis on financial efficiency of MFIs is an outcome of this concern. The emergence of Grameen Bank and some of its clones in Bangladesh as profitable microlenders added an impetus to this emphasis.[110]

The donor-driven emphasis on financial efficiency encouraged MFIs worldwide to move from subsidy approach to market approach which can explain why the current microfinance intervention is

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107 Another trend of microfinance is emerging now which provides loan without any joint liability. See de Aghion, Beatriz Armendáriz; and Morduch, Jonathan (2000), *Microfinance beyond Group Lending, Princeton University*. (manuscript)

108 Vinelli, Andrés (2001), "Replicating Microfinance in the United States: Some Lessons from Developing Countries Concerning Financial Sustainability" in Carr, Jim, and Zhong Yi Tong (eds.), *Replicating Microfinance in the United States*, Washington, D.C.: Fannie Mae Foundation, chapter 5.

109 Seibel, H. D. and Torres, Dolores (1999), "Are Grameen Replications Sustainable, and Do They Reach the Poor? The Case of CARD Rural Bank in the Philippines" in *The Journal of Microfinance*, Vol. 1, No. 1, Fall 1999.

110 In 1995, Grameen Bank decided not to receive any more donor funds and the last installment of donor fund was received in 1998. GB does not see any need to take any donor money or even take loans from local or external sources in future. See http://www.grameen-info.org/bank/GBGlance.htm, last visited 23 March 2007.

mostly associated with income generation.[111] A market approach to microfinance sees poverty as economic deprivation. An over-simplistic notion of poverty is used, based on average annual income at a household level. Seasonal vulnerability, sudden shocks, and the social and power relations within and between households are omitted.[112] The competition is fierce in the market, and to achieve quick financial efficiency, the MFIs may impose exorbitant interest rates which will create a burden on the poor and consequently will have negative impacts on their realization of human rights. More importantly, when financial efficiency is the prime target, such target may deviate the MFIs from their main goal of extending credit in a systematic way to harness potential of the poorest of the poor. It involves a mission drift – more business oriented – more profit to sustain and to access commercial funds – less attention to social factors. This may lead to commercialization of microfinance programmes on the basis of trade-off between business and human rights.

However, Grameen and its successful clones did not change their aim to create social transformation alongside income generation.[113] They relied less on subsidy and at the sane time they increased their outreach to the poor with innovations and organizational skills. The success of Grameen and its clones as a strategic intervention for poverty alleviation and rural development has been described to demystify a 'false notion' created by the experience of green revolution and rural development programmes that rural development requires huge subsidies.[114] The quantity of subsidy may not be huge when microfinance programmes target the poor people. Nevertheless, one must remember what Amartya Sen said about

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111 Woller, G. (2002), "The Second Microfinance Revolution: Creating Customer Centered Microfinance Institutions", *Journal of International Development*, 14(3), (Special Issue), 305–324.

112 Mosley, P.; and Rock, J. (2004), "Microfinance, Labour Markets and Poverty in Africa: A Study of Six Institutions" in Mushtaque, A., Chowdhury, R., and Mosley, P. (eds.), *Journal of International Development*, Special Issue, The Social Impact of Microfinance, 16(3), pp. 467-500.

113 Khalily, M. B., M. O. Imam, and S. A. Khan. (2000), "Efficiency and Sustainability of Formal and Quasiformal Microfinance Programs – An Analysis of Grameen Bank and ASA" in Rahman, Rushidan I.; and Khandker, S. R. (eds.), *The Bangladesh Development Studies*, A Special Issue on Microfinance and Development: Emerging Issues 26 (June/September), pp. 103-46.

114 CIRDAP (1999), op. cit., at p. 6.

poverty index: one should be clear whether one's anti-poverty programme targets the poor who are 'just below' or 'far down below' the poverty line.[115] Thus, when such programmes are designed to target the people below the poverty line, quantity of subsidies may well increase. This is because at the entry level some sort of help in the form of humanitarian relief may be needed to assist the target group. However, some do not agree with the entry-level humanitarian relief:

> ...the microcredit is not a relief programme; nor is it a welfare measure. There are no 'free lunches' in microcredit programme. Those who avail themselves of microcredit must put it to productive use, reap the benefit and repay the loan along with interest. Only then will this become a sustainable programme.[116]

Microcredit is a strong tool of development and the core theme of current development paradigm is human welfare. Thus, the above argument goes against the ends of development. This is purely a market approach to microfinance and such microfinance programmes, though may continue to sustain for some period, will never be able to reach the people below poverty line. And the truth is: MFIs in developing countries are increasingly driven by commercial ideas[117]. In this context, it is highly unlikely they will assess their intervention in accordance to MDGs. Martin Greeley argues:

> At best, they will use some fairly loose 'social' criteria often borrowed from the corporate social responsibility literature; or they may refer, usually without precision, to a double bottom line of financial and social performance. These have little or nothing to do with achievement of the MDGs. [118]

The whole world of microfinance is divided into two approaches: the subsidy approach and the market or business approach. The subsidy approach targets very poor clients who are costly to serve and who thus may require on-going subsidies. The market approach targets less-poor clients who are less costly to serve and who thus may

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115 Sen, Amartya (1981), *Poverty and Famines: An Essay on Entitlement and Deprivation*, New Delhi, Oxford University Press.

116 CIRDAP (1999), op. cit., at p. 9; see also Subrahmanyam P. (2001), "Capacity Building and Empowerment of Women Self-Help Groups through Microcredit and Social Mobilization – An Overview" in CIRDAP (2001), *Towards Empowering Women: Micro Credit and Social Mobilization*, Dhaka, Bangladesh.

117 Greeley Martin (2006), "Microfinance Impact and The MDGs: The Challenge of Scaling-up", IDS Working Paper 255, Institute of Development Studies.

118 Ibid.

represent a profitable niche. The subsidy camp focuses on the poor rather than on the organization, while the market camp focuses on the organization rather than on the poor. Grameen's lesson is that trying to do both provides the best chance to achieve both. Grameen avoided the typical tragedy of development projects; the technical aspects are willing, but the implementing organization is weak. Grameen also avoided the for-profit flaw of ignoring the poor. In both cases, Grameen did this largely because it explicitly tried to. Institution building has no formula, aside from making it a conscious and continuous part of the strategic plan. The Grameen Bank and its successful clones in Bangladesh are in much better positions to undertake a rights-based approach. They have two-fold advantages: firstly they are financially sustainable, profitable and not externally funded. Accepting a rights-based approach will create financial pressure on them, as they will have to give priority to the extreme poor and vulnerable at additional cost. These MFIs have survived due to their organizational skills and innovative approaches. This innovativeness will help them to find new ways to include those who are now excluded. Secondly, they are already addressing various socio-economic issues, which are helping the poor in realizing their economic, social and cultural rights. Every year Grameen Bank staff evaluate their work and check whether the socio-economic situation of the members is improving. In doing so, the Grameen Bank evaluates poverty level of the borrowers using ten indicators[119] which can serve as effective benchmarks.

How Grameen sees poverty will be an important factor towards undertaking a rights-based approach. Grameen's current screening mechanism does not have any reference to human rights. Grameen's understanding of poverty must have reference to denial or violation or non-fulfillment of human rights. The socio-economic issues that Grameen wants to address should be translated into human rights terms.

Grameen needs an evaluation of its social impacts. One problem that Grameen will face is the absence of any mechanism by which it can assess its social impacts. In general all MFIs are facing this same

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119 Yunus, Muhammad (2006), *Ten Indicators to Assess Poverty level*, Dhaka, Grameen Bank. Available online at:
http://www.grameen-info.org/bank/tenindicators.htm, last visited 20 April 2007.

problem – inadequate poverty measurement tools and no social impact measurement tool at all.[120] It is not an easy task. It needs joint and concerted efforts of the MFIs and the donors. Such an evaluation would essentially consider the impacts on the human rights of the borrowers as well as on non-participants who may be affected by direct spillovers and through general equilibrium impacts on prices and other interest rates. The evaluation would also assess prospects for further cost reductions, as well as the development of new products (for example, more flexible savings accounts) that may enhance both the bank's financial bottom line and capabilities of the poor it serves.

A rights-based microfinance will ask for reaching the right people. If it is to be used as a rights-based poverty reduction tool, right people will mean the extreme poor, the vulnerable and the marginalized. These socially excluded groups may not fit a microfinance program from a market approach, but a rights-based approach cannot ignore them. Including these people into microfinance will challenge the financial satiability of an MFI and in this situation, a well designed combination of microcredit and humanitarian relief[121] may be required. This is another opportunity for the donors to reveal their human rights intentions.

So far, the donors involved in microfinance have failed to talk in human rights terms. For example, the World Bank launched the Consultative Group to Assist the Poor (CGAP) in 1995 to facilitate the microcredit program for the poor in the developing world. Almost all the prominent bilateral and multilateral donors have participation in the CGAP. The most common criterion used by the CGAP in measuring success of microcredit programs is loan repayment rate. Undoubtedly, loan repayment rate is very high as compared to commercial lending but this does not explain the qualitative impact of

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120 Copestake, J. (2002), "Horizontal Networks and Microfinance Impact Assessment: a Preliminary Appraisal." Brighton: Imp-Act working paper, available at www.Imp-Act.org; Copestake, J. G., Bhalotra, S., & Johnson, S. (2001), "Assessing the impact of microcredit on poverty: a Zambian case study". *Journal of Development Studies*, 37(4), pp. 81-100; Copestake, J., Johnson, S.; and Wright, K. E. (2002), "Impact Assessment of Microfinance: Towards a New Protocol for Collection and Analysis of Qualitative Data". Bath: Centre for Development Studies, University of Bath.

121 For discussion on models of microfinance combining microcredit and subsidies, see Rai, A. and T. Sjöström (2001), "Grants vs. Investment Subsidies", Harvard Center for International Development Working Paper.

such programs in terms of increasing income flows, levels of employment and sustainability of businesses. Since lenders are primarily concerned with repayment of loans, vital issues related to the quality and wider socio-economic impact of such loans have not been given due attention.[122] It provides guidelines both for donors and MFIs. Their guidelines do not have any reference to human rights.[123] Two issues have appeared in these guidelines very frequently: institutional sustainability and empowerment of women. Women's empowerment has been seen in terms of economic development with a narrow focus on credit and income-generation programs. A rights-based empowerment should include developmental and human rights components other than credit. Poverty, particularly that of women, cannot be defined only in terms of cash flow since it has strong linkages with human rights, inequitable distribution of resources, unequal power relations, illiteracy, lower wages, cuts in developmental spending and anti-poor macroeconomic policies that disproportionately affect the poor women.[124]

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122 This issue was raised by Professor Yunus long ago. See Yunus, Muhammad (1999), "How Donor Funds Could Better Reach and Support Grassroots Microcredit Programs Working Towards the Microcredit Summit's Goal and Core Themes", a paper prepared for the Microcredit Summit Meeting of Councils in Abidjan, Côte d'Ivoire, 24-26 June 1999.

123 See for example, CGAP (2006), *Good Practice Guidelines for Funders of Microfinance: Microfinance Consensus Guidelines*, October 2006, 2nd Edition, CGAP, World Bank; Christen, Robert Peck, Timothy R. Lyman and Richard Rosenberg (2003), *Microfinance Consensus Guidelines*, CGAP/The World Bank Group, Washington, D.C.

124 See Table C.

Table C: Changing Perceptions of Poverty and Microfinance[1]

Poverty	Finance	Expected Results of Finance	Outcome	Donor's Perspective
Narrow view: Income/consumption Assets	**Single role:** Small production loans for survival	**Production and investment:** Virtuous circle of investment, production, income, consumption, savings, and investment	**Economic growth**	**Subsidy**
Broad view: Income/consumption Assets Vulnerability Health Education Voicelessness Powerlessness Food insecurity Environment	**Multiple roles:** Loans for wider uses, leasing, savings, insurance, payment/money transfer, and financial intermediation	**Multiple results:** Virtuous circle of investment, production, income, consumption, savings, and investment Consumption smoothing (food security) Capacity to bear risk Empowerment Education Health Nutrition Child care Environment Contraceptive use and other economic and social impacts	**Human development**	**Good social investment**

[1] Based on Meyer, Richard L (2001) *Microfinance, Poverty Alleviation, and Improving Food Security: Implications for India, Rural Finance Program* The Ohio State University, Columbus.

DEFINING GOOD FAITH UNDER ENGLISH CONTRACT LAW

Dalia Pervin

Certain legal jurisdictions require that while entering into a contract the parties act in good faith. However, the development of the English contract law principles does not evidence any such requirement. The rationale for such absence of a moral view even if not unfounded in English law as we would see in this paper, the judges have in fact incorporated this principle on a case by case basis. Sir T. Bingham in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd.*[1] :

> Although English contract law has not committed itself to the principle of good faith it has succeeded in acting against cases of unfair dealing by developing piecemeal solutions in response to demonstrated problems of unfairness.

In other words it is understood that under English law, the courts have been able to deal with cases of unfair practice, and good faith principles have been adopted as and when the court felt its necessity. However, Lord Ackner in *Watford v Miles*[2] stated that

> The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations... A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party.

If we accept this view of Lord Ackner, an inevitable conclusion with lead to express that the English law is rather antagonistic or unreceptive towards any good faith principle in law. It will be seen, as this author finds, in discussing certain cases that such an absence of a good faith principle has led to the development of subtle technical grounds and legal doctrines or principles.

The courts have attacked contracts on grounds of unconscionability. Epstein argues that the classical conception of contract at common law had as its first premise the belief that private agreements should be

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1 [1989] QB 433 CA.

2 [1992] 1 All ER 453.

enforced in accordance with their terms. The premise of course was subject to important qualifications. Promises procured by fraud, duress or undue influence was not generally enforced by the courts and the same was true with certain exceptions of promises made by infants and incompetents. Again, agreements that had as their object illegal ends were not usually enforced, as for example, in cases of bribes of public officials or contracts to kill third persons. Yet, even after these exceptions were taken into account, there was still one ground on which the initial premise could not be challenged. The terms of private agreements could not be set aside because the court found them to be harsh, unconscionable or unjust. The reasonableness of the terms of a private agreement was the business of the parties to that agreement. True, there were numerous cases in which the language of the contract stood in need of judicial interpretation, but once that task was done there was no place for a court to impose upon the parties its own views about their rights and duties. 'Public policy' was an 'unruly horse', to be mounted only in exceptional circumstances and with care.

This general regime of freedom of contract can be defended from two points of view. One defence is utilitarian. So long as the tort law protects the interests of strangers to the agreement, its enforcement will tend to maximise the welfare of the parties to it, and therefore the good of society as a whole. The alternative defence is on libertarian grounds. One of the first functions of the law is to guarantee individuals a sphere of influence in which they will be able to operate, without having to justify themselves to the state or to third parties: if one individual is entitled to do within the confines of the tort law what he pleases with what he owns, then two individuals who operate within those same constraints should have the same right with respect to their mutual affairs against the rest of the world.

Whatever its merits, however, it is fair to say that this traditional view of the law of contract has been in general retreat in recent years. That decline is reflected in part in the cool reception given to doctrines of laissez-faire, its economic counterpart, since the late nineteenth century, or at least since the New Deal. The total 'hands-off' policy with respect to economic matters is regarded as incorrect in most political discussions almost as a matter of course and the same view is taken, moreover, towards a subtle form of laissez-faire that views all government interference in economic matters as an evil until shown to be good. Instead, the opposite point of view is increasingly urged:

market solutions – those which presuppose a regime of freedom of contract – are sure to be inadequate, and the only question worth debating concerns the appropriate form of public intervention.

That attitude has, moreover, worked its way (as these things usually happen) into the fabric of the legal system, for today, more than ever, courts are willing to set aside the provisions of private agreements.

One of the major conceptual tools used by courts in their assault upon private agreements has been the doctrine of unconscionability. That doctrine has a place in contract law, but it is not the one usually assigned it by its advocates. The doctrine should not, in my view, allow courts to act as roving commissions to set aside those agreements whose substantive terms they find objectionable."[3] It is not out of place to aver that the doctrine of undue influence has also been extended is evident in the decision of *Lloyd's Bank Ltd. v. Bundy*[4] and classes of similar cases. In these classes of cases English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressure brought to bear on him by or for the benefit of the other. The principle of reasonableness brought forward in contracts restraint of trade as found in *Schroeder (A) Music Publishing Co. Ltd. v. Macaulay*[5] is another proof of incorporation of the good faith principle. In *Siboen and the Sibotre*[6] we find reference to the extension of the duress principle. In this case, an actual duress or threat of violence is extended to include coercion or compulsion and an importation of the economic duress principle is also brought forward. This case could be seen the first discussion about the concept of duress applied in an economic context. With 'the *Siboen and the Sibotre*, a court admitted for the first time that in the course of a business, some kind of pressure may cause one of the contracting parties to accept agreements that he would not have accepted otherwise. In the facts of the case, the charterers of two ships renegotiated the rates of hire after a threat by them that they would go bankrupt and cease to trade if

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3 "Unconscionability: A critical reappraisal"(1975) 18 *J Law & Econ* 293, 293-294.

4 [1975] QB 326.

5 [1974] 3 All ER 616.

6 [1976] 1 Lloyd's Rep. 293.

payments under the contract of hire were not lowered. Since they also represented that they had no substantial assets, this would have left the ship owners with no effective legal remedy. The owners would have had to lay up the vessels and would then have been unable to meet mortgages and charges. The problem is that the charterers knew it. Thus, the threats were false, mainly because there was no question about the charterers being bankrupted by high rates of hire. In his statement, Lord Kerr said:

> But even assuming, as I think, that our law is open to further development in relation to contracts concluded under some form of compulsion not amounting to duress to the person, the Court must in every case at least be satisfied that the consent of the other party was overborne by compulsion so as to deprive him of animus contrahendi. This would depend on the facts of each case [...] [The agent of the party alleging duress] was acting under great pressure, but only commercial pressure, and not under anything which could in law be regarded as a coercion of his will so as to vitiate his consent.

This case opened the way for lot of others. The presence of economic duress was rejected here, but it was clear from the judgment of lord Kerr that the notion was going to implant in English law. The basis for the notion was set, though it must be said that at the time, the way courts were going to deal with it was unclear. Nevertheless, one had to wait three years before the appearance of 'economic duress' in English law was confirmed, in a famous case called the 'Atlantic Baron'[7]. Here, the builders of a ship demanded a 10% increase on the contract price from the owners (because the value of the US dollar fell by 10%), or threatened not to complete the ship. The owners paid the increased rate demanded from them, protesting that there was no legal basis on which the demand could be made. The owners were almost obliged to pay, because at the time of the threat, they were negotiating a very lucrative contract for the charter of the ship being built. Mocatta J decided that this case was dealing with economic duress. The building company exerted an illegitimate pressure with their threat to break the contract. Where a threat to break a contract leads to a further contract, that contract, even though made for good consideration, is voidable by reason of economic duress. In this case, the right to have the contract set aside was lost by affirmation. Indeed,

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7 North Ocean Shipping Co. Ltd v Hyundai Construction Co. Ltd, *the 'Atlantic Baron'* [1979] QB 705.

the plaintiffs had delayed for reclaiming the extra 10% until eight months later, after the delivery of a second ship. However, in both cases, the existence of an economic duress doctrine was recognized. But we have to keep in mind that these two cases were the first ones. The doctrine, therefore, was not really well constructed and suffered a lack of coherence in its basis. The point on which judges were focusing was to find out in each case if the victim's mind was overborne. The basis on which the courts intervene to set aside a contract on the ground of duress is, at this time, where the victim's will has been coerced in such a way as to vitiate his consent. This idea, as we have previously seen, was first expressed in the *'Siboen and the Sibotre'* case, by lord Kerr, when he employed such words as: *'...coercion of his will such as to vitiate his consent.'*

According to Atiyah, economic duress is also an established principle in English law now.[8] The English legislators have not been silent and have gone to enact the Unfair Contract Terms Act 1977 to incorporate provisions for the protection of consumers of the weaker party in contract.[9] All such provisions lead to express a view more in line with other jurisdictions of having a good faith principle in place.

However, such absence of a general principle of a good faith in English law as that of certain other systems of European jurisdictions has prompted the judges to exercise technical approach to bring good faith on board. The result has been an absence of a coherent development of the principle. This however, is in contrast with the fact that the obligation of - pacta sunt servanda - is present in English law.

Allan Farnsworth, in his paper "Good Faith performance and commercial reasonableness under uniform commercial code"[10] states that Good faith, as a term, consists of two fundamentally different things. The first issue relates to "good faith purchase". Here, good faith is used to describe a "state of mind: a party is advantaged only if he acted with innocent ignorance or lack of suspicion". This is very much alike the principle of a bonafide purchaser for value without notice.[11] Secondly, Allan[12] has used the term with respect to

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8 Atiyah P.S. (1982) 98 L.Q.R., pp. 197-202.

9 Treitel, G.H., *The Law of Contract*, 6th edition.

10 (1963) 30 *U. Chi. L. Rev.* pp. 666 and 667.

11 ibid.

performance of a contract in good faith. This, we may assert may be a general pre-condition to any contract.

No English author clearly speaks of a good faith issue or principle in the formation of a contract.[13] However, certain principles, as we shall see, do operate very much rather to ascertain the presence of such a practice.

The question of good faith is minimized with the very detailed and well set principles of offer, acceptance, consideration and intention to create a legal relationship as a matter for construction of a contract. In the formative stage of a contract, the good faith principle may not have a direct bearing to assert its presence or any importance. However, as one commences to deal with the area of rescission or variation of a contract by any subsequent agreement, the good faith principle comes into play. The non-binding variations due to lack of consideration are naturally unenforceable. This is because certain formal requirements have not been met or complied with. Problems in this respect can only be resolved by reference to the principle of good faith. Such variations are usually referred to as waivers since one party gives up his strict legal rights or as forbearance[14]. Forbearance as a matter of interpretation includes waivers, concessions and variations of performance which are not contractually binding or enforceable. *Hickman v. Haynes*[15] is a well-known example of a type of forbearance. It was held that where a seller voluntarily withheld delivery at the verbal request of the buyer, no new contract being substituted for the original one, the seller was entitled to maintain his action for non-acceptance of the goods in accordance with the original contract.

Lindley, J. said:

> the proposition that one party to a contract should thus discharge himself from his own obligations by inducing the other party to give him time for their performance, is to say the least, very startling, and if well founded will enable the defendants in this case to make use of the Statute of Frauds, not to prevent a fraud upon themselves, but to commit a fraud upon the plaintiff.

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12 ibid.

13 Treitel G.H. (1983), *Law of Contract*, 6th edition(1983).

14 Dugdale and Yates, 39 *Modern Law Review* p. 681.

15 (1875) L.R. 10 C.P. 598.

Thus, the concept of 'waiver' has been recognized as a means by which certain rights can be suspended, but then revived by appropriate notice. It is observed that the common law courts have created some difficult distinctions with regard to variation, waiver and forbearance in contrast with a more direct application of fairness and reasonableness by the courts of equity in dealing with cases of forbearances. In the leading case of *Hughes v. Metropolitan Railway Co.*[16] Lord Cairns (House of Lords) observed that:

> as the first principle upon which all Courts of Equity proceed", was "that the strict rights arising under the contract will not be enforced or will be kept in suspense or held in abeyance the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

This rule can be interpreted to have been emanated from the principle of good faith. Later developments of the principles of promissory estoppel take its root from this rule of *Hughes*. This is a further ascertainment of the good faith principle. With subsequent applications and developments of the rule in *Hughes* in the areas of equitable or promissory estoppel, and its further extension to forbearance or waiver, it can be easily argues that the principle of good faith is indeed the actual basis of the common law principles in this area. A review of cases on forbearances, in the context of good faith, may show certain difficulties arising out of the doctrine of promissory estoppel. However, if the requirements of honesty, fairness and reasonableness are brought forth, rather than certain technical common law rules, some decisions which are difficult to adjust or reconcile within a technical and schematic approach become more understandable. However, the courts have always held that forbearances have operated to extinguish claims where it would have been impossible or excessively difficult for a party (i.e. the party not seeking to enforce on claim of forbearance) to return to the original position. This is very much akin to the principles of fairness and reasonableness and good faith. The revocability of the forbearance in circumstances where the beneficiary has behaved inequitably is of course perfectly consistent with the good faith nature of the rules in this area. In both *D. & C. Builders Ltd. V. Rees*[17] and *Arrale v. Costain*

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16 (1877) 2 App. Cas. 439, at p. 448.

