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Thesis

Ahmed, Naim. 1998. *Litigating in the Name of the People: Stresses and Strains of the Development of Public Interest Litigation in Bangladesh*. London: SOAS. (Unpublished PhD thesis).

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A. T. Mridha v The State (1973) 25 DLR (HCD) 335, 339 [Here, the case is reported on p. 335, and the quotation/reference drawn from is on p. 339].

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ANOMIE IN INDIVIDUAL, SOCIAL AND GLOBAL CONTEXT

Sheikh Hafizur Rahman Karzon*

Introduction

The French Revolution of 1789 and subsequent industrial revolution directed the French society towards a transformation from its ancient stage to modern. During this social transition Emile Durkheim formulated his theory of anomie. Robert K. Merton reformulated Durtheim's anomie theory and applied it to explain high rate of crimes in American society. Later on many theorists expanded the anomie theory. Many attempts have been made to explain social turmoil and high rate of criminality in different countries and societies. In course of time the term "anomie" has become very popular and scholars widely used it.

When any society encounters anarchic situation, anti-social activities and crimes increase. That normless situation of a society, when it lacks homogeneity and cannot regulate social interactions properly, is viewed as anomie. Social change causes moral deregulation, when existing rules, and values lost their effective control over the societal people. Society continues to sustain this normless condition unless and until alternative rules and values develop. In 1893 Durkheim introduced the term "anomie", which he had taken from a Greek word meaning without norms. He made this concept integral part of sociology and criminology. He maintained that without social solidarity, it was difficult to keep social cohesion to the convenience of the societal people. Durkheim identified collective conscience, sum total of social likeness, as the main source of social solidarity. Any human society, ancient, modern or mixed, requires some sort of social solidarity and collective conscience, without which it cannot survive.

Values, norms and rules are something, which operate at individual, national and global levels to regulate human interactions. If human activities, human relations at micro, macro and international levels are not sufficiently regulated by norms and rules, obviously, that will generate

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anomie. In that normless situation individual becomes confused and faces moral vacuum, society experiences increased crimes and social unrest, international community is taken over by increased terrorist activities, turning the whole world into a hot bed of anomie.

In this paper I have explained how Emile Durkheim has related 'anomie' with the change of French society, and how Robert K. Merton used the term in the context of American society. Normless situation is not something which took place in the process of social transformation of French and American societies, rather it is something which may totter individual and social life of any country. Even international lawlessness may be a fit subject of anomie. How people become victims of normless situation in individual, social and global contexts has become core focus of this article. The article, in its last part, sheds light on the global lawlessness, which is the outcome of a conflict between US-UK led force and Islami jihadists. The global tension affecting the security of people all over the world becomes a concern of the international community, requiring its resolution through international law and practice, most importantly through building mutual trust and eliminating distrust and hatred.

Emile Durkeim, Anomie and Role of Law

Emile Durkeim was one of the major social thinkers of the nineteenth century who developed a very different insight into the dynamics of social change and its consequences on social order. He has been called "one of the best known and one of the least understood major social thinkers."[1] It does not seem easy to present his thought. Some ideas about the political and intellectual environment in which he developed his theories will be conducive to retelling his concept.

The aftermath of the French revolution of 1789 and the rapid industrialization of French society caused great instability in the nineteenth century French society. In response to the effects of these two revolutions, sociology was developed by Auguste Comte in the first half of the century. He was vocal for constructing a rationale society on the residues of the traditional society.[2] Sociologists anatomized the titanic social change that took place in French society and ushered in

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1 LaCapra, Dominick, *Emile Durkheim, Sociologist and Philosopher,* Cornell University Press, Ithaca, New York, 1972, p. 5.

2 *Ibid,* p. 41.

establishing social solidarity. Disintegrated French society required some way out to step into stable social order.[3]

Emile Durkeim was born in 1858 in a small French town and completed his studies in Paris. In different provinces of France he had been teaching Philosophy at various secondary schools. He then studied social science and its relation to ethics in Germany. These studies made him to write two good articles and those publications made a special position for him at the University of Bordeaux. There he started teaching sociology in 1887. University of Paris awarded doctor's degree in sociology to Durkeim in 1892, where he continued teaching sociology until his death in 1917.[4]

In his doctoral thesis, Durkheim visualized the processes of social change during industrialization. This was published in 1893 under the title "The Division of Labour".[5] Durkheim described how the more primitive "mechanical" form of society transformed into the more advanced "organic" form. In the mechanical form, each social group is characterized as self-sufficient unit relatively isolated from other social groups.[6] Lives of the people of these social groups are homogeneous and they do identical works and contain identical values. There is little division of labour, and the solidarity of society emanates from their uniformity. Organic society is the reverse of mechanical society. Organic society is characterized by huge division of labour. As this society is stratified into different segments, the diversity becomes normal due to heterogeneous character of this society. "Durkheim saw all societies as being in some stage of progression between the mechanical and the organic structures, with no society being totally one or the other."[7] Even the most primitive societies possessed some sort of division of labour and even the most advanced societies need some degree of uniformity for its smooth functioning.[8]

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3 Vold, George B. , Thomas J. Bernard and Jeffery B. Snipes, *Theoretical Criminology*, Fifth Edition, Oxford University Press, New York, 2002, p. 101.

4 *Ibid*, p. 102.

5 Durkheim, Emile, *The Division of Labour in society,* translated by George Simpson, The Free Press, New York, 1995.

6 Aron, Raymond, *Main Currents in Sociological Thought*, Vol. II, translated by Richard Howard and Helen Weaver, Basic Books, New York, 1967, p. 12.

7 *Supra* note 3, p. 102.

8 *Supra* note 6, pp. 12-13.

Law becomes integral part of both the societies and maintains social solidarity in a very different way. Law operates to ensure uniformity of the members in a mechanical society. Any deviation from social norms is repressed by legal mechanism. Responsibility of law in the organic society is to regulate the interaction of different segments of society. Two types of societies encounter crimes in different ways, crime is normal in a mechanical society without which society would be over controlled. The society transforms from mechanical to organic state generating a variety of social maladies, including crime. In 1895 Durkheim published his second major work 'The Rules of the Sociological Method' and there described 'crime as normal'. In 1897 he published his most famous work "Suicide" where he elaborated his unique thought "anomie".[9]

Mechanical Society and Crime

Uniformity of lives, works and beliefs of the members are the main character of mechanical societies. All these uniformities are called "totality of social likeness". In the language of Durkheim this is designated as 'collective conscience'.[10] Every society requires some degree of uniformity for its continuance and also encounters some sort of diversity because some people differ with the collective conscience. The pressure for uniformity exerted against this diversity is the main stimuli of keeping solidarity in a mechanical society. Such pressure is exercised in different forms. Its extreme form is criminal sanctions and weaker forms consist of reproach for morally repressible activities.

If I do not submit to the conventions of society, if in my dress I do not conform to the customs observed in my country and my class, the ridicule I provoke the social isolation in which I am kept and produce, although in attenuated form, the same effects as a punishment in the strict sense of the word. The constraint is nonetheless efficacious for being indirect.[11]

Formation and continuance of society cannot be made, as argued by Durkheim, without costly sacrifices by the societal people. These sacrifices are the price of membership of a society and constitute collective conscience. These sacrifices cause to develop a sense of collective identity placing social solidarity a firm footing. But in every

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[9] *Supra* note 3, p. 101.

[10] *Supra* note 6, p. 80.

[11] Durkheim, Emile, *The Rules of the Sociological Method*, translated by Sarah A. Solovay and John H. Mueller, edited by George E. G. Catlin, The Free Press, New York, 1965, pp. 2-3.

society there are some people who deviate from the collective conscience. The people conforming to the collective conscience develop a sense of superiority and identify them as righteous. The people who violate the collective conscience are considered morally reprehensible. Durkheim pointed this sense of superiority, of goodness and righteousness as the major source of superiority. Durkheim argued how existence of criminals is conducive to the maintenance of social solidarity as majority people consider them superior and righteous because of the delinquent activities of criminals. In this way criminals, and also the fear of punishment, play very important role in the maintenance of social solidarity.[12] In case of transgression of collective conscience, the violators are severely punished not for retribution or deterrence, but for that, otherwise the people sacrificing and conforming to the collective conscience will be demoralized.[13]

Durkheim maintained that crime is normal in a mechanical society as there in no clearly marked difference between criminal activities and those which are morally reprehensible. If traditional criminal activities are on the decrease, morally reprehensible activities will be designated as crimes. If morally blameworthy activities decrease, less morally reprehensible activities will be elevated into crime category. This is so, because criminal sanctions, Durkheim argued, are the strongest machinery to maintain social solidarity. As Durkheim put it:

> Imagine a society of saints, a perfect cloister of exemplary individuals. Crimes, properly so called, will there be unknown; but faults which appear venial to the layman will create there the same scandal that the ordinary offence does in ordinary consciousness. If, then, this society has the power to judge and punish, it will define these acts as criminal and will treat them as such. For the same reason, the perfect and upright man judges his smallest failings with a severity that the majority reserve for acts more truly in the nature of an offence.[14]

Durkheim viewed, therefore, that a society without crime is impossible. If the crimes defined by the penal code no longer occur, new behaviour will be designated as crime. So, crime exists forever and is inevitable, because in every society there are some people, whose behaviours are different from the collective pattern. If no crime happens, that is the abnormal or

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12 *Supra* note 3, p. 104.

13 Nisbet, Robert A., *Emile Durkheim*, Prentice Hall, Englewood Cliffs, NJ 1965, p. 225.

14 *Supra* note 11, pp. 68-69.

pathological state of the society, where collective conscience is so rigid that none can oppose it. In this situation crime will be eliminated, but the possibility of progressive social change will be foreclosed. In all societies, progressive change takes place when collective conscience is challenged and defeated. The people, who challenge the collective conscience, are declared criminal by the people having responsibility to preserve the collective conscience. Thus Socrates, Jesus, Mahatma Gandhi and George Washington were declared criminal by the then social authority, holding the rein of control. This crime is the price, Durkhime argued, society pays for the possibility of advancement, as mistake is the price paid for the possibility of personal development.[15]

To Durkheim, there is no human society which is free from the problem of crimes. Every society has some rules and provides sanctions, which are violated by the people deviating from collective conscience. Crime, therefore, is a normal feature of every society, and provided it does not exceed certain levels, the society is healthy. According to Durkheim, the healthy level of crime is found in simple and mechanical societies.[16]

Anomie in Organic Societies

In a mechanical society solidarity emanates from the pressure of its members to conform to the collective conscience against the diversity of its members. Placing some behaviour in the crime category is normal and inevitable for keeping the social solidarity intact. But in an organic society the function of law is to regulate the interactions of variety people of society belonging to different professions. Inadequate regulation of law can cause social mischief including crime. Durkheim called the state of inadequate regulation anomie. In his "The Division of Labour", argued that the industrialization of French society resulted in high division of labour, which destroyed uniformity and solidarity of traditional French society. But the industrialization had been so rapid that society failed to develop sufficient tools to regulate interactions of the societal people. Overproduction was followed by economic slowdown, and strikes and labour violence became frequent. This reality indicated that the relations between producers and consumers and between workers and employers

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[15] *Supra* note 3, pp. 106, 107.

[16] Williams, Katherine S., *Textbook on Criminology*, Blackstone Press Limited, London, 1997, pp. 343, 344.

were ineffectively regulated.[17] The high division of labour caused huge alienation of people of the society.

An organic society is more likely to experience unhealthy levels of criminality, if the law cannot regulate the interaction of the different parts of society. Anomie arises out of incomplete integration, which gives rise to excessive crimes. Durkhein mentioned a large number of examples, which could be classified into three categories. The first was a combination of financial crisis and industrial conflict. The second was rigid division of labour, in which the oppressed might rebel. The third was abnormal division of labour, where workers were alienated and disinterested in their jobs.[18]

Change of norms, confusion and lessened social control are the basic features of the modern urban-industrial societies, where individualism is increasing, so is increasing the possibility of deviant behaviour. In a traditional mechanical society, social bond is strong, and individual aspirations are effectively controlled by the society, where crime remains in a more balanced state. In an organic society, on the other hand, individual desires are not sufficiently regulated, which gives rise to social maladies, including increased number of crimes.[19] In the language of Sue Titus Reid:

> As societies become larger and more complex, the emphasis in law shifts from the collective conscience to the individual wronged, and law becomes restitutive. This shift from mechanical to organic solidarity is characterized by an increased need for division of labor, a division that may be forced and therefore abnormal, leading to the creation of unnatural differences in class and status. People are less homogenous, and the traditional forms of social control, appropriate to a simple homogenous society, are not effective in controlling behavior. Greater loneliness, more social isolation, and a loss of identity result, with a consequent state of anomie, or normlessness, replacing the former state of solidarity and providing an atmosphere in which crimes and other antisocial acts may develop and flourish.[20]

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[17] *Supra* note 6, pp. 370-373.

[18] *Supra* note 16, pp. 344, 345.

[19] Hagan, Frank E., *An Introduction to Criminology: Theories, Methods, and Criminal Behaviour*, Nelson-Hall, Chicago, 1989, pp. 430, 431.

[20] Reid, Sue Titus, *Crime and Criminology*, Eighth Edition, McGraw-Hill, USA, 1997, p. 144. See Emile Durkheim, *The Division of Labour in society*, Paper ed., Free Press, New York, 1964, pp. 374-388.

Anomie in American Society

Society has major responsibility to regulate the natural appetites of individuals. If society fails to control, Durkheim maintains, the unlimited desire and taste of its members, anomie will occur. Robert K. Merton argues, on the other hand, that many appetites of American citizens are not natural, rather they are created by American culture. At the same time social structure of American society puts restriction on certain groups so that they cannot satisfy those appetites. This situation creates strain on individuals of those groups and they become deviant.[21]

Culture of any society defines certain goals for its members, they may vary from culture to culture. The most prominent culture goal set by American society for its members is to acquire wealth. In Durkheimian consideration this might be 'natural aspiration'. But in American culture accumulated wealth is taken with high degree of prestige and social status. Those without money have no prestige and social status. Durkheim said that culture controls the aspirations of individuals. Merton argues that American culture persuades every citizen to acquire huge amount of wealth. The basis of American culture is an egalitarian ideology (at least theoretically) which provides that every person has equal opportunity to achieve wealth. In reality all people cannot reach the goal, unfortunately those failed are labeled as 'lazy' or 'unambitious.'[22]

American culture has fixed some institutionalized means through which culture-goals should be achieved. They are generally called "middle class values" or "the Protestant work ethic." They include hard work, honesty, education, and deferred gratification. The means, such as force and fraud, can be used for quick gain of wealth, but they are forbidden by the institutionalized means. American culture overemphasizes the achievement of culture goal. Persons who conform to the institutionalized means receive little social recognition unless they achieve a moderate degree of wealth. At the same time society recognizes those who acquire wealth through means not approved by society. People, who accumulate wealth through illegal means, enjoy high prestige

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[21] Merotn, Robert K., "Opportunity Structure: The Emergence, Diffusion, and Differtiation as Sociological Concept, 1930s-1950s," in Freda Adler and William Laufer, eds., *Advances in Criminological Theory: The Legacy of Anomie Theory*, Vol. 6, Transaction Press, New Brunswick, NJ, 1995, pp. 6-7.

[22] Merton, Robert K., *Social Theory and Social Structure*, The Free Press, Glencoe, Ill., 1968, pp. 187, 193.

and social status. This situation puts a severe strain on the institutionalized means, specifically those people who cannot achieve wealth through approved means they feel seriously obstructed.[23]

Many people of the society encounter this strain, which specifically falls more severely on the lower class people. Their talents and efforts limit their ability to acquire wealth. Social structure also obstructs them. Only those of this class having extra ordinary talent and the ability to-hard work do can acquire wealth by adhering to institutionalized means. The bulk of the people of lower class cannot think of acquiring wealth through institutionalized means, that is creating severe strain for them. The strain is not so severe among the people of upper class as a person of moderate talents of that group can achieve a degree of wealth through institutionalized means. American culture puts over emphasis on the accumulation of huge amount of wealth and maintains that it is applicable to all people of American society. At the same time social structure limits individual ability of many to acquire wealth through institutionalized means. Merton considers this contradiction between the culture and the social structure of American society as causing anomie. He describes anomie as the permanent feature of American society.[24]

"Merton therefore used a cultural argument to explain the high rate of crime in American society as a whole, and a structural argument to explain the concentration of crime in the lower class."[25] Cultural imbalance is viewed as the cause of high rate of crime in American society. The imbalance lies with the fact that strong cultural forces exalt monetary success and weaker cultural forces inspire the adherence to institutionalized means of hard work, honesty, and education. Why lower class people in America commit more crimes than higher class that cannot be explained in terms of cultural imbalance. Merton then invokes social structure to explain higher crime rates among lower class people. Merton argues that legitimate opportunities to accumulate wealth have been relatively concentrated in the higher classes and relatively absent in lower classes. Less opportunities for lower class people to achieve wealth create pressure on them causing high rate of crime. There are various ways by which an individual can respond to culture goals and

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[23] Ibid, pp. 187, 188, 190.

[24] Ibid, p. 216.

[25] Bernard, Thomas J., "Testing Structural Strain Theories," *Journal of Research in Crime and Delinquency* 24(4): 264-70 (1987).

institutionalized means. Merton describes these options as conformity, innovation, ritualism, retreatism and rebellion.[26]

In a stable society most people adhere to both the culture goals and the institutionalized means. The conformist people struggle to achieve wealth through approved means. Whether they succeed or not matters little to them and they continue to stick to middle class values.

Persons who innovate retain their allegiance to culture goals, but consider that they cannot acquire wealth through approved ways. So, they abandon institutionalized means and acquire wealth through innovative methods not approved by the norms and rules. Crime becomes very high in those societies where most of the people innovate. Upper class people may take resort to fraud and misrepresentation, they may cheat on their income tax. Lower class people may develop gambling, prostitution or drug healing or they may burglarize or rob. Both the upper and lower class people become desperate to accumulate wealth at the cost of approved means.

Some people adhere to approved means, but leave their desire to acquire more wealth. This type of psyche is most frequent among the people of lower middle class. By their talents, hard work and honesty they achieve a minimum level of success. The fear of losing this success causes them to leave the hope to get more material success and lock them into their present position.

Some people take resort to retreatism which involves simply dropping out of the whole game. They do not pursue culture goal and have no desire to adhere to institutionalized means. This category includes psychotics, autists, pariahs, outcasts, vagrants, vagabonds, tramps, chronic drunkards and drug addicts. When people have strong commitment to both the goals and means and they found that there is no possibility of becoming successful, they retreat from the game.

Some people may respond to this frustration by denying the existing social structure. They try to change the society by violent revolution. Rebellious method may be political or spiritual. If it is political the existing society may be replaced by socialist society, if it is spiritual, the concerned person may undergo fasting and meditation. The person who rebels ceases to remain a member of existing society, denies to conform

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[26] *Supra note 3*, p. 138.

to its culture and starts to maintain his/her life according to new culture.[27]

Merton mentions the above mentioned five adaptations as various individuls' options which they can take resort to in response to the strain of anomie. Some individuals may consistently choose one adaptation and some may accept two or more adaptations simultaneously. Finally, Merton devised this theory to account for some delinquent behaviour, not all diverse behaviour prohibited by the criminal law. The intention of the theory is to focus attention on one specific problem, "the acute pressure created by the discrepancy between culturally induced goals and socially structured opportunities."[28]

Anomie and Individuals

When looking into the social transition, Emile Durkheim focused on two types of society. He characterized more primitive mechanical society with attributes of strong social solidarity taking stimuli from collective conscience. In mechanical society law's major responsibility is to discourage individuals so that they will not deviate from the collective conscience. In the process of social transformation, from mechanical to more advanced organic form, the law shifts its emphasis from collective conscience to the individual wronged and law becomes restitutive. Organic society, originating from the womb of mechanical society, requires increased division of labour that bounds the society with severe stratification. Organic society, with industrialization and increased division of labour, causes greater loneliness. More social isolation places individuals in a condition of anonymity. Absence of sufficient social control, more social isolation and a feeling of identity crisis put the whole society in an anomic situation, where crimes and other anti-social activity pervade. The sense of loneliness has become so extensive that Riseman calls it "lonely crowd." Homans describes the situation as "a dust heap of individuals without links to one another."[29] The urbanization and industrialization make the social relationship "cold, anonymous and formal." The interpersonal relationship becomes superficial and transitory, which weakens the bond of kinship, lessens the significance of

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[27] Ibid, pp. 138-140.

[28] Ibid, pp. 140-141.