17 [1966] 2 Q.B. 617.

Civil Engineering Ltd.[18] , which are clearly based on the principle of good faith, it was held that it would be clearly contrary to fairness and reasonableness to allow a party to benefit from a forbearance which he has obtained by unacceptable means.

D & C Builders Ltd. was hired to do work for Rees. Once the job was complete Rees had an outstanding debt of £432. Initially, Rees did not pay. Eventually they reached an agreement where Rees' wife agreed to pay £300 in satisfaction of the entire debt. D & C Builders was desperate and nearing bankruptcy, so they accepted the money. Rees' wife was aware of the company's difficult position and threatened to break the contract unless they provide a receipt stating that payment was "in completion of the account." The company later sued for the outstanding balance. Lord Denning writing for the Court, found in favour of D & C Builders Ltd. Denning considered *Pinnel's case*[19] which stated that settlement for less than full amount would not eliminate the full claim. However, he noted, the case had been criticized in *Couldery v Bartum.*[20] Instead, Denning relied upon equity

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18 [1976] 1 Lloyd's Rep. 98.

19 (1602) 5 Co Rep 117a (otherwise known as Penny v Core). The plaintiff sued the defendant for the sum of £8 10s. The defence was based on the fact that the defendant had, at the plaintiff's request, tendered £5-2s-2d before the debt was due, which the plaintiff had accepted in full satisfaction for the debt.

The rule in *Pinnel's case* is that "payment *of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges that by no possibility, a lesser sum can be a satisfaction to the plaintiff for a greater sum: but the gift of a horse, hawk, or robe, etc. in satisfaction is good ... [as] more beneficial to the plaintiff than the money"* The rule is obiter; in *Pinnel's case* itself the debt was paid before the date of satisfaction, which was considered good consideration. The decision was applied by the House of Lords in *Foakes v. Beer* [1884] 9 A.C. 605 to another part payment of debt. In Stilk v. Myrick (1809) S.C. 6 Esp. 129, where it was agreed that crewman would be given additional wages to help guide the ship home, the rule was held to apply to non-monetary obligations: the Court of Common Pleas held that the crewmen did no more than they were originally contracted to do, and could not recover the additional payment that had been agreed. Pinnel's case and the line of authority that flowed from it was distinguished in the decision of Williams v Roffey Bros [1991] 1 QB 1, where the English Court of Appeal held that performing an existing obligation could be good consideration where it conferred some "practical benefit" above what was originally envisaged. In that case, it was held the a subcontractor who had asked for additional remuneration to do previously agreed work was enforceable, as avoid the subcontractor going into bankruptcy (which otherwise would have happened) constituted a practical benefit). The reasoning in Williams v Roffey Bros has been doubted in subsequent cases, although it has not been overruled.

20 L.R. Ch. D. 394, 399 (1880)

which precluded creditor from enforcing a legal right where there has been an accord. The accord cannot be made under pressure, as it was in the circumstances, at the insistence of Rees' wife. The tactics used by Rees' wife meant equity could not be relied upon.

In *Arrale v Costain Civil Engineering Ltd* the plaintiff had lost his left arm in an industrial accident in Dubai and had accepted a paltry sum in local currency, the full sum to which he was entitled under a local ordinance, "in full satisfaction and discharge of all claims in respect of personal injury whether now or hereafter to become manifest arising directly or indirectly from an accident which occurred on 3 July 1998." The issue was whether the release applied to claims for common law damages. Lord Denning, in agreement with Stephenson LJ (Geoffrey Lane LJ dissenting), held that it did not. But he also held that if, contrary to his view, the release did cover common law claims there was no consideration for the plaintiff's promise. As he put it (at p. 102):

> . . . I would say that, if there was a true accord and satisfaction, that is to say, if Mr Dohale, with full knowledge of his rights, freely and voluntarily agreed to accept the one sum in discharge of all his claims, then he would not be permitted to pursue a claim at common law. But in this case there is no evidence of a true accord at all. No one explained to Mr Dohale that he might have a claim at common law. No one gave a thought to it. So there can have been no agreement to release. There being no true accord, he is not barred from pursuing his claim at common law.

In English law fraudulent misrepresentation with tenets of clear breach of good faith has always given rise to the possibility of adequate remedies.[21] However, less obvious breaches of good faith, at both the formation and performance stages, did not have the same treatment and have mostly gone without remedy. The unconscionability of the bargaining power was at a later stage invoked to remedy unfairness and unreasonableness in the English legal jurisprudence. A distinction, however, is needed to be made between a new general rule on unconscionable bargains, based on the principle of good faith, and long-established rules of common law and equity. In common law and equity a contract may be vitiated if anything therin have been obtained by fraud, duress, undue influence

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21 Spencer, Bower and Turner, *The Law of Actionable Misrepresentation*, 3rd edition, (1974), ch.XI.

and mistake. These rules, although intends to enhance the purpose of law to do justice and ensure fairness as opposed to strictly laid down legal principles, these are not necessarily good faith rules. They can be termed as normal or general principles of law, and even when developed to include new situations of inequality of bargaining power such as 'economic' duress they remain part of the normal body of rules.

As stated earlier, certain other jurisdictions have felt the necessity for the parties to act in good faith even at a pre-contract stage. This means conducting negotiation in good faith. However, as also stated earlier, this is not the case with English law. The case law and the statutes do lessen under English law the necessity to act in good faith at a pre-contract stage. Moreover, it is difficult to categorize any breach at a pre-contract stage. For example, an unreasonable last-minute withdrawal from negotiations or unjustified breaking of the deal is the kind of actions or conduct which might constitute breach of duty to negotiate in good faith.

The basic principle of freedom of contract,[22] and the absence of any legally relevant intermediate stage between contract and no-contract, makes it difficult to identify a possible cause of action for breaches of

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22 The law relating to freedom of contract refers to those choices available to the individual as to who they contract with and what they contract for and on what terms. It comes from the classical model of contract where an individualistic approach is of the highest importance. In the classical theory there is minimal state intervention.c *Atiyah* was central to the classical model. His fall came about when pragmatism, consumer welfarism and reliance took the place of the laissez faire approach and the bargaining model. The notion of freedom of contract has come under scrutiny as legislation has been passed in the UK that has implications on such 'freedom of choices'. There are many examples of statutory interference with the freedom of contract, for example in the fields of employment law, racial and gender discrimination. A wide variety of legislation was passed that helped shape the law of contract. *The Unfair Contract Terms Act 1977 and the Sale of Goods Act 1979* to name but a few. The law of contract, like the legal system itself, involves a balance between competing sets of values. Freedom of contract emphasizes the need for stability, certainty, and predictability, but, important as these values are, they are not absolute, and there comes a point where those most vulnerable need protection. The law began to recognise that not all parties have equal bargaining power as was previously thought. One particular group that were particularly affected were consumers. For this reason, new regulations such as the afore-mentioned examples were implemented. I think this has been of benefit to the English law. Not only does it ensure social justice, it redresses equality of bargaining power. This is particularly of benefit to those disadvantaged from the start.

good faith in the negotiation stage.[23] As it is normal that such breaches may often involve representations about future conduct of the parties themselves, it is difficult in general for a plaintiff to get any remedy since the defense of equitable estoppel will come into play which works as a shield and not as a cause of action.[24] In *Combe v Combe*, an ex-wife tried to take advantage of the principle that had been reintroduced in the *High Trees case*[25] to enforce her husband's promise to give her maintenance. The Court held that promissory estoppel could not be applied. It was only available as a defence and not as a cause of action. In this case Mr and Mrs Combe were a married couple. Mr Combe promised Mrs Combe that he would pay her an annual maintenance. Their marriage eventually fell apart and they were divorced. Mr Combe refused to pay any of the maintenance he had promised. Seven years later Ms Combe brought an action against Mr Combe to have the promise enforced. There was no consideration in exchange for the promise and so no contract was formed. Instead, she argued promissory estoppel as she had acted on the promise to her own detriment. At a trial the Court agreed with Ms Combe and enforced the promise under promissory estoppel. Lord Denning reversed the lower court decision and found in favour of Mr Combe.

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23 Cf. *Brewer Street Investments Ltd. v. Barclay's Woollen Co. Ltd.* [1953] 3 W.L.R. 869 at p.873 and 874.

24 *Combe v. Combe* [1951] 2 K.B. 215.

25 *Central London Property Trust Ltd v. High Trees House Ltd* [1947] K.B. 130; [1956] 1 All E.R. 256 (Note); 62 T.L.R. 557; [1947] L.J.R. 77; 175 L.T. 333 – sometimes simply referred to as the High Trees – is a High Court case decided by Mr Justice Denning (later Lord Denning) that helped establish the doctrine of Promissory estoppel in contract law in England and Wales. In 1937 *High Trees House Ltd.* leased a block of flats for a rate £2500/year from *Central London Property Trust Ltd.*. Due to the war and the resultant heavy bombing of London occupancy rates were drastically lower than normal. In January of 1940, to ameliorate the situation *High Trees House Ltd.* made an agreement with *Central London Property Trust Ltd.* in writing to reduce rent by half. However, neither party stipulated the period for which this reduced rental was to apply. Over the next five years, *High Trees* paid the reduced rate while the flats began to fill and by 1945 the flats were full. *Central London* sued for payment of the full rental costs from June 1945 onwards (i.e. last 2 quarters of 1945). Based on previous judgments in *Hughes v. Metropolitan Railway Co.* and *Birmingham and District Land Co. v. London & North Western Railway*, Mr Justice Denning held that the full rent was payable from the time that the flats became fully occupied in mid-1945, but stated 'obiter' that if *Central London* had tried to claim for the full rent from 1940 onwards, they would not have been able to. This 'obiter' remark was not actually a binding precedent, yet it essentially created the doctrine of promissory estoppel. This decision should be contrasted with *Foakes v. Beer*.

He elaborated on the doctrine from High Trees. Stating the legal principle, Denning wrote:

> where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him. He must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word.

He stated the estoppel could only be used as a "shield" and not a "sword". In High Trees, there was an underlying cause of action outside the promise. Here, promissory estoppel created the cause of action where there was none. In this case, the court could not find any consideration for the promise to pay maintenance. While it may be true that the wife did forbear from suing the husband on the arrears for seven years, this forbearance was not at the request of the husband. Thus, if a remedy in any other branch of law, or more specifically in tort is not found, for instance, by an action for deceit or for negligent representation under the principle in *Hedley Byrne v. Heller*,[26] there may be no effective remedy at all in English law,[27] *Hedley Byrne v. Heller* is the decision of the House of Lords that first recognized the possibility of liability for pure economic loss, not dependent on any contractual relationship, for negligent statements. The basis of this liability was variously held to be an "assumption of responsibility" to the claimant, a "special relationship" between the parties, or a relationship "equivalent to contract". The bankers for Hedley Byrne (an advertising partnership) telephoned the bank of Heller & Partners Ltd. inquiring about the financial state and credit record of one of Heller's client companies, Easipower Ltd. Hedley Byrne was about to undertake some significant advertising contracts for them, and wanted to be sure of their financial security. Heller vouched for their client's record but qualified it by waiving responsibility, stating that the information was: "for your private use and without responsibility on the part of the bank and its officials." Hedley Byrne relied on this information and entered into a contract

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26 [1963] 2 All E.R. 575.

27 *Acrow Automation v. Rex Chainbelt* [1971] 3 All E.R. 1175 (CA).

with Easipower which went bankrupt soon afterwards. Unable to obtain their debt from the bankrupt, Hedley Bryne sued Heller for negligence, claiming that the information was given negligently and was misleading. In the end Umayr was liable. The court found that the relationship between the parties was "sufficiently proximate" as to create a duty of care. It was reasonable for them to have known that the information that they had given would likely have been relied upon for entering into a contract of some sort. This would give rise, the court said, to a "special relationship", in which the defendant would have to take sufficient care in giving advice to avoid negligence liability. However, on the facts, the disclaimer was found to be sufficient enough to discharge any duty created by Heller's actions. There were no orders for damages. *Acrow Automation v. Rex Chainbelt*, is important because it hints at an economic tort which may not be covered by the TULRCA 1992,[28] s. 219 immunity. Here there was no commercial contract at all, merely preliminary negotiations, and the defendant interfered only with the entering into of a contract. If this is tortious (and the authority is not particularly conclusive), then the tort falls outside s. 219. Acrow Automation (AA) had a contract with SI Handling Systems Inc. of Pennsylvania (SI) under which AA had an exclusive license for 5 years to manufacture the 'lo-tow' system. They could only do this by using a chain made by Rex Chainbelt (RC), which was closely associated with SI, but with whom AA had no contract. SI had a dispute with AA, and persuaded RC not to supply chains. This was a clear breach of contract by SI and AA obtained an interlocutory injunction. The issue was whether RC could continue to obey SI's instructions - the CA held not. Lord Denning said :- if one person, without lawful excuse, deliberately interfered with the trade or business of another, and did so by unlawful means, that was unlawful. Here it was unlawful for RC to obey SI's unlawful instructions, in breach of the injunction. This reasoning, if correct, extends general tortious liability beyond the protection of the TULRCA immunities. Under English law, an agreement simply to negotiate does not bind the parties, even to the limited extent of using their best endeavors to reach an agreement.[29] This is a classic instance where there may be a serious breach of good faith and other common law jurisdictions have invoked the principle to provide a remedy. In

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28 Trade Union And Labour Relations (Consolidation) Act 1992.

29 The Scaptrade, [1981] 2 Lloyds' Rep. 425, at 432.

Hoffman v. Red Owl Stores Inc.[30] Hoffman owned a bakery, but wanted to open a Red Owl store. Red Owl assured him that he could open one for $18,000. He started working on opening a store, which included selling the bakery, buying and later selling a small grocery store, paying the option on a lot in Chilton, renting a house in Chilton, and moving to Neenah. Then Red Owl starting raising the amount of capital they wanted from Hoffman to be able to open the store. Hoffman backed out of negotiations and sued Red Owl. The trial court found that Hoffman had acted to his detriment in reasonable reliance on Red Owl's promises, and awarded him reliance damages. The defendant appealed. On appeal, the judge upheld everything except for the damages for the sale of the small grocery store. The defendants appealed again. The issue in this case was should Wisconsin adopt § 90, and if so, it is applicable to the facts of this case? The Court held that insofar as it's necessary to prevent injustice, a promisor will be held to their promise if they reasonably expected that promise to induce reliance on the part of the promisee and they actually did so. The court finds that there was reliance and that the promise must be enforced in order to prevent injustice. The court also goes over the damages and finds them all reasonable except for the damages related to selling the small grocery store.

The House of Lords in *Walford v Miles*[31] maintained the approach which has existed in

England since the 1975 decision in *Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd*,[32] where it was held by the Court of Appeal that *"the law ... cannot recognise a contract to negotiate.' Walford v Miles* was concerned with negotiations between parties for the sale of a photographic processing business in London. Walford wished to purchase Miles' business and during negotiations the two came to an arrangement. Walford agreed to provide a comfort letter from a bank in respect of the purchase price in return for which Miles agreed to terminate negotiations with any third party and not to consider any further proposals from other third parties. Despite the arrangement, Miles sold the business to a third party. Walford then brought an action against Miles for breach of their agreement. The House of Lords noted that ordinarily this would constitute what is called a

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30 133 N.W. 2d. 267 (1965).

31 (1992) 1 All E.R . 453(HL) .

32 [1975] 1 All ER 716.

'lock-out' agreement, which is enforceable provided that the duration of the 'lock-out' is certain. A 'lock- out' agreement, it was observed, is a negative agreement, whereby one person promises another that he will not negotiate, for a fixed period, with any third party. The House of Lords found that the agreement in this case was not enforceable. The 'lock-out' agreement was missing two essential elements which it required to be enforceable. The first was that it did not specify for how long the lock-out was to last; the second was that in the absence of any term in the agreement as to its duration, it did not contain a provision which would allow Miles to determine negotiations. Walford argued that in order to give the agreement business efficacy there must be an implied term that Miles would continue to negotiate in good faith. Further, because it was not specified in the agreement for how long the negotiations would continue, Walford contended that the obligation on Miles to negotiate must endure for as long as was *reasonably necessary for parties negotiating in good faith* to reach a binding agreement (that is, until there is a 'proper reason' to withdraw). The House of Lords held that the 'lock-out' agreement could not be enforced if enforcement required the existence of either a direct or indirect implied agreement to negotiate in good faith. Lord Ackner (with whom the other Lords agreed) observed generally, "the reason why an agreement to negotiate, like an agreement to agree, is unenforceable is simply because it lacks the necessary certainty."

Further, Lord Ackner noted:

> A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from these negotiations, at any time and for any reason. There can thus be no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly, a bare agreement to negotiate has no legal content.

Earlier in a lucid dissenting judgment[33], Bingham L.J. emphasised that the courts would strive not to invalidate a provision for uncertainty and would, wherever possible, uphold commercial practices. He considered the 'lock-out' arrangement to be a separate undertaking which was not part of the continuum of negotiations which were

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[33] In the Court of Appeal , [1991] 2 E.G.L.R. 185 .

subject to contract, rather it related to the machinery for conducting the negotiations. As such its terms were to be construed as negative in content, the defendant agreeing not to deal with any party other than the plaintiffs. His Lordship considered that:

> If any obligation by either party to negotiate is disregarded as legally ineffective, there remains a clear undertaking by Mr. Miles on behalf of himself and his wife, conditional on timely production of a comfort letter, not to deal with any party other than the plaintiffs and not to entertain any alternative proposal. If this undertaking was supported by consideration moving from the plaintiffs as promisees and was sufficiently certain to be given legal effect, I see no reason why it should not form part of a legally enforceable contract.

Although no time limit was prescribed for this 'lock-out', Bingham L.J. saw no obstacle in its remaining in force for a reasonable time which would end if the parties reached 'a genuine impasse'. On the facts, he was unable to accept that the defendant's reasons for ending the negotiations (which were never communicated to the plaintiffs) could be an impasse bringing the plaintiff's period of exclusivity to an end. This reasoning would, of course, indirectly subject the parties to a duty to negotiate in good faith but Bingham L.J. did not view this as an obstacle *"since it is without doubt what the parties intended should happen."* He unequivocally accepted the weight of authority which precluded any finding of a valid contract to negotiate in good faith but, although acknowledging the difficulties inherent in enforcing such a contract, he was "not ... persuaded that the concept was impossible." His Lordship continued:

> such a contract were recognized, breach could not of course be demonstrated merely by showing a failure to agree, and if negotiations were shown to have broken down it might be necessary for the court to decide whether the parties had reached a genuine impasse or whether one or the other party had for whatever ulterior reason aborted the negotiation. This could be hard to decide, but no harder than other matters which regularly fall for judicial decision.

The House of Lords tried to make a clear distinction between 'lock-out' and 'lock-in' agreements. It was held that a negative 'lock-out' arrangement could be enforceable if it provided expressly for the duration of the 'lock-out' and was supported by consideration but that the parties could never be 'locked-in' to positive negotiations by such a contract as it would amount to an uncertain and unenforceable contract to negotiate. Moreover, there could be no implied term to

negotiate positively subsisting for a reasonable period of time in a 'lock-out' contract. Lord Ackner thus decided that an agreement to negotiate positively was not recognized by English law. He thought that the inherent difficulties were that the parties could be under no absolute obligation to finalize a contract and neither would know when he could legitimately end the bargaining. Moreover, he emphasized that a court could not police such an agreement as it would be impossible to decide whether there were, on the facts, proper reasons for terminating the negotiations. The possibility of good faith being the pivotal determinant factor in negotiations was vilified by Lord Ackner in the strongest terms:

> How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined 'in good faith.' However, the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiation is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations.

The essence of Lord Ackner's reasoning appears to be, first, that the duty to negotiate in good faith is inherently 'inconsistent with' and 'repugnant to' the adversarial position of the parties when involved in negotiations, and secondly ,that performance of the obligation cannot be policed. As to the first of these points, it is clear from what Lord Ackner stated earlier that this inconsistency or repugnancy does not exist if one party or both parties have undertaken to use their best endeavors to agree. What he calls 'the necessary certainty' then exists. It also clear that the Privy Council in the *Queensland Electricity Generating Board v New Hope Collieries Pty. Ltd*[34] must have thought that there was no inconsistency or repugnancy involved where the parties impliedly undertook to make reasonable endeavors to agree. Yet a best endeavors negotiation or a reasonable endeavor negotiation is still a negotiation. What the parties do, however, by undertaking to use their best endeavors to impose reasonable restraint on their 'adversarial position.' Moreover Lord Ackner heavily relied on the *Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd,* [35] where the reason given by Lord Denning M.R. for a contract to negotiate in good faith

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34 (1989) 1 Lloyd's Rep. 205.

35 [1975] 1 All ER 716.

having no binding force is that the court could not estimate damages because no one could possibly tell whether the negotiation will be successful or not. This should be contrasted with the case of *Allied Maples Group Limited v Simmons & Simmons*[36] where, Hobhouse L.J. stated that where parties are engaged in negotiations on the detailed terms of a commercial deal upon which they are both agree in principle and from which both are expecting to gain, it is in no way unrealistic to conclude that meaningful negotiations are possible. Further, in *Walford v Miles* Lord Ackner asserted as a law of nature that duty to negotiate in good faith is 'unworkable in practice' or is inherently inconsistent with the position of a negotiating party and it is impossible for the court to police . If that was correct, one would expect it to hold good for other cases also. But in *AT&T Corp. v Saudi Cable Co.*[37] Lord Woolf M.R. accepted that New York law recognizes a contract to negotiate in good faith as a binding contractual obligation. Putting to one side the 'subject to contract' complication in *Walford v Miles*, it is difficult to see who benefits from the decision to apply the rule that an agreement to negotiate is not in law an effective contract, in cases where there is consideration for the promise. If businesspeople are prepared to reach such agreements, why should the law not enforce them? Moreover, it seems that the relevant US cases were not cited in *Walford v Miles*, the only case that was cited was *Channel Home Centers, Division of Grace Retail Corp. v Grossman* [38] which Lord Ackner was able to distinguish because it concerned an obligation to use best endeavors, as opposed to an obligation to negotiate in good faith. The House of Lords was not referred to *Teachers Insurance and Annuity Association of America v Tribune Company*[39] which indisputably concerned an obligation to negotiate in good faith. The facts were also similar to those in *Walford v Miles*, the main terms of the deal had been agreed between the parties on a subject to contract basis. *Teachers Insurance* concerned a commitment letter for a loan which Teachers, as would be lender, sent to Tribune Company as would be borrower. It was held by the Court that Tribune Company was obligated in good faith to conclude a final agreement within the terms specified in the commitment letter. Lord

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36 [1995] 1 WLR 160.

37 [2000] 2 All ER (Comm.) 625.

38 795 F . 2d . 291 (1986).

39 670 F Supp. 491(1987) .

Ackner's pronouncement that 'the concept of a duty to carry on negotiation in good faith is inherently repugnant to the adversarial position of the parties' should now be understood as expressing a rule of construction. An undertaking to negotiate in good faith is to be construed as an agreement to renounce purely adversarial negotiation in the following factual undertaking: A responsibility to begin negotiation in a clearly defined manner and have the necessary involvement in the process of contract negotiation. An open mind to consider each other suggestion for resolution of any dispute that might rise in negotiation process or likely to crop up in a later stage of the contract. Particularly in terms of valuation, pricing and title rights the parties should not take undue advantage of each other and keep each other in dark about known fact which have a direct bearing on the negotiation process.[40]

Cheshire and Fifoot[41] hold that the "common commercial device of a 'letter of intent' which indicates that one party is very likely to contract with another is also a possible source of non-actionable breaches of good faith under existing English law". These issues can also be governed under a general rule requiring negotiations in god faith.

Good faith, in the sense of 'honesty' can be both relevant and irrelevant in considering the legality of a contract. Considerations of public policy at times do require that the innocent party who has acted in good faith should nevertheless be penalized.[42] In this referred case of *Nash* it was held that a contract for the use of unlicensed vehicles is prohibited despite that intentions of the parties. The courts the courts would be always influenced by the facts and considerations of fairness, justice, reasonableness, however it would be rare occasions when courts would permit a party who entered into an illegal contract in good faith or honestly" to recover damages. The cases mostly are cases to recover money paid or property transferred under an illegal contract. Thus, the rules relating to good faith that we find in place today are mostly positive laws in branches of law which have

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40 http://209.85.165.104/search?q=cache:HUN_3snJX18J:employment.indlaw.com/publicdata/articles/article214.pdf+Roger+Brownsword+%2B+good+faith&hl=en&ct=clnk&cd=9&gl=uk.