[29] Wirth, Louis, "Urbanization as a Way of Life," *American Journal of Sociology*, July, 1938, pp. 1-24.

family, and ultimately undermines the traditional basis of social solidarity.[30]

Individuals have to stay within a social structure, for that social factors, in particular social ups and downs, influence individual behaviour. As Durkheim put it:

> The industrialization of French society, with its resulting division of labour, had destroyed the traditional solidarity based on uniformity. But this industrialization had been so rapid that the society had not yet been able to evolve sufficient mechanism to regulate its transactions. Periodic cycles of overproduction followed by economic slow down indicated that the relations between producers and consumers were ineffectively regulated. Strikes and labour violence indicated that the relations between workers and employers were unresolved. The alienation of the individual worker and the sense that the division of labour was turning people into mere "cogs in the wheel" indicated that the relation of the individual to work was inadequately defined.[31]

Durkheim attributed anomie to unlimited aspirations of human being and breakdown of social norms to regulate those aspirations. Durkheim began his theory with a comparison of animal and human nature, and argued that physical body of animals limit their appetites. If animals are provided with sufficient food and convenient places to sleep they remain satisfied. Having active imaginations humans have physical, intellectual, spiritual and mental needs and desires. Some of these desires are good, and some are bad. When basic needs of humans are met, then other needs and demands arise. "The more one has the more one wants"—this famous saying expresses very crude reality of human life. Durkheim was very correct in maintaining that physicality puts natural limits on the appetites of animals, but human appetites are naturally unlimited. Durkheim argued that only moral rules of society could regulate unlimited desires of human being. Humanity's darkest danger, as Durkheim maintained, resides in the absence of deregulation, or in absolute freedom.[32]

Some individuals may have sufficient control over their appetites, but most human are very vulnerable to their unlimited desires. There should be some authority to control their aspirations. Durkheim pondered

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[30] *Ibid.*, p. 17.

[31] Durkheim, Emile, *The Division of Labour in Society*, translated by George Simpson, The Free Press, New York, 1965, pp. 370-73.

[32] *Supra note 3*, p. 108.

collective conscience as a strong agency to harness individual desires and whims. "Either directly and as a whole, or through the agency of one of its organs, society alone can play this moderating role; for it is the only moral power superior to the individual, the authority of which he accepts."[33]

There are various situations when social rules become weakened or even break down. Durkheim thinks that there is a rapid social change, when a breakdown of society's ability to regulate human relations occurs. "Durkheim went on to argue that that French society, over the previous 100 years, had deliberately destroyed the traditional sources of regulation for human appetites. Religion had almost completely lost its influence over both workers and employers. Traditional occupational groups, such as the guilds, had been destroyed. Government adhered to a policy of laissez-faire, or noninterference, in business activities. As a result human appetites were no longer curbed. This freedom of appetites was the driving force behind the French industrial revolution, but it also created a chronic state of anomie, with its attendant high rate of suicide."[34]

Human nature is not devoid of anti-social traits. 'Every human is a potential criminal' is not an altogether alien idea. Psycho-analysis, genetic science and theology can be strongly cited to substantiate this concept. Anti-social elements are claimed to have deeply rooted in human nature, as every human gets selfishness, acquisitiveness, aggressiveness, sexuality and so on. from their parents. This is argued to be the criminal legacy of *Homo sapiens*. Most humans do not commit crimes, because all the anti-social elements are minimized through a process of socialization. Human behaviour is moulded, at least primarily, by family values. In course of time an individual interacts with different segments of society. Family values, social rules and religions teaching contribute to the development of behaviour. If the factors regulating human behaviour become weak, people behave in an anti-social manner. Hardships in family relation, rapid social change and global insecurity may bring about on anomic situation, when individuals cannot understand what to do and what not to do. Authority of conventional agencies like family, society, and religion, becomes weak with the increased urbanisation, and industrialization. Globalization and technological advancements have

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[33] Abraham, Francis M., *Modern Sociological Theory: An Introduction*, Oxford University Press, 6th impression, 2001, p. 177.

[34] Durkheim, Emile, *Suicide*, Macmillan, New York, 1952, pp. 246-58.

brought more isolation for individuals where they develop a sense of anomie.

The increasing wave of globalization does not leave any aspect of life untouched. People no matter wherever they live, confront the offshoots of globalization. Free flow of information, and development in technology and genetics brought change, in social relation. To the mounting consequences of globalisation, people cannot keep quiet. Traditional concept of geographical sovereignty has lost its currency, over which economic independence is considered more important. People of different countries are thinking to develop supra-national institutions like EU. Multi-national companies have subjected the people to increased hardships.

Capitalism, with its individualistic ideology and private profit economy, has provided foundation for the global order, which most of the local economies have taken as model. Capitalism is transmitting a (so-called) global culture to people's mind through an international corporate media. Western industrial societies, combination of capitalism and individualism, are very quick in generating individual alienation, which is spreading rapidly to the rest of the world. All the global changes are so fast and moving so faster that individuals cannot cope with the changing circumstances. They are gradually losing their ability to make changes in their respective spheres.[35]

The modern societies have created anomic situation for people of different countries. Thus, fugitive attitude of drug addicts, violent political activism of the young radicals, escapism of the people, and the deviant life styles of the counter cultures are only manifest expressions of the malady of "all the lonely people." "Most usages of 'alienation" as Keniston points out, "share the assumption that some relationship or connection that once existed, that is 'natural,' desirable, or good, has been lost."[36] The ideas of anomie and individual are old, but their relationship gained wide currency only recently. Contemporary social theories also get enormous interest in the matter.[37]

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[35] Amin Samir, *Maldevelopment: Anatomy of a Global Failure*, London, Zed Books, 1990, p. 109.

[36] Keniston, Kenneth, *The Uncommitted : Alienated Youth in American Society*, Harcourt, Brace and World, New York, 1965, p. 452.

[37] *Supra* note 33, p. 176.

Anomie and Society

Durkhein justified the existence of crime in a mechanical society and maintained that crime was normal in a society as there was no clearly marked dividing line between criminal activities and those which are ethically blameworthy. By citing an example of a society of saints Durkheim strongly argued that crime is normal in any society. He maintains:

> Imagine a society of saints, a perfect cloister of exemplary individuals. Crimes, properly so called, will there be unknown; but faults which appear venial to the layman will create there the same scandal that the ordinary offence does in ordinary consciousness. If, then, this society has the power to judge and punish, it will define these acts as criminal and will treat them as such. For the same reason, the perfect and upright man judges his smallest failings with a severity that the majority reserve for acts more truly in the nature of an offence.[38]

Durkheim developed the idea of anomie in the context of rapid change of French society. He attributed anomie to a time of social turmoil, when morality and social rules broke down and societal people could not cope with the changing time. As a result, social unrest and criminal activities increased. Durkheim saw anomie occured during times of social unrest. But Merton saw anomie as a permanent feature of American society. He argued that American society has set a culture goal for all the citizens of America, and determines institutionalised means to reach the target. Culture goal of American society is to acquire wealth. Society prescribes education, labour, and deferred gratification to acquire wealth. But society recognises those who acquire wealth through illegal means. Society also limits opportunity of lower class to acquire wealth. This contradiction, which has become permanent feature of American society, between culture goal and institionalised means creates severe strain on the people in general, specifically lower class people feel seriously obstructed. As a result they take resort to criminal activities or presumably some of them do so to express their agony.

Merton developed his insight into American society, and tried to explain the cause of high crime rate. Social structure and its inner crisis influence the overall condition of a state, including its law and order situation.

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[38] Durkheim, Emile, *The Rules of the Sociological Method*, translated by Sarah A. Solovay and John H. Mueller, edited by George E.G. Catlin, The Free Press, New York, 1965, pp. 68-69.

Durkheim developed his theory of anomie in the context of French society, but Merton perceived anomie in the American social context. In course of time concept of anomie has become extensive and researchers find out the cases of severe lawlessness in different countries.

Both Durkheim and Merton maintain that crime is a consequence of a defective social regulation. The authority of society is so flawed that it imposes few restraints on unlimited appetites of human, as a result deviant behaviour will occur. In many places people are living in conditions, where formal control is either absent or defective. People are living in an unpredictable situation, where personal safety is in danger, the society is abound with much tension and high rate of crime. The poorest areas of the American cities, some housing estates in Paris, London and St Louis lack basic social cohesion. After designating their traditional hunting grounds as a national park, the IK of northern Uganda, a tribe for example moved to a mountainous area. Having adapted to new form of life now they are beset with 'acrimony, envy and suspicion' and abandon their former life of cooperation, 'Excessive individualism, coupled with solitude and boredom' cause them to temporize with an envious and suspicious life.[39]

A number of criminologists discover how massive scale anomie has flourished that entire society has broken down, which results in anarchy and lawlessness. There are countries where political structures are so disordered that those create confusion whether there exists any government at all. Kaplan refers to the road warrior culture of Somalia, the explosion of violent activities in the Ivory Coast and Sierra Leone. He describes these states as lawless having their national armies as 'rabble', which have lost control over their cities at night. "The future for many, he luridly predicted, would be a ' run down crowded planet of skinhead Cossacks and juju warriors, influenced by the worst refuse of western pop culture and ancient tribal hatreds, and battling over scraps of overused earths in guerilla conflicts.'[40]

Guerillas and terrorists wage conflicts against governments which threaten the state's conventional monopoly of violence, Martin Van

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[39] Rock, Paul, "Sociological Theories of Crime," in Mike Maguire, Rod Morgan, and Robert Reiner, eds., *The Oxford Handbook of Criminology*, Second Edition, Oxford University Press, 1997, pp. 236- 239.

[40] Kaplan, R., "The Coming Anarchy", *The Atlantic Monthly*, February, 1994, pp. 62-63.

Crevet considers it as the ubiquitous growth of 'low intensity conflict.' Amount of crime, inevitably, depends on how crime is being defined by law and how effectively the law is being executed by state machinery. If the state itself has been criminalised or the law enforcement department has become perpetrator, extensive anomie will be concomitant. A report revealed that Mexican police was involved in extortion, kidnappings, thefts and drug trafficking.[41] Aeroplane of Colombian President was found to be carrying large quantities of cocaine.[42] In this context it is very difficult to distinguish between crime and politics. "There has been, [...] a widespread decline of the myth that the sovereign state can provide security, law, and order, a decline in the legitimacy of the state through corruption scandals, a growth of international crime and a rise of criminal states such as Chechnya, and, in Africa particularly, the emergence of barbarism, horror, and atrocity.[43] In some settings, Cohen said 'lawlessness and crime have so destroyed the social fabric that the state itself has withdrawn."

In the context of the invasion of Kuwait by Iraq on August 2, 1990, the UN sent troops to liberate Kuwait. People of Kuwait got their country back. Kuwait had to sustain huge infrastructure destruction and financial loss, but they faced their major catastrophe in the change of their social cohesion. One resident said, "no one trusts any body anymore, we are becoming like Chicago." Enormous social changes occur in the post-war Kuwait when crime rate rose significantly with rape reaching epidemic proportions.[44] The old ways of society started disintegrating gradually and the Kuwaiti society seemed very difficult to restore that existed prior to the war. Many residents armed themselves with guns, sexual behaviour was changing and alcohol, though officially prohibited, was consumed freely. Many women refused to subject them to their traditional submissive role.[45]

The introduction of private entrepreneurship and reform along the line of market economy caused the Chinese society to encounter a lawless situation. China has been, traditionally, an agricultural country, consisting

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41 *New York Times*, September 3, 1996.

42 *New York Times*, September 23, 1996.

43 Cohen, Stan, "Crime and Politics", *British Journal of Sociology*, 1996, p. 47.

44 *USA Today*, July 8, 1991, p. 9.

45 Kabir, Ahmed Ehsanul, "Anomie: Individual, National and International Context," *Journal of Law*, Vol. 1, No. 1, June 2003, pp. 34-45.

of rather self contained families with agriculturist husband and weaver wife. The traditional life of China had long been directed as per the teachings of Confucius and this life was abandoned after the communist takeover. The then incumbent of China introduced a reform in 1978 to establish a socialist market economy. This introduction infiltrated capitalist elements into Chinese society, causing change in the social order, which set crime rate to rise vehemently.[46]

In the context of rapid social change the old norms became obsolete and new one had yet to appear. In this situation people could not understand what to do. Both the traditional Confucianism and socialist ideology were not fully consistent with the new economic reform. At the same time communist authority did not fully accept western ideas and its market economy. The conglomeration of socialist ideology with market economy and its penetration into Chinese society created an anomic condition, where many people became confused and felt lost. Social regulation had broken down and seemed inadequate to control unlimited human appetites. Some people took resort to crime to realise their desires, which caused increased crime and delinquency in modern China.[47]

Post communist Russian society is beset with peoples' resentment. Culminated problems, left behind the iron wall of totalitarian regime, are now out in the open. The situation has been aggravated due to the transition of Russian society, which is transforming from tradition bound, community-based form to a modern form where individualism and consumerism are gaining momentum. Russian people, as a result, face a situation to which old forms do not suit fully and many cannot cope with too much individualistic ethos. Hosking characterizes this condition of society as 'vacuum of values.' This anomic condition causes, as pointed by Hosking, "a sharp increase in crime, violence and suicide, as well as proliferation of bizarre beliefs and aberrant behaviour. Another has been the ethnicisation of all political issues as people redirect their dislocated loyalties from local community to the nation."[48]

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[46] *Ibid*, pp. 41, 42.

[47] Information collected from Internet Site of Anomic based on China.

[48] Hosking, Geoffrey, *The Awakening of the Soviet Union*, 1960, pp. 211-212. From Internet version.

Anomie in Bangladesh

Anomie is taking strong hold in Bangladesh. Here I shall discuss how the crime is increasing in Dhaka city, indicating extensive anomic situation. More than half of the crimes of Dhaka city are now committed by the juvenile delinquents. Their ages range from 12 to 20. Everyday there takes place one incident of killing, sometimes the frequency is more regulating. Every month 5-6 persons are kidnapped for ransom. Twelve incidents of hijackings and 35 to 40 different types of crimes are committed in Dhaka city everyday.[49]

17 per cent out of the total crimes in the whole country are committed in Dhaka city. In every 1000 persons 8 crimes have been so far committed from 1990 to 2001. But the number of crimes committed in Dhaka city is 18 per 1000. That means that the crimes committed in Dhaka city is 2.2 per cent more than the total number of the whole country's that acierate. In 1990 crimes were committed in Dhaka city at a rate of 5.1 per cent. In 2002 it increased to a rate of 8.9 per cent. From this data it appears that law and order situation has not improved as expected.[50] There are 80 crime syndicates in the whole country out of which 28 are operating in the city.[51]

Anomie may be defined as a situation where norms are confused, unclear and not present. Simply it is normlessness, which leads to deviant behaviour. Durkheim delineates the transformation of a simple and non-specialized 'mechanical' society into highly complex and specialized 'organic' society. By anomie Durkheim means the breakdown of social norms where norms no longer control the activities of the societal members. "Individuals cannot find their place in society without clear rules to help guide them. Changing conditions as well as adjustment of life leads to dissatisfaction, conflict and deviance. Durkheim observed that social periods of disruption brought about greater anomie and higher rates of crime, suicide, and deviance."[52]

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[49] The Daily Bhorer Kagoj, April 3, 2002.

[50] An article published in the Detective, the official publication of the Police Department, has revealed all these information. See The Daily Janakantha, January 12, 2003.

[51] The Daily Sangbad, December 3, 2003.

[52] Sociology at Hewett, Collected from Internet, See http://www.hewett.norfolk.sch.uk/curric/soc/crime/devmap.htm

Is it possible to explain present situation of Dhaka city in terms of the anomie theory propounded by Durkheim? Have the rules regulating the behaviour of the people of Dhaka city totally broken down? Has total normlessness occurred in Dhaka city? How can we explain high rate of crime and deviance of Dhaka city? Anomie situation has not totally devoured the urban life of Dhaka, rather the situation of Dhaka can be termed as "anomie-like". Normlessness has not totally occupied the social life of Dhaka, but the norms are confused and unclear. If everything is all right, why no one in Dhaka city is secured? Social disorganization, together with 'anomie-like' situation, may be the cause of high degree of insecurity, crime and deviance. Derogation of norms and values has taken strong hold among the young generation of Dhaka city. Many of the people have been confronting with erosion of values and bad impact of pornography and satellite culture.

The operation of the aftermath of the conflict between culture goal and social means, as pointed by Robert K. Merton, is very much active in Dhaka city. The society of this city, like American society, has determined a culture goal before everyone of us, that is to accumulate wealth. Everyone in Dhaka city is running behind money, they do not bother the means. Bangladesh has been heading the top position of the most corrupt countries in the world, Dhaka being the capital of that country. The attitude of earning money through any means is creating huge instability among the people of Dhaka city, which finally will be expressed as deviance or criminal activity. Not that everyone is responding to the conflict through the same way. We also see the existence of various modes to respond towards culture goal and approved means. In Dhaka city some people do not have access to approved means and some avoid the means because they do not have the ability to earn wealth through approved means. Both of these groups, most of them are young people, try to earn money through illegitimate ways. Theft, robbery, hijacking, extortion, kidnapping for ransom are committed by these types of people. Moreover, corruption has gone to the root of the society. Corruption has taken institutional shape in Dhaka city.

Anomie in Global Context

US patronization of Islamist forces, their subsequent rise, US armed presence in Middle-East during gulf war, and terrorist attacks on western targets have created tension and insecurity in different countries. Finally the incident of 9/11, and US attack on Afghanistan and Iraq have created widespread lawlessness all over the world.

USA has been the strongest country in terms of economic and political powers and military establishment. After the fall of the Soviet Union in 1990, the whole international order was put under the supremacy of the USA, which could have exploited its ability to develop a better global system. But it is busy with expanding its political hegemony, underlying which is the intention to perpetuate economic interests.

CIA equipped Mujahideens with modern arms and training to combat the USSR aggression on Afghanistan. After the fall of the Soviet-sponsored government, the Taliban took control of Afghanistan, who sheltered bin Laden and his al-Qaeda. Osama bin Laden, once business partner of present U. S. President Junior Bush, developed his al-Qaeda net work with active U. S support and for long served the geo-strategic purposes of U. S. government. The CIA, getting substantial help from Pakistan's ISI, played key role in training the Mujahadeens. Receiving modern training and arms, al-Qaeda installed its world wide network and started subversive activities.[53]

Initially the US-Mujahideen relation was reciprocal, both worked together because their interests coincided, and continued so long it was mutually-beneficial. In course of time al-Qaeda started working for its own exclusive agenda. It got seriously shocked on US armed presence in Mddle-East and warned US to leave, but noticed no-response instead. As a result they started targeting western establishments.

Four terrorists hijacked Air France Flight 8969 on December 29, 1994, a flight from Algiers to Paris. The terrorists, alleged to have ties to Osama bin Laden, loaded the plane with explosives with a purpose to run it into the Eiffel Tower. Commandos stormed into the Plane and killed the hijackers, thus dismantling the evil plot.[54]

French intelligence partially stopped an al-Qaeda suicide hijacking seven years before the 11th September incident. The 1998 US Embassy bombings in Kenya and Tanzania were alleged to be orchestrated by al-Qaeda. Finally the al-Qaeda hit World Trade Centre and Pentagon. Their attempt to white House, though failed, scared the American people and compelled American President to go into hiding. It was first ever attack

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53 Clossudovsky, Michel, From a Research Paper prepared by Internet Crime Site.

54 Hansen, Chris, "The Lesson of Air France Flight 8969," *NBC News*, September 30, 2001.

in mainland since Pearl Harbour, an attack having some symbolic value as hitting their highest commercial, military and political establishment, but very barbaric and inhuman. After this attack, U. S. declared war on terror, in particular to stamp out al-Qaeda, in general putting the Muslim community in danger. Having internationally well-organized set-up, their agents are working not only in Muslim region, but also the non-Muslim regions putting the U.S. and British establishments under the threat of sudden attack.

The policy of (USA) patronising the religious extremists to destroy the counter establishment (USSR) has become suicidal. The Frankenstein, the radical Islamists, developed its power to the extent to hit strategic mainland targets of U.S., which they did on 11th September. The U.S. policy, sometimes very cunning and sometimes one eyed, is implanting seeds of hatred, humility and distrust among the people of all over the world. In particular the policy, which U.S. is practicing on Middle East affairs, has made insurmountable gap between U.S. and Muslim community. The existing situation, with its attending consequences, has put the whole world under an ideal state of anomie, where life is uncertain everywhere. This reality has been reflected by the terrorist attacks in London, Delhi, Mumbai, Indonesia, Madrid, Russia, Egypt, and Amman. So long persecution, torture, and harassment of Muslims in Iraq, Philistine, Afghanistan, and other places will continue in the name of war on terror, global anomic situation has dim possibility to come to an end.[55]

Terrorists launched suicide attack on the parliament house of India on December 13, 2001, in which 14 people were killed. Another attack hit a temple of Guzrat in September 2002 that took away 33 lives. On October 12, 2002 Mari, a night club of Bali island in Indonesia, sustained a bomb attack, which the terrorists did with the aid of a strong bomb like C-4. 200 people became victim of this attack. Madrid, capital city of Spain, experienced terrorist attack on March 11, 2004. 200 people were killed and another 400 were injured in three separate attacks, which the al-Qaeda terrorists were alleged to have orchestrated, in 3 railway stations.

Chechen rebels made hostage of 1100 students in a school in the Russian city of Beslan on September 1, 2004. Russian force took action after three days in a bid to rescue the students. 200 children and guardians were

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[55] *The Daily Prothom Alo*, 15 September, 2006.

killed during crossfire and due to collapse of the roof. This tragedy happened because of the reluctance of Russian authority which did not pay heed to the demand of regional autonomy, for which Chechens have been struggling from early 90s.

July 7, 2005 could have been a delighted day for the people of London as the on night before they got the opportunity to be the host city for Olympic Games for 2012. But it became a tragic day for Londoners, who witnessed several attacks in the subways at the very morning of the day. Within one and half hours it turned into a city of dead. Four attacks took away 52 lives. Two thirds English people view, according to the report of a survey, the terrorist attacks are linked to the occupation of Iraq by US-British force.

Sharam-Al-Sheikh of Egypt is a famous tourist spot, which became a target of series of bomb attack on July 23, 2005. It took away 83 lives. A terrorist group related to al-Qaeda admitted the responsibility of the attacks. Terrorists again targeted Bali island of Indonesia, in three separate suicidal attacks 32 people were killed on October 1, 2005. Hotel Radison, Grand Hayet, and Dig-Inn, three five star hotels of Amman city sustained suicidal attacks of al-Qaeda on November 9, 2005. The attacks washed away at least 85 lives. Eight strong bombs were exploded in different trains of Mumbai, commercial capital city of India, within only 11 minutes on July 11, 2006. 200 people lost their lives in those attacks.

CIA is alleged to direct their covert operations throughout the Middle East, the Caucasus, the Balkans and Central Asia with the assistance of ISI, intelligence wing of Pakistan. This region not only contains huge oil and gas reserves, but also produces three quarters of the world's opium. The U. S. A. and Saudi Arab funded the Islamic jihad, but a substantial portion of funding came from the drug trade of the Golden Crescent.

USA, with its ally Britain, occupied Iraq territory in pursuance of an apprehension that Iraq might attack with its huge weapons of mass destruction, thus embracing the doctrine of preemption and executing it on the face of strong protest, unprecedented till the Vietnam atrocities. There was no visible sign on the part of Iraq, or trustworthy ground to believe that Iraq was planning to attack U.S. No credible evidence was available of the Iraq's connection with the incident of 9/11. In no way Iraq could be pondered as a possible threat to U.S. Nevertheless U.S. and

Britain sent troops, in defiance of U.N. Resolution, to Iraq to topple Saddam Government, which made the whole region of Middle-East instable.

If Iraq could have possessed weapons of mass destruction, or constituted a substantial threat to any country, or patronized any terrorist group, that would have been a matter pertaining to U.N. jurisdiction. In no situation the unilateral action by U. S. and Britain is justified, which they did in clear violation of the U.N. decision and international practice, leaving aside the U.N. as an impotent organization.

The causes of 9/11 are closely linked with the long practising policies of US, which also sustained their aftermath. According to Jacques Derrida, it is the USA who created the people who brought about the incident of 9/11. America trained them during Afghan war against Soviet aggression. The people, whom US created in the name of ending so-called cold war, launched attacks on world trade centre of New York. Derrida considers the time after cold war worse, both from historic and psychological point of view. It was easy to keep a balance between two super powers during cold war. But it is not possible to keep a balance with terrorism, as attack does not come from any state, comes from a force, whose power cannot be measured. Psychologically, 9/11 not only takes place in memory, but also in unconscious. The way it has been presented in the media, it is not directed towards past, rather will be seen in the future. According to Derrida, in the name of waging war against terrorism, western alliance has declared war against itself. They have permanently determined who is friend, and who is enemy. We shall be noticing its far-reaching consequences in the future. Moreover, the concept of terrorism, on the basis of which the distinction between friend and enemy has been demarcated, is very complicated.[56]

According to Derrida, the term 'terrorism' is related to national liberation struggle or state sovereignty, but America-Britain use the term to indicate only terrorist activities. Their aim is to achieve two goals, those are: A. to

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[56] Derrida, Jacques, Interview taken on October 22, 2001 by Giovana Borradori. See *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* by Giovanna Borradori, University of Chicago Press, 2003. See "Jak Derridar Bichar", Translated by Masuduzzaman. *The Daily Prothom Alo*, September 15, 2006.

capture bin Laden, and B. to have American people their brain washed. They have psychologically prepared the people of America and Europe that 9/11 has caused great damage. Sustenance of America, and preservation of world order require continuous war against terrorism. It is America, the imperialist force, is patronizing national and international terrorists. Sometimes they call someone freedom-fighter, sometimes terrorist. The same fighter, using the same arms, once has become freedom-fighter or national hero, gets the title 'terrorist' at another time. When Afghan Mujahideens were fighting against Russian force, they were freedom-fighter, national hero. But when America-Britain attacked Afghanistan, manifesting state-terrorism, to capture bin Laden and resisted, the Afghan became terrorist. If this is the case, what can be said about Israel, Chechnya, and Irish? Where is the border line between 'national' and 'international', between 'police' and 'army', 'peace-keeping of peace-keeping forces' and 'war', 'terrorism' and 'war', 'civilian' and 'military', and 'bordered' and 'borderless' attack and self-defence? Now America or countries of the South do not occupy any country like the colonial period, but take control of technology and economic establishment (such as oil and pipe line of oil), or political power (such as Iraq or Afghanistan).[57]

In understanding the present global situation politics both during and after the cold war are important. In 1950s, the USA did not make friendly relation with the nationalist and secular forces of different countries. Rather they did it with the religious forces of Arab world, as policy-makers of US envisaged them anti-communist. The way they considered religious forces reliable, the progressive forces were not.[58] According to Robert Dreyfuss[59], US journalist and writer, USA erred again in the 1970s, during the peak of cold war, when in an attempt to control the Middle-East it supported Islami rightist forces from Egypt to Afghanistan, either covertly or overtly.[60]

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[57] *Ibid.*

[58] Ahmed, Rahnuma, *Islami Chintar Punorpathan: Samokalin Musolman Budhijibider Sangram*, (In Bengali), (Reinterpreting Islam: The Struggles of Contemporary Muslim Intellectuals), Ekushey Publications Ltd., Dhaka, 2006, p. 13.

[59] Dreyfuss, Robert, *The Devil's Game*, Henry Holt and Co., Metropolitan Books, American Empire Project Series, 2005. <http://www.robertdreyfuss.com/thebook.htm>.

[60] *Supra* note 58, pp. 13, 14.

In Afghanistan US supported Mujahideens, who later on turned out to be Taliban. Zbigniew Brzezinski,[61] former national security adviser of the USA, in an interview given in 1998 told that, they started to help the Mujahideens' before six months of the Soviet aggression in Afghanistan. Their intention was to create Vietnam war for Soviet Union. When asked whether he had any repentance as they gave arms to Islamists, the future terrorists, he replied that they considered the destruction of Soviet Union more important than 'some excited Muslims'.[62]

In 1980s the agents of CIA begun 'Jihadi-recruitment' in Muslim countries in order to woge war against communism. After the Second World War, Afghanistan became the largest field of secret operation for US, which expended more than 3 billion dollar, for the training of Mujahideens. During the Soviet-Afghan war, Afghanistan-Pakistan became the largest producer of heroin and market of illegal arms due to the operation of CIA.[63] In 1985 President Reagan compared the Mujahideen with the great men, who established America.[64]

The close relation between USA and Mujahideens fairly suggests the creation of Laden and al-Qaeda by CIA. Many assume the incident of 9/11 as cooked and still US has very good relation with al-Qaeda. But some put a different interpretation. They mentioned the entering of US armed force into Saudi Arab, sacred place of Muslim community, where foreign force never let in. US force went there during the gulf war to help Saudi Arab, but after defeating Suddam, when they did not leave Saudi Arab, Laden released letters, one after another, questioning the presence of US force and asked them to quit. Previously Laden struggled to drive away Soviet force, now he intended to see the US force warded off Saudi

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[61] Zbigniew Brzezinski: How Jimmy Carter and I started the Mujahideen. Interview of Zbigniew Brzezinski, *Le Nouvel Observateur*, France, January 15-21, 1998, p. 76. <http://www.counterpunch.org/brzezinski.html>.

[62] *Supra* note 58, p. 14.

[63] Mahmood, Saba and Hirschkind, Charles, "Feminism, the Taliban and the Politics of Counterinsurgency." *Anthropological Quarterly*, Spring 2002, 75, 2, pp. 339-354. <http://www.fathom.com/feature/190136/index.html>.

[64] Ahmed, Eqbal, "Terrorism: Theirs and Ours." A Presentation at the University of Colorado, Boulder, October 12, 1998. <http://www.sangam.org/ANALYSIS/Ahmad.htm>.

land. People like Laden, according to Eqbal Ahmed,[65] though millionaire, obeys tribal ethics, which can be translated into loyalty and revenge. If you keep your words, I shall be loyal to you, otherwise I shall take revenge.[66]

In Iraq, the main consideration of US is 'oil'. Bill Christinsen, the former political analyst of CIA, considers three causes behind Iraq attack, those are: US desires (1) to establish full control over oil of Iraq; (2) to take global supremacy, and (3) (to prompt) the 'strategic transformation' of the whole Muslim Middle-East, first step of this plan was Iraq occupation.[67] Had all these in mind, US put forward a doctrine of preemptive war. US pleaded Iraq's possession of WMD, weapons of mass destruction, to justify the war, but later enquiry revealed it out and out false.

As Masud tells us:

> "Trends in Global Terrorism: Implications for the United States", a report by the National Intelligence Estimate (NIE), assesses the consequences of Iraq war. The NIE prepared the report in April, 2006 on the basis of consensus of 16 US intelligence agencies. Some leaked portion of the report contradicted the claim of President Bush that Iraq war was needed to save the American people from al-Qaeda's terrorism, rather considered the Iraq invasion as a 'cause celebre' for jihadists, "breeding a deep resentment of US involvement in the Muslim world and cultivating supporters for the global jihadists movement."[68]

The NIE assesses that the jihadists are increasing both in number and geographic decentralization. The NIE report identifies that the attitude of jihadists towards Europe is very important because of large scale Muslim immigration. To them Europe is important both for a source of recruitment and for a target of attack, which was demonstrated by Madrid and London bombings. But the jihadists' appeal seem not to be very strong to many Muslims. Particularly women do not like Sharia-based conservative governance.[69]

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[65] *Ibid.*

[66] *Supra* note 58, pp. 15, 16.

[67] *Ibid*, p. 16.

[68] Masud, Kazi Anwarul, "Iraq conflict a cause celebre for jihadists", *The Daily Star*, October 8, 2006, p. 10.

[69] *Ibid.*

Daniel Benjamin and Steven Simon in their recently published book, *The Next Attack: The Failure of the War on Terror*, have identified a number of causes, which will set Islamic radicalism to spread all over the world. Those are unilateralism, provocative rhetoric like 'axis-of-evil', overly active tactics, and the invasion and occupation of Iraq. In his book *'Winning Modern Wars'*, General Wesley views that US has been led to a path of isolation and insecurity by Bush administration's expanding the war on terror. Professor John Mueller observes:

> Although it remains heretical to say so, the evidence so far suggest that fears of the omnipresent terrorist may have been over-blown, the threat presented within the United States by al-Qaeda greatly exaggerated. The massive and expensive homeland security apparatus erected after 9/11 may be persecuting some, spying on many, inconveniencing most, and taxing all to defend the United States against an enemy that scarcely exists.[70]

Conclusion

Standard norm expects an orderly set up and natural continuation of the individual, social and international life. But normless situation very often takes place in individual, social and international life, making the people confused. Anomic, spreading lawlessness and anarchy into different types of societies, becomes volatile like seething excitations simmering in the cauldron. If there is moral vacuum and, if social values cannot regulate unlimited human appetites, the individuals encounter normless situation when s/he cannot understand what to do. Rapid social change as depicted by Emile Durkheim or conflict between culture goal and approved means as pointed by Robert K. Merton may cause anomic situation, pushing social condition at the edge of ruin. The breakdown of social regulation, criminalisation of state, introduction of new economic policy, and the total absence of morality and legal rule may jointly or separately subject a society to unbearable pressure causing erosion of its core structure. The clash of civilizations, more precisely the conflict between Christians and Muslims in the guise of war on terror, has constituted the *causa justa* of the recent global anomie all over the world. Identification of the causes of anomic situation, which is inextricably related to human life and society, fairly suggests their possible elimination, ushering in the establishment of a better organised world conducive for peaceful human habitation.

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[70] *Ibid.*

AN INTRODUCTION TO CORPORATE SOCIAL RESPONSIBILITY (CSR), ITS DIMENSIONS AND THE CHARACTER OF ITS STANDARDS

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1. Introduction

Corporate Social Responsibility (CSR) is a well recognised growing term of social and ethical dimension of corporate business across the world. Though the integration of social responsibility issues into the corporate business began in 1970s at the domestic levels of some developed countries, the issue got worldwide recognition and prominence in 1990s. Ever since, the adoption and integration of this concept into the business activities by enterprises has brought about a fundamental change into the character of business practices of corporations that business organizations are a part of the society and hence they have roles to play for the development of the society.

The societal demands on business have become more insistent as the realization about the impact of corporate operations on social and economic life has grown largely among the people in recent times. On the other hand, the very process of globalization has heightened expectations of what companies can or should contribute to environment and social progress. As a result, a positive business trend is growing alongside the developed world in the corporate sectors of developing countries companies to respond to the social issues beyond their legal responsibilities.

This widespread recognition of the concept of CSR has broadened the meaning and scope of CSR practices in phases and thereupon shifting has occurred time to time from one approach to another approach of practices. For instance, three approaches of CSR have come so far into practices namely, shareholder approach, stakeholder approach; and by and large societal approach. These shifts have given rise to numerous definitions of CSR by the academics, corporations, business and

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development organisations. In this backdrop, it is necessary to know what actually CSR means.

The ever-growing integration and adoption of CSR by the business enterprises as a tool of corporate sustainability and protection of business brand image have brought about a dimensional change into CSR practices that regularly includes more issues and aspects relating to business behaviour with its different kinds of stakeholders like shareholders, employees, consumers, investors, buyers and the community where a company operates. The different self-regulatory codes of conduct developed by the intergovernmental initiatives like OECD Guidelines for Multinationals, ILO Conventions and Recommendations as well as multi-stakeholders initiatives like Social Accountability (SA) 8000, International Standardization Organization (ISO) 9000, 14001 so on have also encompassed multi-dimensional approaches of CSR in connection with labour rights and employment relations, human rights and environment. The understanding of the dimensions is crucial for corporations as well as the stakeholders to have a clear idea about how CSR will apply and to what extent.

In addition, the widespread recognition of CSR and the development of its standards give rise to a question as to the status of the application of CSR principles in the corporate business practices. It means that how it can be settled that CSR is a voluntary and non-binding issue of corporate business that is taken care of beyond legal requirements to create balance between the needs of society and business.

This work is an effort to answer to the questions indicated above. The work discusses the debate centring on the definition of CSR and its various dimensions, determines the character of the CSR standards. In doing so, the work will be based on existing CSR texts, research articles, different norms setting self-regulatory international and multi-stakeholder codes of conduct and the views of academics.

2. Definitional construct of CSR

CSR can be said a self-clarified terminology as it generally stands for the responsibility of the corporations towards the society. It may otherwise mean the responsibility of the corporations which is social by nature, not determined by the legal principles. Social responsibility normally extends to moral and ethical concerns. Corporations or companies' social responsibility therefore encompasses their social and ethical obligations

to the community in and outside of their operational territory. A company can itself determine how it behaves socially with the stakeholders involved in its process of business and also impacted thereby. It therefore does not need to get through the technical vocabulary of a set definition. Nevertheless, CSR has been found in companies' business since long and the dimensional change has occurred in recent years and as a result the academic debates on CSR have become in prominence, many definitions and views have been generated both at conceptual and operational levels.

In defining CSR, there is no overall agreement[1] or there is a lack of all embracing definition.[2] As a result, there remains an uncertainty about what CSR exactly is formally.[3] The reason may be rooted in its interchangeable character with other terminologies such as 'corporate citizenship, the ethical corporation, corporate governance, corporate sustainability, social responsible investment, corporate accountability"[4] or in the fact that the term essentially involves the concept of stakeholders and development as an integral issue in the present context. The

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1 Hopekins, Michale, 'Corporate Social Responsibility: An Issue Paper' (Working Paper No. 27, Policy Integration Department, World Commission on Social Dimension of Globalisation, 2004)p.1, visit for details www.ilo.org/public/english/bureu/integration/download/publicat/4_3_285_wcsdg-wp-27-27.pdf.

2 Van Marrewijk, M. ' Concept and Definitions of CSR and Corporate Sustainability: Between Agency and Communion' (2003), *Journal of Business Ethics*, vol. 44:2-3, pp. 95- 105,

3 Jamie Snider and others in their articles titled "Corporate Social Responsibility in 21st century: A view from the world's most successful firms," said that an exact definition of CSR is elusive since beliefs and attitudes regarding the nature of this association fluctuate with the relevant issue of the day. As such, view points have varied over time and occasionally are even oppositional. See also Pinkston, T. and A. Carroll, 'A Retrospective Examination of CSR Orientations: Have They Changed?' (1996),*Journal of Business Ethics* ,vol. 15:2,pp.199-207

4 Australian Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility : Managing Risk and Creating Value* (June 2006), [1,4] ;
See also, Blowfield Michael & George Frynas, Jerdej, "Setting New Agendas: Critical Perspectives on Corporate Social Responsibility in the Developing World", (2005), *International Affairs*, vol. 81:3, pp. 499-501.

statement of Mr. Jeremy Cooper of Australian Securities and Investment bears a clear indication to this.[5]

> [t]here are some vexing terminology problems... such as what a stakeholder is, what sustainability means, what triple bottom line reporting is and what we really mean by corporate social respon- sibity itself....

Another reason for the lack of agreed definition may lie in the ever-changing and dynamic character of the concept of CSR itself and its expansion of practices aligning with the increased demands from the society and needs of the development issues. From that point of view CSR so far historically can be referred to a sequence of three approaches each having a different perspective in terms of definition and boundary of responsibility.[6] They are shareholder approach, stakeholder approach and societal approach.[7]

The shareholder approach is regarded as the classical view on CSR pioneered by Milton Friedman. According to this CSR is interpreted as a means to increase or maximise the profits of business of the company where the shareholders are the focal point in pursuit of the profit maximisation.[8] Social responsibility activities are not the main concern for companies that are concerned with CSR only to the extent it contributes to the aim and goal of the business. [9] This view in fact is intended for the protection of the shareholders or the stockholders economic interests. This view is not consistent in full with the objects and purposes of the concept of CSR as recently construed where stakeholders' interests are a significant concern.[10]

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5 Ibid

6 Van Marrewijk, M. above no. 2

7 Van Marrewijk , M. above no. 2

8 Friedman, M. "The social responsibility of Business is to increase its profit." *The New York Times magazine*, (13 September, 1970), p-32-33, 122-126.

9 Van Marrewijk, M. above no.2

10 for examples, the definitions given in recent times that mean during 1990s and after by different organizations and individuals such as Commission of the European Communities in 2001, 2002 and 2003, World Business Council for Sustainable Development in 1999 and 2000, Michael Hopkins in 1998 and 2003, Marsden in 2001, Anderson , 2003 converge on the point of stakeholders interests.

According to the stakeholder approach that propounded first by Freeman in 1984, the business organizations are not only responsible and accountable to its shareholders but also take into consideration the legitimate interests of the stakeholders that can affect or affected by the operational activities as well as the achievement of organisational objectives.[11] This approach never means that the companies ignore business profits and wealth creation initiatives. Rather it makes balance between business profit and stakeholder interests as the companies have immense influence on the lives of stakeholders.[12]

The societal approach[13] as the broader view on CSR suggests that companies as an integral part of society should perform responsibility to the society as a whole. They should conform to the public consent to serve constructively the needs of the society up to their satisfaction.[14] In connection with the business responsibility in society David C. Korten said,[15]

> *Business has become, in the last half century, the most powerful Institution in the planet. The dominant institution in any society needs to take responsibility for the whole....Every decision that is made,every action that is taken, must be viewed in the light of that kind of responsibility.*

It is true that there is no all agreed and universally recognised definition of CSR for the reasons as aforesaid. However, it does not mean that CSR lacks definition; rather it gives rise to the proliferation of numerous definitions at the different stages of time in view of the different context. In his article on 'Corporate Social Responsibility : Evolution of Definitional Construct' Carroll has given a long account of evolution of the definition of the concept of CSR beginning from the 1950s to the 1990s with a specific feature of each decade in terms of the development.[16] He marked 1950s as the modern era of CSR in terms of

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11 Van Marrewijk, M. Above 2.

12 Post, James E. and Lawrence, Anne T., Weber, James. *Business and Society*, (10th ed. 2002), p.59.

13 With early contributions of Mcguire (1963), Goodpaster and Mathews (1982), and Committee for economic development (1971), but also Van Marrewijk (2001) and Gobbles (2002).