41 Cheshire and Fifoot, op. cit., p. 39; S.N. Ball, "Work carried out in pursuance of letters of intent", 99 L.Q.R. 572.

42 *Nash v. Stevenson Transport Ltd.* [1936] 2 K.B. 128.

enunciated in them the principles of good faith rather than making direct principles of good faith as a general rule. Under English law of contract, good faith requirement is incorporated to for assessing performance or breach of the parties in the branches of contract law. Therefore, separate rules for good faith are not called for.

However, as mentioned earlier, there are situations where the existing rules cannot deal with particular manifestations of unfair or unreasonable conduct, and the general principle of good faith may be invoked. In *Panchaud Frères SA v. Etablissements General Grain Co.*,[43] Winn, L.J. suggested that "there may be an inchoate doctrine stemming from the manifest convenience of consistency in pragmatic affairs which would prevent a party from 'blowing hot and cold' in commercial conduct". In that case, the defendant accepted without objection shipping documents which clearly showed that the goods had been shipped out of time in breach of an express term of the contract. When the goods arrived, the defendant rejected them on another ground which was later held to be insufficient and only three years later sought to justify rejection on the ground that the goods had been shipped out of time. To have allowed rejection after such a long time for a ground which might properly have been raised immediately would be inconsistent with 'a requirement of fair conduct. Winn LJ suggest that there must be actual knowledge and that constructive notice would not be sufficient to establish waiver in the context of commercial law. The plaintiff here relied and acted upon the concession that was extended by the defendant by way of an earlier letter. And what the plaintiff did was entirely within the purview of what Lord Denning LJ said in the case of *Charles Rickards Ltd v. Oppenheim*[44] where his Lordship said that for a waiver to operate effectively, the party to whom the concession was granted must act in total reliance of that concession. The general rule that a party can reject goods, or terminate a contract of employment, for breach, which is a material one and although he was not aware of that particular breach at the time, and relied instead on some other alleged breach which in fact is insufficient, is understood to be well settled.[45] It was, however, overridden in Pachaud Frères because the principle

43 [1970] 1 Lloyd's Rep. 53.

44 [1950] 1 KB 616 at 623; [1950] 1 All ER 420, at 423, CA.

45 *Arcos Ltd. v. E.A. Ronaasen & Sons* [1933] A.C. 470.

of good faith required it.[46] A great deal of discussion in made in the case of *Director-General of Fair Trading* v. *First National Bank plc.*[47] "The Unfair Terms in Consumer Contracts Regulations 1994 ("the 1994 Regulations") were adopted to implement Directive 93/13/EEC. These Regulations (which have since been replaced with the Unfair Terms in Consumer Contracts Regulations 1999 ("the 1999 Regulations") provide, *inter alia*, for the challenge of terms perceived as unfair by a public body with an interest in consumer protection. This has been done successfully over the past five years by a special unit within the Office of Fair Trading (OFT). The 1999 Regulations enable other bodies with an interest in consumer protection to challenge unfair terms. One element of this power is that the Director-General of Fair Trading (DGFT) may apply to the courts for an injunction to prevent the continued use of an unfair term where the business using the particular term fails to agree to remove this after receiving the OFT's objections. The decision in *Director-General of Fair Trading* v. *First National Bank plc* is of interest for a number of reasons: first, the case is the result of the first application by the DGFT for an injunction to prevent the continued use of a term which is regarded unfair in consumer contracts. Secondly, the decision offers important guidance on the interpretation of two concepts, that of the "core term" and the meaning of "good faith", for the purposes of the Regulations. The case arose over the disputed fairness of a condition in a standard form for regulated consumer credit agreements used by First National Bank plc ("the bank"). Under the agreement, a consumer who had taken out a loan with the bank had to repay this by monthly installments. Clause 8 of the agreement permitted the bank to demand payment of any installments which were more than 7 days late, and to demand repayment of the full loan amount should the consumer fail to meet the bank's initial demand for the unpaid installment. The final sentence of this condition stated that "Interest on the amount which becomes payable shall be charged . . . until payment after as well as before any judgment (such obligation to be independent of and not to merge with the judgment)." This sentence was objected to by the DGFT. The effect of this condition was that when the bank obtained judgment against a consumer, the consumer would have to pay interest on the total amount still outstanding as

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46 *Waren Import Gessellschaft Krohn & Co. v. Alfred C. Jeopfer* (The "Vladimir Ilich") [1975] 1 Lloyd's Rep. 322 at 329.

47 [2000] 2 W.L.R. 1353, (C.A.) (Gibson, Waller and Buxton L.JJ.

well as any interest accrued which was unpaid at the date of judgment. This goes against the objective of the Consumer Credit Act 1974, which provides that once judgment is given in consumer credit claims, no further interest may be charged by the lender. It is, however, possible to ask the court to order that interest will continue to be chargeable after judgment. The DGFT believed this term to be unfair, because it deprived the consumer of the protection under the Consumer Credit Act 1974 that no further interest may be charged after judgment when the court has extended the time allowed for repayment. Whether or not this provision is economically sound, the thinking behind this was to limit the financial difficulties of consumers who were already in serious debt. At first instance, Evan-Lombe J. refused to grant the injunction sought by the DGFT. He held that the term was not unfair for the purposes of the 1994 Regulations, and that the DGFT's application should be refused. The DGFT appealed. The Court of Appeal disagreed with the judge at first instance and allowed the appeal. Peter Gibson L.J., who delivered the only judgment in this case, held that the term in question was not a core term and could be assessed for its fairness, and, furthermore, that the term in question was, in fact, unfair. Both at first instance and in the Court of Appeal, two issues had to be considered: the first was whether the term in question was to be regarded as a core term, in which case it would not be open to challenge under the 1994 Regulations. Secondly, if it was not a core term, then the question was whether it was unfair within the meaning of the Regulations. These issues will now be examined more closely. The core terms were: Regulation 3 (2) of the 1994 Regulations states that: In so far as it is in plain and intelligible language, no assessment shall be made of the fairness of any term which (a) defines the main subject matter of the contract, or (b) concerns the adequacy of the price or remuneration, as against the goods or services sold or supplied. Thus, a term which merely describes the reason for the contract (*e.g.*, "A Regulated Consumer Credit Agreement between Bank X and Consumer Y"), as well as the "price" for this (*e.g.* "19.5% a.p.r.") would not be assessed for its fairness. The Bank had claimed that Clause 8 was a core term. Its argument was as follows. If the bank obtained a judgment against a consumer following a default in repaying the loan, this clause provided the new rate of interest which the consumer would have to pay. Therefore, this was a term which defined the price to be paid for the service (*i.e.* the loan) supplied. At first instance, Evans-Lombe J.

rejected this. He suggested that a consumer seeking to obtain a loan from a bank would not regard the default provisions in the loan agreement as important terms of the contract in the sense that these provisions would influence the consumer in deciding whether or not go ahead with the loan agreement. The important term for the consumer would be the clause which set the rate of interest he would have to pay if he repaid the loan in instalments by the due date each month. This term would indicate to him the overall cost of the loan facility. Therefore, Clause 8 was not a core term, and could be assessed for its fairness. The Bank raised this issue again when the DGFT's appeal was heard by the Court of Appeal. It argued that any term in a consumer credit agreement which set the amount of interest and the period over which this was payable (both before and after a judgment) constituted a core term because it contained the price payable for the loan facility. It also referred to the Scottish case of *Bank of Scotland* v. *Davis*[48] as authority that any contractual term which deals with the payment of interest was a core term of that contract. The DGFT counter-argued that Clause 8 was not a core term for two reasons: first, the clause only took effect when there had been a breach of contract, *i.e.*, a failure by the consumer to repay the loan in accordance with the terms of the loan agreement. Core terms, however, only define the rights and obligations of the parties in the due performance of the contract. Secondly, the clause did not specify the rate of interest payable, but rather set out the circumstances in which interest is to be paid. The Court of Appeal agreed with the DGFT. It held that the issue was not whether the term would be regarded as core term under the ordinary rules of contract, but whether the term fell within the definition of Regulation 3(2). As the clause neither defined the main subject matter of the contract, nor the adequacy of the remuneration, it did not fall within that definition and could therefore be assessed as to its fairness.

Having thus decided that clause 8 could be assessed as to its fairness, the Court then had to decide whether the clause was fair or not. Under Regulation 4(1), a term is unfair if, "contrary to the requirements of good faith, [it] causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer". It was, first of all, necessary to consider the meaning of "good faith". In interpreting the "good faith" principle under the

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48 [1982] S.L.T. 20.

Regulations, both the judge at first instance and the Court of Appeal, referred to academic commentary, and notably an essay by Professor Hugh Beale. At first instance, Evans-Lombe J. decided to apply common sense before considering the legislative framework. He suggested that a consumer would expect to have to pay the normal rate of interest on the loan amount, whether or not a judgment had been obtained against him by the bank. Furthermore, the judge suggested that a consumer would be surprised to discover that his financial situation would improve after a judgment if the bank were not allowed to charge interest: Equally, it seems to me, that if he was informed that . . . if he defaulted in making the payments required by the agreement, and judgment was obtained against him, he would . . not have to pay interest at all . . . he would have been surprised that his financial obligations would become less onerous as the result of a judgment. In other words, the term complained of by the DGFT would not change the consumer's position. Evans-Lombe J. then referred to Bingham L.J. in *Interfoto Library Ltd.* v. *Stiletto Ltd.*[49], who observed that good faith at least required a business to deal openly and fairly with its customers. He then went on to draw on "several academic commentators on this area of law" and suggested that a breach of the requirement of good faith could take two forms, "substantive" and "procedural" unfairness. The former involved the imposition of "an onerous term out of proportion to a reasonable assessment of the obligations of the parties under the contract by the supplier on the consumer". The latter referred to instances where a consumer becomes subject to an onerous term, although not necessarily substantively unfair, affects the balance of obligations under the contract to the consumer's detriment. This is what has also been referred to as "unfair surprise". Based on this interpretation, the judge concluded that there was no infringement of the requirement of good faith. He held that the only substantive advantage of which consumers may have been deprived by Clause 8 was the fact that no interest would normally be imposed after a judgment. The procedural disadvantage could only have been that consumers would have been unaware of the clause, but the judge found that on the evidence before him, no such disadvantage had been made out. Therefore, the clause did not infringe the requirement of good faith. The Court of Appeal took a similar approach to applying the "good faith" requirement.

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49 [1989] Q.B. 433, [1988] 1 All E.R. 348.

Peter Gibson L.J. first similarly referred to Bingham L.J. in *Interfoto*, and then to Professor Beale's essay, which discusses the procedural and substantive elements of the "good faith" concept. He then observed that the element of "significant imbalance" in Regulation 4(1) appeared to overlap substantially with that of the absence of good faith. The Court of Appeal disagreed with the judge's application of the "good faith" requirement. It held that the assessment of unfairness was to be done purely by reference to the legislative scheme. With reference to Evans-Lombe J.'s "common sense" approach, Peter Gibson L.J. observed: [W]e are far from convinced that a borrower would think it fair that when he is taken to court and an order for payment by installments has been tailored to meet what he could afford and he complied with that order, he should then be told that he has to pay further sums by way of interest. The term was, therefore, unfair and the appeal was allowed. The DGFT sought an injunction that would have operated to prevent the use of the term in dispute not just in the agreement in question, but generally, with the effect that agreements offered by other lenders which contained this term would automatically be regarded as unfair and could no longer be used. The Court of Appeal was only willing to grant a limited injunction, but it encouraged the parties to come to an arrangement by which the term in question would be amended. Following the handing-down of the judgment, an undertaking was agreed and no injunction was ultimately granted.

The judgment of the Court of Appeal is particularly welcome for its clarification of the scope of the 'good faith' principle. It is now clear that 'good faith' in the context of the 1994 Regulations is to be equated with open and fair dealing, and has a procedural and substantive element. But is this an acceptable interpretation of the 'good faith' principle? The literature on 'good faith' in English law has grown rapidly in the last five years or so, undoubtedly motivated, at least in part, by the adoption of the EC Directive on unfair contract terms. Thus, Brownsword[50] has similarly suggested that one possible interpretation of 'good faith' could be by reference to the standards of fair dealings of the society of which the contracting parties are members – in his words, a 'good faith requirement'. However, Brownsword favours an objective standard of good faith, which would be based on the standards of fair dealing and co-operation as

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50 Brownsword, Roger, "Two Concepts of Good Faith", (1994) 7 *JCL* 197.

prescribed by the most defensible moral theory. He prefers an objective criterion – a 'good faith regime'. Yet, he concedes that English law at present seems to be developing a 'good faith requirement', and this decision of the Court of Appeal confirms this. This interpretation of the concept and its most likely prevalence over a normative interpretation was also suggested by John Wightman. His concept of 'contextual good faith' is based on what the parties to the contract would reasonably expect particularly reasonable standards of fair dealing. Whereas Wightman also finds merit in an objective 'good faith' concept, he too concedes that English contract law would develop the concept more in line with an interpretation as open and fair dealing. Thus, the Court of Appeal's judgment confirms academic opinion on how the 'good faith' concept would develop in English contract law."[51]

The law of remedies in English law, however, puts huge restriction on abuse of rights and hence does compensate to some extent the absence of a general principle of good faith. It is to be remembered that remedies is the core of a contractual suit n most cases and hence is an influential mechanism. This is more so for the fact that remedies are controlled by the courts and because the parties' freedom of contract in this field is limited. We need to distinguish here between the discretionary (equitable) remedies and non-discretionary (legal) remedies and self-help.

Discretion, as the word suggest, refers to the withholding power of the court to allow a relief. A difficult question arises when the rights given are absolute and the remedy is essentially discretionary. Some of the legal paradoxes are to be found where a legal right is defined as absolute, while the remedy for its protection is discretionary.[52] In the exercise of this discretion, the court may deprive the part of the ability to do that which in theory it is entitled to do, namely, to insist upon his 'absolute' right in disregard of the circumstances and interests of others. The plaintiff's unfairness may lead to the denial of specific performance not only if it occurred at the formation of the contract, but also when it happened during its performance. The court's power

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51 http://209.85.165.104/search?q=cache:PccDkaCTAiUJ:www.ntu.ac.uk/nls/centreforlegalresearch/nlj_recent_editions/8371.pdf+John+Wightman+%2B+good+faith&hl=en&ct=clnk&cd=5&gl=uk

52 Sherwin EL, "An Essay On Private Remedies", (1993) 6 *Can J. of Law and Jurisprudence* 89.

to withhold discretionary remedies is, therefore, an important tool of controlling unfair conduct. It is a particularly a great weapon where the alternative non-discretionary remedy, usually, damages, is unavailable or of little value, as where the plaintiff suffered no loss or where the loss cannot be proved.[53] Here, Lord Parker observed that "indeed, the dominant principle has always been that equity will only grant specific performance if, under all the circumstances, it is just and equitable so to do." The problem becomes more complex where the non-discretionary remedies, which the plaintiff has at his disposal, can potentially be effective. Sherwin, in "Law and Equity in Contract Enforcement" observes that "Specific performance (discretionary remedy) and damages (non-discretionary remedy) are meant to serve precisely the same purpose".[54] Both intend to put the innocent party in the position he would have been in, had the contract not been breached[55]. The difference is a general knowledge of any law student that the specific enforcement grants the plaintiff the promised performance in specie, while damages intend to provide him with the exact equivalent in monetary terms. Although these two remedies may in theory serve the same purpose, they can differ considerably in effect. The extent of the difference depends upon the rules on the appraisal of the damages. The principles of awarding damages attempt to reduce the practical gap between specific performance and damages. Thus, although the remedy of damages is non-discretionary and English law does not recognize a general principle of good faith, the rules on damages often take good faith into account. This is sometimes reflected in the mode of calculating damages, and in other instances through the principle of mitigation.

Then, there is the issue of self-help. Atiayh[56] observes that the exercise of self-help enables the aggrieved party to obtain a remedy without resorting to an action in court. He goes on to state that self-help can be challenged in court as well, but it has the advantage of moving the duty to initiating litigation to the other party. There are two types of self-help. Physical help takes such forms as, for example, reception of stolen goods. Legal self-help refers to an extra-judicial legal act which affects the rights of the parties. A typical example is the termination of

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53 *Shell UK Ltd. v. Lostock Garage Ltd.* [1976] 1 WLR 1187, at 1202.

54 (1991) *50 Maryland LR* 253, 260

55 Farnsworth, *Contracts*, 2nd edition, (1990) pp. 826-9.

56 Atiyah, PS, *An Introduction to the Law of Contract*, 4th edition (1989).

a contract on the ground of breach. The question of physical self-help arises rarely in the context of contractual rights. Legal self-help is, however, quite common in contractual contexts. Legal self-help consists of forfeiture, termination and the right to 'earn' the contractual payment. Typically, forfeiture is a self-help remedy. Where the forfeited interest greatly exceeds the loss suffered by the aggrieved party, the forfeiture is severe. Moreover, the option to terminate the contract or to keep it in force is an option to exercise legal self-help at the instance of the sufferer. The innocent party is given a power which he is free to use without resorting to court. The basic position of English law is that the party in breach cannot dissolve the contract. This privilege is reserved to the injured party. But as the power to terminate a contract can be abused, so can the power to keep it in force. A typical case in which the issue arises is where the contract is kept in force so that the injured party can gain the promised performance.

Concluding, good faith is a vital feature of legal systems. Despite the fact that it isn't adopted by the English legal system, it is implied and applied in many situations in combination with the other remedies, sometimes. It is a fundamental principle directly related to honesty, fairness and reasonableness aiming to improve legal rules. It seems that the signs of traditional English hostility towards good faith might be abating. The courts have adopted a more sympathetic stance on a number of occasions recently and the express references to good faith in the Unfair Terms in Consumer Contracts Regulation 1999 and the Commercial Agents (Council Directive) Regulations 1999 will require English judges to use the language of good faith. While English law presently does not recognize a duty of good faith, it can be very firm in its treatment of those who act in bad faith. Secondly, many if not most of the rules of English contract law do in fact conform to the notion of good faith. It has been acknowledged that the foundation of a general rule of good faith can be discerned in the common law dust but the courts have not been prepared to use these particular rules *'as the piles for building the principle of good faith.'*[57] Moreover, if English law is to embrace international conventions or to play role in the development of the Principles of European Contract, it must come to grips with the language of good faith. And in what is now a global

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57 *Timeload Ltd v British Telecommunication Ltd.* [1995] EMLR 472; *Balfour Beatty* Civil Engineering Ltd. v *Docklands Light Railways Ltd* (1996) 78 Build R L 42, p. 58 ; and *Re* Debtors (Nos 4449 and 4450 of 1998) .

economy, it may not be possible for English contract law to resist the commercial and economic pressure in favor of an increasingly unified law of contract and unified law of contract will almost certainly contain a significant role for good faith and fair dealing. Lord Steyn best reflects the present argument when he turns to criticise the narrow approach in *Walford v Miles*, claiming that a good faith principle is perfectly practical and workable. However, he emphasized :

> I have no heroic suggestion for the introduction of a general duty of good faith in our contract law. It is not necessary to. As long as our courts always respect the reasonable expectations of the parties our contract law can satisfactorily be left to develop in accordance with its own pragmatic tradition. ....After all, there is not a world of difference between the objective requirement of good faith and the reasonable expectations of the parties.[58]

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58 Lord Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 *LQR* 433 p. 439.

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DEATH PENALTY UNDER DIFFERENT NATIONAL LEGAL SYSTEMS AND ASSESSING ITS COMPATIBILITY WITH INTERNATIONAL HUMAN RIGHTS

Mohammad Towhidul Islam

1. Introduction:

'Neither in the heart of individuals nor in the morals of society will there be a lasting peace as long as death is not outlawed.'[1]

In spite of the fact that the modern world is very sympathetic to the concept of human rights issues, death penalty as a form of capital punishment has still been going in rampage in the world. During 2001, at least 3,048 people were executed in 31 countries. At least 5,265 people were sentenced to death in 68 countries.[2] It is very funny to see that some advanced countries, which assert themselves to be pioneer for the protection and promotion of human rights and which are also very vocal to the human rights situation in the developing world, do impose death penalty on offenders, even on children. This research aims at looking into some of the legal systems of the world like the United States of America, United Kingdom, China, South Africa and Bangladesh containing penal provisions for imposing death penalty and examining how far the State death penalty provisions are in accord with international human rights norms and conventions.

2. Development of the Term 'Human Rights':

The core concept of human rights takes its position in the political vocabulary quite recently i.e. after World War II.[3] Its gradual promotion and emphasis paving the development of a legal policy doctrine, the creation of international agreements and monitoring mechanisms were a sentient reaction to the horrors of World War II. Once upon a time people felt helpless and insecure, then came out consensus among them on a certain list of those rights and freedoms, which characteristically and unavoidably belong to human beings,

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1 Camus, Albert, *Re'flexions Sur La Peine Capitale*, 1957, p 125.

2 Amnesty International Report, 2001, available at: http://www.web.amnesty.org/ai.nsf/index/ACT500052000 19/03/2003.

3 Davidson, Scott, *Human Rights*, Open University Press, London, 1993, p 1.

by way of giving necessary compensation in cases of violations. In criminology, the word 'punishment' is used to denote compensation to the violation of one's right to life and the violators (offenders) have to suffer different punishments depending on the aggravating form of violations (wrongdoings).[7] In cases of grave violation of the right to life, the wrongdoers are executed by the punishment of death penalty.

5. Death Penalty as a Form of Punishment in History:

As a form of punishment death penalty has been getting on all the way through history by different societies. The most primitive death penalty laws dated back the Eighteen Century B.C.'s in the Code of King Hammaurabi of Babylon. It contained death penalty provisions for twenty-five different crimes. The Fourteen Century B.C.'s Hittite Code, the Seventh Century B.C.'s Draconian Code of Athens and the Fifth Century B.C.'s Roman Law of the Twelve Tables made death penalty for all crimes. The death penalty was carried out by such means as crucifixion, beating to death, burning alive and impalement.[8]

During the Tenth Century A.D., Britain used hanging as the typical method of execution. In the subsequent century, William the Conqueror authorized hanging in times of war. This trend went wild in the Sixteenth Century, under the reign of Henry VIII. At that time more than 72,000 people are estimated to have been executed. Executions took place for such capital offences as marrying a Jew, not confessing to a crime and treason. By the Seventeen Century, Britain made 222 crimes punishable by death, including stealing, cutting down a tree, and robbing a rabbit warren. Assuming the severity of the punishment of death, many juries wouldn't convict defendants if the offence was not serious. This led to reforms of Britain's death penalty legislations. From 1823 to 1837, the death penalty was abolished for over 100 of the 222 crimes punishable by death.[9]

When European settlers occupied different parts of the world, they carried the practice of capital punishment. Britain as a colonial power influenced America's use of the death penalty more than any other country did. The first recorded execution in the new colonies was that

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7 Grupp, Stanley E. (ed.), *Theories of Punishment*, Indiana University Press, New York, 1971, p 6.

8 Ibid.

9 http://deathpenaltyinfo.msu.edu 19/03/2003.

of Captain George Kendall in the Jamestown colony of Virginia in 1608. Kendall was exposed to execution for being a spy for Spain. In 1612, Virginia Governor Sir Thomas Dale enacted the Divine, Moral and Martial Laws, containing the death penalty for even minor offences such as stealing grapes, killing chickens and trading with the Indians.[10]

A great number of societies think that death penalty prevents future murderers and the society has always used punishment to dispirit future criminals from wrongdoing. Since the society has the highest interest in preventing murder, it imposes the strongest punishment to deter murderers. If murderers are executed, potential murderers will definitely rethink for own life before killing.[11] It is presumed by statistical displays, which are not beyond question but convincing, capital punishment is likely to deter more than other punishments because people get frightened of death more than anything else.[12]

Some society imposes death penalty for the taking of a life. The balance of justice is disturbed on killing. Unless that balance is restored by taking murderer's life, society succumbs to a rule of violence. Retributionists rooted in religious values, historically maintain that it is proper to take an 'eye for an eye' and a 'life for a life'. Although the victim and the victim's family cannot be restored to the earlier status, at least an execution brings closer to the murderer (and closer to the ordeal for the victim's family) and ensures that the murderer will make no more victims.[13]

Despite the fact that for centuries, the argument for retaining or abolishing death penalty continues, the abolitionist movement has developed over the life of the human rights movement. Those who do not hold up the death penalty, find support in the writings of European theorists Montesquiu, Voltaire and Bentham and English Quakers John Bellers, John Howard and Cesare Beccaria. In the essay, Beccaria theorised that there was no justification for the State's taking of a life. The abolitionists fuelled by him believe that the death penalty is not a proven deterrent to future murders. The conclusion from

10 Ibid.

11 Ibid.

12 Van den Haag Ernest, Amnesty International Report, 2001, available in http://www.web.amnesty.org/ai.nsf/index/ACT500052000 19/03/2003.