14 Van Marrewijk, M. above no.2, p. 11.

15 Ibid

16 Carrol, A. B., 'Corporate Social Responsibility: Evolution of a Definitional Construct' (September, 1999), *Business & Society*, vol. 38: 3, pp.268-295.

definitional construct or evolution which expanded in the 1960s and proliferated during the seventies.[17]

According to Carroll in 1980s some alternative theoretical issues were added to the concept itself including corporate social performance, stakeholder theory and business ethics theory.[18] In the definitional development occurred in 1990s theses alternative themes took centre stage in the manifestation of CSR[19] and thereupon all the subsequent definitions of CSR were dominated by stakeholder and societal approach with the recognition of social, economic and environmental issues as the basic components of responsibility. The best illustration of this is available in the definitions developed in the late 1990s and thereafter by the different intergovernmental and development organisations and some post modern academics.[20]

Some major definitions will be analysed hereinafter to understand the current notion of CSR. Among the intergovernmental and development organisations, the World Business Council for Sustainable Development (WBCSD), Commission on the European Communities, Business for Social Responsibility (BSR), Global Corporate Social Responsibility Project and so on have played significant roles in defining CSR. Most of their definitions are very recent and dynamic in nature having the multi-dimensional sustainable development approach.

WBCSD first in 1998 defined CSR as 'the continuing commitment to behave ethically and contribute to the economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large.'[21] But later in 2000 there was

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17 Ibid

18 Ibid

19 Ibid

20 Dahlsrud, Alexander, 'How Corporate Social Responsibility is Defined: an Analysis of 37 Definitions' (31 August, 2006), *Corporate Social Responsibility and Environmental management*, published online in Wiley Inter Science. P. < www. interscience.wiley.com >

21 WBCSD, Dialogue in the Netherlands in 1998 < info.worldbank.org/etools? ZDocs/Library 125 527 csr-mainconcepts.pdf > 24 May 2007; Corporate social Responsibility Index, ' Measuring Corporate Social Responsibility in Australia,'< www.corporate social responsibility.com.au / about/ articles and--- media/media/media_release-01.asp> 24 May 2007; Blow Field, Michael and Farinas Jedrzej George,

a little change in the definition as said to be 'the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life.'[22] The later one has not at all any contradiction with the former one. In the later, the phrase 'sustainable economic development' has been added. If taken together, both the definitions focus on voluntary character of the social responsibility, stakeholders' social and economic development and, by and large, the development of the whole society.

In a similar fashion the Commission of the European Communities defines CSR as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interactions with their stakeholders on a voluntary basis.'[23] In another definition by the Commission it has been said that corporate social responsibility is essentially a concept whereby a company decides voluntarily to contribute to a better society and a cleaner environment.[24] Given the definitions, CSR appears to be a managing element that starts at company level by its performance in a socially responsible manner, where the trades-off between the requirements and the needs of the various stakeholders are in balance, which is acceptable to all parties.[25]

Business for Social Responsibility (BSR) also belongs to a consistent view that socially responsible business practices strengthen corporate accountability by respecting ethical values and the interests of all stakeholders including the preservation of environment. These practices help to improve the quality and opportunities of the life of people where the companies operate through economic empowerment. In a report published by BSR it has been viewed as a bundle of policies, programmes and practices beyond legal compliance that are integrated throughout

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"Setting new agendas: critical perspectives on Corporate Social Responsibility in the developing world," (2005), *International Affairs, vol.* 81: 3, pp.499-501.

22 Ibid

23 European Commission, *Green Paper Promoting a European Framework for corporate social* responsibility (2001)< www.europa.eu.int)

24 Alexander, above no.20

25 Ibid

business operations and decision making process so as to participate in the sustainability of the development of the society.

In a recent publication the Australian Parliamentary Joint Committee on Corporations and Financial Services instead of giving any conclusive definition of CSR has looked into the concept of CSR from the following stand points:[26]

1. It is considering, managing and balancing the economic, social and environmental impacts of companies' activities;
2. It is companies' assessing and managing risks, pursuing opportunities and creating corporate value beyond the traditional core business; and
3. It is also about companies taking an 'enlightened self-interest' approach to considering the legitimate interests of the stakeholders.

Another Australian consulting company has explained CSR as being that "a company is responsible for providing more benefits than just profits for shareholders. It has a role to play in treating its employees well, preserving the environment, developing sound corporate governance, supporting philanthropy, fostering human rights, respecting cultural differences and helping to promote fair trade, among others." [27]

Like different business and development organisations, over the last decade some academics have also contributed to the broad-based definitions of CSR focussing on its basic features and dimensions. Among them, for examples, Michael Hopkins, Marsden and Andersen are prominent. Michael Hopkins in her final observation in 2003 wrote:[28]

CSR is concerned with treating the stakeholders of the firm ethically or in a responsible manner. 'Ethically or responsible' means treating stakeholders in a manner deemed acceptable in civilized societies. Social includes economic responsibility. Stakeholders exist both within a firm and outside.

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26 Australian Parliamentary Joint Committee on Corporations and Financial Services, "Corporate Responsibility: Managing Risk and Creating value", pp. 1,5, see also Above no. 1

27 Juno Consulting, *Making Sense of Corporate Social Responsibility* Part 1, <www.junoconsulting.com.au >

28 Hopkins, above no.1

Marsden's observation as to CSR considers it as behavioural issue companies' core, not an additional option. He says,[29]

Corporate social responsibility is about the core behaviour of companies and the responsibility for their total impact on their societies in which they operate. CSR is not an optional add-on nor is it an act of philanthropy. A socially responsible corporation is one that runs a profitable business that takes account of all the positive and negative environmental, social and economic effect it has on society. Andersen's observation regarding CSR is based on broader societal approach including the environmental issue as saying,

We define corporate social responsibility broadly to be about extending the immediate interest from oneself to include one's fellow citizens and the society one is living in and is a part of today, acting with respect for the future generation and nature.[30]

All the aforementioned definitions reveal that there is no conclusive definition of CSR, it can have different meaning to different people and different organizations as an ever growing multifaceted concept, but it may be said that they are inwardly consistent and converge on some common characters and similar elements. They can be identified as follows:

- CSR is a management element of a company involving internal and external Issues;
- It is a core and strategic behaviour of a company balancing between needs and requirements of stakeholders and its business profitability;
- It is a voluntary and self interest ethical activity undertaken by a company on long-term basis as distinguished from traditional philanthropy;
- It is meant for preserving and respecting the legitimate interests of all stakeholders;
- It encompasses economic, social and environmental issues as major components
- It is about strategic and consistent activities incorporating employees and their families, community and society responding to a sustainable development; and
- It is a set of responsibility issues the corporations should perform beyond legal requirements.

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29 Alexander, above no. 20.

30 Ibid

More precisely, if CSR is looked into from practical and operational point of view it comes out that CSR requires a company

- to consider the social, environmental and economic impacts of its business operations
- to be responsive to the needs and expectations of its customers, employees, investors, shareholders and the community or communities(otherwise known as stakeholders) in which it operates in the context of those impacts.

Despite the fact that CSR covers a range of common issues in all definitional constructs based on stakeholder approach in recent years, can it be appropriate to be applicable to all modern corporations which are diverse in terms of size, sectors, stakeholders, structures and strategies? More importantly, can the definitions of CSR as basically developed both at conceptual and operational level in developed economic world be appropriate for the business enterprises of least developed and developing countries?

Looking into the similarity and convergence of the common issues of CSR, one can raise a question why these definitions integrate into one. The answer may be that the similarity of the definitions does not indicate that the organisations are in an effort to go for formulating a single and same definition but it rather indicates to the increase of variables the contemporary CSR that inclusively concern environmental management and protection, sustainable development and over all the preservation of interests of the stakeholders.[31]

Moreover CSR accepts ever-changing nature with the passage of the time as the corporate activities and their impacts as well as the societal expectations do not remain same at all times and all stages. For example, once it was not in the mind of the people that company has a duty to protect the environment, nor they did know what sustainable development is and the companies' participation is needed there.[32] Likewise the expansion of the companies' activities and their sphere of influences causing the proliferation of its contents and conceptual

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31 Zu, Peng, *Shareholder Primacy, Director Primacy and Corporate Social Responsibility*, (M.Phil Thesis, Division of Law, Macquarie University, (2006), p.103.

32 Ibid

variables and a trend set to continue in the future. It does not mean that when CSR is so changeable it should not have any particular definition. It must have a precise definition for a particular country in the light of its social-economic development context so that the country can guide and encourage its corporations to perform their duties.[33]

3. Explaining the different Dimensions of CSR

There are different views and opinions about the determining of the dimensions of CSR. The European Commission Green Paper 2001 identifies two types of dimension of CSR; internal and external. The internal dimension includes human resource management, health and safety at work, management of environmental impacts and natural resources. The external dimensions involve local communities, business partners, suppliers, consumers, human rights and global environment.

The analysis of 37 definitions of CSR made by Alexander Dahlgren identifies that CSR has altogether five dimensions.[34] They are voluntary dimension, stakeholder dimension, economic dimension, social dimension and environmental dimension.[35]

The above mentioned dimensions, from functional perspective, can be classified into two, nature-based dimensions, content and issue-based dimension. First two that is voluntariness dimensions and stakeholder dimensions are nature-based ones. Other three are issue- based dimensions. Nature-based dimensions refer to be something that focuses the inherent character and actionable value. Content or issue-based dimensions refer to the main concerns and areas of a thing and also demarcate the purview of action. Voluntariness is the basic character of the CSR agenda. Stakeholder is the latest and ongoing model of the CSR concept that, in fact, brings a fundamental change into character of CSR and broadens the scope of action. Economic, social and environmental issues are the main areas the principles of CSR deal with and concentrate on. The core concept of CSR mainly involves these three issues of a company that it should take into considerations in the operation of their business. All these dimensions will be discussed in the following.

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33 Ibid

34 Alexander, above no. 20

35 Ibid

3.1 Nature-based Dimension

3.1.1 Voluntary Dimension of CSR

Voluntariness of CSR reflects that the adoption, integration and compliance with CSR agenda are voluntary, non-legal and non-binding on the part of the corporations. The voluntariness of CSR has been reflected in the different definitions by the use of the words and phrases such as on a voluntary basis, based on ethical values, voluntarily, to behave ethically, ethically or socially responsible, ethical values, 'beyond legal requirements or obligations' and so on.[36] The voluntariness suggests that CSR principles involve all those issues which are not within the corporations' legal requirements authoritatively defined by the national legislations or international law-making treaties or conventions. They are based on ethical or social values that a company should have respect for, in the economic interest of the business and welfare of the society. The corporate codes of conduct concerning CSR principles having their sources from international instruments like OECD Guidelines for multinationals, UN Global compact, ILO Tripartite Declarations are predominantly voluntary, self-regulatory or soft-regulations. They are otherwise called 'regulated self- regulations', which are not mandated.[37]

3.1.2 Stakeholder Dimension of CSR

The Concept of CSR assumed the stakeholder dimension first in 1984 when Edward Freeman in his book 'Strategic Management: A stakeholder approach' brought stake holding into the mainstream CSR saying that managers bear a fiduciary relationship to stakeholders.[38] This was a shift from Milton Friedman's shareholder approach of CSR that emphasised on the exclusive fiduciary duties of the management towards the shareholders.

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36 Some examples: Definitions of Commission of European Communities, 2001,2002, World Business Council for Sustainable Development, Business for Social Responsibility 2000, Hopkins, 1998, 2003, UK Government 2001, Van Marrewijk, 2003.

37 Anderson, Kerstin Sahlin, "Corporate Social Responsibility: a trend and a movement, but of what and for what?" (2006), *Corporate Governance*, vol. 6: 5, pp. 595-608.

38 Elisabet Garriga & Domenec Mele 'Corporate Social Responsibility Theories: Mapping the Territory' (2004), *Journal of Business Ethics,vol.53* ,pp.51-71

In 1990s the idea of stakeholder gained the prominence in business practice.[39] Freeman himself defined stakeholders as 'those groups without whose support the organisation would cease to exist.'[40] He also defined stakeholder as 'any group or individual who can affect or be affected by the achievement of the organisation's objectives'.[41] It may refer to 'any person, group or organisation that can place a claim on company's attention, resources or output.[42] So the term includes a broad range of persons or group. They are shareholders, employees, customers, financiers, investors, suppliers, creditors, business partners, communities in the localities of companies' operations, pressure groups or NGOs, media and government.[43]

The basic notion of stakeholder dimension is how the corporations interact with their different stakeholders or how they treat the stakeholders in and outside the corporations.[44] The mood of interaction differs with different stakeholders on the basis of their diversity of contributions to the corporations as well as of interests in the business activities.

The stakeholders belong to different types of interest in a company's business. Shareholders belong to equity interest in the company.[45] Investors, financier, creditors and the suppliers have the financial interest in the company as the investors and creditors are the providers of financial resources and the suppliers provide raw materials, energy, supplies and appliances.[46] Employees contribute their work skills and

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39 The 2001 state of corporate social responsibility in India poll, ' Understanding and Encouraging Corporate Social Responsibility in South Asia'

40 E., Freeman, *Strategic Management: A Stake holder Approach* (1st ed. 1984), 31.

41 Ibid , See also UN Norms on Responsibility of Transnationals Corporations and Other Business Enterprises with Regard to Human Rights (2003)

42 Kytale, B. and Ruggie, J., ' Corporate Social Responsibility as Risk Management : A Model for Multinationals (2005) Kennedy School of Government, Harvard University (March 2005) p.3

43 Australian Government Corporations and Market Advisory Committee, '*Corporate Social Responsibility*,' (Report, 2006), p. 54; See also Corporate Social Responsibility: WBCSD's Journey (2002), p.2.

44 Alexander , above no.20

45 E. , Freeman, above no.40

46 Ibid p.46; see also, Post. James E., and Lawrence Anne T., Weber James, above no.12, p. 11.

knowledge and thus involved in company's wealth creation.[47] Customers are the persons who pay for the production and services being produced by the companies and assist the companies to set in the market place.[48] Customers play the major role to make consumer choices about corporate products detailing various factors in relation to products like production practices, environmental and social impacts, product safety and reliability issues.[49] Other stakeholder groups like local communities, government, NGOs are directly or indirectly affected by the company's primary activities and decisions.

3.2 Issue-based Dimensions

As mentioned earlier that, except first two dimensions, other three issue-based dimensions are economic, social and environment. These three issues and areas are popularly recognised and distinguished as fundamentals to the CSR agenda.[50] Because the activities and the operations of the corporations mainly impact economic, social issues of the people in and outside as well as the natural and human environment. Simon Zadek states "corporate citizenship is about business taking greater account of its social and environmental – as well as financial footprints."[51] The concept of sustainable development or sustainability reporting for business developed and operationalised by *'Triple Bottom Line'* focuses on three issues, namely, social responsibility (people), environmental responsibility (planet) and economic responsibility (profit).[52] So a company can be considered simultaneously in terms of responsibility variables as an economic institution a social actor and an environmental protector.

3.2.1 Economic Dimension

As far as economic dimension of CSR is concerned, a company's goal should be to contribute to the economic improvement, preserving

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47 Ibid

48 Ibid

49 Ibid

50 Antonio Argandona, 'From Ethical Responsibility to Corporate Social Responsibility', IESE Business School , University of Navarra

51 Z, Simon., *The Civil Corporation: The New Economy of corporate Citizenship,* (1st ed. 2001),p.7

52 The Concept of Triple Bottom Line was developed by J Elkington in Cannibals with Forks: Triple Bottom Line of 21st Century Business in 1997.

profitability and conducting business operation. The best explanation of this can be found in Novak's seven set of economic responsibilities. What these include are[53] (1) to satisfy the customers with goods and services of good quality and real value, (2) earn a fair return of on the funds generated by the financiers and investors, (3) create new wealth to 'maximize social value' and help the poor for their economic emancipation and also optimize efficiency by raising wages of the employees,(4) create new jobs, (5) defeat envy through generating increased mobility and giving people the sense that their economic conditions can improve, (6) multiply the economic interests of the citizens, and(7) promote innovation.

As regards economic responsibilities of company's CSR agenda, Carroll emphasises on its consistent performance for maximizing per share earnings, commitment to profitability, maintenance of strong competitive position, maintenance of high level of operational efficiency, retaining consistent profitability.[54] 'Triple Bottom Line' provides fourteen economic indicators including , more importantly, (1) direct and indirect economic impact on communities through spending power and geographic economic impact,(2) economic impact through business process, (3) outsourcing, knowledge, innovation, social investments in employees and consumers, and (4) taxes, tax incentives, wages, pensions and other benefits payed to employees[55]

3.2.2 Social Dimension

The social dimension of CSR agenda is the key factor to set up the relation between business and society. Its basic objective is that the corporations should work for building up a better society and therefore, integrate social concerns in their business operations and consider the full scope of their impacts on communities.[56] The application of the

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53 Lantons, G.P. "The Boundaries of Strategic Corporate Social Responsibility" (2001), *Journal of Consumer Marketing*, vol. 18: 7, pp.595, 597.

54 Carrol, AB., "The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organisational Stakeholders", (1991), *Business Horizons*, vol.34:4, pp.39, 41.
< www.emeraldinsight.com/researchregisters >

55 Australian Government Corporations and Market Advisory Committee, Above no.43, p. 71.

56 Alexander, above no.20

issues covered under this may result in bringing up a better working and business environment in and outside a company and may assure its 'good citizenship, in the society.

A company as a social actor, being itself a part of human community should pay their attention to serve the purpose of the internal and external human communities. It should realise and accordingly go into action about the needs, expectations, rights and demands of them for the wellbeing of their social life. Internal human community includes owners, managers and employees. But the social responsibility concept as developed internationally explains basically the needs of the employees as internal community.[57] External communities mean the local community where the corporations operate and also the other stakeholders. From practical point of view, social issues mainly concern the local community who are impacted in many ways by the companies' activities in their social life and also expects their assistance in improving the quality of life.

In the light of above discussion the social contents of a company's CSR agenda cover a range of issues that may be divided into three clusters: labour rights and practices, human rights, other social issues. Labour rights and practices include all core labour standards and workplace oriented rights as recognised by UN Tripartite Declaration concerning Multinational Enterprises and Social Policy and all other ILO Declarations and Recommendations. They are freedom of association, right of collective bargaining, prohibition of forced and compulsory labour; abolition of child labours, a guarantee of acceptable working conditions.[58] Working conditions include a maximum number of hours per week, a weekly rest period, limits to work by young persons, a minimum wages, minimum workplace safety and health standards, elimination of employment discrimination and equal opportunities.[59]

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57 See the International Instruments dealing with corporations' responsibilities like OECD Guide for Multinationals, UN Global Compact and so on.

58 See , International Labour Organisations , *UN or ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (1977, revised 2000) <www.ilo.org/public/english/employment >

59 See Ibid, See also Social Accountability International, *Social Accountability 8000* (1998) <www.ceppa.org>. SA(8000) is designed to describe the labour

Right to work meaning protection against unjustified dismissals and technical and vocational guidance and training can be considered as the rights of employees.[60]

As far as the human rights concerned, the respect for protection and compliance with international human rights standards in the jurisdiction of companies' operations are the paramount concern of the corporate social behaviour. The UN Global Compact urges the business enterprises to support and respect the internationally proclaimed human rights within 'their sphere of influence'.[61] The phrase 'within their sphere of influence' indicates the inclusion of wide range of people who are either in or outside the corporations and linked to or influenced by the business operations. It also proclaims that 'company must ensure that they are not complicit to human rights abuse.[62]

In the light of these two above mentioned principles corporations have responsibilities for the promotion and protection of all relevant civil, political , economic, social and cultural rights of those who are within 'the sphere of its influence'. These can be enumerated as fundamental labour rights, right to life of the employees, suppliers, customers, right to hold opinions, freedom of expression, thought, conscience, religion, right to family life, right to privacy, minority rights to culture, religious practices, language, culture and development rights: right to education, health, adequate food and fair distribution of food, clothing, housing, social security, enjoyment of the technological development. [63]

The Sub-Commission on the Promotion and Protection of Human Rights in 2003 adopted a set of international human rights draft norms applicable to Transnational Corporations and other Business Enterprises. These draft norms explains a bundle of rights; the corporations should

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standards in the developing countries, and Global Reporting Initiatives Guidelines concerning labour practices and decent work.

60 The right to work as mentioned in the 'Triple Bottom Line' though does not fall within the purview of core labour rights, but as these are concerned with employees' labour issues, can be considered as labour rights.

61 *United Nations Global Compact* principle 1

62 Ibid principle 2

63 See, Triple Bottom Line of Sustainable Development, Amnesty International's Guidelines for Companies, Social Accountability 8000, Global Reporting Initiative Guidelines (GRI)

integrate them into their policies and practices. The rights include equal opportunity and non-discriminatory treatment (as provided by international instruments and national legislations) security of persons (i.e., forced or compulsory labour, engagement in the violation of humanitarian law) all working rights recognised by international instruments and national legislations, consumer protection as well as protection of the environment.[64]

The above discussion about labour and human rights aspects of social dimension reflects that the labour and human rights issues are overlapping, mutually supportive and inclusive of each other. Moreover all other assessment or performance tools and reporting methods like Social Accountability 8000, Global reporting Initiatives show a significant mix up to much extent between labour and human rights issues.