13 Grupp, (ed), op. cite (1971).

years of deterrence studies is, at best, no more of a deterrent than a sentence of life in prison. Criminologists like William Bowers of Northeastern University, maintain that the death penalty has the opposite effect i.e. society is brutalized by the use of the death penalty and this increases the likelihood of more murder.[14] The United States of America, with death penalty, has a higher murder rate than the countries of Europe or Canada, which do not use the death penalty at all.

The abolitionists claim that death penalty does not deter as most people who commit murders either do not expect to be caught or do not carefully weigh the differences between a possible execution and life in prison before they act. Frequently murders are committed in moments of passion or anger, or by criminals who are substance abusers and acted impulsively. The US former Attorney General Jim Mattox who presided over many of Texas's executions, has remarked: 'I think in most cases you'll find that the murder was committed under severe drug and alcohol abuse.'[15]

The emotional infatuation for revenge is not a satisfactory justification for invoking a system of capital punishment, with all its associated problems and risks. The laws and criminal justice system should lead to higher principles that tell a complete respect for life, even the life of a murderer. Encouraging the motives of revenge, which ends in another killing, extends the chain of violence. Allowing executions supports killing as a form of 'pay-back.'[16]

The human society has never believed the notion of an eye for an eye, or a life for a life, which is a simplistic one. It is not legitimate to torture the torturer, or rape the rapist. Taking the life of a murderer is similarly a disproportionate punishment.[17]

The death penalty is unwarranted and unacceptable, since it does not single out the worst offenders. Rather it encourages an arbitrary group based on irrational factors such as the quality of the defence counsel, the country in which the crime was committed, or the race of the defendant or victim.

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14 Amnesty International Report, 2001, available in http://www.web.amnesty.org/ai.nsf/index/ACT500052000 19/03/2003.

15 Ibid.

16 http://deathpenaltyinfo.msu.edu 19/03/2003.

17 Ibid.

The risk of executing the innocent rules out the use of the death penalty. The death penalty alone imposes an irretrievable sentence. Once an inmate is executed, nothing can make a correction if a mistake has already been done. Many of the innocent accused stays in the death row as a result of factors remaining in the justice system.[18]In other cases, DNA testing has exonerated death row inmates. So it can be said that society takes many risks in which innocent lives are lost.[19]

6. Death Penalty under International Law:

The Universal Declaration of Human Rights, which was adopted in 1948 as an outcome of World War II, has incorporated most of the human rights. It has specially enshrined the protection of the right to life in Article 3. However, Article 29 recognises that human rights and fundamental freedoms are subject to reasonable restrictions. Though it did not specify clearly, it is presumed that by imposing death penalty as compensation to the violation of one's right to life, the right to life of the wrongdoer may be curtailed in certain circumstances. The death penalty is the only exception that is mentioned in Article 6 of the International Covenant on Civil and Political Rights 1976.

Looking into the consequences that the death penalty has been causing, the community of nations has adopted three international treaties: one is of worldwide scope and application and the other two is regional. They are Second Optional Protocol to the International Covenant on Civil and Political Rights, Protocol to the American Convention on Human Rights, and Protocols 6 and 13 to the European Convention on Human Rights.

Article 6 of the 1976 Covenant containing the right to life provision, is composed of six paragraphs, four of which (2, 4, 5 and 6) make direct reference to the death penalty. This provision which, is set in Article 3 of the Universal Declaration of Human Rights, completes it depending upon the interpretation that is given to Article 3 and with the limitations herein provided. While Article 6 begins by speaking out the right to life, effectually it continues to identify capital punishment as a permissible exception to the right to life, and then spells out limitations on the use of capital punishment. At the same

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18 Belluck , Pam, "Class of Sleuths on Death Row", *N. Y. Times*, February 5, 1999, p. A14.

19 Leibman, J. S., "The New Death Penalty Debate: What's DNA Got to Do with It?", (2002) 33: 2 *Columbia Human Rights Law Review*, p. 527.

time, in two places Article 6 also contemplates abolition of the death penalty.

(1) The Second Optional Protocol to the International Covenant on Civil and Political Rights:

The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of death penalty, adopted by the UN General Assembly in 1989, is of worldwide reach.

Article 1 of the Second Optional Protocol consists of two paragraphs. The first provides that no one within the jurisdiction of a State part shall be executed. The second paragraph was added imposing an obligation on States parties to abolish the death penalty.

Article 2 of the Second Optional Protocol permits reservation of the application of the death penalty in time of war, pursuant to a conviction for a most serious crime of a military nature committed during war.

Article 3 of the Second Optional Protocol obliges States parties to take account of information about progress in abolition of the death penalty in their periodic reports to the Human Rights Committee. According to articles 4 and 5, if a State party has already accepted the inter-State and individual communications procedures for the Covenant, these are also relevant to the Second Optional Protocol. However, a State may pronounce otherwise at the time of ratification or accession. Article 6 portrays the provisions of the Second Optional Protocol as additional to the International Covenants on Civil and Political rights. In assessing whether a State has violated article 6 of the Covenant by extraditing an individual to a country where he or she might be executed, the Human Rights Committee deems it relevant that a State may have ratified the Second Optional Protocol to the Covenants.

Any State, which is a party to the International Covenant on Civil and Political Rights, can happen to be a party to the Protocol. This Protocol has 49 parties, and 7 countries have signed but haven't yet ratified.[20]

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[20] Amnesty International, *Ratifications of International Treaties to Abolish Death Penalty*, 2001, available at: http://www.web.amnesty.org/ai.nsf/index/ACT500052000 19/03/2003.

(2) The Protocol to the American Convention on Human Rights:

The Inter-American human rights system of the Organization of American States, encircling the Western hemisphere, is one of two regional systems with a convention abolishing the death penalty. The Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty was adopted in 1990.

Article 1 asserts that the death penalty shall not be applied by States parties, in their territory to any person subject to their jurisdiction. In the Inter-American Protocol, States parties may apply the death penalty in wartime in harmony with international law, for extremely serious crimes of a military nature. The reference to international law, which incorporates the death penalty provisions of the Geneva Conventions as well as the additional protocols, does not emerge in the Second Optional Protocol.

Any State party to the American Convention on Human Rights can become a party to the Protocol. The Protocol has been signed and ratified by 8 countries; Chile has signed but not yet ratified.[21]

According to Roger Hood's study, 'the hundred year tradition of abolition in South America now hold sway over almost all of the region ... However history shows that, in this region at times of political instability, military governments may reinstate the death penalty for a variety of offences against the state and public order.' On the other hand, the membership of the Organization of American States also includes some of the most ardent retentionist States, including Jamaica, Trinidad and Tobago and the United States of America.[22]

(3) Protocol No. 6 to the European Convention on Human Rights:

Protocol No.6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) providing for abolition of death penalty, was adopted by the Council of Europe in 1982.

Article 1 of Protocol 6 establishes three principles:

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21 Amnesty International, 2001, available at: http://www.web.amnesty.org/ai.nsf/index/ACT500052000 19/03/2003.

22 Schriffin , N., "Jamaica Withdraws the Right of Individual Petition under the International Covenant on Civil and Political Rights", (1998) 92 :3 *American Journal of International Law*, p. 563.

a) the death penalty shall be abolished,

b) no one may be condemned to death and

c) no one may be executed.

The second sentence of Article 1 prohibits execution, even in the case of an individual destined to death prior to the entry into force of the Protocol.

Article 2 sets out the lone exception to the principle of abolition, that a State may make provision in its law for the death penalty in respect of acts committed in time of war or imminent threat of war. The principal effect of Article 2 is to confirm that the Protocol applies only in time of peace.

Article 3 prohibits any derogation by virtue of article 15 of the European Convention. Ordinarily Article 15 would apply to an additional protocol to the Convention, permitting States parties to derogate in time of war or public emergency threatening the life of the nation. The Protocol does not apply in time of war, where there is a clear overlap between its Article 2 and Article 15 of the Convention.

39 countries have signed and ratified this Protocol and 3 countries have signed but not yet ratified it.[23]

(4) Protocol No. 13 to the European Convention on Human Rights:

Protocol No. 13 to the European Convention on Human Rights adopted by the Council of Europe in 2002, provides for the abolition of death penalty in all circumstances, including the time of war or of imminent threat of war. This Protocol has 8 Articles with a preamble. Article 2 of the Protocol prohibits any derogation under Article 15 of the European Convention of Human Rights. Article 3 of the Protocol prohibits any reservation under Article 57 of the European Convention of Human Rights.[24]

This Protocol has only 5 parties and there are 34 States who have signed but not yet ratified including France, Germany and United Kingdom.

Besides those international treaties, there are some other conventions such as-

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[23] Amnesty International Report, 2001, available at: http://www.web.amnesty.org/ai.nsf/index/ACT500052000 19/03/2003.

[24] http://deathpenaltyinfo.msu.edu 19/03/2003.

(1) the Convention on the Rights of the Child, which prohibits execution of individuals for crimes committed while under the age eighteen years. Article 51 explicitly permits reservations, but only to the extent that they are compatible with the object and purpose of the Convention;

(2) the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment which envisages that 'all were agreed that the death penalty was a cruel, inhuman and degrading punishment';

(3) Convention on the Elimination of All Forms of Racial Discrimination, which in its article 5 says, on the issue of death penalty, that States parties will '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, ...'.[25]

7. Death Penalty under International Islamic Law:

a) The Islamic Council adopted a Universal Islamic Declaration of Rights in 1981, which states: 'Human life is sacred and inviolable and every effort shall be made to protect it. In particular no one shall be exposed to injury or death, except under the authority of the law.' The concluding phrase appears to permit capital punishment and is in any case consistent with the practice of all Islamic States.

b) The Islamic Conference has prepared a document on human rights and Islam, in which Article 2 guarantees the right to life to every human being.[26]

c) The Arab Charter of Human Rights, adopted in 15 September 1994, but not yet ratified by any members of the League of Arab States, proclaims the right to life in the same manner as the other international instruments. However, three distinct provisions contained in Articles 10, 11 and 12 recognize the legitimacy of the death penalty in the case of 'serious violations of general law,' prohibit the death penalty for

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25 Schabas, William A., *The Abolition of Death Penalty in International Law*, Cambridge University Press, Second Edition, 1997, pp. 364-368.

26 Schabas, William A., "Islam and Death Penalty", (2000) 9: 1 *Bill of Rights Journal*, pp. 223-37.

political crimes and exclude capital punishment for crimes committed under the age of eighteen and for both pregnant women and nursing mothers for a period of up to two years following childbirth.[27]

8. Death penalty under State Legal Systems:

On the basis of the international conventions and norms stated above, the death penalty provisions of some leading and developing legal systems will be closely examined in the following way---

(1) The United States of America:

The US Supreme Court Justice Arthur Goldberg once said that the deliberate institutionalised taking of human life by the state is the greatest degradation and humiliation of the human personality that one can think of. Although most developed nations in the world have abandoned the death penalty, the US which purports to be a leader in the protection of human rights, retains the death penalty even in the case of children with Somalia.[28]

The death penalty law, which travelled to America with the European settlers, exists till date with some exceptions. On seeing global protests by the theorists, criminologists and politicians against death penalty having its inhumane consequences, American intellectuals were influenced for abolition of death penalty. Here the credit goes especially to Beccaria, who persuaded them by saying that there was no justification for the States taking for a life.[29] In 1794 Pennsylvania repealed the death penalty for all offences except first-degree murder and followed by Michigan, Rhode Island and Wisconsin, which abolished the death penalty for all crimes as well. Although some US states began abolishing the death penalty, most states held onto capital punishment. Some states made more capital offences, especially for offences committed by slaves. In 1838, in an effort to make the death penalty more edible to the public, some states passed laws against mandatory death sentencing, instead enacting discretionary death penalty statutes. With the exception of a small

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27 Ibid.

28 Bright, S. B., "Will the Death Penalty Remain Alive in the Twenty-First Century: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent" (2001) 1 *Wisconsin Law Review*, p. 1.

29 Beccaria, C., *On Crime and Punishment*, H. Paoluccitrans, 1963, available in http://deathpenaltyinfo.msu.edu 19/03/2003.

number of rarely committed crimes in a few jurisdictions, all mandatory capital punishment laws had been abolished by 1963. During the Civil War, opposition to the death penalty declined, since more attention was given to the anti-slavery movement.[30]

From 1907 to 1917, six states totally outlawed the death penalty and three limited in to the rarely committed crimes of treason and first-degree murder of a law enforcement official. However, this reform was for the time being. There was turbulent atmosphere in the US, as citizens began to panic about the threat of revolution in the wake of the Russian Revolution. In addition, the US had just entered World War I and there were severe class conflicts as socialists mounted the first serious confrontation to capitalism, As a result, five of the six abolitionist states reinstated their death penalty by 1920.[31]

From the 1920s to the 1940s, there was restoration in the use of the death penalty. This happened partially because of the writings of criminologists, who argued that the death penalty was an indispensable social measure. The 1960s came across challenges to the fundamental legality of the death penalty. Before then, the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution were interpreted as permitting the death penalty. However, in the early 1960s, it was recommended that the death penalty was a 'cruel and unusual' punishment and therefore unconstitutional under the eighth Amendment.

The question of the arbitrariness of the death penalty was brought before the Supreme Court in *Furman v. Georgia*.[32] Furman, bringing an Eighth Amendment challenge, argued that capital cases resulted in arbitrary and capricious sentencing. In 9 separate opinions, and by a vote of 5 to 4, the Court held that Georgia's death penalty statute, which gave the jury absolute sentencing discretion without any guidance as to how to exercise that discretion, could result in arbitrary sentencing. The Court held that the design of punishment under the statute was therefore 'cruel and unusual' and violated the Eighth Amendment. Thus, on 29 June 1972, the Supreme Court effectively invalidated 40 death penalty statutes, thereby commuting the sentence of 629 death row inmates around the country and

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30 http://deathpenaltyinfo.msu.edu 19/03/2003.

31 Ibid.

32 408 U. S. 238 (1972).

suspending the death penalty because existing statutes were no longer valid. To address the unconstitutionality of unguided jury discretion, some states eliminated all of that discretion by mandating capital punishment for those convicted of capital crimes. However, the Supreme Court in *Woodson v. North Carolina* held this practice unconstitutional.[33]

Other states sought to diminish that discretion by providing sentencing guidelines for the judge and jury when deciding whether to impose death penalty. The guidelines authorized for the introduction of aggravating and mitigating factors in determining sentencing. These guided discretion statutes were permitted by the Supreme Court in *Gregg v. Georgia*.[34] The Court also said that the death penalty itself was constitutional under the Eighth Amendment. The Court maintained that only after the jury has determined that the defendant is guilty of capital punishment, it would decide in second trial whether the defendant should be sentenced to death or given a lesser sentence of prison time. The Court also accepted the practice of automatic appellate review of convictions and proportionality review.

After the World War II, when many European Countries prohibited or restricted death penalty signing and ratifying international treaties abolishing death penalty, the federal government adopted the death penalty in 1988, expanded it to over forty crimes in 1994 and limited federal review of capital cases in 1996.[35] The US retained death penalty through some limitations on capital punishment. The US Supreme Court held in *Coker v. Georgia*[36] that the death penalty is an unconstitutional punishment for the rape of an adult woman when the victim was not killed.

The Supreme Court banned the execution of insane persons in *Ford v. Wainwright*.[37] However, the Court held that executing persons with mental retardation was not a violation of the Eight Amendment in *Perry v. Lynaugh*.[38] Mental retardation would as an alternative, be a mitigating factor to be considered during sentencing. The United

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33 428 U.S. 280 (1976).

34 428 U.S. 153 (1976).

35 The Violent Crime Control and Law Enforcement Act 1994.

36 433 U.S. 584 (1977).

37 477 U.S. 399 (1986).

38 492 U.S. (1989).

States Supreme Court agreed to reconsider a twelve-year-old ruling permitting the execution of the mentally retarded in *McCarver v. North Carolina*.[39] Governor Jeb Bush confirmed an administrative halt on executions of the retarded in Florida, and legislative bans thereafter passed the legislatures of Arizona, Connecticut, Florida, Missouri, and Texas.[40]

From detention to sentencing, the criminal justice system treats people in a different way based on their race. A person of colour is more likely than a white person to be stopped up by the police, to be abused by the police during that stop, to be arrested, to be deprived of bail, to be charged with a serious crime, to be convicted, and to receive a harsher sentence.[41]

Meticulous judges, who have had no knowledge about people of other races, may be prejudiced in their decision making by racial stereotypes and attitudes they have developed over their lives. Without realizing it, a white judge may consider a young white man who is before the court for sentencing as a youth with potential in need of help, but see a young black man as a thug who is to be feared.[42]

The same favouritism, whether conscious or unconscious, influences the decisions of prosecutors, jurors and other actors in the system. The prosecutor has always discretion to ask for death penalty or not to ask for death penalty or to recommend a sentence less than death in exchange for the defendant's guilty-plea.

That race plays a crucial role in capital sentencing has been confirmed by several studies. Most recently, the US Department of Justice made a thorough examination of its own record on the use of the death penalty and uncovered that over three-fourths of the people given death penalty were members of racial minorities.

The Supreme Court's decision in a case, named *McCleskey v. Kemp*[43]race was again in the headline The Supreme Court held that racial disparities would not be acknowledged as a constitutional

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39 532 U.S. 941 (2001).

40 Leibman, op cit., at p. 527.

41 Ibid.

42 Ibid.

43 481 U.S. 279 (1987).

violation of 'equal protection of law' unless intentional racial discrimination against the defendant could be shown.[44]

Poverty enhances the chances of being sentenced to death. All the way through history, the death penalty has been retained almost exclusively for those who are poor. A Court-appointed lawyer who may be short of the skill, resources, and, in some cases, even the inclination to provide a competent defence is representing the major consequence of poverty.[45]

In the late 1980s the Supreme Court disposed of three cases regarding the constitutionality of executing juvenile offenders. In *Thompson v. Oklahoma*,[46] four Justices held that the execution of offenders aged fifteen and younger at the time of their crimes was unconstitutional. The fifth vote was Justice O'Connor's concurrence, which restricted Thompson to states without a specific minimum age limit in their death penalty statute. The joint effect of the opinions by the four Justices and Justice O'Connor is that no state without a minimum age in its death penalty statute can put to death someone who was under sixteen at the time of the crime.

The subsequent year, the Supreme Court held in the cases *Stanford v. Kentucky* and *Wilkins v. Missour*[47] that the Eight Amendment of the Constitution doesn't not prohibit the death penalty for crimes committed at age sixteen or seventeen as it does not fall within the Eight Amendment's prohibition against 'cruel and unusual punishments.' At present 15 States block the execution of anyone under 18 at the time of his or her crime.[48]

In 1992, the United States ratified the International Covenant on Civil and Political Rights. Article 6(5) of this treaty requires that the death penalty not be used on those who committed their crimes when they were below the age of 18. However, although the US ratified the treaty, they have made reservation as to the right to execute juvenile offenders. The Human Rights Committee noted that the ICCPR neither prohibits nor permits reservations and that 'it is desirable in principle that States accept the full range of obligations' and as

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44 Leibmann (2002), op. cit.

45 Ibid.

46 487 U.S. 815 (1988).

47 492 U.S. 361 (1989).

48 Leibmann, (2002), op. cit.

evidenced by the preparatory works, the drafters intended to create binding norms that give effect to the standards of the UDHR. As the reservation made by the US offends a peremptory or binding norm, including the prohibition on executing juveniles, it is illegal and must be cut off from the treaty and the US will be bound to the ICCPR without the benefit of the reservation.[49]

Even though the US participated in the drafting of the American Convention on Human Rights and has signed it, it has not ratified it. It failed to put objection to the prohibition of the juvenile death penalty. Therefore, the United States is abstained to Article 4 (Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age...).[50]

Every UN member had ratified the Child Rights Convention except the US and Somalia. A few months before the United Nations Human Rights Committee announced that reservations concerning execution of children were incompatible with rules of customary international law and therefore were invalid. The US seeing this situation and getting no other alternative to make reservation, refused to ratify it.[51]

Although the US has not ratified Protocols I and II to the Fourth Geneva Convention, it has ratified the Geneva Convention. Upon the adoption of the text of the Geneva Convention, the US reserved 'the right to impose the death penalty in accordance with the provisions of Article 68', without regard to whether the offences referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins. The US, however, made no reservation to Article 68 at the time of ratification.[52]

Given these, the US is in violations of the ICCPR, the ACHR, the Child Rights Convention and the Fourth Geneva Convention. Although the US reserved the right to execute defendants according to the standards set by the Supreme Court, its reservations are invalid because they are incompatible with the object and purpose of these

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49 Ibid.

50 Levesque, C. A., "International Covenant on Civil and Political Rights: A Primer for Raising a Defense against the Juvenile Death Penalty in Federal Courts", (2001) 50:3 *American University Law Review*, p. 755.

51 Ibid.

52 Ibid.

treaties. Although its reservations are illegal, the US is still a party without the benefit of the reservations.[53]

The prohibition of juvenile death penalty has matured into a *jus cogens*, i.e. customary rule of international law. There is a worldwide acceptance of prohibition of juvenile death penalty, which satisfies the first element of generality. As there is little discrepancy concerning the prohibition, the second element of consistency is met. The prohibition has lasted long enough for an extensive and virtually uniform practice to develop, which satisfies the third element of duration. A presumption exists that *opinio juris*, the final element, is fulfilled as only a handful of states practice the juvenile death penalty. Therefore the US is in violation of international customary law regardless of whether its reservations to these four treaties are legitimate.

In 2004, the US has imposed death penalty on 59 persons meaning 20 executions per 100 million residents.[54]

(2) The United Kingdom:

"It is queer to look back and think that only a dozen years ago the abolition of the death penalty was one of those things that every enlightened person advocated as a matter of course, like divorce reform or the independence of India. Now, on the other hand, it is a mark of enlightenment not merely to approve of executions but to raise an outcry because there are not more of them."[55]

Death penalty was the reprimand for murder in English law till the first half of the Twentieth Century. While retribution continued to exist only in a symbolic form elsewhere in the criminal law, capital punishment, as Oxford criminologist Max Grunhut maintained, was a 'powerful relic of retaliation in kind'. The law still replicated the ancient society that every murderer forfeits his life because he has taken another's life: 'He that smiteth a man, so that he die, shall be surely put to death'.[56]

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53 Ibid.

54 http://en.wikipedia.org/wiki/Right_to_life 18/10/2003.

55 George Orwell.

56 Hodgkinson, P., "Europe - A Death Penalty Free Zone: Commentary and Critique of Abolitionist Strategies", (2000) 26: 3 *Ohio Northern University Law Review*, p. 626.

From 1887, executions for those under eighteen years were virtually abolished by the use of royal prerogative of mercy. The Children Act 1908 formally abolished the death penalty for persons under sixteen; the Children and Young Persons Act 1933 confirmed capital punishment for those under eighteen. The Sentence (Expectant Mothers) Act 1931 prohibited the death sentence on a pregnant woman.[57]

In practice, the rigidity of the law was lessened by the exercise of the royal clemency. The effect of a reprieve, before 1948, was to decrease the sentence to penal servitude for life.

Nonetheless, the debate in favour of retaining or abolishing death penalty continued in the Parliament, media and streets. Political scientists like John Stuart Mill and his followers supported the retentionists saying that death is more humane than the 'rotting death' of a long prison and Harold J. Laski took the abolitionist view. The Labour Party introduced the Criminal Justice Bill in the Parliament and some amendments were proposed abolishing death penalty but the bill was delayed due to the World War II. After the World War II, some public support went in favour of the rententionists as Nuremberg lent justification to a retributive approach to indigenous murder.[58] More influential was the rise in officially recorded crime and the 'moral panic' the figures generated. So there was no solution on the issue of death penalty. Prior to 1965, there had been a number of attempts towards the abolition, which were debated and defeated in the main through the un-elected and largely hereditary House of the Lords where the Bishops were instrumental in carrying the opposition.[59]

Following the Royal Commission (Gower Report) in 1953 to report on capital punishment, as a concession the Homicide Act of 1957 was drafted into legislation to distinguish between capital and non-capital homicide. Luckily for the abolitionist movement, this legislation had been drafted so poorly as to make the dissimilarity between capital and non-capital even more ambiguous. The Act attempted to define as capital those crimes that might be deterred by the death penalty,

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57 Ibid.