Another aspect of social dimension is corporate social investments and philanthropic activities for the communities. It includes poverty alleviation programmes, sponsoring social and cultural activities of the local communities, establishment of academic institutions, funding for basic education, training and other sensitization programmes, organising skill and capacity building programmes, founding hospitals, medical units and arrangement of other health care services, funding for curbing epidemics like HIV, cancer, undertaking natural disaster management programmes, development partnership programme with the government and NGO, investment for greengage and fresh water supply and so on. In addition, participation in community programmes, provision of employment opportunities, engagement in social security management, involvement of the local people in the decision-making of corporation are considered as social dimension of CSR. The said aspect of corporate responsibility is intended to remove 'the social welfare deficiency' and enhance and improve the community's quality of life.[65]

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64 United Nations Commission on Human Rights, *Draft Norms on the Responsibilities of Transnationals Corporations and Other Business Enterprises with Regard to Human Rights*(2003)<www.unhchr.ch/huridocda/huridoca.nsf/(Symble)/E.CN.4.Sub.2.2003.12.Rev.2...>

65 Carrol, AB., above no. 54, p.39,

3.2.3 Environmental Dimension

The last content-based dimension of CSR is environmental protection which is the most significant concern of business enterprises across the world today as the operational activities of the corporations have immense impact on living and non-living natural resources, including ecosystems, land, air and water. All major international instruments providing normative standards of CSR introduce corporate responsibilities for environmental protection. . The UN Global Compact among its ten principles on the whole, dedicates three as primary responsibilities of the corporations. They are 'adopting a precautionary approach to environmental challenges',[66] 'undertaking initiatives to promote greater environmental responsibility,[67] and 'encouraging the development and diffusion of environmental friendly technology.'[68] ICC Business Charter Sustainable Development introduces sixteen principles for environmental management covering 'inter alia' the establishment of environmental management on the basis of priority, integrating management systems, the efficient use of energy and materials, sustainable use of renewable resources, minimisation of adverse environmental impact and waste generation, and the safe and responsible disposal of residual waste, adopting precautionary approach, development emergency preparedness plans, and so on.[69]

OECD Guidelines for Multinational Enterprises in association with other corporate responsibilities provides some principles for environmental protection. They focus mainly on the assessment and consideration by enterprises of foreseeable environmental and environment- related health consequences of their activities and their impact on indigenous natural resources, assessment of health risks of products as well as from the generation, transport and disposal of waste[70]. In addition, the enterprises should undertake appropriate

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66 United Nations, *Global Compact* (2000, revised in 2004) < www.unglobalcompact.org>

67 Ibid

68 Ibid

69 International Chamber of Commerce, *Business Charter for Sustainable Development* (1991) <www.iccwbo.org/home/environment_energy/charter.asp >

70 See Organisation for Economic Co-operation and Development (OECD) *Guidelines for Multinational Enterprises* (2000), < www.oecd.org.>

measures in their operations for the minimisation of the risk of accidents and damage to health and the environment and to co-operate in mitigating adverse effects.[71]

It is already indicated that the activities of the corporations may cause the different types of environmental impacts. Global Reporting Initiatives Guidelines provide as many as sixteen indicators of environmental impacts.[72] In consideration of all these impacts, the environmental responsibilities of the business enterprises may extend to energy conservation, waste minimisation, recycling, and pollution prevention (e.g. emission to air and water, effluent discharges), protection of bio-diversity, plant-varieties, reducing energy consumption, prevention of soil, ground and surface water contamination; animal welfare, use and handling of genetically modified organisms, treatment and reduction of waste water, preservation of eco-efficiency, consumption of raw-material, afforestation, expenditures for curbing global warming and other environmental programmes.

The international normative standards of CSR developed so far comprise of social, economic, and environmental issues. In setting standards more attention and considerations are paid to labour rights and industrial relations, human rights, environmental protection, combating bribery, protection of consumer interests and other business conduct. But it is true that the key standards of CSR are related to labour, human rights and environment. The social investments, community relations and the philanthropic issues are mainly based on companies' discretion which has been developed through practices in order to be a 'good citizen of the society'. However, the international sustainability reporting and auditing frameworks as well as management and certification schemes like Global

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71 Ibid

72 Established in 1997 through a partnership between the Coalition for Environmentally Responsible Economics (CERES) and the UN Environment Programme (UNEP), with the goal of enhancing the quality, rigour, and utility of sustainability reporting.' Global Reporting Initiative, preface to SustainabilityReportingGuidelines(2002) <www.globalreporting.org/guidelines/2002/gri_2002_guidelines.pdf> 04 September 2007; See also Shoop Marcelle, 'Corporate Social Responsibility and Environment-Our Common Future,' in Ramon Mullerat (ed.) *Corporate Social Responsibility: The Corporate Governance of the 21st Century,* (2005),pp.159,169.

Reporting Initiatives, ISO 9000, 14001, Social Accountability 8000, Accountability 1000 series set norms to consider these issues.[73]

4. The character of the normative standards of CSR

There are numbers of international standards and guidelines developed in recent years providing practical rules regarding what constitutes CSR and how it can be implemented within business organisations. The prominent international standards are OECD Guidelines for Multinational Enterprises (2000), UN Global Compact (2000, revised in 2004), UN Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977, revised in 2000), UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003), UN Principles for Social Policy. These instruments provide norms and guiding principles to achieve the uniform out of CSR practices.

These international instruments seem to constitute a body of non-binding international soft law.[74] They donot belong to the status of binding international-law making treaties as they are merely recommendations of the governments and also declarations addressed to corporations to observe them voluntarily. In International law, the declarations and recommendations are not legally binding; they can be viewed as morally and politically guiding.[75] The compliance or observance relies on the commitment and willingness of the parties. These instruments in fact seek to encourage the corporations to undertake self-regulation for implementing CSR in their business operations.[76]

The OECD Guidelines for Multinational Corporations (MNCs) as an instrument setting the normative standards for Multinationals aims to

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73 Ibid

74 Dashwood, Hevina S. ' Corporate Social Responsibility and the Evolution of International Norms' in Kirten John J. and Trebilcock Michael J. (ed.)*Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (2004), pp. 185,189; See also. Justine Nolan, 'Response to CAMAC's Corporate Social Responsibility' A Discussion Paper (2005) Australian Human Rights Centre < www.ahrcentre.org >

75 Buhmann, Karin, "Corporate Social Responsibility: what role for law? Some aspects of law and CSR" (2006), *Corporate Governance*, vol. 6:2, pp.188, 195.

76 Ibid, pp.188-202

'encourage the positive contributions that multinational corporations can make for economic, environmental and social progress and to minimise the difficulties to which their various operations may give rise.'[77] The Guidelines was first adopted in 1977 and then it was updated in 2000.The Guidelines set out the recommendations jointly addressed by the member countries to multinational enterprises operating in their constituencies that cover major areas of business conduct, including employment and industrial relations, human rights, environmental protection, combating bribery, consumer interests and competition.[78] In the updated Guidelines the OECD calls upon the MNCs to act consistently with the host state's implementation of human rights obligations.

A detailed 'follow up' procedure for implementation including consultation, mediation, conciliation as well as clarifications are incorporated in the Guidelines which appear to be softer by nature as the implementation rests with the will of the governments through their National Contact point (NCP).[79] NCPs are not obliged to make the results of compliant procedures public, which substantially weakens the efficiency of the Guidelines' implementation. The text itself states that 'observance of the Guidelines is voluntary and not legally enforceable.'[80]

The UN Global compact is actually an effort to seek the support and partnership of the world business community initiated by the former UN Secretary General Kofi Annan in order to "safeguard sustainable growth within the context of globalisation by promoting a set of universal values which are fundamental to meeting the socio-economic needs of the world people".[81] In the address at World Economic Forum in Davos on 31 January 1999, Mr. Annan advocated for 'Global Compact' called on world business leaders to " embrace and enact" a set of nine principles relating to human rights, labour rights and the protection of

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77 OECD, *Guidelines for Multinatinationals* (revised 2000) < www.oecd.org or <www.itcilo.it/actrav/actrav-english/telearn/global/ilo/guide/oecd.htm >

78 Ibid

79 Ibid

80 Ibid

81 The Global Compact took launch in 2000 with 9 principles, and then one principle relating to 'corruption' was added in 2004.

environment."[82] The words "embrace and enact" imply the voluntary character of compliance with the principles by the business enterprises.

Moreover, it is argued that principles set out by the Global Compact do not constitute sufficient basis for designing enforceable standards although it has provided relevant indicators of international human rights and environmental norms to business.[83] The Global Compact invites the corporations to respect human rights and environmental issues and support its principles through adopting 'best practices.' and therefore Kerstin Sahlin-Andersson views it as a soft regulatory framework, which is voluntary and has no legal sanction applied to those who fail to comply.[84] He remarks 'it is an initiative built on a menu of written principles based on international declarations and agreements for members of the Global Compact to follow and it is formulated in general terms so that it provides considerable freedom for those interpreting the regulations to translate them into practice in a way that fits their circumstances and expectations.'[85]

The UN Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy[86] can be said to be providing guidance for how corporations implement the fundamental ILO conventions. The Conventions of ILO are: Forced Labour Convention(No.29); Freedom of Association and Protection of Right to Organise Convention (No.87); Right to organize and Collective Bargaining Convention (No.98); Equal Remuneration Convention (No.100); Abolition of Forced Labour Convention (No. 105); Discrimination (Employment and Occupation) Convention (No.111); Minimum Age Convention(No. 138), Worst Form of Child Labour Convention, 1999 (No.182), ILO Tripartite Declaration on Fundamental Principles of Rights at work[87].

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82 Anderson, Kerstin Sahlin, "Corporate Social Responsibility: A Trend and A Movement, but of What and for What?" (2006), *Corporate Governance*, vol. 6: 5, pp-595-608.

83 Nolan , Justine, *Response to CAMAC's Corporate Social Responsibility Discussion Paper* (Nov.2005) Australian Human Rights Centre <www.ahrcentre.org>

84 Anderson, above no.82, pp. 596,598.

85 Ibid

86 It was adopted first in 1977, and then revised in 2000.

87 The revision in 2000 of the said UN Tripartite Declaration was held to add the last of ILO Tripartite Declaration on Fundamental Principles of Rights at work.

These Conventions are legally binding on the states which have ratified them, not on the corporations directly. But the concerned states can bind the corporations for the enforcement of these principles at national levels through incorporation into domestic laws. However, according to these Declaration MNEs governments, employers' organisations and workers' organisations are recommended 'to observe on a voluntary basis' the guidelines of the Declaration which primarily addresses the labour rights.[88]

The UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights is a draft code adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights. The Norms encompass a wide range of human rights, labour, humanitarian, environmental, consumer protection, and anti-corruption legal principles. But it looks to be more comprehensive and focussed on human rights principles than any other international voluntary instruments adopted by ILO, the OECD, the European Parliament, and the UN Global Compact and so on. The distinguished character of this draft code is that it represents a significant international instrument that imposes obligations on TNSs as well as all other business enterprises. In addition, unlike other international instruments, the norms are addressed directly to the business enterprises without reducing the obligations to promote, to secure the fulfilment of, respect, ensure respect for, or protect human rights.[89]

The intensity of the obligations of the corporations and goals of the Norms as stated by this instrument go further than a mere traditional voluntary instrument. This is why some scholars have evaluated them differently. It has been observed that although the Norms are not adopted as treaty, its wider scope and implementation provisions demonstrate that it is not like other typical voluntary code of conduct.[90]

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88 International Labour organisation (ILO), *Tripartite Declaration of Principles Concerning Multinational EnterprisesandSocialPolicy*(2000)<www.ilo.org/public/english/employement/multi/download/declaration2006.pdf >

89 UN Norms, Above no.61

90 Lea Hanakova '*Accountability of Transnational Corporations under International Standards,*' (LL.M theses, University of Georgia, 2005) 63, < http://digitalcommons.law.uga.edu/stu_llm/17>

The argument is that Norms 'use the term "shall" instead "should" signifies the intention and purpose of the Norms to play more role than a typical soft law instruments.[91] But it was not finally decided to be representing obligatory standards on the transnational and other business enterprises' conduct. Because it still lacks enough detailed implementation mechanism and it is also not specific enough in describing the reparation in case of business' non-compliance.[92] More importantly, the Norms are not adopted in the form of treaty creating legal obligation upon the parties.[93]

Likewise, David Weissbrodt & Muria Kruger said "the Norms as adopted are not voluntary initiative of corporate social responsibility. Many implementation provisions show that they amount to more than inspirational statements of desired conduct. The voluntary nature of the Norms goes beyond the voluntary guidelines found in the UN Global Compact, ILO Tripartite Declaration, and the OECD Guidelines for Multinational Enterprises."[94] The legal authority of the Norms principally is derived from treaties and international customary law, as a re-affirmation and restatement of international legal principles applicable to companies. Nevertheless, it can not be considered as treaty having binding force on the parties as the creation of the treaty requires high degree of consensus among the countries. Although, the Norms have gained the support of few countries, but as yet it is not apparent that there exists an international consensus on the place of business and other non-state actors in the international legal order.

Moreover, the decision can rely on the distinction of international 'hard law' such as treaties and 'soft law' such as recommendations. International hard law refers to a regime that creates legally binding force from the outset. Soft law begins in the form of recommendations and for a certain range of the time may act as interpreting treaties and customs or

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91 Ibid

92 Ibid

93 Ibid

94 David Weissbrodt & Muria Kruger, "Norms on the Responsibility of Transnational Corporations and Other Business with Regard to Human Rights", (Oct.2003), , *The American Journal of International Law,* vol. 97:4, pp. 901,904.

may serve as basis for next drafting treaties. So it is safer to say that the Norms have started it mission as 'soft law' like other international recommendations which may be codified later in the form of treaty with gaining the required consensus.

There are also some most famous international instruments on human rights and the environment which, though not intended for corporations as a whole, have implications for corporate practices. They are, for instance, the Universal Declarations of Human Rights (1948), the Declaration of United nations Conference on the Human Environment (Stocholm,1972), and the Rio Declaration on the Environment and Development. These Declarations are non-binding, not legally enforceable, although, they are authoritative and comprehensive in nature.

The Universal Declaration of Human Rights (UDHR) directly applies to the corporations. In its preamble the corporations as an 'organ of the society'[95] are called upon to promote, respect and secure the recognition of the rights which are directly applicable to the business. These rights are enumerated as right to freedom of thought, conscience and religion, freedom of peaceful assembly and association, the right to just and favourable conditions of work and right to an adequate standard of living. While the UDHR itself, as a declaration does not create any legal obligations, other three documents produced by UN codifying the UDHR that is, the International Covenant on Civil and Political Rights, Covenant on Economic, Social and Cultural Rights, Optional Protocol to Civil and Political Rights, create legal obligations upon the states parties to them,[96] not upon the companies directly.

The Declaration of United Nations Conference on Human Environment and the Rio Declaration on Environment and Development are the key international instruments concerning environment and development that influence all other subsequent inter-governmental instruments with inputs in framing provisions applicable to corporations on environment. These two documents provide a comprehensive guideline for states to

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95 The Preamble of the Universal Declaration of Human Rights reads that it is 'a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of the society....'

96 David, above no.94.

preserve and control the natural environment with an emphasis of international co-operations. Agenda 21 which was developed in support of Rio-declaration acknowledges the corporate responsibility for proactive environmental stewardship and adopting self regulatory codes.[97] The guidance is also available in the Monterrey Consensus (on financing for development, 2002)[98] and UN Millennium Goals for Development (2000) which is developed recently on a global consensus of the states. These instruments prescribe the responsibilities of the corporations for the protection of environment and human rights in more aspirational way than obligatory.

Apart from above mentioned major international instruments there are some Multi-stakeholders' codes of conduct that provide voluntary international frameworks for management and certification schemes for particular normative standards as well as international reporting standards of social responsibility of the corporations. These instruments are used, generally, by the external auditing companies or organisation to examine the eligibility of obtaining certificates on particular issues like employment relations and core labour rights, environment and so on. They are International Organization for Standardization (ISO) 14001, Social Accountability 8000(SA 8000), Accountability 1000 (AA1000) and Global Reporting Initiative (2002).

All these international norms setting instruments according to the basic principles of international law are considered to be non-binding, soft law as they lack the requirements to be binding.

The above discussion makes the point clear that the standard setting instruments in international law are not in the position of hard law as having the sanctions, if violated, and their compliance is voluntary. But the question is, is it absolutely soft as it means technically? The general principle ensuing from the practical point of view is that whenever any soft law is respected, then it looks hard and is treated as similar to hard law, because of apparent commitment and acceptance. For example, endorsement of Global Compact is voluntary, but whenever some business organisation endorses Global Compact, it has to take pledges to

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97 UN Division for Sustainable Development, *Agenda 21* (2002) < www.un.org/esa/sustdev/agend21.htm>

98 See United Nations Department of Economic and Social Affaires, *Monterrey Consensus on Financing for Development* (2002) <www.un.org/esa/ffd >

publicly advocate the Compact in their mission statements, annual reports and other public statements.[99] So, although by nature, the CSR standards are soft and voluntary they are not just soft or voluntary or just hard, more than soft and similar to hard in practice.

5. Conclusion

The above discussions lead us to arrive at some conclusions as to the definitions of CSR, its different dimensions and the character of international standards of CSR. Although there is no all agreed definition of CSR at global level, the concept of CSR has been settled and recognised as long term business strategy balancing corporate rights with obligations towards its stakeholders which is ever- growing in nature. It requires a company to consider the social, environmental and economic impacts of its business operations. In addition, it suggests a company to address the needs and expectations of its customers, employees, shareholders and communities.

As far as the dimensions of CSR are concerned, the CSR agenda involves economic, social and environmental responsibilities as the activities of the corporations implicate these three matters largely in human life. The majority of the international standards focus on labour, human rights, environment and consumer protection related issues as the core contents and dynamics of CSR. The social investment, community relations, stakeholder engagement and philanthropic activities also fall within the purview of companies' responsibility. These are mainly based on companies' discretion developed by the individual self-regulatory guidelines.

The review of different international intergovernmental and multi-stakeholder codes of conduct establishes a fact that the basic character of the standards of CSR is non-binding soft law. As they are developed through self-regulatory mechanism, the enforcement and implementation are more value-based, depend upon the commitment, trust and sense of responsibility of the actors themselves. Moreover, the standard setting declarations and guidelines articulate the weight of responsibility the corporation should shoulder on.

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[99] Gordon Kathryn, ' OECD Guidelines and Corporate Responsibility Instruments: A Comparison' Working Papers on International Investment , OECD Directorate for Financial , Fiscal and Enterprise Affairs,2001),p. 5 < www.oecd.org>

THE TRIPS AGREEMENT IN BANGLADESH: IMPLICATIONS AND CHALLENGES

Mohammad Towhidul Islam*

1. Introduction

The *Agreement on Trade Related Aspects of Intellectual Property Rights*, 1994 (the *TRIPs Agreement*)[1] of the World Trade Organization (WTO) has long been the subject of a major contentious trade issue between its current and potential developed, and developing and least developed country (LDC) members. The Agreement with its intellectual property rights (IPRs)[2]-trade linkage and strict protection standard-setting creates competing interests for developing and least developed countries. Alhough adopted in the realm of trade liberalisation, the IPRs-trade tie appears to monopolise free trade and secure rent payments for IPRs-owning developed countries when the Agreement's strict protection is accorded to IPRs and duration of such protection is extended.[3] The Agreement

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1 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, *1869 U.N.T.S. 299*; *33 I.L.M. 1197* [hereinafter the *TRIPs Agreement*].

2 It was customary to refer to industrial and intellectual property rights. The term 'industrial' was used to cover technology-based subject areas like patents, designs and trade marks. 'Intellectual property' was used to refer to copyright. The modern convention is to use 'intellectual property' to refer to both industrial and intellectual property. The *TRIPs Agreement* translates IPRs into trade-related intellectual property rights to commercialise the inventions and simultaneously to stop others from doing so unless rents are paid on licensing; see for details, M Rafiqul Islam, *International Trade Law of the WTO* (Melbourne: Oxford University Press, 2006) 379-80.