58 Bailey, V., "Shadow of the Gallows: The Death Penalty and the British Labour Government, 1945-51", (2000) 18: 2 *Law and History Review*, p. 305.

59 Ibid.

overlooking any consideration of a moral dimensions. Many commentators assumed that the problems associated with the legislation would lead to perverse jury decisions and this, combined with a recent history of questionable executions, led finally to abolition.[60]

The Murder (Abolition of the Death Penalty) Act of 1965 abolished the death penalty except for treason and piracy, initially for a period of five years, after which it was ratified by a free vote in Parliament.

In 1990, the Parliament considered an abolitionist amendment attempting to bring the residual legislation into line by replacing the words 'hanged by the neck until he be severely dead' with 'sentenced to imprisonment for life' but was defeated. The last instance on which there was a restoration debate was in February of 1994, when all amendments were defeated because of the Conservative Party.[61]

Labour's huge win at the general election in 1997 gave all those with an interest in human rights great hope that the UK had finally come into line with its EU partners in such areas as the death penalty, minimum wage, freedom of information and the incorporation of the European Convention on Human Rights into domestic legislation. The House of Commons voted on 20 May 1998, to incorporate into domestic law the 6th Protocol of the ECHR, which was subsequently ratified on 20 May 1999. In the meantime, in the upper house, the House of Lords' amendments to the Crime and Disorder Act, 1998, led to the repeal of the remaining civilian crimes of treason and piracy. The final provisions for the death penalty under military law were eliminated when the Human Rights Act came into force in November 1998.[62]

There waited one more hurdle for the UK to straddle. This was finally consummated with ratification of the 2nd Optional Protocol to the International Covenant on Civil and Political Rights in December 1999. Little or nothing of these developments was reported in the media, suggesting perhaps that the Government's opposition was superfluous and misjudged. For example, there was no remark, adverse or otherwise, following the decision to sign the 6th Protocol to the ECHR and the 2nd Optional Protocol to the ICCPR. This is especially attention grabbing, given the sensitivity there is in the UK

60 Ibid.

61 Ibid.

62 Ibid.

to issues of sovereignty and its reputation for being somewhat europhobic.[63]

The United Kingdom has signed the Protocol No.13 to the European Convention on Human Rights i.e. abolition of death penalty in all circumstances, including time of war or of imminent threat of war, but it has not yet ratified the Protocol.[64]

(3) The People's Republic of China:

For centuries, the state machinery on the Chinese mainland has had a very advanced system of legal enumeration and codification. Imperial dynasties dating back to the Tang (A.D. 619-906) enacted full sets of penal statutes with significant staying power. One factor in such perpetuity may have been the threat of violent justice. Tradition dates the first public execution in China as early as 2601 B.C. In each dynastic Code thereafter, up to and including the final Code of Qing dynasty, there were well over one hundred crimes (such as Plotting Rebellion and Gross Unfilialness) legally punishable by death. In these instances when 'evil is extreme', the offender was usually executed by slicing without the possibility of amnesty. In addition to harsh punishment for these serious crimes against the social and political order, the imperial Codes imposed death sentences for 'ordinary crimes', including trespassing on imperial property, non-manifest theft and the taking of illegal property by an official or clerk. Useless to say, by the time of the Qing the lengthy list of death-eligible crimes in the Code was enforced with great frequency.[65]

The second decade of the Twentieth Century witnessed the fall of the imperial system in China, but the death penalty was retained by its successors. During this turbulent 'Republican Era' from 1911 to 1949, the formal authorities, from Yuan Shikai's Revolutionary Alliance to the developing Chinese Communists and Sun Yat-sen's National People's Party, all had their own laws imposing death penalty. The 'warlords' actually in command of most of the mainland territory during this period certainly had their own extreme form of justice.

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63 Ibid.

64 Amnesty International, 2001, available at: http://www.web.amnesty.org/ai.nsf/index/ACT500052000 19/03/2003.

65 Mothy, J. T., "Internal Perspectives on Chinese Human Rights Reform: The Death Penalty in the PRC", (1998) 33: 1 *Texas International Law Journal*, p. 189.

Chiang Kai-shekh's original Criminal Code of 1935 contained a number of crimes punishable by death.[66]

In 1956, after a period of warlord and revolutionary violence, Mao Zedong denounced capital punishment and broke with the tradition of legal violence to the people and he expected death penalty to be abolished. But the Criminal Law adopted in 1979 after Mao era expanded the list of crimes punishable by death, a far cry from the hundreds in the Qing Code.[67]

Under both systems i.e. Qing Code and Criminal Law, suspects were put to hardship to extract confessions; summary and secret trials were held, often without appropriate defence; where no law was available to punish, analogy was drawn and sentences were confirmed by nominal approval from the higher courts; executions were held in public places and executants were shown shackled at the ankles, handcuffed behind their backs until their execution. Prisoners may be paraded in trucks driven from a detention centre to the execution ground, often via a public rally sometimes with placards hanging from their necks listing their names and alleged crimes.[68]

The new Criminal Law was passed by the fifth session of the Eighth Congress on 14 March 1997. It specifically laid down three principles that provide the sharpest break from imperial law: abolition of analogy stipulation, the end of special enforcement for cadres and the uniform imposition of punishments per severity of the crime. After the revision of Criminal Law, a total of 68 crimes including non-violent crimes, such as economic crimes, bear the death penalty in 'serious circumstances'.[69]

The nationwide anti-crime campaign, Yanda (Strike Hard) launched on 28 April 1996, led to mass executions in 1996 on a level unprecedented since 1983 and was marked by numerous cases of

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66 Ibid.

67 Ibid.

68 Amnesty International Report, February, 2001, available in http://www.web.amnesty.org/ai.nsf/index/ACT500052000; visited on 19/03/2003.

69 Svensson, Marina, "State Coercion, Deterrence, and the Death Penalty in the PRC", paper presented to the Annual Meeting of the Association for Asian Studies, Chicago, 22-25 March, 2001.

summary justice.[70] The campaign has continued until today, focussed in different provinces, on selected crimes and criminal activities. The crimes targeted include primarily corruption, drug trafficking, separatism and more general economic crimes. During 'Strike Hard' people are often sentenced to death or executed for crimes, which may have received a lesser penalty at other crimes or in another region.[71]

Under revised Criminal Law, death penalty will not be imposed to pregnant women and persons under the age of 18 at the time of their alleged offence. Though China, who is a party to the Convention of Child, cannot execute a juvenile of 18 under its own law as well, imposed death to Feng Jinliang for kidnapping and murder of two children and he was executed on 22 April 1999.

Though China is one of the five members of UN Security Council, it does not comply with international standards of human rights norms. The application of the death penalty for the non-violent crimes such as economic crimes causes a problem for China as it is in the process of ratifying ICCPR.

In 2004, China executed death penalty in 3,400+ cases meaning 260 executions per 100 million residents.[72]

(4) The Republic of South Africa:

On the death penalty provision in Section 277 of the Criminal Procedure Act, the Constitutional Court of the Republic of South Africa in *State v. Makwanyane*[73] said that the death penalty was unconstitutional for breaching the rights to life and human dignity, and also for being unjustifiable in an open and democratic society.[74]

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70 Boxer, J. T., "China's Death Penalty: Undermining Legal Reform and Threatening National Economic Interest", (1998) 22: 2 *Suffolk Transnational Law Review*, p. 593.

71 Amnesty International Report, August, 1997, available at: http://www.web.amnesty.org/ai.nsf/index/ACT500052000 visited on 19/03/2003.

72 http://en.wikipedia.org/wiki/Right_to_life 18/10/2003.

73 1 LRC 269 (1995).

74 Section 33 (1) of the Constitution provided that the rights entrenched in the Constitution may be limited by law of general application, provided that such limitations shall be permissible only to the extent that it is reasonable and justifiable in an open and democratic society based on freedom and equality; and shall not negate the essential content of the right in question. The Court held that since these requirements are not met, the provision of death penalty must be held to be inconsistent with Section 11(2) of the Constitution prohibiting 'cruel, inhuman and degrading treatment or punishment".

Moreover, South Africa is a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights, which provides for the total abolition of death penalty.

(5) The People's Republic of Bangladesh:

The death penalty provisions contained in several legislations in Bangladesh can be compared with the provisions found in the legislations of Britain before 1823 where the death penalty was imposed for 222 crimes or with the 1612 Virginia Divine, Moral and Martial Laws, which provided the death penalty for even insignificant offences such as stealing grapes, killing chickens and trading with the Indians. The following are the offences punishable by death in the legislations of Bangladesh:

a) under the Penal Code 1860-
   i) waging or attempting to wage war or abetting waging of war against Bangladesh,[75]
   ii) abetment of mutiny, if mutiny is committed in consequence thereof,[76]
   iii) giving and fabricating false evidence with intent to cause any person to be convicted of a capital offence, if an innocent person is consequently convicted and executed,[77]
   iv) murder,[78]
   v) murder by a person under sentence of imprisonment for life,[79]
   vi) abetment of suicide of child or insane person,[80]
   vii) attempt by life convicts to murder, if hurt is caused[81]
   viii) kidnapping or abducting a person under the age of ten,[82]
   ix) dacoity with murder.[83]
b) under the Special Powers Act 1974-
   i) sabotage,[84]

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75 Section 121, The Penal Code, 1860.
76 Section 132, ibid.
77 Section 194, ibid.
78 Section 302, ibid.
79 Section 303, ibid.
80 Section 305, ibid.
81 Section 307, ibid.
82 Section 364A, ibid.
83 Section 396, ibid.
84 Section 15, The Special Powers Act 1974.

ii) hoarding or dealing in black market,[85]
iii) counterfeiting currency notes and Government stamps,[86]
iv) smuggling,[87]
v) adulteration or sale of adulterated food, drink, drugs or cosmetics [88]and
vi) attempt for committing offences punishable with death.[89]

c) under the Arms Act 1878 - using unlicensed firearms for murder;[90]
d) under the Explosives Act 1884 - abetment and attempts to commit offences punishable with death;[91]
e) under the Explosive Substances Act 1908- causing explosion likely to endanger life, person or property;[92]
f) under the Women and Children Anti-oppression Act 2000-
i) causing or attempt to cause death to women and children by inflammatory, corrosive or poisonous substances.[93]
ii) trafficking women,[94]
iii) trafficking children,[95]
iv) detaining women or children for claiming pawn[96]
v) causing death by rape,[97]
vi) taking part in gang rape[98]
vii) causing death for dowry,[99] and
viii) taking any part of the body off for engaging a child in begging etc.[100]

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85 Section 25, ibid.
86 Section 25A, ibid.
87 Section 25B, ibid.
88 Section 25C, ibid.
89 Sections 25D, ibid.
90 Section 20A of the Arms Act 1908.
91 Section 12 of the Explosives Act 1884.
92 Section 3 of the Explosives Substances Act.
93 Section 4 of the Women and Children Anti Oppression Act 2000.
94 Section 5, ibid.
95 Section 6, ibid.
96 Section 8, ibid.
97 Section 9(2), ibid.
98 Section 9 (3), ibid
99 Section 11(a), ibid.
100 Section 12, ibid.

Bangladesh is a party to the Convention on the Rights of Child and hence it cannot impose death penalty on children. Sometimes death penalty is inflicted on children here in Bangladesh due to faulty birth registration system which fails to determine who is a child.

Bangladesh is neither a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights abolishing death penalty nor had been in the process of signing and ratifying it. For this reason it may be claimed that the Second Optional Protocol to the International Covenant on Civil and Political Rights is not binding on Bangladesh. Still Bangladesh can abolish death penalty provisions from its statutes if it tries to promote and protect human rights in compliance with the International Bill of Rights. This is because the Bill neither supports violation of one's inherent right by another nor encourages taking off another's life as compensation for his or her wrongdoing nor expects the violators of one's right to place in the inhumane conditions of the condemned cell for ages awaiting hanging.

However, the Constitution of the People's Republic of Bangladesh embedded in the International Bill of Rights gives recognition that fundamental rights are not absolute; they are subject to reasonable restrictions. Though it has not mentioned plainly, it can be taken from reading that by imposing death penalty as payment to the violation of one's right to life, the right to life of the wrongdoer is shortened in certain circumstances, e.g. trying the offenders without having properly heard, putting the inmates in the brutal conditions of the condemned cell for a considerable period of time awaiting execution.

In 2004, Bangladesh hanged in 7+ cases meaning 5 executions per 100 million residents.[101]

9. Conclusion:

At the dawn of the 21st Century, the death penalty is considered by most civilized nations as a cruel and inhuman punishment. Like other civilized countries Bangladesh should also consider abolishing cruel and inhuman punishment of death penalty. It has been abolished *de jure* or *de facto* by 106 nations, 30 countries have abolished it since 1990. However, the death penalty continues to be commonly applied in other nations. China, the Democratic Republic of Congo, the United States and Iran are the most prolific executioners in the world. Indeed, the USA is one of six countries (including also Iran in 2004, 159+ hanging; Vietnam in 2004, 64+; Nigeria, Pakistan in 2004, 15+; Saudi

101 <http://en.wikipedia.org/wiki/Right_tolife18/10/2005>.

Arabia in 2004, 33+ and Yemen in 2004, 6+), which executes people who were under 18 years old at the time they committed their crimes.[102] For executing people under 18, the USA and Somalia have not yet fully ratified the UN Child Convention. While international documents have restricted and in some cases even banned the death penalty, its application is still not considered to be against customary international law. Much debate continues in the USA as to whether it constitutes suitable punishment, at least to the most heinous crimes. In recent years, the debate has been further energised by the use of new technologies, which have shown that a large proportion of people sentenced to death are, indeed, innocent.

Despite the fact that we are very far from achieving a worldwide ban on capital punishment considering its harshness, there are certain situations in which the death penalty as a capital punishment should be looked upon as a violation of universally accepted international norms. Where the death sentence is imposed on minors, pregnant woman or persons with psychiatric disorder, at odds with internationally recognised norms, it constitutes a human rights violation. Even where a death sentence is carried out in circumstances that are not in accordance with internationally accepted procedural norms, this constitutes a human rights violation. Further, where the death penalty is imposed for less serious crimes - economic crimes or drug offences – this constitutes a violation of human rights. Again, not only on the grounds of personal circumstances, or because of the disproportionality of the punishment in relation to the crime, but also on the grounds of attendant circumstances, such as the manner in which the sentence is imposed or executed, the conditions of detention and the time spent awaiting execution, the death penalty amounts to a violation of human rights.[103]

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102 Ibid.

103 Some portion of the research was done as a part of the coursework at the University of East London and later on it was published in *The Daily Star* , Dhaka, on 29 June 2003.

POWER IMBALANCE AND ITS IMPACT ON MEDIATION OF FAMILY DISPUTES INVOLVING FAMILY VIOLENCE: AUSTRALIAN PERSPECTIVE

Jamila Ahmed Chowdhury

Abstract: *Gender based power imbalance exists in human civilization from a time immemorial. Women in an advanced country like Australia are also not liberated from such kind of prejudice. Imbalance of power between male and female may escalates because of the existence of family violence characterized by a process of male dominance and control. The objective of this article is to accentuate how the existence of family violence in Australian society magnifies their already existent gender based power imbalance and make mediation ineffective as a tool for resolving family disputes involving family violence. It will also suggest some measures to screen out disputes involving family violence and to deal with such family violence cases when effective screen out is not possible. Finally, some recommendations have been provided to address this family violence issue by taking measures ranging from short to long term solutions with an ultimate goal of women's empowerment in the society.*

Introduction:

Australia, a country with a history of using non-litigatious alternative forms of dispute settlement from a time immemorial,[1] has formally recognized the use of Alternative[2] Dispute[3] Resolution[4] (ADR)[5] from

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1 Alternative forms of dispute resolution system, complementing the formal adjudicative system, is found to be practiced in Australia from a time that might dates back as much as 40 thousand to 100 thousand years. See more detail in Spancer, D., and Altobelli, T., *Dispute Resolution in Australia: Cases, Commentary and Materials*, Lawbook Co., Pyrmont, NSW, 2005, p. 2.

2 ADR processes are *'alternative'* to formal adjudicative trial in two important aspects. Firstly, people enter into formal trial with a win-lose strategy, whereas the objective of different ADR techniques is to attain more consensual solutions to a problem with a win-win strategy. Secondly, in formal court trial, parties assign third parties- lawyers and judges- to control the process and outcome of the dispute. Respective lawyers advocate on behalf of the parties and judge makes a binding decision to the dispute for the parties. But, parties can exert more control about the process and outcome of their dispute resolution process by getting recourse to various ADR processes. See more detail in Stintzing, H., *Mediation – A Necessary Element in Family Dispute Resolution?*, Peter Lang, Berlin, 1994, p. 37.

3 Dispute arises when acts or events made by one person are injurious to another person and in detriment to his rights, persons sustained injury claim some

its first constitutional journey[6] started more than a century ago. Over more than ten decades' experiments have been made with various alternative forms, such as ombudsman, tribunals, arbitration, mediation, counseling etc. Although the major impetus on the use of ADR has started only over the last 30 years,[7] it has been claimed that one major breakthrough attained in the use of ADR in Australia was initiated after the passage of the Family Law Act 1975 (Commonwealth) that for the first time uses the option of *'mediation'* in resolving disputes.[8] Mediation, after its initiation in 1975, has spurred great enthusiasm among people, as it provides the ultimate control of making any decision on the hands of the parties concerned.[9] It also fascinated the policy makers by offering an apparently cheaper and quicker means of resolving disputes complementing the formal adjudicative system. Practitioners and policy makers sometimes show

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remedy from the injurer and the person causing injury deny to honor such claim. See for more detail ibid, p. 39.

4 A dispute is resolved if both the parties to a dispute consider its solution as acceptable. Since in ADR parties participate directly in the decision making process and make more consensual decision, it is more oriented to resolve a dispute than the formal adversarial system where parties enter with a win-lose strategy and the third party binding decision made by a judge is more intended to *settle* the dispute than to *resolve* it. It is more likely that decision made under adversarial system will not resolve the dispute, for the loosing party may have some reservation about the decree made. See for more detail ibid, p. 41.

5 ADR refers to processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also be used to mean assisted or appropriate dispute resolution. Some also use the term ADR to include approaches that enable parties to prevent or manage their own disputes without outside assistance. See also PDR, (NADRAC's brochure: What is ADR?); NADRAC, Terminology: A Discussion Paper, 2002, at p. 29.

6 According to section 51 of the Constitution of Commonwealth of Australia, "The Parliament shall, subject to the Constitution, have power to make laws for peace, order, and good government of the Commonwealth with respect to:- (xxxv.) Conciliation and arbitration for the prevention and settlement of industrial disputes beyond the limits of any state", cited in supra note 1.

7 Ibid., p.5.

8 Ibid.

9 According to the National Alternative Dispute Resolution Advisory Council (NADRAC), "Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement..... Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement." Supra note 5, p. 34.

a great concern and enthusiasm to solve family disputes through mediation.[10] They advocate for using mediation to get advantage of time and cost[11] savings that can be achieved through mediation. Another important reason that the proponents of mediation in family dispute present is their desire to rescue and keep intact family bondage in Australian society[12]. According to them, mediation can be a more suitable dispute resolution method where a family is involved, for mediation facilitates consensual decision by reducing hostility and antagonism between the participants through successful negotiation under a win-win strategy. But, in case of formal court trial the discord between the parties increases as it follows a win-lose strategy. *Family Law Act 1975* (Cth.) also sets principle to protect the intact family tie by advising any court exercising its jurisdiction under this Act, to consider *'the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into life'*.[13] As time passes and as mediation has been practiced to settle disputes with diversified natures, several controversies have emerged regarding the validity of the claim as to the relative benefits of mediation over adversarial system, in resolving disputes. Some of these issues still remain as an open concern to be dealt with by the scholars and policy-makers in Australia. But the objective of this paper is confined only to the critical issue of power imbalance caused by family violence and its impact on successful mediation.

Mediation is a process where two parties sit together to achieve a mutually acceptable consensual solution to a dispute.[14] To make such

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10 The Alternative Dispute Resolution Conference held in October 1990 defined mediation as "an empowering voluntary process which involves the intervention of a trained, impartial and neutral third party or parties, who have no authoritative decision making power. The mediator assists the disputing parties to reach their own mutually acceptable settlement..... the mediator systematically breaks down the dispute into manageable issues to help the parties generate options and consider alternatives. The disputants are seen to take responsibility through actively participating" (in the mediation process). Cited in Stintzing, H., *Mediation – A Necessary Element in Family Dispute Resolution?*; Peter Lang, Berlin, 1994, p. 46.

11 Astor H., "Swimming against the tide: keeping violent men out of mediation", in Julie Stubbs *Women, male violence and the law*, (ed.), Federation Press, Sydney, 1994, p. 154.

12 Ibid, p. 163.

13 Section 43(a) of the Family Law Act 1975 (Cth.).

14 According to NADRAC, mediator is a person who "has no advisory or determinative role in regard to the content of the dispute or the outcome of its

consensual decision under the assistance of a neutral mediator who can not directly influence such decision, parties should have fairly equal bargaining power to ensure their respective rights from others. So, the problem arises when mediation is applied to a family dispute even when there is existence of a wide power imbalance that makes successful mediation impossible. Before going to discuss about such problem, we should first consider something about *'power'*, its relevance with mediation, and how a mediator can address the issue of power imbalance between the parties to mediation.

What power is all about:

To understand the issue of power imbalance between sexes and its implication on family mediation, first of all we should define the term *'power'*. Power itself is a very complex issue to operationalize, for an individual it is not a constant phenomenon rather changes depending on whom a person is dealing with and also on the basis of time, place, and circumstance where that particular person stands[15]. For example, to cite Professor Astor on explaining how power of the same person with relation to different other individuals might differ, "a Supreme Court judge is powerful in relation to those in the courtroom but much less powerful when in conflict with his teenage daughter."[16] Likewise, the power of a company secretary, who is more robust than his subordinate staff in the office, may change towards that subordinate staff when both of them join a local dance party and the company secretary who is a novice dancer seeks for some practical tips from his subordinate. In the office, the company secretary can dictate his subordinate about how to draft a letter or report, while in the dance party the subordinate can instruct the secretary about how to make movement of his arms to adopt a specific technique of dancing. So, the power may change or even shift depending on the circumstances, even when all other positional identities between the individuals remain same.

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resolution, but may advise on or determine the process of mediation whereby resolution is attempted". See for more detail in supra note 5, p. 34.

15 Neumann, D., "How mediation can effectively address the male-female power imbalance in divorce", (1992) 9(3) *Mediation Quarterly*, at pp. 230-31.

16 Astor, H., "Some contemporary theories of power in mediation: a primer for the puzzled practitioner", (2005) 16(1) *Australian Dispute Resolution Journal*, at p. 32.

From the above discussion we can understand that power is the ability of one person to influence other *to get what one wants.*[17] John Haynes, one of the most prominent mediators in the United States, has given a very brief but worthy list of factors on which one party may have a control or access to influence the will of the other. According to Haynes, power can be defined as the *"control of or access to emotional, economic and physical resources desired by the other party."*[18] One traditional belief may be that, power is always negative and coercive;[19] that is to say, it is used to dominate others' will with a threat to do harm otherwise. However, scholars have identified three different avenues of exerting power on others namely, *reward, punishment* and *persuasion.*[20] It is the function of a negotiator to determine, depending on specific circumstances, about how to use these different avenues to impose power on the counterpart so as to attain the best outcome from a negotiation.[21]

Different intellectuals have defined power on various ways while mentioning about how it arises and how it can be used etc. One influential listing about the sources of power related to mediation has been given by Mayer. In his article, *The Dynamics of power in Mediation and Negotiation* he has identified ten different sources of power to an individual negotiator.[22] These includes *formal power* vested to a position; *expert/information power* generated through the access to information or having expertise in some area related to the dispute; *associational power* generated when people as a group have some power and one person get associated with that group; *resource power*

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17 Parenti, M.J., *Power and the Powerless.* St Martin's Press, New York, 1978, p. 4; cited in Neumann, D., "How mediation can effectively address the male-female power imbalance in divorce", (1992) 9(3) *Mediation Quarterly*, at p. 229.

18 Haynes, J., *Power Balancing*, in Folberg J. and A. Mitro (eds.) *Divorce Mediation: Theory and Practice*, Guilford Press, New York, 1988, p. 278; cited in Neumann, D., "How mediation can effectively address the male-female power imbalance in divorce" (1992) 9(3) *Mediation Quarterly*, at p. 229.

19 See above, note 16, p. 32.

20 Mayer, B. "The dynamics of power in mediation and negotiation", (1987) 16 *Mediation Quarterly*, at p. 78.

21 Ibid.

22 Ibid, p. 78. In one of his later works, *The Dynamics of Conflict Resolution: A Practitioners Guide* (Jossey Bass, 2000), pp. 50-70, as cited in supra note 5, at p. 33, Mayer has identified legal prerogative, perception of power and definitional power as three more forms of power that exist in negotiation. See also Spencer, David. *Dispute Resolution in Australia: Cases, Commentary and Materials.*

generated from the control over resources while those resources need not to be the controller's own; *procedural power* to control the mechanism or procedure through which a decision can be made; *sanction power* or the power to deter one party to enjoy some benefit; *nuisance power* to create some problem to other while enjoying some benefit, although not able to deter from enjoying such benefit all together; *habitual power* arises when one person has something in his possession and try to maintain the *status quo*;[23] *moral power* arises from the belief that the negotiator is right in her position;[24] and *personal power* arises out of a variety of personal characteristics such as self-assurance, determination and endurance etc.

Power imbalance and its relevance to family mediation:

Family mediation is sometimes rejected by some feminists as a standard tool for ensuring equitable justice for women on the ground that male and female have power imbalance in the society and a mediator as a neutral person, without having any decisive power, can not ensure *equitable* justice for women. They are skeptical about *equity* in mediation, for men are considered to be rational, while women are considered to be emotional.[25] Men are usually authoritative and dominating, while women are passive and submissive.[26] When men and women interact between themselves, men are found to interrupt more frequently than women and speak for a longer period;[27] again men usually have access to more economic resources and information over their female counterpart. Since existence of significant power imbalance may cause hindrance to effective mediation, the question emanates that whether a mediator has any role to play in minimizing such gender based power imbalance through mediation.

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23 The other party is just trying to change that *status quo* but the party having in possession may feel some power because maintaining a *status quo* by one person is easier than to make any change in that *status quo* by others.

24 The premise of such belief of being right can vary. It may be a religious belief or a decree by a court.

25 Payton, "Releasing excellence: Erasing gender zoning from the legal mind", (1985) 18 *Ind. L. Rev.* at p. 633; sited in infra 25, at p. 3.

26 Craver, C.B., "The impact of gender on clinical negotiating achcievement" (1990) 6 *Ohio State Journal on Dispute Resolution* at p. 3.

27 "Special Project, Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduate", (1988) 40 *Stan. L. Rev.* at p. 1227; cited in Craver, C.B., "The impact of gender on clinical negotiating achievement", (1990) 6 *Ohio State Journal on Dispute Resolution*, at p. 3.

Minimizing power imbalance in mediation by mediator:

One important point we have to bear in mind is that neutrality of a mediator does not mean that he is powerless. As pointed out by Stintzing, "it is important principle of our legal system to provide protection for the weak... Therefore, it can be accepted as the State's duty to ensure that the principle of protecting the weak is safeguarded in alternative dispute resolution methods; this should not be seen as undue influence by the state but as the provision of the appropriate framework for successful negotiations." Though he didn't clarify the term *'weak'*, as identified by Astor, women are usually those who constitute the weaker part of the society. So, a mediator can in many ways try to minimize this male-female power imbalance during mediation. If we compare the position of a mediator in a mediation session with the sources of power defined by Mayer, as discussed earlier, one very important power that a mediator possess is the procedural power, as both the parties to mediation voluntarily accepted him as a mediator and entrusted with him the duty to conduct mediation. According to Neumann, a mediator can use his/her *procedural power* in nine different ways during a mediation session.[28] These are:[29]

1. *Creating the ground rules*
2. *Choosing the topic*
3. *Deciding who may speak (first)*
4. *Controlling the length of time each person may speak*
5. *Allowing and timing a person's response*
6. *Determining which spouse may present a proposal to the other and*
7. *Presenting an interpretation of what the spouse said*
8. *Ending the discussion and*
9. *Writing down the statement.*

Analysis of a practical example given by Neumann from her own experience can show how a mediator can use such *procedural power* to minimize the power imbalance between parties during mediation. To quote in Neumann's own words:

> During a mediation session with Greg & Judy, I began by providing background information concerning alimony. I then asked, "How do you each feel about paying or receiving alimony?" Greg quickly

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28 See for details, on supra note 20, at p. 81.

29 See above, note 15, at p. 232.

> replied, "I won't pay it." I referred his statement to "you prefer not to make alimony payments?" He nodded his head vigorously. I turned to Judy, to respond to my inquiring expression by responding, "Well, what can I say? You heard him say that he won't pay alimony." I explained that Greg has stated his preference in response to my question, and then said, "What is your preference?" Judy then said "Well may be I do want support from Greg."

The example itself supports the arguments that men are usually intrepid enough to express their position, to take floor first and women are hesitant even when expressing their rights. At the same time, it has also put some light on how a mediator can help to empower the women during mediation. First of all, the mediator provided background information on alimony which is helpful to reduce the effect of power imbalance that might arise due to a lack of information to one party comparing to other. The mediator can also provide the parties with information about their legal prerogative and can enhance their *moral power* as well. Moreover, while Judy takes the comment of Greg that he will not pay alimony as granted, the mediator using her *procedural power to interpret* has explained Greg's comment just as a response to her question. By this, the mediator indirectly reduced Greg's *personal power* that evolved out of her determination and endurance. Although initially Judy was silent and Greg took the floor to express his opinion, the mediator induced Judy to give comment. This improves Judy's perception of power that she also has a right to say something that Greg has to consider. Lastly, by asking Judy directly about her preference on alimony, the mediator actually provoked Judy to use her *nuisance power* that Greg might not enjoy all his wealth without giving the due share of alimony to Judy.

So, it is argued that a mediator can in many ways minimize the power imbalance between parties. They can use visual materials to make parties understand about some technical issue or seek help from professionals[30] such as accountants, psychologists, and physicians etc. to strengthen the argument of a less empowered party who is rather hesitant to place their arguments. Since relative power of two individuals can change depending on circumstances, there is no reason to think that the power imbalance that exists at the beginning of mediation persists all over the process of mediation. A mediator can use various available techniques to change the situation in favor

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30 Ibid, p. 232.

of a disadvantaged party and try to ensure an equitable solution for all.

Limitation of power balancing in mediation:

Despite all efforts by mediators, it may not be possible for a neutral mediator to balance all the power imbalances that exists between the parties. Although a mediator can try to give relevant information to a party and induce a party to make his/her claim, a mediator can not make any opinion in favor of any party or insist any party to settle for a specific term.[31] So, although a mediator can foresee an inequitable solution, he has nothing to do but to wait for the parties themselves to make the proposal and just help him to do so by using various strategies as mentioned above or otherwise. So, although it is sometimes argued by the scholars that existence of power imbalance between male and female can be addressed by the mediators during mediation session[32] to attain a reasonably fair solution and so, mediation can be held even when some power imbalance exists between the male and female participants, these arguments face strong challenge when power imbalance exists by such a significant degree that effective mediation becomes impossible. This type of insoluble power imbalance might arise in the mediation of family disputes involving family violence.

Mediation of family disputes involving family violence and the issue of power imbalance in mediation:

Family violence may takes different forms, such as, physical assault to cause physical injury, mental torture through forced social isolation or through threat to make physical assault, economic deprivation by providing poor maintenance or not giving access to use matrimonial property etc.[33] In Australia, the *Family Law Act 1975* defines family violence[34] as, "conduct; whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for,

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31 See above, note 20, at p. 83.

32 See above, note 4, at p. 228. See also, Davis, A. M., and Salem, R. A., "Dealing with power imbalances in the mediation of interpersonal disputes" (1984) 6 *Mediation Quarterly*, at p. 18.

33 Astor, H., "Violence and family mediation: Policy" (1994) 8(1) *Australian Journal of Family Law*, at p. 4.

34 Section 60D of the Family Law Act 1975 (Cth).

or be apprehensive about, his or her personal well being or safety". While examining violence on recently separated people, Grania Sheehan and Bruce Smith defined violence as, occurrence, attempt or threat to cause physical or sexual violence those are considered as offences under the criminal law. Their study shows that violence might not always cause a severe physical injury. For example, 65% women reported family violence when the above mentioned definition of violence was used. But, family violence was reported by only 14% of the respondent women, when it was defined as actions those cause injury requiring medical treatment[35]. So, instead of family violence, this type of action by the perpetrators can be termed as domestic assault. But, one more problem appears when we see that many of the victims are assaulted or harassed by their ex-partner even after separation or divorce. So, an even better term can be *'spouse assault'*, although this spouse can be an ex-spouse as well. However, for our discussion here, we should rather stick on the term *'family violence'*- a term which is mostly used in Australian literatures to discuss about this issue.

Scholars dealing with family violence, pose stout opposition to mediate family disputes involving family violence because of the strong power imbalance between the perpetrator (usually husbands) and its target (usually wives). In case of persistent family violence, this power imbalance may be so high that effective mediation becomes impossible.[36] Family violence impairs the target of violence's capacity to mediate, for most of the cases[37] the objective of a perpetrator, in case of family violence, is to achieve control over the target by physical assault or threat to do so etc. So, when a perpetrator becomes successful to establish such control over his target, it is hardly possible for such target to come out of such control and make a

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35 Sheehan, G., and Smith, B., "Spousal violence and post-separation financial outcomes" (2000) 14 *Australian Journal of Family Law*, at p. 109; cited in Astor H., *Dispute Resolution in Australia*, 2nd ed., 2000, p. 351.

36 Astor, H., "Swimming against the tide: keeping violent men out of mediation"' in Stubbs Julie (ed.), above note 11, p. 150.

37 According to Michael Johnson, violence caused by male to gain control over their partners can be termed as *'Patriarchal Terrorism'* and is different from the *'Common Couple Violence'*, which is relatively infrequent and of a non-escalating nature. Johnson, M., "Patriarchal terrorism and common couple violence: Two forms of violence against women", (1995) 57 *Journal of Marriage and of the Family*, at p. 283; cited in Astor, H., *Dispute Resolution in Australia*, 2nd ed., 2000, p. 350.

successful negotiation with the perpetrator, based on her perceived rights and expectations over such perpetrator, during mediation.[38] The problem escalates when persistent assault on targets permanently degrades their demands and expectations up to a level that will not antagonize the perpetrator to initiate another assault. When the victims habitually modifies their behavior, she is also unlikely to make any challenge to the proposal made by the perpetrator during the mediation session,[39] for she has already given up to raise her demands and degraded her demand up to a level that is offered by the perpetrator.

Another argument used for not using mediation to resolve family disputes involving family violence is that mediation requires a minimum level of consensuality, respect and trust between the parties to make them able to reach a *mutually* beneficial agreement. But, in case of couples involving family violence, the presence of such kind of relationship is unusual. A batterer husband always tries to establish and continue his control over the target and so, always tries to be in a more advantageous position, denying the rights of his target. So, if a couple who has history of severe family violence comes to mediation, there may be two possible consequences. Either there will be a highly inequitable settlement, favoring the perpetrator,[40] or the mediation will be unsuccessful if in any case, the assaulted woman, who is used to act as subservient to the perpetrator, denies to do so. Another significant criticism against the use of mediation in family disputes involving family violence is its gradual attempt to decriminalize the violent actions those occur inside the home.[41] As will be discussed little later, in Australian society family violence is widely treated as private matter. For this reason, activists who are working against such violence had to make a long rigorous effort to take such violence in political agenda and, to make policy makers to promulgate laws against such violent actions. So, increased decriminalization of family violence by settling family disputes involving family violence through

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38 Astor, above note 37 at p. 351.

39 Kaganas, F., and Piper, C., "Domestic violence and divorce mediation", (1994) 16 *Journal of Social Welfare and Family Law*, at p. 272.

40 See above, note 35, p. 151.

41 See above, note 32, p. 24.

mediation can pave a way to lose the hard battle of criminalizing family violence already won.[42]

Family violence in Australia- a need for concern:

In Australia, there is a great concern about family dispute mediation in presence of family violence, for research data shows the existence of family violence by a considerable degree in Australian society.[43] So, if the increasing trend of referring family dispute to mediation persists, there is a wide possibility that family disputes involving family violence will also be dealt with mediation and so, assaulted women having great power imbalance will not get justice due to the ineffective mediation they attend. Statistical data for a period from 1968 to 1986 shows that 43% of homicides in New South Wales (NSW) were committed within the family[44]. *Women Safety Survey*- the largest empirical study in Australia to reveal violence against women- identified that in a period of 12 months prior to this survey, 247,700 women in Australia experienced violence, amongst which 180,400 women or around 73% experienced violence from their current or ex-spouses.[45] Family violence is even a greater concern during the period of mediation, for women go to family mediation during the time of their separation and separation is a time when family violence tends to escalate.[46] In Australia, nearly half of the women who were killed by their spouses were either separated or in the process of their separation, at the time of their killing.[47] Through family violence a perpetrator usually tries to establish and continue his control over the target. But, making separation to get divorce is a sign from the part of the target to break up and come out of such control. So, perpetrators become more desperate and even more violent during the days of separation to reestablish or perpetuate their control.[48] Another important motive for a perpetrator behind the escalation of violence

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42 Astor, above note 37, p. 353.

43 Astor, H., "The weigh of silence: talking about violence in family mediation", in *Public and private: feminist legal debates*, Thornotn Margaret (ed.), 1995, Melbourne, at p. 178.

44 See above note 35, p. 156.

45 See above note 41, p. 350.

46 See above note 35, at p. 151.

47 Wallace, A., *Homicide: the Social Reality* (1986); cited in above note 24, p. 157.

48 See above not 38, p. 267.

during the days of separation may be, to make pressure on his target to suppress past violence. Since the family law in Australia does not require a prior mediation effort before filing a case for 'disputes involving family violence',[49] suppression of past violence is important to put the dispute in a mediation table, get relieve of criminal offences those might arise if the case were filed and, to attain a most favored solution by making negotiation with the frightened target, who has experienced violence recently.

As mentioned earlier, mediators can try to minimize the power imbalance between the parties during family mediation. But, in case of family mediation involving family violence, mediators face some practical problems those restrict their effort in this regard. Since during the mediation session a mediator acts like a neutral person without having an authority to make any direct influence to the outcome of the session, he might not be able to minimize such power imbalance up to the level sufficient enough to make a fairly equitable solution,[50] even if he can perceive the severe power imbalance that exists between the perpetrator and his target. Moreover, in many cases, targets remain silent about the family violence they experienced in the past or even deny it, and so violence is significantly underreported.[51] This habit of concealment can even continue when they go for mediation.[52] When this kind of concealment occurs, mediators may not perceive the violence and so appropriate measures are not taken in this regard. As a result, there is a possibility that target women have to make a more compromised solution. For example, women might make more sacrifice on maintenance and property decisions when the perpetrator husband claims that he has to give access to see his child, even if the mother would like to get the custody. Although this type of proposal might seem very much reasonable to a mediator who is not aware of any past violence, the target can perceive that possibility of a future contact with the perpetrator also increases her risk for future violence. So, to avoid any possibility of future violence, she might agree to sacrifice much of her claims on maintenance, property share etc. Because of these reasons,

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49 Rule 1.05(2) of the Family Law Rules 2004.

50 See above, note 41, p. 352.

51 See above, note 42, at p. 184.

52 See above, note 35, p. 160.

there remains a strong protest, from a group of scholars and practitioners dealing with these issues in Australia, against the use of mediation to resolve family disputes involving family violence.

Screening out family disputes involving family violence from mediation and some challenges for effective screening:

But to deter disputes involving family violence from mediation, a mediator should be able to screen out the disputes involving family violence and refer them to court trial if the severity of violence exceeds a level that makes effective mediation impossible. Problem may arise here about how to choose the criteria for determining the severity of violence experienced. Sometimes severity is determined by the involvement of fire arms or gross physical injury etc.[53] or by the time when last violence occurred. But the problem with using such *'severity criteria'* is that response of two women may be different towards similar type of violence involving fire arms or causing the same level of physical injury etc. One may be frightened enough to sacrifice all her rights to get rid of such violence, while the other may be courageous enough to negotiate with, or protest against the perpetrator. Another enigma arises in using such severity criteria as a screen out devise when past physical violence has some dynamic effect on the control established by the perpetrator over his target[54]. When a perpetrator becomes successful to establish control over his target's will through consecutive violence, it may not be necessary for him to make any further violence to continue such control, rather a simple threat to make violence, or any specific sign of anger may be enough to make the target women do, what she knows will soothe the perpetrator. So, severity of physical injury or time when violence last occurred can not be a good criterion to screen out family violence cases from mediation. To assess the effects of violence on target, what we need to assess is the extent to which the existence of any recent or past violence is able to control the behavior of that target. That is, to what extent family violence has impaired the target's ability to make free choices based on her necessity and rights, an ability that she would require to use during mediation.[55]

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53 See above note 32, p. 17.

54 See above note 41, p. 350.

55 See above note 32, p. 15.

As mentioned earlier, another predicament that might arise, and widely experienced during the initial screening out of family violence cases, is the silence of assaulted women regarding the history of violence they have experienced in the past. But why battered women remain silent about the history of family violence they have experienced? There is no single response to this question, for the reasons can be multiple. One reason that can be readily identified is their fear to experience further violence, if information about past violence is revealed. In many cases after separation, perpetrators physically assault their targets or threat to do so in the car park, popularly known as *'car park violence'*. In such instances, perpetrators may make their targets to write scripts in favor of mediation and give instructions to the targets about their future conduct.[56] Women sometimes prefer mediation because they become desperate to end the violent relationship and take mediation as an easy and quick process to do so, avoiding the lengthy trial process in the formal courts. They might even think that breaking the control of the perpetrator with an amicable process like mediation, without going to formal courts that might create a criminal charge against the perpetrator, will placate the perpetrator and not antagonize him much to take any further violent action.[57] If this is the case, it seems wise for the target women to keep silent about her past experience of violence because, revealing violence may cause her dispute to be screened out from mediation. Another corollary reason for abused women's silence about past violence during mediation is their financial condition. Women may be poor enough to afford to go to the court and so takes mediation as a cost effective way to get rid of the control of her husband.[58] Moreover, legal aid programs are increasingly attaching the condition of a prior use of mediation before going to formal trial. So, financially incapable women may remain silent about violence, for identification of violence may screen out their cases from mediation and also reduce their possibility to get any legal aid.[59] Sometimes women keep silent with an assurance from their perpetrator that there will not be any further violence, if the target keeps silent about any past occurrences. This type of assurance is actually a threat in a

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56 See above, note 35, pp. 159-60.

57 Ibid, p. 160.

58 See above, note 32, p. 14.

59 See above, note 35, p. 156.

polished form, to cause further violence if the request of the perpetrator is not obeyed by his target. Another notable reason for which assaulted women may keep silent about violence is the social attitude towards family violence. Because Australian society treat family violence as a private matter to be dealt with by the couples themselves inside their house, women sometimes get ashamed to discuss about this with others.[60] They also get ashamed to be treated as a *'battered women'*.

'Effective intake session'- a remedy to the screening problem:

To break the silence of victim women about family violence and, therefore, to make an *'effective screening'* out of disputes involving family violence, we need a very effective *intake session*. During these intake sessions, an expert having knowledge about the dynamics of violence tries to elicit the information regarding the existence of any prior family violence and its nature, if such violence existed.[61] But, mediation schemes run by many mediation organizations do not follow any rigorous *intake procedure*, for these processes are time consuming and expensive, requiring much specialist helps. So, to minimize the use of specialist time and consequent higher cost of intake sessions, we might consider splitting the intake process into two parts. In the first phase, a well trained specialist on family violence may make a *shuttle intake session* to determine with some considerable degree of accuracy about the possibility of the existence of any prior history of family violence. In the second phase, we can use an interviewer to make intensive face to face interview about different aspects of the dispute. This interviewer should be trained and should be one who has clear knowledge about the mediation process and the dynamics of family violence women usually face in Australian society. But such interviewers should not be a specialist in this field, for trained women from refuges or women from other organizations who used to be the target of family violence and also experienced mediation can be a good interviewer.[62] Even if a family dispute involving family violence is referred to formal trial, an *extensive intake session* should be made before such referral has been made. Making an extensive intake session before making any court

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60 See above, note 32, p. 15.

61 Ibid, p. 13.

62 Ibid, pp. 19-20.

referral is necessary, because during mediation women have more chance to share their story in an uninterrupted manner and without being considered for its relevancy tested against some formal rules and procedures of the court.[63] Contrary opinion might argue that there is a possibility for a perpetrator or the target to make fake story and that the capacity of story telling in a more convincing way might differ from person to person.[64] But if we would like to make effective screening, mediators or other experts operating intake sessions should have the capability to reveal the true story behind. Moreover, vulnerable women who choose to go for mediation even with a considerable sacrifice of their right, are not supposed to exaggerate the existence of any family violence that will ultimately screen out their cases from mediation. However, for enhanced safety of possibly vulnerable target, intake session of perpetrator and his target should be held separately, while one does not know about the time and place of the intake session for the other.[65]

Even with the use of intake procedures to screen out family disputes involving family violence from mediation, due to their extreme difficulty in reliable identification, one can not expect to ensure a complete success in this regard.[66] So, in 1991 the National Committee on Violence against Women developed a *Guideline for the Mediation of Cases Involving Violence against Women*. They also recommended for mediators' training regarding the mediation of disputes involving violence.[67] Besides, mediators can use various techniques to help battered women when they come for mediation. One such technique is the use of *Shuttle Mediation*. In shuttle mediation, the parties are kept separate and a mediator makes shuttle negotiations between the parties involved. This type of shuttle mediation is most helpful to the parties who are expecting further assault, if the perpetrator knows the whereabouts of his target. Although shuttle mediation can remove the instant threat from the mind of a target that she will be detected by her perpetrator and have to face further assault, it might not be enough to remove completely the dynamic effect of control created by

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63 See above, note 42, p. 190.

64 Ibid, p. 191.

65 See above, note 32, p. 13.

66 See above, note 35, p. 161.

67 Ibid, p. 161.

the perpetrator by his earlier assaults.[68] Other measures to make assaulted women more competent for mediation may be use of *protection order* as part of mediation,[69] organizing some information sessions to make the target more aware about her legal, and economic rights against the perpetrator, and to use counseling sessions to make the target more confident in negotiation. While Community Justice Centres (CJCs)[70] and similar other organizations can organize regular *information sessions* to discuss about general rights about women. However, attendance in such mediation sessions can be referred to any party intending to participate in mediation but, do not have sufficient knowledge about his rights and opportunities required to make such mediation more successful.[71] Mediators can also use *private caucus*[72] to provide necessary legal, economic, and financial information to the assaulted women, when the information of such assault is revealed after the initiation of mediation. Alternatively, in case of a post-revelation of family violence a mediator can stop to proceed with mediation and refer the dispute to formal trial.[73]

Recommendations giving 'access to justice' the ultimate priority:

Since family disputes involving family violence causes extreme power imbalance that can not be minimized effectively by a family mediator, for the sake of effective mediation we should screen out family violence cases from mediation and refer those cases to formal trial. Although formal trial has some limitations in providing access to

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68 See above, note 32, p. 6.

69 Gagnon, A. G., "Ending mandatory divorce mediation for battered women", 1992 (15) *Harvard Women's Law Journal*, p. 274.

70 Community Justice Centres (CJCs) are government funded centres to deal with arise within the community. These centres provide mediation free of cost. Mediation sessions at CJCs are conducted by two impartial trained mediators who help people to understand each other's view and to reach a mutually acceptable solution to their problem. Disputes suitable for mediation in CJCs are (i) disputes between neighbors (ii) family disputes (iii) business disputes, (iv) civil and small claim matters, (v) workplace disputes, (vi) disputes arises in incorporated associations, and (vii) disputes arise between and among communities etc. See more detain in Mediation at Community Justice Centers, Fact Sheet.