3 Jagdish Bhagwati, 'From Seattle to Hong Kong' (December 2005: WTO Special Edition) 84(7) *Foreign Affairs* 2-12. In spite of his great active role in liberalising trade under the World Trade Organization (WTO), he is of the view that the *TRIPs Agreement* legitimates rent seeking behaviour and perpetuates monopoly, and these aspects are inconsistent with the principle of free trade.

causes further tension when it introduces a uniform and mandatory protection regime for all WTO members, developed, developing and least developed countries alike. The uniformity in normative protection seems to undervalue countries that have different standing in terms of economic development. It also disregards developing and least developed countries' comparative advantage of reverse engineering in IPRs products when it restricts technology transfer. Such TRIPs approaches appear to prioritise the highest revenue collecting interests of developed countries over least developmental interests of developing and least developed countries. Researchers and international organisations – governmental and non-governmental demonstrate these TRIPs experiences in their writings and reports.[4] These experiences come into view as implications and

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[4] United Nations Conference on Trade and Development, 'The Least Developed Countries Report 2007: Knowledge, Technological Learning and Innovation for Development' (prepared by the UNCTAD Secretariat, Geneva, 2007) 125-6 [hereinafter UNCTAD]; United Nations Development Programme, 'New technologies and global race for knowledge' in *Human Development Report* (1999) 68 [hereinafter UNDP]; Ruth L Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (2003) 7 *Singapore Journal of International and Comparative Law* 315; UNCTAD, *The Role of the Patent system in Developing Countries* (1975); see also Michael Blakeney, 'Intellectual Property in World Trade' (1995) 1(3) *International Trade Law and Regulation* 76, 77-8; see also Jerome H Reichman, 'The TRIPs Component of the GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market' (1993) 4 *Fordham Intellectual Property, Media and Entertainment Law Journal* 171; Peter Drahos, 'Developing Countries and International Intellectual Property Standard-setting' (2005) 5(5) *Journal of World Intellectual Property* 765; Vandana Shiva, *Protect or Plunder? Understanding Intellectual Property Rights* (London: Zed Books, 2001) 49-53; Jerome H Reichman, 'The TRIPs Agreement Comes of Age: Conflict or Cooperation with the Developing Countries' (2000) 32 *Case Western Reserve Journal of International Law* 441; Laurence R Helfer, 'Regime Shifting: The *TRIPs Agreement* and New Dynamics of International Intellectual Property Lawmaking' (2004) 29(1) *Yale Journal of International Law* 1; World Health Organization, 'Public Health: Innovation and Intellectual Property Rights' (Report of the Commission on Intellectual Property Rights, Innovation and Public Health, 2006) [hereinafter WHO]; The Commission on Intellectual Property Rights, 'Integrating Intellectual Property Rights and Development Policy' (Report of the Commission on

challenges for developing and LDC members in general in their IPRs-appropriating nature of developmental needs in agriculture, access to medicines, transfer of technology, economic development, and so on.[5] Bangladesh which is an LDC and has one-thirds of its population living below the poverty line, faces such TRIPs implications and challenges since it depends mostly on agriculture for livelihoods, generics of drugs for health, foreign patented products for reverse engineering, and technology transfer for economic development.

This article seeks to address the TRIPs implications and challenges in general and Bangladesh in particular. While doing so, it will dig out some fields of TRIPs implications, which have tremendous bearing on Bangladesh and its people. It will conclude with some recommendations how these implications and challenges can be tackled without substantially hampering the interests of TRIPs stakeholders and users like Bangladesh.

2. Problem Statement of the Article

The *TRIPs Agreement* obliges its members to offer plant varieties protection (PVP) either through 'an effective *sui generis* system' or patents or a combination of both.[6] However, the Agreement keeps unspoken on the definition of 'an effective *sui generis* system.' Some bilateral treaties[7]

Intellectual Property Rights, London, September 2002) 35 [hereinafter UK Commission].

5 UNCTAD, Ibid, 125-6.

6 *TRIPs Agreement* Article 27.3(b).

7 e.g. *United States-Bangladesh Bilateral Investment Treaty 1986* signed 12 March 1986; entered into force 25 July 1989, Treaty Doc.99-23 Congress. Article 1c) provides: 'Investment' means every kind of investment owned or controlled directly or indirectly, including equity, debt; and service and investment contracts; and includes... [i]ntellectual property, including rights with respect copyrights and related patents, marks and trade names, industrial designs, trade secrets and know-how and goodwill.' See also, European *Union-Bangladesh Cooperation Agreement on Partnership and Development 1999*, signed 22 May 2000, LEX-FAOC036142 <http://faolex.fao.org/docs/pdf/bi-36142.pdf> 2 April 2008. Article 4.5.(c) states: '... Bangladesh shall endeavour to accede to the relevant international conventions on intellectual, industrial and commercial property referred to in Paragraph 2 of Annex II.'

binds a number of developing and least developed countries to offer the PVP in the form of plant breeders' rights (PBRs)[8] as laid down in the *International Convention for the Protection of New Varieties of Plants 1961 (UPOV Convention).*[9] The Convention requires members to protect PBRs against unauthorised production of these varieties for commercial use[10] although it has been a long established custom, popularly known as 'farmer's privilege'.[11] Not only that, it also extends PBRs to 'essential derivation' of a plant variety from a protected variety. This enables the right holder of the protected variety to have the benefit of both types of plant.[12]

With the use of TRIPs Article 27.1 as regards patenting of bio-technology and Article 27.3(b) as regards patenting of a bio-technological process to produce a plant,[13] multinational corporations (MNCs) generate

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8 UPOV, *Welcome* <http://www.upov.int/index_en.html> at 22 March 2008; See also, Anitha Ramanna, 'IPRs and Agriculture: South Asian Concerns' (2003) 4(1) *South Asia Economic Journal* 55, 63.

9 The *International Convention for the Protection of New Varieties of Plants* was adopted on 2 December 1961, by a Diplomatic Conference held in Paris [hereinafter the *UPOV Convention*]. The *UPOV Convention* came into force on 10 August 1968. The Convention establishes the International Union for the Protection of New Varieties of Plants (UPOV). It has been revised on 10 November 1972, 23 October 1978, and on 19 March 1991, in order to reflect technological developments in plant breeding and experience acquired with the application of the *UPOV Convention.* See for details, <http://www.upov.int> 22 March 2008.

10 Ibid, Article 5.

11 Michael I Jeffery, 'Intellectual Property Rights and Biodiversity Conservation: Reconciling the Incompatibilities of the *TRIPs Agreement* and the Convention of Biological Diversity' in Burton Wong (ed) *Intellectual Property and Biological Resources* (Singapore: Marshall Cavendish Academic, 2004) 197.

12 *UPOV Convention* Articles 14, 15, and 16.

13 *TRIPs Agreement* Article 27.3 (b). It states - 'Members may also exclude from patentability: ... (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.'

seeds using 'terminator' technology and patent them.[14] These seeds do not germinate second time and farmers are forced to pay royalties for these engineered varieties of seeds. In addition, the Agreement's patent protection of products made out of genetic resources and traditional knowledge leads to bio-piracy tending to deprive local people of benefit sharing and stop their time-immemorial local usages.[15]

Thus, the monopoly right arising in the case of agriculture is likely to cause an increase in the price of seeds and other inputs, which can make many farmers unable to afford[16] or which can create a threat to the farmer's right of control over their own food production.[17] However, from the perspectives of development and reward in return of research and development (R&D) the TRIPs provisions as regards agriculture fits quite well in justificatory, further developmental and economic argument theories.[18] Because such provisions safeguard the investment in

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14 Terminator technology is also known as Genetic Use Restriction Technology (GURT).

15 Vandana Shiva, (2001) 49-53.

16 Laurence R Helfer, 'Intellectual Property Rights in Plant Varieties: An Overview with Options for National Governments' (FAO Legal Papers Online, July 2002) <http://www.fao.org/Legal/Prs-OL/lpo31.pdf> at 23 March 2008. See also, Marie Byström and Peter Einarsson, 'TRIPs Consequences for Developing Countries: Implications for Swedish Development Cooperation' (Consultancy Report to the Swedish International Development Cooperation Agency, Final Report, August 2001). Both of the researches reveal the concerns like price hike of seeds, change of livelihoods in developing countries.

17 Michael Jeffery, (2004) 198; see also, Graham Dutfield, *Intellectual Property Rights, Trade and Biodiversity: Seeds and Plant Varieties* (London: Earthscan, 2000) 27. Dutfield notes the PBRs monopolisation in the hand of MNCs and their collection of royalties from farmers under compulsion in countries like India, Thailand, Brazil, and so on.

18 Lockean compensatory justice argument says that persons (innovators) are naturally owners of the fruits (innovations) of their own labour and that the improperly taking of these fruits amounts to an attack (piracy or theft) on the self-government or even the veracity of the person. In accordance with the Hegelian self-developmental approach, the products of the mind are stamped with the personality of their inventors or creators. This feature of creations confers them with an ethical claim to exploit those products to the exclusion of third parties. And in accordance with the economic justice

agricultural R&D, encourage MNCs to develop new technology to boost up agricultural production in consideration of limited resources and move forward the economic developmental activities by means of agriculture.

Articles 27.1 and 70.8 of the *TRIPs Agreement* read together require members to offer patent protection to pharmaceutical products or processes.'[19] In terms of justificatory, further developmental, and economic argument theories patenting in pharmaceutical products is intended to have more inventions in pharmaceuticals, more welfare in health sectors. However, patenting provisions in the *TRIPs Agreement* confer in fact monopolies to MNCs by prioritising profiteering decisions as regards inventions and price-setting of pharmaceuticals. Consequently, the MNCs' apprehension of less profit causes pharmaceutical R&D to focus on first world ailments (e.g. arthritis, diabetes) at the expense of pandemic and endemic diseases such as HIV/AIDS, malaria or other tropical diseases. And developing and least developed country people suffer for this MNCs' hesitation since it results in absence of cheap or effective medication. In addition, the product patent provision causes members not to manufacture the same product by adopting different processes. This results in nonappearance of competition among drug manufactures and rise of monopolies in the hands of MNCs. Moreover, the *TRIPs Agreement* tends to protect public health interests in dire necessities by providing relaxation clauses (e.g. compulsory licensing).[20] However, such clauses with protectionism approach appear to be proving ineffective in facing pandemic and endemic diseases like HIV/AIDS.[21]

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argument an innovator or creating firm will be less likely to make investment if someone else takes into custody or appropriates at little or no cost a considerable part of the economic returns from the investment in question. See for details, Michael J Trebilcock and Robert Howse, *The Regulation of International Trade* (London: Routledge, 3rd edition 2005), 398-9.

19 *TRIPs Agreement* Article 70.8. It states, 'Where a Member does not make available as of the date of entry into force of the WTO Agreement patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27, that Member shall ... provide patent protection in accordance with this Agreement ...'

20 *TRIPs Agreement* Article 33.

21 M Rafiqul Islam, 'The Generic Drug Deal of the WTO from Doha to Cancun: A Peripheral Response to Perennial Conundrum' (2004) 7(5) *Journal of World Intellectual Property* 675.

Furthermore, the extended duration of patent which is set 20 years as minimum, ensures pharmaceutical patent owners' return in R&D. However, it makes manufacturers of generic drugs wait longer to produce the same and causes hazards in public health for developing and LDC people who mostly depend on generics which are relatively cheaper and affordable.

The *TRIPs Agreement* requires IPRs to be protected essentially by members irrespective of their developmental standing and comparative advantage in reverse engineering of IPRs products. It also requires the free use of IPRs to be treated as a trade barrier on the ground of piracy and counterfeiting. This ensures IPRs owners' investment in R&D. However, this restrains developing and LDCs from easy access to IPRs products and from tagging on the imitation model that the United States (US) and Japan followed earlier in mitigating their developmental needs.[22] For accessing to IPRs, they are further made to pay licensing fees, which are often unaffordable in consideration of their economic stability. This trend of IPRs protection appears as an obstacle in the way of technology transfer required for economic development and trade expansion.

Thus, IPRs-protection seems to encourage monopolisation and make restraints to free trade for developing and LDC members.[23] The Agreement recognises this monopolisation as private rights,[24] places them over public interests in agriculture, public, and economic development and provides non-human rights aspects of protection for them.[25] In addition, TRIPs restrictions on technology transfer and comparative

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22 See Robert H Wade, 'What Strategies are viable for Developing Countries Today? The World Trade Organisation and the Shrinking of Development Space' (2003) 10(4) *Review of International Political Economy* 621.

23 Steven Shrybman, *The World Trade Organization: A Citizen's Guide* (Ottawa: Canadian Centre for Policy Alternatives, 2nd edition, 2001) 111-2.

24 *TRIPs Agreement,* Preamble.

25 Caroline Dommen, 'Safeguarding the Legitimacy of the Multilateral Trading System: The Role of Human Rights Law' in Frederick M Abbott, Christine Breining-Kaufman and Thomas Cottier (eds), *International Trade and Human Rights: Foundations and Conceptual Issues* (Ann Arbor: University of Michigan Press, 2006) 126-7. She notes that the TRIPs non-human rights aspects include the extended term of IPRs protection, patenting of biotechnology by way of bio-piracy etc.

advantage appear to clash with the neo-liberalism principle of comparative advantage.

With the LDCs' compliance deadline i.e. 1 July 2013 and 1 January 2016 (patenting of pharmaceuticals), Bangladesh must offer patent or flexible *sui generis* protection (of its own kind) to plant varieties. However, the execution of bilateral agreements binds Bangladesh to tender the UPOV[26] style *sui generis* protection. This protection requires it to ensure plant breeders rights, stop farmers exchanging or selling the seeds and make them pay royalties each time they plant the protected variety of seeds.[27] Besides, the pharmaceutical companies will not be able to produce generics of the patented drugs on its entry into force of the *TRIPs Agreement*. Then the companies will either have to get licence or wait until the patent expires. In cases of producing generics of patented drugs, the high licensing fee bears the risk of raising the prices of essential drugs too high, not to be affordable for poor Bangladeshis.[28] Further, since Bangladesh possesses very weak R&D infrastructure, it needs technology transfer to initiate its economic development with its limited affordability of bearing the cost of licensing. However, the *TRIPs Agreement* cannot be taken granted as a tool for technology transfer for its complex formalities and strict protectionism.[29]

The above TRIPs issues appear as insinuations and challenges for Bangladesh since in its compliance, it has to resolve all of these issues taking into consideration that about one-thirds of its people mostly depend on agriculture, cannot afford medicines for their health, and rely on indigenous knowledge for their daily activities. On having based on these issues and compliance deadline, this article deals with the way-outs how these TRIPs implications and challenges can be tackled for an LDC like Bangladesh. For this, this article analyses the IPRs laws in Bangladesh

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26 The *International Convention for the Protection of New Varieties of Plants*, adopted on 2 December 1961, 815 UNTS 89 [hereinafter UPOV Convention].

27 Jai Prakash Mishra, 'Biodiversity, Biotechnology and Intellectual Property Rights: Implications for Indian Agriculture' (2000) 3(2) *Journal of World Intellectual Property* 211, 221.

28 WHO, 'Public Health: Innovation and Intellectual Property Rights' (Report of the Commission on Intellectual Property Rights, Innovation and Public Health, 2006) 22.

29 Ibid, 111.

in the context of TRIPs implications and challenges emerging under different regimes and examines the TRIPs suitability with the IPRs laws in Bangladesh.

3. IPRs Laws of Bangladesh

The currently enforceable IPRs laws in Bangladesh are in place for its compliance with the international IPRs protection regimes. Most of them are older than its membership[30] in international IPRs regimes. The laws are the *Patents and Designs Act, 1911 (Patents and Designs Act)*[31], the *Trade Marks Act, 1940 (Trademarks Act)*[32], and the *Copyright Act, 2000 (Copyright Act)*[33] as amended in 2005[34]. These IPRs law are the inheritance from colonial IPRs laws enacted in British India. They are said to have followed the [British] *Patents and Designs Act 1907*,[35] the [British] *Copyright Act 1911*[36] and the [British] *Trademarks Act 1938*[37] suiting the British interests reflecting the British empire building and colonization.[38]

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30 *WIPO Convention*, since 11 May 1985; *Paris Convention*, since 3 March 1991; *Berne Convention*, since 4 May 1999; *TRIPs Agreement*, since 1 January 1995, and *UCC* since 5 May 1975. See for details,
< http://www.wipo.int/treaties/en/SearchForm.jsp?search_what=C> 31 March 2008;
< http://www.unesco.org/culture/copyright/html_eng/ucc52ms.pdf > 31 March 2008.

31 *The Patents and Designs Act*, 1911 (ACT NO. II of 1911) *Bengal Code Vol. VII; Pakistan Code Vol. 6*, enacted 1 March 1911 (hereinafter *Patents and Designs Act*).

32 *The Trade Marks Act, 1940* (ACT NO. V of 1940) *Pakistan Code, Vol. 10*, enacted 11 March 1940 (hereinafter *Trademarks Act*).

33 *The Copyright Act, 2000* (ACT NO. XXVIII of 2000) *Bangladesh Gazette Extra 18 July 2000* (hereinafter *Copyright Act*).

34 *The Copyright (Amendment) Act, 2005* (ACT NO. XIV of 2005) *Bangladesh Gazette Extra 18 May 2005*.

35 1907 CHAPTER 29 7_Edw_7.

36 1911 CHAPTER 46 1_and_2_Geo_5.

37 1938 CHAPTER 22 1_and_2_Geo_6.

38 Hedwig Anuar and Richard Krzys 'Asia, Libraries in' in Allen Kent et al (eds), (1987) 42 *Encyclopedia of Library and Information Science* 24, 38; Keith Hodkinson, *Protecting and Exploiting New Technology and Designs* (London & New York: Spon Press Pub., 1987) 101-2.

The British laws have changed several times[39] in order to cater for the needs and developmental objectives and to keep pace with the revision[40] of the *Paris Convention* and the *Berne Convention*.[41] However the newly independent countries were bound by the conventions on the basis of the defunct rule of continuity even after decolonisation.[42] This is because when the British colonial master acceded to international IPRs regimes, the operation of such accession extended to 'His Majesty's Dominions'.[43]

In spite of the continuity of obligations, some countries conducted reviews in order to assess whether the colonial IPRs laws still suited the socio-economic conditions prevailing in those countries. India is one of them, which carried out an extensive review of its IPRs laws and found some of the IPRs rules ineffective to 'stimulate inventions among Indians and to encourage the development and exploitation of new inventions'.[44] It redesigned them to go well with its own national circumstances

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39 See for details, *The Patents Act 1977 (Amendment) Bill*, Bill 9 of 2001-02, Research Paper 01/84, 31 October 2001, <http://www.parliament.uk/commons/lib/research/rp2001/rp01-084.pdf> 12 November 2007.

40 World Intellectual Property Organization (ed), *Introduction to Intellectual Property: Theory and Practice* (London & Boston: Kluwer Law International, 1997) 388-91. The revisions enabled the Conventions to shift from soft coordination to hard institutional organisation or to provide for compulsory licensing for translation and reproduction of copyrighted educational materials in developing countries; See for details of the revisions, <http://www.wipo.int/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf> 31 March 2008 [hereinafter WIPO]; < http://www.wipo.int/article6ter/en/general_info.htm> at 31 March 2008.

41 Ruth L Okediji, 'Sustainable Access to Copyrighted Digital Information Works in Developing Countries' in Keith E Maskus and Jerome H Reichman (eds) *International Public Goods and Transfer of Technology: Under a Globalized Intellectual Property Regime* (New York: Cambridge University Press, 2005) 142, 159-60.

42 Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works* (Oxford: Oxford University Press, 2006, 1987) 797-807.

43 Peter Drahos, 'Developing Countries and International Intellectual Property Standard-Setting' (2002) 5(5) *Journal of World Intellectual Property* 765.

44 S Vederaman, 'The Indian Patents Law' (1972) 3 *International Review of Industrial Property and Copyright Law* 39-43.

comprising low R&D, huge population of poor people and some of the highest drug prices in the world.[45] Having started its journey from similar position and having the same circumstances, Bangladesh has not yet made it possible to review its IPRs laws.

4. Bangladesh under the WIPO Regime

Most of the IPRs laws in Bangladesh seem to be very age-old in terms of defining and protecting IPRs, covering emerging issues in IPRs, providing adequate benefits to the IPRs owners, identifying causes of infringement of IPRs in a globalised world and remedying them or keeping pace with the trends of liberalising trade and promoting sustainable development.

The *Patents and Designs Act 1911* was enacted in line with the *Paris Convention* originally adopted on 20 March 1883. Between the date of enactment of the *Patents and Designs Act* and the adoption of the *TRIPs Agreement 1994*, the concepts of patents and designs have come across massive development through adoption of a large number of international conventions[46] and decisions of courts throughout the world. They recommended enactment of uniform laws on intellectual property including patents and designs. For Bangladesh as a member of the *Paris Convention,*[47] the current Act requires to be updated in order to validate certain revisions and amendment made to the *Paris Convention* as regards independence of patents obtained for the same invention in different countries,[48] mention of the inventor in the patent,[49] protection of industrial designs in all the member countries[50] or prevention of unfair

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45 Ibid.

46 Amongst them are several revisions for *Paris Convention for the Protection of Industrial Property*, *Convention on the Grant of European Patents* (adopted in Munich, 5 October 1973 *BGB1. 1976 II, 649*, 826), *Convention for the European Patent for the Common Market* (adopted in Luxembourg, 15 December, 1975, *76/76/EEC*), and *Patent Co-operation Treaty* (adopted in Washington, 19 June 1970, *1970 TIAS 8733*).

47 Ibid.

48 *Paris Convention* Article 4*bis*.

49 Ibid, Article 4*ter*.

50 Ibid, Article 5*quinquies*.

competition through effective use of compulsory licensing or parallel importation[51] etc.

The *Trademarks Act 1940* was enacted as an instrument of protection of the industrial property as formulated in the *Paris Convention*. Over the years the definition and scope of trademarks have undergone gradual international development and application[52] and the Convention has also contained some revisions. These revised or amended provisions of the Convention are not covered in the present Act. Some of them include refusal or cancellation of registration or use of well-known marks in another member country[53] or protection of marks registered in one member country in the other member countries.[54]

The *Copyright Act 2000* as amended in 2005 and substituted the *Copyright Ordinance 1962*[55] is updated in many respects as required by the *Berne Convention*. In accordance with the Convention, the old statute required to incorporate compulsory licensing as regards translation and reproduction of copyrighted materials keeping in consideration of the educational needs of Bangladesh and its developing country status.[56] The old ordinance also lacked provision in relation to protection of broadcasting and related rights.[57]

5. Bangladesh under the TRIPs Regime

Inspiring inventions among the Bangladeshis, encouraging development and exploitation of new inventions, and ensuring rights and obligations of parties therein through appropriate protection appears to be a daunting task for these laws. In the meantime, like other LDCs Bangladesh aspires to attract FDI, technology transfer and innovation enabling it to promote economic development.[58] To this end, it enters the age of trade liberalisation by signing all the WTO Agreements including

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51 Ibid, Article 10*bis*.