71 Ibid, p. 278.

72 'Private caucus may provide the opportunity for the mediator to discuss the provision of support for a weaker party, such as legal or financial advice.' Supra note 24, p. 153.

73 See above, note 48, p. 278.

justice to women because of its exorbitant cost and delay, nonetheless we can not refer all disputes to mediation if mediation can not ensure a better justice than formal trial. So, what we need is to improve our formal justice system and not to refer those cases to mediation which are not suitable for mediation.[74] While screening out family disputes involving family violence from mediation, we have to ensure that exclusion of family disputes involving family violence from mediation should not exclude the women facing family violence from getting their access to justice. To resolve this dilemma, we have various alternatives in our hand. One option suggested by scholars is to give an option to make an *informed choice* by the target women between mediation and formal trial. But before doing so, we have to make sure that the assaulted women have courage and confidence enough to make successful negotiation during mediation, that she has sufficient knowledge about the mediation process, has sufficient knowledge about her legal and economic rights against the perpetrator, and an understanding about the other methods of resolution available at her hand.[75] All these things can be done in the *extensive intake session* that takes place prior to mediation. Moreover, *information sessions* and *private caucus* as mentioned earlier can be helpful for a target to make such informed choice for mediation. But as we can not screen out all disputes involving family violence because of procedural complicacy as mentioned earlier, we must have to provide training to the mediators about how to deal better with disputes involving family violence. These trainings involve not only the identification of issues of violence and how to address them, but also about how to change the attitude of individual mediators regarding family violence.[76] Training for attitudinal change is required as mediators are part of society who might also use common social values that consider family violence as a private matter and so not to be discussed much. Another solution used by the CJCs to deal with family disputes involving family violence is to make effort to keep the issue of family violence separate from other issues of dispute and, make resolution of those other issues, such as maintenance, custody etc. through mediation. But since negotiation on any family issue requires minimum power balance that might be impaired

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74 See above, note 32, p. 20.

75 *Ibid.*

76 See above, note 42, p. 181.

through family violence, this type of arbitrary separation is not supported by the scholars[77].

While referring disputes to formal courts, we have to make sure that economically disadvantaged women have access to legal aid programs. But given the financial constraint, it might not be possible to provide adequate support to all financially handicap women seeking legal aid to run their cases in the formal courts. Moreover, indiscriminate referral of all family disputes involving family violence may again create the problem of exorbitant cost and congestion problem to the formal courts. So, without making an indiscriminate referral to all family disputes involving family violence to formal trial, we can transfer only those cases to formal trial which involve *severe* family violence. On the other hand, family disputes with a history of minor family violence for which a mediator is able to handle the power imbalance effectively can be dealt through mediation. If we have to implement such type of *partial exclusion policy*, the *protection order* taken by abused women should be strictly implemented and should be a part of her effort to do mediation.

Conclusion:

So, indiscriminate referral of all family disputes involving family violence to formal trial or mediating other issues of a family dispute keeping the issue of family violence aside (as is done by CJCs) can be short run temporary solutions to the problem. Several things we may do to improve the access to justice for battered women. One is to conduct effective intake sessions to screen out family violence cases with a considerable degree of accuracy and refer them to formal trial, if the battered women are not judged suitable to attend mediation. We may even form a separate body to run such effective screening. While these can be some medium-term solutions to enhance access to justice for women, the ultimate long term goal should be the economic and social empowerment of women[78] that will resolve the problem of family violence and assist women to acquire more equitable justice either through mediation or by following a course of trial in formal courts.

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77 See above, note 32, at p. 17.

78 "... [E]conomic domination perpetuates violence in the family. Women's economically unrewarded work in the home results from women's economic dependence on men." Stallone, D. R., "Decriminalization of violence in the home: Mediation in wife battering cases", (1984) 2(2) *Law and Inequality*, p. 502.

LOCATING THE PRINCIPLE OF COMMON BUT DIFFERENTIATED RESPONSIBILITY IN THE CLIMATE CHANGE REGIME

Arif Jamil

1. Introduction

Human societies adopt increasingly sophisticated and mechanized lifestyles. The amounts of heat-trapping gases in the atmosphere have increased. By increasing the amount of these gases, humankind has enhanced the warming capability of the natural greenhouse effect. It is the human- induced enhanced greenhouse effect that causes environmental concern. It has the potential to warm the planet at a rate that has never been experienced in the human history.[1] An international scientific consensus has emerged that our world is getting warmer. Abundant data demonstrate that global climate was warmed during the past 150 years. The increase in temperature was not constant, but rather consisted of warming and cooling cycles at intervals of several decades. Nevertheless, the long term trend is one of net global warming. Corresponding with this warming, alpine glacier has been retreating, sea levels have risen, and climatic zones are shifting.[2]

It is established that all states contribute to climate change and all states may suffer from the same consequence, of course, with little difference in gravity. The exploitation may increase in the days to come and evil consequence will follow the unrestricted manner of use. However, while all the nations should come forward to save the nature and have common responsibility to do so, the developed nations should take the lead, as they have been benefited at the cost of the nature. The principle of "common but differentiated responsibility" (hereinafter mentioned as CBDR) contains these notions. The principle of CBDR has wide application in climate change regime. This principle has, and should have, significant importance in implementing the laws relating to climate change.

This article deals with the issues, reasons and effects of climate change. It discusses the principle of CBDR, actions of major state

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1 www.climatechange.gc.ca/english/canada/goc.asp. Visited on 06.05.2004.

2 www.climatechange.gc.ca/english/canada/goc.asp. Visited on 07.05.2004.

parties, and the importance of implementation of agreements. How far the activities of states comply with the legal regime and the principle of CBDR is also discussed. This article emphasizes that a successful legal regime should have reflection of the principle of CBDR, so that there can exist a global equitable situation among and between the nations and regions of the world. Since the per capita emissions in the developing countries are still relatively low, the claim of implementation by applying the CBDR is justified. Some measures have been suggested to address the climate issues. Throughout this article it is being consistently claimed that reducing these emissions is crucially important because climate change is real and it is a threat.

This article deals with relevant Conventions and Protocol on the matter. Different books, articles, newspaper, websites are consulted for this writing. The article has seven sections. The first section is an introductory one. Section two gives idea about climate change, its causes and effects. The legal regime of climate change is discussed in section three. Principle of CBDR and its implications are described in section four. Implementing mechanisms are enumerated in section five. Activities of states and reflection of principle of CBDR is discussed in section six. Section seven draws conclusion and suggests ways to combat climate change.

2. Climate change : what it is

Climate change is a change in the "average weather" that a given region experiences. Average weather includes all the features we associate with the weather such as temperature, wind patterns and precipitation.[3] Climate change is defined in the United Nations Framework Convention on Climate Change (hereinafter mentioned as UNFCCC) as:

> "Climate change" means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.[4]

2.1 Causes of climate change

The earth's climate is determined in large part by the presence in the atmosphere of naturally occurring greenhouse gases, including in

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3 www.climatechange.gc.ca/english/canada/goc.asp. Visited on 07.05.2004.

4 Article 1(2), the United Nations Framework Convention on Climate Change, 1992.

particular water vapour, carbon dioxide (CO_2), methane (CH_4), CFCs, nitrous oxide (N_2O), and tropospheric ozone (O_3). These are transparent to incoming shortwave solar radiation but absorb and trap long wave radiation emitted by the earth's surface. Their presence exerts a warming influence on the earth. Scientific evidence suggest that continued increase in atmospheric concentrations of selected greenhouse gases due to human activities will lead to an enhanced 'greenhouse effect' and global climatic change.[5] Carbon dioxide from emissions from the combustion of fossil fuels, production of cement, and agricultural and other land use (including deforestation) is widely considered to be the most significant contribution to the threat of climate change, but global emission of CFC-11 and 12, methane and nitrous oxide also pose a significant threat.[6]

2.2 Effect of climate change

Climate change is more than a warming trend. Increasing temperature will lead to changes in many aspects of weather, such as wind patterns, the amount and type of precipitation, and the types and frequency of severe weather events that may be expected to occur in an area.[7] Not all regions of the world will be affected equally by climate change. Low- lying and coastal areas face the risks associated with rising sea levels. Increasing temperatures will cause oceans to expand (water expands as it warms), and will melt glaciers and ice cover over land- ultimately increasing the volume of water in the world's oceans. Scientists estimate that sea levels could rise by an average of 5 cm per decade over the next 100 years. Some estimates suggest that sea levels could rise by almost a full meter by the year 2100.[8] Scientists have also determined that warming will be greater in Polar Regions than nearer to the equator, and that continental interiors will experience greater warming than coastal areas. This has serious implications for sensitive polar ecosystems, their wild species and the human inhabitants. Interior regions may face more frequent and intense heat waves.[9]

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5 See, UNEP, *Environmental Data Report*, 3-9 and 121-30 (1991).

6 Sands, Philippe, *Principles of International Environmental Law*, Manchester University Press, Manchester, 1995, p. 271.

7 www.climatechange.gc.ca/english/canada/goc.asp. Visited on 08.05.2004.

8 www.climatechange.gc.ca/english/canada/goc.asp. Visited on 09.05.2004.

9 *Ibid.*

The effect of global warming and sea level rise (SLR) has already become noticeable in different parts of the world. Rising sea levels have submerged two islands in the Sunderbans, where tigers roam through mangrove forests in the Ganges river delta, and a dozen more islands are under threat, scientists say.[10] "Two islands, Suparibhanga and Lohacharra, which have gone under water, could not be sighted in satellite imagery. The (disappearance of the) two islands have rendered over 10,000 people homeless", said Sugata Hazra, Director of Kolkata School of Oceanography.[11]

3. The United Nations Framework Convention on Climate Change

Framework convention signifies a Convention that provides instructions about what is to be done regarding the concern and objectives of the same. It does not strictly direct how is to be done or how the objectives would be carried out or even what would be the enforcement mechanisms. Strict obligation of the state parties on target achievement is also not present there. Therefore, the implementation depends on relevant factors. There exist some general obligations but no specific obligation. The preliminary convention on climate change is a framework convention, known as, United Nations Framework Convention on Climate Change (UNFCCC). [12] International initiative to face the problem of climate change was formalized with the adoption of this convention in May 1992. It entered into force in March 1994.[13] The UNFCCC does not instruct any emission reduction target on the state parties. Its objective is not indicative to the exact implementation level. Its objective is, therefore, 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system,'[14] and the time frame along with vagueness

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10 The Daily Star, Vol. XVI No. 334, December 22, 2006, p. 1.

11 *Ibid.*, p. 14.

12 Open to: States that are Members of the United Nations or of any of its specialized agencies or that are Parties to the Statute of the International Court of Justice and regional economic integration organizations (Article 20). Depositary: United Nations.

13 Opened for Signature in new York, 9 May 1992, Entered into Force: 21 March 1994 (Article 23).

14 Article 2 (Objective) of United Nations Framework Convention on Climate Change, 1992.

ensures to 'enable economic development to proceed in a sustainable manner'.[15]

3. 1 The Kyoto Protocol

On a conference held at December 1-11, 1997 in Kyoto, Japan the parties to the UNFCCC agreed to the historic Kyoto Protocol to reduce the greenhouse gas emission to protect the environment. The Kyoto Protocol includes emission's targets and timetables for industrialized nations and measures for meeting those targets. Throughout the international negotiations on a protocol to the Climate Convention, developing countries consistently declared that they would not agree to any limitations in their GHG emissions until the developed countries substantially reduced theirs.[16] In short the developed nations including United States who are responsible for the problem would have to agree to binding limitations on their own greenhouse gas emissions before expecting the same from the developing and poor nations. The stiff resolve of the developing countries was further demonstrated by a comment from one of their delegates at the October 1997 climate change talks in Bonn, made in response to President Clinton's announcement of the U.S. position that same month (which called on developing countries to take on new commitments for reducing their greenhouse gases): "No protocol is better than a protocol with new developing country commitments."[17] The developing countries acted on these sentiments in Kyoto, vetoing any language in the Protocol that would call them to make even voluntary commitments to limit their emissions on greenhouse gases.[18] Consequently the Kyoto Protocol of December 10,

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15 United Nations Framework Convention on Climate Change, Article 2 (Objective): "The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner."

16 After Kyoto, New round of Battle Coming Up, J. GROUP 77 (Sept-Nov. 1997). see http://www.g77.org/Journal/sepnov97/06.htm.

17 Bettelli Paolo et al., Highlights from the Meeting of the FCCC Subsidiary Bodies, 12 EARTH NEGOTIATIONS BULL. 1, 16 (Oct. 24, 1997).

18 Bettelli Paolo et al., Report of the Third Conference of the Parties to the United Nations Framework Convention on Climate Change, 1-11 December 1997.

1997 requires developed countries to reduce their aggregate emissions of greenhouse gases by five per cent below 1990 levels by 2012.[19]

The United State agreed to reduce its emissions by seven per cent, the Europeans by eight, the Japanese by six. A few developed nations were allowed to increase their emissions. Conforming to the principle of CBDR, the Kyoto Protocol does not require the developing nations to take on new commitments to limit their GHG emissions. All the specific obligations are, therefore, made for the developed nations.

3.2 Classification of states in respect of responsibility

States are classified into different category in respect of performing obligation for reduction of pollution level. They are classified as Annex-I, Annex-II countries in the climate change convention. Annex B countries (from the Kyoto Protocol) are essentially the same as Annex I countries (from the UNFCCC). But Belarus and Turkey are not included in Annex B. Annex B countries are Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, European Community, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America. [20]

3.3 General commitments and specific obligation

Countries are committed to reduce their emission level but few developed countries are under obligation to reduce their emission. In so doing, they are to take into account the 'quantified emission reduction target'. To attain the objectives of the UNFCCC all state parties are committed to take certain measures, taking into account their common but differentiated responsibility. These general commitments also incorporate the development of national inventories of anthropogenic emission by sources and removal by sinks of greenhouse gases,[21] formulation and implementation of national programmes and cooperation between parties. Basic obligation accepted by the parties is mentioned in Article 3(1) of the

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19 Art. 3(1), Kyoto Protocol, 1997 .

20 Kyoto Protocol to the United Nations Framework Convention on Climate Change, December 11, 1997 .

21 See, Art. 4(1), UNFCCC, 1992.

Kyoto Protocol. It requires the parties to reduce and restrict their emission of the greenhouse gases listed in Annex-A in a time frame and in certain quantity specified for them.[22]

4. The principle of common but differentiated responsibility

The environment is a common concern of humankind. All states have right to enjoy the benefits and privilege of it and all states have responsibility to save the same from serious harm. It is, therefore, common duty of every state to maintain its original and natural form. But the states are differentiated in respect of compensating or rewarding for safeguarding the environment.

4.1 Evolution and application of the principle of common but differentiated responsibility

The principle of 'common but differentiated responsibility' evolved from the notion of the 'common heritage of the mankind' and is a manifestation of general principles of equity in international law. The principle recognizes historical differences in the contribution of developed and developing states to global environmental problems, and differences in their respective economic and technical capacity to tackle these problems. Despite their common responsibilities important differences exist between the stated responsibilities of developed and developing countries.[23] The Rio Declaration states:

> In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.[24]

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22 Kyoto Protocol, Article 3 (1) : "The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012".

23 CISDL Legal Brief, for the World Summit on Sustainable Development 2002, Johannesburg.

24 Principle 7, The Rio Declaration, 1992.

Similar language exists in the Framework Convention on Climate Change. Parties should act to protect the climate system on the basis of equality and in accordance with their common but differentiated responsibilities and respective capabilities.[25] However, the Principle of CBDR includes two fundamental elements. The first concerns the common responsibility of states for the protection of the environment. The second concerns the need to take into account the different circumstances, particularly each state's contribution to the evolution of particular problem and its ability to prevent, reduce and control the threat.[26]

The principle of CBDR has its roots prior to UNCED and has achieved support, apparently, through state practice at the regional and global level. Common responsibility describes the shared obligations of two or more states towards the protection of a particular environmental resource. Common responsibility is likely to apply where the resource is shared, under the control of no state, or under the sovereign control of a state, but subject to a common legal interest (such as bio diversity – termed a common concern of humankind). The concept of common responsibility evolved from an extensive series of international laws governing resources labeled as 'common heritage of mankind' or of 'common concern'.[27]

Differentiated responsibility of states for the protection of environment is widely accepted in treaty and other state practices. It translates into differentiated environmental standards set on the basis of a range of factors, including special needs and circumstances, future economic development of countries and historic contributions to the creation of an environmental problem.[28] The Stockholm declaration of 1972 emphasized the need to consider the "applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the

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25 Article 3 (1) : "The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof".

26 CISDL Legal Brief for the World Summit on Sustainable Development 2002, Johannesburg.

27 *Ibid.*

28 *Ibid.*

developing countries." In the Rio Declaration of 1992 states agreed that-

> Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply.[29] Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries. [30] The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority.[31]

Differentiated responsibility, therefore, aims to promote substantive equality between developing and developed States within a regime, rather than mere formal equality. The aim is to ensure that developing countries can come into compliance with particular legal rules over time- thereby strengthening the regime in the long term. Therefore, differential responsibility does result in different legal obligations.[32]

In summary, states have common responsibilities to protect the environment and promote sustainable development, but due to different social, economic and ecological situations, countries must shoulder different responsibilities. Thus the principle reflects the core elements of equity, placing more responsibility on wealthier countries and those more responsible for causing specific global problems. Perhaps more importantly, the principle also presents a conceptual framework for compromise and co-operation in effectively meeting environmental challenges.[33]

5. Endeavour to fulfill commitments of the parties under Kyoto Protocol

Climate change is a common concern of humankind. To protect the global climate, this concept was first introduced in a 1988 resolution of the United Nations General Assembly.[34] It has since been supported

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29 Principle 11, Rio Declaration on Environment and Development, 1992.

30 *Ibid.*

31 Principle 6, the Rio Declaration on Environment and Development, 1992.

32 CISDL Legal Brief, for the World Summit on Sustainable Development 2002, Johannesburg.

33 *Ibid.*

34 UN General Assembly Resolution 43/53 on the Protection of Global Climate for Present and Future Generations of Mankind, 6 December 1988.

by numerous international climate meetings.[35] The Kyoto Protocol suggests some mechanisms for fulfillment of commitment of the parties.

5.1 Emission reduction targets

The Kyoto Protocol has prescribed emission reduction targets for the Annex I parties on whom emission reduction is binding owing to the level and degree of emission. In the words of Philippe Sands:[36]

> The major achievement of the Kyoto Protocol was the commitment of Annex I parties to quantified emissions reduction targets and a time table for their achievement. The basic obligation accepted by the annex-I is set out in Article 3(1). It provides that Annex I parties 'shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex-A do not exceed their assigned amounts'. The 'assigned amounts' are calculated pursuant to each party's quantified emissions limitations and reduction commitments set out in Annex B. Annex I parties must implement their obligation under Article 3(1) 'with a view to reducing their overall emissions of gases by at least 5 per cent bellow 1990 level in the commitment period 2008 to 2012'. This is estimated to represent an actual reduction of about 30 per cent over 'business as usual' emissions levels.

5.2 Mechanisms under the Kyoto Protocol: Emissions Trading, Joint Implementation and Clean Development Mechanism

Emissions Trading, Joint Implementation and Clean Development Mechanism are some of the most innovative mechanisms that enable parties to reduce emissions. These mechanisms are technique of shifting responsibility from one country to another. Any party on whom performance of obligation is binding may have the same done by another party who agrees to accept the trading deal. Sands states:[37]

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35 E.g., decision in 15/36 of the UNEP Governing Council; the Second World Climate Conference; Working Group I of the Intergovernmental Negotiating Committee on Climate Change (INC); the Noordwijk Declaration; the Langkawi Declaration; the Beijing Declaration, the Meeting of the Group of Legal Experts to Examine the concept of the Common Concern of Mankind in Relation to Global Environmental Issues, Malta, 13-15 Dec., 1990. (Summary of the discussions and reports, edited by David J. Attard, Nairobi, 1991.

36 Sands, Philippe, *Principles of International Environmental Law*, Cambridge University Press, Cambridge, UK, Second edition, 2003, p. 371.

37 *Ibid*, pp. 372-373.

> By far the most innovative (and controversial) aspect of Kyoto Protocol negotiations was the proposal to enable Annex I parties to meet their commitments under the Protocol by purchasing or acquiring credits representing greenhouse gas reductions in other countries. Emissions trading permits an Annex B party to 'buy' emissions reduction credits, in the form of assigned amounts units, from another annex B party where it would be more cost-effective for it to do so rather than to undertake the reduction domestically.

The inclusion of emission trading in the Protocol was strongly opposed by China and the group of 77 developing countries. Hence, the emissions trading system was not beyond controversy and opposition:

Sands reiterates:[38]

> An eleventh hour compromise text was included in the Protocol as Article 17. This allows annex B parties to 'participate in emissions trading for the purpose of fulfilling their commitments under Article 3', but provides that any such trading must be 'supplemental' to domestic actions taken to achieve emissions reductions. Article 17 left to the conference of the parties the task of defining 'relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading.

The basic mechanism for a trading regime has been defined in Article 3, paragraphs 10 and 11.[39] Any emission reduction units, which a Party acquires from another shall be added to the assigned amount for the acquiring Party and shall be subtracted from the assigned amount of the transferring one. However, this is a way made open to the developed countries to escape duty and obligation and use money rather than strict adherence which should have been ensured under the Protocol.

Regarding the Joint Implementation, Sands observed:[40]

> A further economic incentive mechanism included in the Protocol is the possibility for joint implementation by Annex I parties of their emission reduction commitments. Article 6 provides that for the purpose of meeting its commitments under Article 3, any Annex I party may transfer to, or acquire from, any other Annex I party

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38 *Ibid*, pp. 373.

39 See Kyoto Protocol to the UNFCCC, December 11, 1997.

40 Sands, Philippe, *Principles of International Environmental Law*, Cambridge University Press, Cambridge, Second edition, 2003, p. 373.

> 'emission reduction credits resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy'. Annex I party may authorize private legal entities, under its responsibility to participate in actions leading to the generation, transfer or acquisition of emissions reduction units from joint implementation.

The Clean Development Mechanism (CDM) is another innovative mechanism which provides scope for developing countries to participate. As part of the CDM, Annex I parties can invest in emission reductions reductions accruing from such project activities to limitation and reduction commitments under Article 3. [41] On the other hand, joint Implementation invokes the concerted participation of interested Annex I parties in a project undertaken by them. Moreover, the private or public entities may be allowed to take part in Joint Implementation and CMD under the supervision of the Executive Board.

5.3 Reporting and compliance

The Protocol has established reporting obligations for the parties and has prescribed the review process for successful implementation of the Protocol Sands observes: [42]

> Detailed reporting obligations for Annex I parties are established by Articles 5, 7 and 8 of the Protocol. These build upon the reporting and review procedures developed under the Convention, particularly the in-depth review process. Article 5(1) provides that each Annex I party is required to have in place, no later than 2007, a national system for the estimation of anthropogenic emissions by sources and removal by sinks of greenhouse gases. Guidelines for such national systems are to be decided upon by the Conference of the Parties serving as the Meeting of the Parties to the Protocol at its first session. Under Article 7(1), each Annex I party is required to incorporate in its annual inventory of anthropogenic emissions by sources and removals by sinks, 'the necessary supplementary information for the purpose of ensuring compliance with Article 3'. Annex I parties are also required to include supplementary information to demonstrate compliance with commitments under the protocol.

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41 *Ibid*, pp. 373-374.

42 *Ibid*, p. 375.

The parties are expected to develop a structured system for the estimation of emission of greenhouse gases. The Conference of the Parties may suggest guideline for such systems. The Annex I parties shall enable themselves to provide relevant information in order to ensure compliance with the commitments under the protocol. [43]

5.4 Institutional arrangement

The Climate Change Convention establishes a conference of the parties (COP), a secretariat, two subsidiary bodies and a financial mechanism. The conference of the parties is the supreme body of the Convention, entrusted with keeping the implementation of the Convention under regular review and making decisions to promote its effective implementation. It met for the first time in 1995 and has subsequently met annually.

5.4.1 Climate change negotiations : conference of the parties

The Kyoto protocol left several issues open to be decided later by the Conference of Parties (COP). Therefore, the Protocol provides provisions for the establishment of the implementing mechanism, the Conference of the Parties to the Protocol, which is entrusted with the task of supervising the implementation of the Protocol.[44] The first Conference of the Parties (COP) to the UNFCCC met in Berlin in March-April 1995 launched a new round of talks on strengthening the commitments of developed countries.[45] It resulted in consensus decision at COP 3 held in Kyoto (December 1997) to adopt a protocol under which only the developed countries will reduce their combined greenhouse gas (GHG) emissions by at least 5 per cent at 1990 levels by the period 2008-2012.[46] At COP 4 held in Buenos Aires in November 1998, the parties established a joint working group on compliance to develop a compliance system with a view to adopt a decision at COP 6. The Bonn agreement adopted at COP 6 in Hague took a decision on consequences a party would face in the event of failure to meet its target making the legal character of the compliance regime deferred. They include penalties i.e., make up the shortfall,

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43 *Ibid*, p. 367.

44 See Article 13.

45 Quoted from Desai, Bharat H., "Institutionalizing the Kyoto Climate Accord" *Environmental Policy & Law*, Vol. 29, No. 4, 1999.

46 *Id.*

suspension of its eligibility to sell credits under emission trading and development of a compliance action plan. The Seventh Conference of the Parties (COP 7) to UNFCCC was held in Marrakech, Morocco from 29 October to 9 November, 2001. The agreement so reached at the Conference is known as "Marrakech Accords". The parties, at COP 7 on the basis of Buenos Aires Plan of Action adopted at COP 4, finalized the operating rules for the flexible mechanisms. The Marrakech Accords establish that all the credits generated under the three mechanisms are equivalent and equally tradable. The Accords also allow the activities in the CDM project for the first commitment period. But the modalities and procedures for such activities were developed at COP 9, which include a limit on the extent to which Annex-I parties may use certified emissions reductions (CERs), generated from such sink projects towards their target.[47] However, the parties at COP 9 held in 2003 and COP 10 held in 2004 completed some unfinished business of Marrakech Accords. Thus, finally the European Union, Japan and other nations then ratified the Protocol.[48]

The first Meeting of the Parties to the Kyoto Protocol (MOP1) was held in Montreal from November 28 to December 9, 2005, along with the 11th conference of the Parties to the UNFCCC (COP11). [49] The conference attracted unprecedented business interest as a result of two operation trading systems: the pan-European emissions trading scheme and the Clean Development Mechanism. [50] On 10 December 2005 in Montreal, The United Nations Climate Change Conference closed with the adoption of more than forty decisions that will strengthen global efforts to fight climate change. [51]

6 The Kyoto Protocol and reflection of the principle of common but differentiated responsibility in state activities

The Kyoto Protocol to the UNFCCC is an international treaty on climate change. Countries that ratify this protocol commit to reduce their emissions of carbon dioxide and five other greenhouse gases, or

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47 Hossain, Md. Iqbal, "Combating Global Climate Change: Revisiting Kyoto Climate Accord", *Journal of the Faculty of Law", The Dhaka University Studies Part-F*, Vol. 15, No. 2, 2004, p. 225.

48 *Ibid* p. 213.

49 http://en.wikipedia.org/wiki/Kyoto_Protocol. Visited on 18.05.2006.

50 http://unfccc.int/meetings/cop_11/items/3394.php. Visited on 09.10.2006.

51 *Ibid.*

engage in emissions trading if they maintain or increase emissions of these gases.[52]

6.1 Objectives of the Protocol

Kyoto is intended to cut global emissions of greenhouse gases. The objective is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." The Intergovernmental Panel on Climate Change (IPCC) has predicted an average global rise in temperature of 1.4°C (2.5°F) to 5.8°C (10.4°F) between 1990 and 2100. Current estimates indicate that even if successfully and completely implemented, the Kyoto Protocol will reduce that increase by somewhere between 0.02°C and 0.28°C by the year 2050. [53]

6.2 Status of the Protocol

The Treaty was negotiated in Kyoto, Japan in December 1997, opened for signature on March 16, 1998, and closed on March 15, 1999. The agreement came into force on February 16, 2005 following ratification by Russia on November 18, 2004. As of April 2006, a total of 163 countries have ratified the agreement (representing over 61.6% of emissions from Annex I countries). Notable exceptions include the United States and Australia. Other countries, like India and China, which have ratified the protocol, are not required to reduce carbon emissions under the present agreement. Australia and the United States have signed but currently decline to ratify it. The Protocol is subject to ratification, acceptance, approval or accession by Parties to the Convention. According to terms of the protocol, it enters into force "on the ninetieth day after the date on which not less than 55 Parties to the Convention, incorporating Parties included in Annex I which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I, have deposited their instruments of ratification, acceptance, approval or accession." Of the two conditions, the "55 parties" clause was reached on May 23, 2002 when Iceland ratified. The ratification by Russia on 18 November

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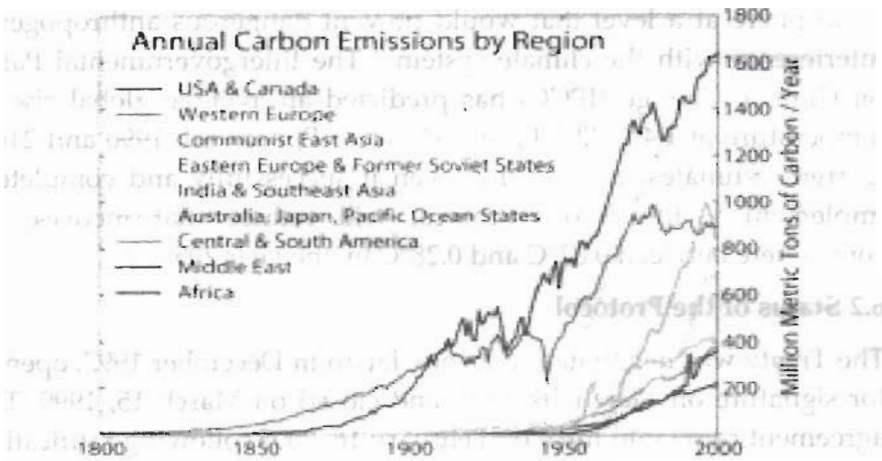
52 http://en.wikipedia.org/wiki/Kyoto_Protocol. Visited on 18.05.2006.

53 http://en.wikipedia.org/wiki/Kyoto_Protocol. Visited on 18.05.2006.

2004 satisfied the "55 per cent" clause and brought the treaty into force, effective from February 16, 2005. [54]

6.3 Actions of the states

The graph below shows the regional emission of carbon in the global context.[55]



Carbon emissions from various global regions during the period 1800-2000 AD as shown above makes it clear that from the year 1800 to 2000, countries of Western Europe have been consistently emitting carbon. The emission by USA and Canada has risen rapidly from 1850 to 2000 and the region has become the highest emitter in the global context. Eastern Europe and former Soviet States have also been identified as significant emitter.

6.3.1 Position Russia

Vladimir Putin approved the treaty on November 4, 2004 and Russia officially notified the United Nations of its ratification on November 18, 2004. With that, the Russian ratification is complete. The issue of Russian ratification was particularly closely watched in the international community, as the accord was brought into force 90 days after Russian ratification. The Kyoto Protocol limits emissions to a percentage increase or decrease from their 1990 levels. Since 1990 the economies of most countries in the former Soviet Union have collapsed, as have their greenhouse gas emissions. Because of this, Russia should have no problem meeting its commitments under

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54 *Ibid.*

55 *Ibid.*

Kyoto, as its current emission levels are substantially below its targets.[56]

6.3.2 Position of the European Union

On May 31, 2002, all fifteen then-members of the European Union deposited the relevant ratification paperwork at the UN. The EU produces around 22% of global greenhouse gas emissions, and has agreed to a cut, on average, by 8% from 1990 emission levels. The EU has consistently been one of the major supporters of the Kyoto Protocol, negotiating hard to get wavering countries on board. In December, 2002, the EU created a system of emissions trading in an effort to meet these tough targets. Quotas were introduced in six key industries: energy, steel, cement, glass, brick making, and paper/cardboard. There are also fines for member nations that fail to meet their obligations, starting at €40/ton of carbon dioxide in 2005, and rising to €100/ton in 2008. Current EU projections suggest that by 2008 the EU will be at 4.7% below 1990 levels. The position of the EU is not without controversy in Protocol negotiations. However, one criticism is that, rather than reducing 8 per cent, the EU should cut 15 percent as they said they would during the negotiation. Also, emission levels of former Warsaw Pact countries who now are members of the EU have already been reduced as a result of their economic restructuring.[57]

6.3.3 The United States

The United States of America (USA), although a signatory to the protocol, has neither ratified nor withdrawn from the protocol. The signature alone is mostly symbolic, as the protocol is non-binding over the United States unless ratified. On July 25, 1997, before the Kyoto Protocol was to be negotiated, the U.S. Senate unanimously passed by a 95–0 vote the Byrd-Hagel Resolution, which stated the sense of the Senate was that the United States should not be a signatory to any protocol that did not include binding targets and timetables for developing as well as industrialized nations or would result in serious harm to the economy of the United States. On November 12, 1998, Vice President Al Gore symbolically signed the Protocol. The Clinton Administration never submitted the Protocol to the Senate for ratification. The President, George W. Bush, has indicated that he does not intend to submit the Treaty for ratification, not because he does not support the general idea, but because of the

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[56] http://en.wikipedia.org/wiki/Kyoto_Protocol. Visited on 18.05. 2006.

[57] *Ibid.*

strain he believes the Treaty would put on the economy. [58] Furthermore, he is not happy with the details of the treaty. For example, he does not support the split between Annex I countries and others. However, in June 2002, the American Environmental Protection Agency (EPA) released the "Climate Action Report 2002". Some observers have interpreted this report as being supportive of the protocol, although the report itself does not explicitly endorse the protocol. Later that year, Congressional researchers who examined the legal status of the Protocol advised that signature of the UNFCCC imposes an obligation to refrain from undermining the Protocol's object and purpose, and that while the President probably cannot implement the Protocol alone; Congress can create compatible laws on its own initiative. [59] However, the United States has signed the *Asia Pacific Partnership on Clean Development and Climate*, a pact that allows those countries to set their goals for reducing greenhouse gas emissions individually, but with no enforcement mechanism. Supporters of the pact see it as complementing the Kyoto Protocol while being more flexible, but critics have said the pact will be ineffective without any enforcement measures.[60]

6.3.4 Position of Canada

On December 17, 2002, Canada ratified the treaty. While numerous polls have shown support for the Kyoto protocol, there is still some opposition, particularly by some business groups, non-governmental climate scientists and energy concerns, using arguments similar to those being used in the US. There is also a fear that since US companies will not be affected by the Kyoto Protocol that Canadian companies will be at a disadvantage in terms of trade.[61] In 2005, the result was limited to an ongoing "war of words", primarily between the government of *Alberta* (Canada's primary oil and gas producer) and the federal government. There are even fears that Kyoto could threaten national unity, especially in Alberta. [62]

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58 Corn, David, AlterNet. Posted June 19, 2001.

59 CRS Report for Congress. See, http:// fpc.state.gov/documents/organisation

60 http://en.wikipedia.org/wiki/Kyoto_Protocol. Visited on 29.06.2006.

61 http://en.wikipedia.org/wiki/Kyoto_Protocol.Visited on 30.06.2006.

62 Alberta has developed a political culture that is more conservative, in both economic and social issues, than the rest of Canada. Its economic base and political culture are highly similar to the U.S. state of Texas; on occasion Alberta is referred to as "Canada's Texas". Alberta separatism arises from the belief held by some that Alberta is culturally distinct from the rest of Canada, and particularly from Eastern Canada, and from the belief that Alberta is harmed economically by providing financial support to other provinces through the federal transfer payment program. There is also significant opposition within

After January 2006, the Liberal Party government was replaced by a Conservative Party minority govenment under Stephen Harper, who previously has expressed opposition to Kyoto. During the election campaign, Harper stated he wanted to move beyond the Kyoto debate by establishing different environmental controls. Rona Ambrose, who considers the emission trading concept to be flawed, replaced Stephane Dion as the environment minister and the chief overseer of the protocol in the United Nations.[63]

On April 25, 2006, Ambrose announced that Canada would have no chance of meeting its targets under Kyoto, and would instead look to participate in U.S. sponsored Asia Pacific Partnership on Clean Development and Climate. "We've been looking at the Asia-Pacific Partnership for a number of months now because the key principles around [it] are very much in line with where our government wants to go," Ambrose told reporters. [64] On May 2, 2006, it was reported that environmental funding designed to meet the Kyoto standards has been cut, while the Harper administration develops a new plan to take its place.[65] Douglas Macdonald, a senior lecturer at University of Toronto Center for the Environment, predicted that the Harper administration would not actually withdraw from the Kyoto accord, which Canada formally ratified in 2002. "That would be too visible," he said. "They are more interested in smoke screens. Canada had been one of the leaders pushing for Kyoto. Now the government is saying we won't take it seriously."[66] The international agreement requires Canada to cut its greenhouse gas emissions to six per cent below 1990 levels by 2012. But since 1990, emissions have gone up, with the latest figures showing an increase of almost 30 per cent. [67]

Alberta to the Kyoto Protocol as the Kyoto treaty has been believed to have negative effects on the provincial economy.

See <http://en.wikipedia.org/wiki/Alberta_separatism>.

63 http://en.wikipedia.org/wiki/Kyoto_Protocol. Visited on 30.06.2006.

64 CBC News, CANADA, Last Updated Tue, 25 Apr 2006 15:31:31 EDT. See more-See, for details:

<http://www.cbc.ca/story/canada/national/2006/04/25/ambrose060425.html>

65 Doug, Struck, Washington Post Foreign Service, Wednesday, May 3, 2006; A16. See <http://www.washingtonpost.com/wp> dyn/content/article/2006/05/02/AR2006050201774.html

66 http://www.washingtonpost.com/wp-dyn/content/article/2006/05/02/AR2006050201774.html. Visited on 04.07.2006

67 CBC News, CANADA, Last Updated Tue, 25 Apr 2006 15:31:31 EDT.

See more-
http://www.cbc.ca/story/canada/national/2006/04/25/ambrose060425.html

A private member's bill, Bill C-288, has been put forth by Pablo Rodriguez, Liberal Member of Parliament for the riding of Honoré—Mercier,[68] whose aim is to force the minority government of Stephen Harper to "ensure that Canada meets its global climate change obligations under the Kyoto Protocol." This bill has the support of the Liberals, the New Democratic Party and *le Bloc Québécois*,[69] and is currently being debated in the Canadian House of Commons. With the support of all opposition parties, this bill is expected to be passed, forcing Harper's government to form a Climate Change Plan within 6 months of the bill receiving royal assent. [70]

6.3.5 Position of Australia

Despite the fact that Australia was at the time of the negotiation already one of the biggest emitters on per capita basis, the country was granted an easy target of 8 percent increase. This is because Australia used its relatively smallness as a negotiation tool while other big players were negotiating. And the result of the negotiation was reported in its media as success. However, Australia has refused to sign the Agreement. The Australian Prime Minister, John Howard, has argued that the protocol would cost Australians jobs, and that Australia is already doing enough to cut emissions. This is despite the fact that the Australian government is keen to reduce Greenhouse gas emissions and has pledged $300 million over the next three years.[71] The Federal Opposition, the Australian Labor Party, is in full support of the protocol and it is currently a heavily debated issue within the political establishment. The opposition claims signing the protocol is a "risk free" prospect as they claim Australia would already be meeting the obligations the protocol would impose. [72] As of 2005, Australia

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68 Honoré-Mercier is a federal electoral district in Quebec, Canada, that has been represented in the Canadian House of Commons since 2004. See details in : <http://en.wikipedia.org/wiki/Honor%C3%A9-Mercier_%28electoral_district%29>.

69 The Bloc Québécois is a federal political party in Canada that is devoted to the promotion of sovereignty for Quebec. It also holds the goal of the "defence of the interests of all Quebecers in Ottawa" (notably by promoting, in the federal parliament, the consensus of the National Assembly of Quebec). It has very close relations with the Parti Québécois, though it is incorrect to say that one is a branch of the other. See <http://en.wikipedia.org/wiki/Bloc_Qu%C3%A9b%C3%A9cois>.

70 The granting of Royal Assent is the formal method by which a constitutional monarch completes the legislative process of lawmaking by formally assenting to an Act of Parliament. See- http://en.wikipedia.org/wiki/Royal_assent

71 http://en.wikipedia.org/wiki/John_Howard. Visited on 31.08. 2006.

72 http://en.wikipedia.org/wiki/Australian_Labor_Party. Visited on 31.08.2006.

was the world's largest emitter per capita of greenhouse gases.[73] The Australian government, along with the United States, agreed to sign the Asia Pacific Partnership on Clean Development and Climate at the ASEAN regional forum on 28 July 2005.

6.3.6 China

The People's Republic of China is the world's most populous country and the second largest energy consumer (after the United States). China is a non-Annex I country under the United Nations Framework Convention on Climate Change, meaning that it has not agreed to binding targets for reduction of carbon dioxide emissions under the Kyoto Protocol. According to a report by the World Health Organization (WHO), seven of the world's ten most polluted cities are in China. [74]

According to the information from the U.S. EIA, Chinese energy-related usage produced 3.541 billion metric tons of CO_2, while the U.S. produced 5.796 billion metric tons.[75] However on a per capita basis the Chinese emit 1/10th the CO2 that Americans do and Americans emit more than twice the CO2 as their counterparts in similarly developed countries like Germany, France, and the United Kingdom that have ratified the treaty and agreed to further reduce emissions. [76]

6.3.7 Position of India

India signed and ratified the Protocol in August, 2002. Since India is exempted from the framework of the treaty, it is expected to gain from the protocol in terms of transfer of technology and related foreign investments. At the G-8 meeting in June 2005, Indian Prime Minister Manmohan Singh pointed out that the per-capita emission rates of the developing countries are a tiny fraction of those in the developed world. Following the principle of common but differentiated responsibility, India maintains that the major responsibility of curbing emission rests with the developed countries, which have accumulated emissions over a long period of time.[77]

7. Conclusion

In conclusion, the following findings and recommendations may be summed up:

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73 http://en.wikipedia.org/wiki/As_of_2005. Visited on 31.08.2006.

74 http://www.eia.doe.gov/emeu/cabs/china.html. Visited on 06. 06. 06.

75 http://en.wikipedia.org/wiki/Kyoto_Protocol. Visited on 06.06.06.

76 UN Statistics Division.

77 See, http://en.wikipedia.org/wiki/Kyoto_Protocol. Visited on 06.06.06.

Climate change is a change in the average weather that a particular part of the globe experiences. Constant emission of greenhouse gases is responsible for global warming. Increasing temperature can lead to changes in many characteristics of weather. Severe drought, unusual inundation, late summer, dry monsoon and early winter are some of the warnings of severe effects of climate change and global warming. Therefore, climate change will affect agriculture, fisheries, livestock, forest and biodiversity which can threaten food security and existence of lives on earth. The people of the earth should make a choice right now, before it is too late.

Expected Sea Level Rise (SLR) would adversely affect the low-lying, densely populated deltaic coastal countries like Bangladesh, Egypt, Marshall Islands and the Netherlands.[78] The coastal areas are densely populated. SLR would, therefore, adversely affect human settlement in the coast, which would result in the ecological refugees. Eco-migration will take place within the country, as well as, its spill over effects would be felt by the neighboring countries of the region.[79] As deserts shall grow and fertile lands will shrink, there are possibilities to experience more disputes within and across boarders. The African countries are facing increased risks of famine as the disastrous change of climate is already occurring. Egypt may witness the loss of Nile flow from the south and rise of sea level in the north. Both may result to absolute destruction of its agricultural land and ecosystem across the Nile delta.

International initiative to deal with the problem of climate change was formalized with the adoption of United Nations Framework Convention on Climate Change. The parties to the UNFCCC agreed to a historic Protocol called 'Kyoto Protocol' which includes target of emissions reduction and specifies timetables and measures for meeting those targets. States are classified into different categories in respect of performing their obligations. Many of the developed countries are under obligation to reduce their emission level. Kyoto Protocol suggests some mechanisms for the fulfillment of commitment of the parties. The commitment of Annex-I parties to quantified emissions reduction targets is considered as the major achievement of the Kyoto Protocol. Other mechanisms included in the protocol are emissions trading, joint implementation and clean development mechanism. The Kyoto Protocol, because of its being

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78 Haque, Mahfuzul, *Climate Change: Issues for the Policy Makers of Bangladesh*, Dhaka, 1996, p. 7.

79 *Ibid* p. 8.

most comprehensive and rational in nature, should be accepted by all and therefore, be implemented by the states.

It is recognized as common duty of every state to maintain environment's original and natural form. But the states are differentiated in respect of compensating for safeguarding the environment. Once the earth was unlimited to be used and the developed nations utilized the resources of the earth and the nature with gradual abuses and in unrestricted manner that caused the disruption in the system and balance of the whole globe and caused today's climate change. Still this day, the developed nations are the greatest emitter of the harmful gases in the atmosphere. The attempts of the developing nations to be industrialized and to be in the level of production and to lead the economy like other developed nations is taking place in a time when the atmosphere is no more unlimited and the natural composition of the atmosphere, earth, biodiversity are almost disturbed and threatened. These developing countries still have small contribution to environmental degradation and climate change. Therefore, keeping in mind that the principle of CBDR is a manifestation of general principles of equity in international law, the developed nations should take the lead and rationally be responsible to address the issue by observing this principle. The developing countries can show the "Polluter Pays Principle" and ask the developed world to compensate the nature.

The major countries responsible for the matter are divided in their efforts and actions. The two major countries currently opposed to the treaty are the United States and Australia. United States is the single largest emitter of greenhouse gases. They emit almost 20 percent of the world's manmade greenhouse gases. Therefore, the United States is expected to be the first country to limit the emission. But it is not happening and thereby frustrating the successful implementation of the Treaty. Nevertheless, if it is said that the people is strength in democracy, then it gives hope that there is continuing and ongoing support for the implementation of the Treaty in the United States and Australia. The people of these countries are now criticising their leaders' choice on the matter. However, China, India, and other developing countries were exempted from the specific obligations of the Kyoto Protocol. The reason is: they were not the main contributors to the greenhouse gas emissions during the industrialization period which is believed to be causing today's climate change. On the contrary, it is noticeable that China and India are going to dominate the world market in diferent commodities in the days to come. Hence, it is expected that they should come forward to share the responsibility of reducing emissions. But the example of China and India should not be shown as an excuse to avoid responsibility by any

developed country. Developed countries should pay attention to fulfill their obligations only, as the earth's environment is already damaged because of different developmental activities done by them.

Bangladesh is apprehended to be the single largest vulnerable country due to climate change. More than 20 million people would turn into "environental refugees" if the sea rises by one meter.[80] Climate change and sea level rise would affect the whole country not the coastal ares only. The Sundarbans mangrove forest would be severely affected by floods due to climate change. Fisheries, agriculture and cultivable lands would be adversely affected by inundations. Emission of Carbon Dioxide by Babgladesh is one of the lowest in the world. Bangladesh should not wait to suffer from its adverse consequences. Therefore, before it is too late, Bangladesh should play an active role in international level on this issue.

It is necessary to introduce climate friendly-technologies in different sectors. The Government incentives and assistance can play an important role in technology deployment. To employ climate-friendly technologies, the Government can assist or encourage the corporations by providing tax subsidies. The investors, entrepreneurs and promoters should also have courage and will. Otherwise, the Government's money itself is not sufficient to motivate and promote use of climate friendly technologies. Moreover, following initiatives can also be fruitful to combat climate change:

(I) the parties to the Protocol, states, corporations, investors, and entrepreneurs can produce and use energy more carefully. In the energy sector, policy measures should be taken to improve and promote alternative sources of energy like wind and solar power, bio-gas plants etc. At the same time, fuel efficient technologies should be introduced in the industries, power generation, transport and other related sectors; (II) methods to capture and lastingly store carbon dioxide from the fossil energy sources can also be pursued as another means of combating climate change. But, voluntary programs and tax incentives are not sufficient to get these technologies deployed at a satisfactory scale and speed to avoid climate catastrophe. An obligatory limit on carbon dioxide emissions can, optimistically, create the right market conditions for these investments. Government should take initiatives to set the political framework to encourage and promote investment by using climate friendly technologies.

[80] Proceedings of the third workshop on *Special Situation of Low-Lying Deltaic Countries to Climate Change: Issues for the Policy Makers of Bangladesh*, held at Bangladesh Civil Service (Admn) Academy, Dhaka, on 5 October 1996. Key-note paper was presented by Dr. Mahfuzul Haque, National Project Director of National Environment Management Action Plan (NEMAP).