52 e.g. geographical indications have started getting registered as trademarks.

53 Ibid, Article 6*bis*.

54 Ibid, Article 6*quinquies*.

55 Ordinance No. XXXIV of 1962 (now stands repealed), *Gazette of Pakistan* 2 June 1962.

56 *Berne Convention* Articles 2*bis*, 9.2, 10.2, 10*bis* and the ten year rule, Article 30.2(b).

57 Ibid, Article 11*bis*.

58 Carlos M Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPs Agreement and the Policy Options* (Oxford: Oxford University Press, 2007) 23-24.

the TRIPs on 1 January 1995.[59] The *TRIPs Agreement*'s strict protection regime generates some tensions as well as challenges for Bangladesh in the fields of legal and institutional framework, agriculture, health, traditional knowledge and geographical indications, information technology, economic development, and human rights.

5. 1. Implications in Legal and Institutional Framework

In order to enjoy the WTO membership by way of preventing IPRs-misappropriation and accessing to developed countries markets, the *TRIPs Agreement* requires Bangladesh to update its the long-standing colonial laws. It also requires Bangladesh to have an extended and modern legal framework, sufficient and equipped administrative offices manned with efficient and trained personnel, capable state mechanism to monitor transfer of technology arrangements. Since all of these involve huge budget and expertise for now and future, a least developed country like Bangladesh may not easily afford them.[60] A study of World Bank and UNCTAD estimates that Bangladesh may need approximately US$ 250,000 one time plus US$ 1.1 million per annum for reform and capacity building on intellectual property law in the context of the *TRIPs Agreement*.[61]

While doing a similar review on Vietnam, Michael Smith notes that copying the laws or legal structures of the developed countries is a simple matter but maintaining an effective structure of laws and enforcement procedures compatible with those of developed countries and encouraging domestic innovations is a multidimensional process causing impending pitfalls.[62]

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59 < http://www.wto.org/english/thewto_e/countries_e/bangladesh_e.htm> at 12 November 2007.

60 UNCTAD, 'The *TRIPs Agreement* and the Developing Countries' (1996) 2-3.

61 Jayashree Watal, 'Implementing the *TRIPs Agreement*' in Bernard Hoekman, Aaditya Mattoo and Philip English (eds), *A Hand Book on Development Trade and WTO* (Washington, D.C.: The World Bank, 2002) 1-10.

62 Michael W Smith, 'Bringing Developing Countries' Intellectual Property Laws to TRIPs Standards: Hurdles and Pitfalls Facing Vietnam's Efforts to Normalise an Intellectual Property Regime' (1999) 31(1) *Case Western Reserve Journal of International Law* 211.

The Least Developed Countries Report 2007 corroborates the apprehension when it says, '[T]he *TRIPs Agreement* is highly problematic for LDCs owing to the high transaction costs involved in complex and burdensome procedural requirements for implementing and enforcing appropriate national legal provisions. LDCs generally lack the relevant expertise and the administrative capacity to implement them.'[63]

5.2. Implications in Agriculture

The *TRIPs Agreement* requires Bangladesh to provide for the protection of plant varieties either by patents or by an effective *sui generis* (of its own kind) system or by any combination thereof. On using the flexibility Bangladesh is not bound to provide a stringent protection for plant varieties by way of patent; rather it is allowed is adopt a less harsh approach of '*sui generis*'.[64] This approach is not so lenient as is expected since the developed countries contend that the expression 'by an effective *sui generis* system' is meant to be the UPOV style protection.[65]

For Bangladesh, UPOV style is a must because it executes the *United States-Bangladesh Bilateral Investment Treaty1986*[66] or the *European Union-Bangladesh Cooperation Agreement on Partnership and Development 1999*[67] containing the TRIPs Plus requirements of acceding to the Budapest Convention (micro-organism) and adopting of the UPOV Convention respectively.[68] Both of these bilateral agreements bind Bangladesh to become a party of the UPOV Convention. In view of these provisions, the plant varieties protection is supposed to ensure plant breeders rights

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63 UNCTAD, *The Least Developed Countries Report 2007 Report: Knowledge, Technological Learning and Innovation for Development* (2007) 99.

64 Megan Bowman, 'Intellectual Property Rights, Plant Genetic Resources and International Law: Potential Conflicts and Options for Reconciliation' (2007) 4(1) *International Journal of Intellectual Property Management* 277, 287. She notes that the plant variety protection by *sui generis* system of IPR creates a greater degree of flexibility for TRIPs members.

65 Anitha Ramanna, 'IPRs and Agriculture: South Asian Concerns' (2003) 4(1) *South Asia Economic Journal* 55, 63.

66 See above n 7.

67 Ibid.

68 UNCTAD, *The Least Developed Countries Report 2007 Report: Knowledge, Technological Learning and Innovation for Development* (2007) 99.

in stopping the Bangladeshi farmers exchanging or selling the seeds and make them pay royalties each time they plant the seeds.[69] Now in absence of any legislation securing farmers' rights, it may cause havoc to the agriculture-prone Bangladesh resulting in change of livelihood of farmers and affecting the foodstuffs produced from the seeds.[70]

In addition, due to the increased rent-generating role of IPRs, the agricultural research which is basically in the hand of public sector in Bangladesh is gradually getting privatised.[71] Besides, some local small seed breeders which play a major role in breeding, are merging with MNCs now-a-days. With the expectation of huge profits, these private sector companies have been investing huge money in agro-biotechnology research. They are inventing more plant or rice varieties using terminator technologies and making the use of these varieties, dependent on herbicides and pesticides produced by them. As a result, farmers who were once reliant on the public sector for cheaper seeds, now depend on private sectors for more varieties and dependent fertilisers, herbicides, and pesticides. In absence of price regulations or anti-competition law, the farmers are made to pay a higher price. The higher price and

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69 Jai Prakash Mishra, 'Biodiversity, Biotechnology and Intellectual Property Rights: Implications for Indian Agriculture' (2000) 3(2) *Journal of World Intellectual Property* 211, 221.

70 Gerard Downes, 'TRIPs and Food Security: Implications of the WTO's *TRIPs Agreement* for Food Security in the Developing World' (2004) 106(5) *British Food Journal* 366, 376.

71 UNEP-GEF Project on Development of National Bio-safety Frameworks, 'Bangladesh: National Progress Report Submitted to the Third Series of Sub-Regional Workshop' (2003/2004) <http://www.unep.ch/biosafety/development/country reports/BDprogressrep.pdf> at 28 November 2007. In the report it notes that public sector biotechnology institutes such as Bangladesh Agricultural Research Institute (BARI), Bangladesh Council for Scientific and Industrial Research (BCSIR), Bangladesh Agricultural Research Council (BARC), Bangladesh Agricultural Development Corporation (BADC), Bangladesh Agriculture University (BAU) and so on are competing with private sector multinational corporations like Novartis and their local agents, NGOs like BRAC, Grameen Krishi Foundation, Proshika, DEBTECH and so on.

terminator seeds raise the costs of farming and cause detriments to poor farmers in Bangladesh.[72]

Furthermore, Bangladesh does have the *Bangladesh Standard and Testing Institute Ordinance 1984* to test the quality and standard of fertilisers, herbicides, and insecticides used in agricultural farming and assess their suitability in the soil. Due to the shortage of advanced technology and expert manpower, these functions of the Bangladesh Standard and Testing Institute are not carried out. As a result, Bangladesh faces some potential concerns arising out of the toxicities of hybrids-fertilisers-herbicides-insecticides linkages in its soil. The concerns include loss of soil fertility, low organic matter contents in the soil, low level of nitrogen in almost all soil types, deficiency in P, deficiencies in Z, S and B etc.[73]

Whatever impacts the PVP provisions of the *TRIPs Agreement* do have on agriculture in Bangladesh, in order to feed 150 million people in Bangladesh, the necessity of growing much food in a limited area, patenting of agricultural biotechnology and its use can not be denied. So, Bangladesh needs to frame a legislation providing breeders rights as well as farmer's rights within the purview of *TRIPs Agreement*, *UPOV Convention*, *CBD* and *ITPGRFA*. Plant breeders' rights can forward the country's public or private sector research to invent new varieties suiting the local conditions. The Agreement enables Bangladesh to protect its traditional plant varieties through *sui generis* protection. Besides, to have the benefits of the *TRIPs Agreement*, the enactment of a competition law is

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72 e.g. Enrico Bonadio, 'Crop Breeding and Intellectual Property in Global Village' (2007) 29(5) *European Intellectual Property Review* 167-71. He notes that due to increasing intellectual property protection, agricultural research is privatised; small seed breeders which once played a major role in inventing varieties have started merging with MNCs. These larger firms tend to produce an oligopoly allowing them greater freedom to engage in price fixing and anti-competitive behaviour through inducing farmers; Mahbub Hossain and Uttam K Deb, 'Trade Liberalisation and Rice Sector in Bangladesh: Next Step in Rice' [2003] *Journal of the Bangladesh Rice Foundation* (26 January 2003) 79.

73 Farid U Ahmed, 'Systems and National Level Experiences for Protecting Traditional Knowledge, Innovations and Protections: Experience of Bangladesh' (Paper presented at the UNCTAD Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices, Geneva, 30 October – 1 November 2000).

essential, because it can regulate the price control so that patenting of seeds and agrochemicals do not become a barrier to the agricultural means of livelihood of the Bangladeshis.

5. 3. Implications in Access to Medicines

The pharmaceutical companies in Bangladesh are engaged in formulation of active pharmaceuticals ingredients (APIs)[74] for major international brands of leading multinational companies, production of generics of patented and off-patent drugs.[75] With the entry into force of the *TRIPs Agreement*'s provision on pharmaceuticals patents from 2016, the local pharmaceutical companies will not be able to produce generics of the patented drugs. They will have to either get licence or wait until the patent expires. In cases of producing generics of patented drugs, the high licensing fee bears the risk of raising the prices of essential drugs too high, not to be affordable for poor Bangladeshis.[76]

5. 3. 1. Paragraph 6 of the Doha Declaration[77]

In the meantime, since the pharmaceutical companies in Bangladesh have manufacturing capacities and they do not need licensing, under paragraph 6 of the Doha Declaration, they can utilise the transitional period and use the clinical test data in areas of pharmaceutical products and related processes in producing generics of the patented life saving drugs through

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74 An active pharmaceutical ingredient (API) is the substance in a drug that is pharmaceutically active. The term is similarly used in pesticide formulations where active substance is also used. Some medications may contain more than one active ingredient. The traditional word for the API is pharmacon (from Greek: (φάρμακον), adapted from pharmacos) which originally denoted a magical substance or drug. A dosage form of a drug is traditionally composed of two things: The API, which is the drug itself and an excipient, which is the substance of the tablet, or the liquid the API is suspended in, or other material that is pharmaceutically inert. Drugs are chosen primarily for their active ingredients. < http://en.wikipedia.org/wiki/Active_ingredient> 2 April 2008.

75 UNCTAD, (2007) 114-5.

76 WHO, 'Public Health: Innovation and Intellectual Property Rights' (Report of the Commission on Intellectual Property Rights, Innovation and Public Health, 2006) 22.

77 WTO Doc. WT/MIN (01)/DEC/1, <www.wto.org> 07 July 2008.

reverse engineering.[78] These drugs can be accessed for local use at an affordable price. They also hold a very good prospect for Bangladesh for their export in the world market.[79] The UNCTAD findings in 2007 that Bangladesh exports a large range of drugs to 67 countries corroborate this assumption.[80]

5.3.2. Paragraph 7 of the Doha Declaration

During the transitional period, the Agreement requires Bangladesh to store all applications seeking patents in the mail box and provide the owner an exclusive marketing right for the invention applied for. However, in consideration of the concerns already raised as regards patent monopolisation of drugs, the exclusive marketing rights provision has been waived till the end of the transitional period for least developed countries. This will go in favour of the poor people in LDCs like Bangladesh in accessing the patented drugs prior to the local registration of patents for these drugs get effective.

5.4. Implications in Traditional Knowledge and Geographical Indications

Patenting medicinal plants and indigenous knowledge through modification in modern library may cause damage to the biodiversity of Bangladesh.[81] It may result in injuring the livelihood of small producers and depriving the poor from using their own traditional resources and knowledge on which they are dependent for their basic needs of health and nutrition.[82] Bangladesh needs laws containing *sui generis* protection or

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78 <http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htM> 2 April 2008.

79 Centre for Policy Dialogue, 'Post Doha Consultation' (Report No. 46, Dhaka, May 2002) [hereinafter CPD].

80 UNCTAD, (2007) 100.

81 Bangladesh Environmental Lawyers Association, 'Traditional Knowledge and State of Bio-diversity in CHT: Case Study of Khagrachhari' (Research Report, Dhaka, March 2003) [hereinafter BELA]; <http://www.sawtee.org/pdf/publication/traditionalbanglades.pdf> 12 October 2007. The report notes that the marketing of local seeds through modification as opposed to the traditional way of preservation by women causes damage to the biodiversity.

82 Ibid.

provisions for preserving biological diversity, herbal medicines and knowledge, heritage and culture, and domestic natural resources.[83] In absence of such laws, the current IPRs protection regime thus carries the risk of violating their human rights to livelihood, health, and nutrition and putting their survival in threats.[84]

In Bangladesh, there are some region-specific handicrafts, tea, spice, sweets, fruits, rice, and so on.[85] In absence of laws ensuring effective GI protection, marketing of similar products making false indications misleads the public and encourages unfair competition. Given the circumstances, Bangladesh needs to take timely measures toward amendment to the existing laws or enactment of new laws, initiatives for notification and registration of geographical indications. It will also have to take initiatives to prepare the list of the product eligible for GI protection.[86]

5.5. Implications in Information Technology

The *TRIPs Agreement* requires Bangladesh to adopt strict copyright regime, which may limit the availability of educational materials for Bangladeshi school and university students.[87] In addition, strict copyright protection to computer programmes will stop reverse engineering, which can cause tension for growing software industry in Bangladesh. Further, protection of layout designs of integrated circuits through *sui generis* protection under the *Washington Treaty* bears the risk of affecting the potential semiconductor industry in the country.

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83 Debapriya Bhattacharya, et al, 'Hong Kong Declaration of the WTO: Reflections on the Outcomes from Bangladesh Perspective' (March-April 2006) 34(2) *The Cost and Management* 68-83.

84 Sadeka Halim, A T M Al Fattahm and Omar Faruque, 'Intellectual Property Trap: Search for an Alternative' (International Seminar on the North-South and South-South Research Partnership, Cartagena de Indias, Colombia, 28-30 December 2002).

85 Donald McClatchy, 'The Ongoing WTO Negotiations on Agriculture: Issues and Options for Bangladesh' (Paper 15, Centre for Policy Dialogue, Dhaka, February 2002).

86 A recent communication with the Ministry of Industry, Government of the People's Republic of Bangladesh, reveals that the process is underway since 2003.

87 UNCTAD, (2007) 100.

5.6. Implications in Technology Transfer and Economic Development

There is a huge debate whether *TRIPs Agreement* fosters technology transfer in developing and least developed countries and the next issue is whether technology transfer contributes to economic development. For countries like South Korea, Taiwan, and Brazil technology transfer has taken place in absence of strong IPRs laws during pre-TRIPs regime and they are now about to have the developed country status, whereas some African countries like Senegal and Niger have received very little technology transfer though they have IPRs laws, very similar to those of developed countries.[88] In this context, it needs to be examined whether Bangladesh, which is exceptional in many ways in the LDC category owing to its flourishing domestic processing sector consisting of ready-made garments (RMG), processed food products and generic drugs,[89] needs technology transfer for its economic development or whether its flourishing domestic processing sector owes to IPRs controlled technology transfer.

For economic and technological development, developing and least developed countries seek access to foreign technology and in response developed countries set IPRs as a key condition to promote increased flows to technology transfer to developing countries.[90] Now the question is whether technology transfer depends on IPRs.

In all three channels of formal technology transfer i.e. international trade in goods/imports, foreign direct investment/joint venture and licensing as noted by Maskus, IPRs may come into play. In informal mode of technology transfer i.e. imitation and copying, IPRs do not have any impact. That's why, in cases of economic and technological development of South Korea, Taiwan and Brazil, IPRs were of no use.

With adoption of the *TRIPs Agreement*, the informal mode of technology transfer gets strictly prohibited. Moreover, due to very little R&D in

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88 Carlos M Correa, 'Can the TRIPs Foster Technology Transfer to Developing Countries?' in Keith Maskus and Jerome H Reichman (eds), *International Public Goods and Transfer of Technology under a Globalised Intellectual Property Regime* (New York: Cambridge University Press, 2005) 227-8.

89 UNCTAD, (2007) 109-110.

90 Correa, (2005) 227.

developing and least developed countries, these countries depend strongly on foreign technology.[91] Now the *TRIPs Agreement* is required to regulate technology transfer, which may bring increased profits and more innovation to developed countries through rents from developing and least developed countries for protected goods and technologies.[92] As a result, developing and least developed countries may treat IPRs as a blockade to technology transfer. In addition, the *TRIPs Agreement* puts some typical restriction on technology transfer: tie-ins, export restrictions, requirement guarantees, and competition restrictions.

Since Bangladesh possesses very weak R&D infrastructure or it cannot afford the cost of licensing, informal technology transfer could be a good alternative tool for its economic development, where IPRs will not be able to impact on technology transfer. Even in the case of progress in domestic processing centre, the presence of IPRs does not play any role in any of the technological transfer modes.[93]

The *TRIPs Agreement* also indicates some shortcut ways to get the technology transfer free. They include compulsory licensing, parallel imports, Bolar exception and so on where IPRs do not have any impact. On its failure, there might be call to reform the Agreement. That's the reason of Ban Ki Moon's assertion that '[t]he rules of intellectual property need to be reformed, so as to strengthen technological progress and to ensure that the poor have better access to new technologies and products.'[94]

Due to the institutional challenges and above all, transitional period, IPRs infringement predominantly of computer software, motion pictures, audio and videocassettes, pharmaceutical products, agricultural products, literary works, and so on goes in rampage.[95] It seriously affects the

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91 Carlos M Correa, 'Pro-competitive Measures under TRIPs to Promote Technology Diffusion in Developing Countries' in Peter Drahos and Ruth Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* (New York: Palgrave, 2002) 41.

92 Ibid.

93 UNCTAD, (2007) 111.

94 <www.un.org/ecosoc> 2 April 2008.

95 International Intellectual Property Alliance, '2007 Special 301: Bangladesh' (12 February 2007) 202;

stakeholders who may rethink to invest further or facilitate technology transfer in the form of foreign direct investment, joint venture, etc. This may cause an adverse effect on the economic development of Bangladesh.

5.7. Implications in Human Rights

Bangladesh will not have to carry out the entire IPRs obligations coming out of the *TRIPs Agreement* during the transitional period. During this interim period, being a WIPO member it has existing obligations as regards patent, copyright and trademarks under its IPRs laws framed in line with the WIPO-affiliated conventions and treaties. All of these laws contain human rights implications in a least development country context.

Under the existing *Patents and Designs Act* it offers patents to pharmaceutical processes. On attaining the full fledged TRIPs obligations, it shall have to add patent protection to pharmaceutical products. As a result, it will not be able to continue copying or reverse engineering in producing generics of patented life saving drugs. To produce them, the pharmaceutical companies will have to get licences from the foreign patentees. Since it involves huge expense, it carries the risk of increasing price of pharmaceuticals. This will affect 33% of the poor people who live below the poverty line[96] and they will not be able to get access of drugs. It will cause concerns for their right to health or life.

On the Agreement's entry into force, the country will have to offer plant varieties protection. It carries the potential to curtail farmers' rights as regards exchanging or selling seeds. Moreover, by using patented terminator seeds, they will have to depend on special type of seeds, which increase farmers' costs of farming. As a consequence of this, farmers' right to food in agriculture-prone Bangladesh is likely to get affected.[97]

<ww.iipa.com/rbc/2007/2007SPEC301BANGLADESH.pdf> 19 November 2007 [hereinafter IIPA].

96 Economic And Social Commission For Asia And The Pacific (ESCAP), 'Country Report: Bangladesh' (Macao, China, 9 October 2007)

97 Mahfuz Ullah, *Intellectual Property Rights and Bangladesh* (Dhaka: Centre for Sustainable Development, 2002) 48-56.

In addition, patenting of biotechnology carries the concerns of bio-prospecting the traditional knowledge, destroying biodiversity and affecting sustainable development.[98]

The existing Copyright Act affects the right to education mostly dependent on books, journals, electronic resources and other educational materials copyrighted in a foreign country. It limits students and researchers often with least financial capability in accessing these materials. Unless these materials are produced locally under compulsory licence or imported from countries producing generic versions under compulsory licence and sold at a cheaper rate, Bangladesh will have to face multidimensional constrains in education. It may lead to copyright piracy as is recently reported by the International Intellectual Property Alliance.[99]

The success in facing these human rights implications and challenges of the *TRIPs Agreement* may bring forth the light in fulfilment of the constitutional vision of Bangladesh for a society, which will ensure human rights and adopt measures to conserve the cultural traditions and the heritage of the people.[100]

7. Concluding Remarks

To get rid of TRIPs implications and challenges, there may be two possible way-outs: (1) making drastic amendments to the TRIPs Agreement accommodating the developing countries' developmental needs and (2) suspending the operation of the TRIPs Agreement unless the developing and least developing countries can reach a level playing field. The first option can be made possible by incorporating special and differential treatment for developing countries in fulfilling their developmental needs, which is currently available in terms of deadline for compliance. The second option is possible if developed countries come forward with some genuine assistance as promised but these are vaguely provided in the body of the TRIPs Agreement. So far Bangladesh is

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98 BELA, (2003).

99 IIPA, '2008 Special 301 Report' (11 February 2008). It recommends the USTR to place Bangladesh atop the Watch List for copyright piracy and other IPRs violations.

100 Mahfuz Ullah, (2002) 33.

concerned, it can get forward in both ways. Unless is anything done, it can provide some *sui generis* protection to plant varieties for its domestic uses, it can utilise Paragraphs 6 and 7 of the Doha Declaration for manufacturing generics of patented drugs and exporting to other countries. Since it has manufacturing capacity, it can incorporate fair use, Bolar exception clauses for invoking foreign patented and copyrighted products keeping in mind its developmental needs. Again, since it has manufacturing capacity for producing drugs or copying other IPRs products, it can go for renting technologies, produce products for domestic consumption and exports. This will ultimately go a long way for Bangladesh in gaining economic development, and protecting and promoting human rights in agriculture, health, education and others.

ADMINISTRATIVE TRIBUNALS IN THE SUBCONTINENT : A STUDY IN THEIR ORIGIN AND DEVELOPMENT

S. M. Hassan Talukder*

I. Concept of Administrative Tribunal

The word 'Tribunal' is used in two senses: wide and narrow. In wide sense, it has been defined to mean "the seat of a judge"[1] and, as such, 'Tribunal' includes in it the court of law. Although Tribunal resembles court in determining controversies, it is not court in the real sense. It exercises judicial power and decides special matters and disputes brought before it judicially or quasi-judicially, but the courts are invested with the judicial powers as a part of the ordinary hierarchy of the regular courts of law.[2]

In narrow sense, the sense it is used in Administrative Law, the word 'Tribunal' is defined as an adjudicating body or authority other than a court or executive department, which exercises some judicial powers of the State in resolving special disputes between the parties under certain special laws. As the Indian Supreme Court in Harinagar Sugar Mills Ltd. Vs. Shyam Sundar Jhunjhunwala[3] observed:

> 'Tribunals' mean those bodies of men who are appointed to decide controversies arising under certain special laws.

In the same vein, the Supreme Court of Bangladesh observed in the case of Bangladesh Vs. Dhirendra Nath Sarker[4] thus:

> 'Tribunals' mean those bodies of men who are appointed to decide controversies arising under certain special laws between parties.

Initially, all types of Tribunals were collectively called Administrative Tribunals.[5] No distinction was made between Tribunal

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1 Wharton: *Law Lexicon,* (1976 Reprint Edn.) p. 1012; quoted in Hoque, Azizul : *The Bangladesh Supreme Court Digest*, Vol. III (1980-81) p. 133.

2 Aiyar, K.J. : *Judicial Dictionary,* (1998) p. 343.

3 AIR 1961 SC 1669.

4 1981 BLD (AD) 378.

and Administrative Tribunal. Unlike in the U.K,[6] a clear distinction between Tribunal and Administrative Tribunal is now maintained in India, Pakistan and Bangladesh. But this distinction is recognised either in supreme laws or in ordinary laws of these countries of the Subcontinent.

In India, the 1949 Constitution recognises the distinction between Tribunal and Administrative Tribunal in its Articles 323A and 323B.[7] As Article 323A of the Constitution has empowered the Parliament to enact laws providing for the establishment of Administrative Tribunals to deal with disputes and complaints relating to the recruitment and conditions of services of public servants and other officials appointed in connection with the affairs of the Union or any State or of any local or other authority in the territory of India or under the control of Government of India or of any corporation owned and controlled by the Government.[8] On the other hand, under Article 323B, Parliament of India or any State Legislature has been given the mandate to pass laws providing for the establishment of Tribunals for the adjudication of disputes, complaints or offences with respect to matters relating to levy, assessment, collection, enforcement of any tax, foreign exchange, import and export across customs, frontiers, industrial and labour disputes, ceiling on urban property, etc. depending upon their legislative competence.

Therefore, it is evident that whereas Article 323A speaks of the Administrative Tribunal to resolve disputes relating to the recruitment and condition of services of civil servants, Article 323B provides for the establishment of Tribunal to deal with disputes relating to levy, assessment or collection of any tax, foreign exchange or customs, industrial and labour disputes, etc.

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5 Because, all tribunals were designed to be part of some schemes of administration. Wade, H.W.R. and Forsyth, G.F.: *Administrative Law*, (7th Edn.) p. 904.

6 In the U.K., there are no separate Administrative Tribunals to deal with disputes pertaining to service matters of civil servants.

7 Arts. 323A and 323B have been inserted in the Constitution of India by the Constitution (42nd Amendment) Act, 1976.

8 In compliance with the Art. 323A, the Indian Parliament has enacted the Administrative Tribunals Act, 1985. And the Administrative Tribunals Act, 1985, by its sec. 14, has empowered the Administrative Tribunal to deal with matters relating to the terms and conditions of service of persons appointed to public service or any body controlled by the Government.

Unlike the Indian Constitution, which makes a distinction between Administrative Tribunal and other Tribunals, the Constitution of Pakistan, 1973,[9] merely speaks of the establishment of the Administrative Tribunal with wide and extensive powers including even the jurisdiction to settle down the disputes in connection with the acquisition, administration and disposal of enemy property under any law. As Article 212 of the Constitution has empowered the Federal Parliament and the Provincial Assemblies to enact laws for the establishment of Administrative Courts or Tribunals to deal with exclusively the matters relating to the terms and conditions of services of civil servants;[10] claims arising from tortious acts of Government, or its servants while acting in exercise of their duties, or of any local or other authorities empowered to levy any tax or cess;[11] or the acquisition, administration and disposal of enemy property under any law.[12]

But, the Service Tribunals Act passed by the Federal Parliament in 1973 in pursuance of the provisions of Article 212 of the Constitution provides for the establishment of Administrative Tribunal (named in the law as Service Tribunal) with limited powers to resolve only disputes relating to the terms and conditions of services of civil servants including their disciplinary matters.[13] Therefore, the Service Tribunal's power and jurisdiction have been confined merely to deal with service matters of civil servants. Thus, despite the constitutional provisions, the Tribunal has not been given the authority to settle disputes relating to claims arising from tortious acts of the Government or its employees or in respect of matters relating to the acquisition, administration and disposal of enemy property. Although the Constitution of Pakistan does not contain provision regarding the establishment and jurisdiction of any other Tribunals except Administrative Tribunals, the Federal Parliament, besides passing the Service Tribunals Act in 1973 for the establishment and operation of Administrative Tribunals, has also passed many other Acts in a piecemeal manner for the establishment of other Tribunals especially to resolve disputes of special nature between contesting parties. These other Tribunals are, among others, Election Tribunal established

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9 *The Constitution of the Islamic Republic of Pakistan.*

10 Art. 212 (1) (a), ibid.

11 Art. 212 (1) (b), ibid.

12 Art. 212 (1) (c), ibid.

13 Sec. 3, the Service Tribunals Act, 1973.

under the Representation of People Act, Mines Tribunal established under the Mines Act, Railway Rates Tribunal established under the Pakistan Railways Act, etc.

Like the Constitution of Pakistan, the Constitution of Bangladesh does not recognise any distinction between Administrative Tribunal and Tribunal. It speaks merely of Administrative Tribunals and is absolutely silent as to the setting up of other Tribunals. As Article 117 (1) of the Bangladesh Constitution empowers the Parliament to make laws for the establishment of one or more Administrative Tribunals to deal with matters relating to the terms and conditions of persons in the service of the Republic;[14] the acquisition, administration, management and disposal of any property vested in or managed by the Government and service in any nationalised enterprise or statutory public authority;[15] and any law mentioned in the First Schedule to the Constitution.[16]

But, the Administrative Tribunals Act, passed in 1981,[17] has empowered the Administrative Tribunals to resolve disputes only relating to or arising out of the terms and conditions of service of persons in the service of the Republic or of any statutory public authority.[18] Despite the constitutional provisions, the Administrative Tribunals have not been vested with the power to deal with matters relating to the acquisition, administration, management and disposal of any property vested in or managed by the Government, service in any nationalised enterprise and most of the laws mentioned in the First Schedule to the Constitution.[19] Indeed, the House of the Nation (Bangladesh Parliament) did not fully comply with all the provisions contained in Article 117 of the Bangladesh Constitution.

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[14] Art. 117 (1) (a), *the Constitution of the People's Republic of Bangladesh.*

[15] Art. 117 (1) (b), ibid.

[16] Art. 117 (1) (c), ibid.

[17] The Administrative Tribunals Act, 1980, was tabled before the legislature in 1980 and it was passed in 1981 and as such it is numbered as Act No. VII of 1981. It received the assent of the Acting President on 5.6.1981 and was also published in the Bangladesh Gazette on the same date. It came into force on 01.02.1982.

[18] Sec. 4, the Administrative Tribunals Act, 1980.

[19] Arts. 117(1)(b) and 117(1)(c), *the Constitution of the People's Republic of Bangladesh.*

Apart from enacting the Administrative Tribunals Act in 1981 for the establishment and operation of Administrative Tribunals, Bangladesh Parliament has also passed several other Acts from time to time for the establishment and operation of other Tribunals in Bangladesh with a view to resolving disputes of special nature. The other Tribunals established are, among others, Labour Court[20] and Labour Appellate Tribunal established under the Bangladesh Sromo Ain, 2006; Taxes Appellate Tribunal established under the Income Tax Ordinance, 1984; etc.

Taking into account the provisions of the Constitutions of India, Pakistan and Bangladesh concerning jurisdiction of Administrative Tribunals and the various enactments passed accordingly providing for the establishment and defining jurisdiction of Administrative Tribunals, the term 'Administrative Tribunal' may be defined as the Tribunal which resolves litigation relating to the terms and conditions of service of persons appointed in the public service or in any statutory body controlled by the government. In this sense, the expression 'Administrative Tribunal' has been used in this Article except the United Kingdom perspective as, unlike in France and the Subcontinent, there are no separate Administrative Tribunals in the United Kingdom to deal with disputes pertaining to service matters of civil servants.

II. Origin and Development of Administrative Tribunals in France and the United Kingdom

It is said that the French and English Legal Systems of Europe have exerted considerable influence in shaping Administrative Tribunals in the Indo-Pak-Bangladesh Subcontinent. An attempt is, therefore, made in this part to examine the origin and development of Administrative Tribunals under both French and English Legal Systems.

i) Under the French Legal System

Under the French Legal System, there are two sets of judicial bodies, ordinary courts of law and administrative tribunals, independent of each other. The ordinary courts administer the ordinary law of the country as between private individuals. The administrative tribunals

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[20] In Pubali Bank Vs. Chairman, Labour Court, Dhaka, (1992) 44 DLR (AD) 40, it was clearly held by the Appellate Division of the Bangladesh Supreme Court that Labour Court is not to be considered as a court; as such, it is a tribunal.

administer the law called *Droit Administratif*[21] as between a private individual and the State.[22] If an administrative authority by its act inflicts an injury upon a private individual by violating any provision of law, an action will only be before an administrative tribunal and not before an ordinary court of law. In France, presently there are two types of administrative tribunals. These tribunals are –

a) *Conseil d' Etat* (1799 – to date); and

b) Tribunaux Administratif (1953 – to date).

Before *Conseil d' Etat* came into existence, another sort of administrative tribunal called *Conseil du Roi* had functioned in France.[23] An attempt is made below to trace the development of these tribunals in France.

Conseil du Roi

In the pre-revolutionary France,[24] *Conseil du Roi* had to perform various functions viz., legal, executive and judicial. Among others, it advised the King in legal and administrative matters. It also discharged judicial functions in resolving disputes between great nobles.

After the French Revolution of 1789, a major change was brought in the legal system. The first step taken by the revolutionaries was to curtail the power of the executive in pursuance of the theory of 'Separation of Powers' propounded by French writer Montesquieu. *Conseil du Roi* was abolished and the King's powers were curtailed. Nepoleon, who became the first consul, favoured freedom for the administration and also favoured reforms. He wanted an institution to give relief to the people against the excesses of the administration. Therefore, in 1799 *Conseil d' Etat* was established.[25]

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21 *Droit Administratif*, ordinarily known as French system of Administrative Law, is a body of rules that determine the organisation and the duties of public administration and which regulate the relation of administration with citizens of the State. It consists of rules developed by the judges of administrative tribunals and does not represent the principles and rules laid down by the French Parliament.

22 Takwani, C. K.: *Lectures on Administrative Law*, (1998) p. 21.

23 Massey, I. P. : *Administrative Law*, (1985) p. 21.

24 French Revolution was held in 1789.

25 Massey, I.P. : *Administrative Law*, (1985) p. 21.

Conseil d' Etat

At the beginning, *Conseil d' Etat* was not an independent adjudicating body. It was an appendage of the executive. Its main task was to advise the minister with whom the complaint was to be lodged. In fact, the minister was the judge and the *Conseil d' Etat* administered only advisory justice. It did not have public sessions. It had no power to pronounce judgments.[26]

In 1872, *Conseil d' Etat* was empowered to give independent decision against the administration. Its formal power to give judgment was established. Subsequently, in the year 1889, a significant change was brought out in the justice approach of *Conseil d' Etat.* The minister was deprived of his powers to hear the complaint, and the complainant was allowed a direct access to *Conseil d' Etat* subject to the condition that he was to state the cause that led to his grievance.[27]

But, with the ever-expanding activity of administration, the *Conseil d' Etat* worked successfully till 1945, when the number of cases began to grow disproportionately. Later, its work was bifurcated into eight sub-sections, but still it fell behind in its race to go with the speed of litigation. By the end of 1953 as many as 26000 cases were pending before it.[28] To remedy the situation, its work on the original side was assigned to local courts, which were named as *Tribunaux Administratif.*

Tribunaux Administratif

Initially, the object of *Tribunaux Administratif* was to quicken the process of justice and reduce the workload of *Conseil d' Etat*, though the *Conseil* exercised the appellate jurisdiction over the newly created *Tribunaux Administratif.* All other matters, which fell beyond the jurisdiction of *Tribunaux Administratif*, could be brought before the Conseil. Thus, the Reform of 1953 conferred a new jurisdiction and new status upon these local adjudicating bodies. However, in case of conflict between the ordinary courts and the Administrative Tribunals regarding jurisdiction, the matter is decided by the *Tribunal des Conflicts.*

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26 Ibid.

27 Chhabra, Sunil : *Administrative Tribunals,* (1990) p. 7.

28 Wraith and Hutchesson : *Administrative Tribunals,* (1973) p. 33.

Tribunal des Conflicts

Tribunal des Conflicts consists of an equal number of ordinary and administrative judges, and is presided over by the Minister of Justice. It was established in France in 1871.[29]

Thus, France, with its experience of administrative courts extending over nearly two centuries, offers a very useful guidance to countries experimenting with Administrative Tribunals.

ii) Under the English Legal System

An important feature of the English Legal System is the establishment of various types of administrative tribunals[30] mainly in the 20th century as a by-product of the welfare state,[31] although some trace their origin before the 20th century.

Under the English legal system, the King's Council and the Court of Star Chamber are considered as the oldest among the tribunals established in the United Kingdom before the 20th century. The other important tribunals established before the 20th century are the Commissioner of Customs and Excise, the General Commissioner of Income Tax, and the Railway and Canal Commission. These tribunals were established by the Customs and Excise Act, 1660; the Income Tax Act, 1799; and the

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[29] Report of the Pakistan Law Reform Commission (1967-70) on Administrative Tribunals, Chap. XXVII. Quoted in Rahman, Syed Lutfor: *Administrative Tribunals Manual,* (1991) p. 59.

[30] In this part of the Article, the expression 'Administrative Tribunal' has been used in wide sense. The expression 'Administrative Tribunal' is, in wide sense, a generic name which represents all types of tribunals dealing with special matters under special laws between contesting parties, since tribunals are designed to be part of some schemes of administration. Under the English Legal System, there exists, in narrow sense the sense it has been used in this Article, no Administrative Tribunals in the United Kingdom to deal with disputes pertaining to service matters of government servants.

[31] The chief characteristics of welfare state are : i) a vast increase in the range and detail of government regulation of privately owned economic enterprise; ii) the direct furnishing of services by government to individual members of the community – the economic and social services as social security, low-cost housing, medical care, etc.; iii) increasing government ownership and operation of industries and business which, at an earlier time, were or would have been operated for profit by individuals or private corporations.

Railways Act, 1873, and dealt with disputes relating to customs and excise, income tax and Railways respectively.

At the beginning of the 20th century, a number of tribunals were established by statutes, of which the Local Pension Committee and the Board of Education are worthy of note.[32] During the early years of the 20th century, several different authorities were given judicial powers to resolve various disputes under the Housing Act, 1919; the Unemployment Insurance Act, 1920; the Roads Act, 1920; the National Health Insurance Act, 1924; etc.

But in the year 1929, there was a sharp reaction against the growth of these adjudicating bodies. Lord Hewart, the then Chief Justice, wrote a book titled "The New Despotism" where he launched a scathing attack on the ousting of the court's jurisdiction and vesting it in the hands of bureaucracy.[33] The view of the learned Chief Justice had an impact on the thinking of the English Government, and it was because of such a reaction that the British Parliament in the same year appointed a Committee on Minister's Power headed by Lord Donoughmore known as Donoughmore Committee.

Donoughmore Committee

The Committee was asked to examine as to whether England should adopt a full-fledged system of Administrative Courts on French model. Describing the criticism by Lord Hewart against administrative tribunals as not well founded, the Committee submitted its report in 1932. In the report, the Committee gave its opinion against the proposal of Administrative Court on the French model on the ground that it was opposed to the flexibility of the English Constitution and the system of normal judicial control over administrative proceedings.[34] Instead, the Committee laid stress on the independence of administrative tribunals and, among others, recommended that –

i) Administrative tribunals should continue to function and exercise judicial powers; and
ii) there should be an appeal to the High Court on the point of law.

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[32] The Old Age Pensions Act, 1908, and the Education Act, 1921, established these tribunals respectively.

[33] Chhabra, Sunil : *Administrative Tribunals,* (1990) p. 4.

[34] Basu, Durga Das : *Administrative Law,* (1998) p. 308.

After the recommendations of the Donoughmore Committee, there has been an extensive growth of administrative tribunals in the United Kingdom that indeed took tremendous proportion after the Second World War. The National Service Act, 1945, the Town and Country Planning Act, 1945, the Family Allowances Act, 1945, the National Insurance Act, 1946, the National Assistance Act, 1946, the National Insurance (Industrial Injury) Act, 1946, the Transport Act, 1947, and the Agricultural Act, 1947, are considered as the vital among the Acts passed by the Parliament after the World War II. These Acts, indeed, have increased the number, enlarged the jurisdiction and raised the status of different kinds of administrative tribunals in the United Kingdom. In most cases, tribunals consisting of three persons have been set up. Their Chairmen are independent, but the other members represent the various interests involved. In some cases, even judicial powers have been given to ministers and superior tribunals have been appointed to hear and decide appeals from the lower tribunals.[35]

But there were many complaints from different quarters, especially from the Treasury against the working of these tribunals. And as a result of reaction from the Treasury, a Committee under the chairmanship of Sir Oliver Franks, known as Franks Committee, was appointed in 1955 by the Lord Chancellor to report on the working of administrative tribunals engaged in different areas of State-activity vis-a-vis human relationship.

Franks Committee

The Franks Committee submitted its Report in 1955. The Report, containing a number of recommendations, rejected the view of the Treasury that the administrative tribunals were a part of the administration and consequently were not judicial institutions. Rather, the Report justified that the administrative tribunals were independent organisations to settle legal claims and disputes.

The report of the Franks Committee, published in 1957, gave the administrative tribunals a higher status than they had earlier enjoyed. The Committee accepted the principle of openness, fairness and impartiality as the very basis of the functioning of the tribunals. The Committee, among others, recommended a Council on Tribunals to supervise their workings. As a result, the British Parliament enacted the Tribunals and Inquiries Act in 1958.

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[35] Mahajan , V. D. : *Select Modern Governments,* (1988) p. 149.

The Tribunals and Inquiries Act, 1958

In the history of the development of tribunal system in the UK, the role played by the Tribunals and Inquiries Act, 1958, is considered as crucial. The Act, indeed, provided for a control of the administrative tribunals by the courts of law and maintained the traditional Rule of Law. The Tribunals and Inquiries Act, 1958, was amended in 1959 and 1966. Later, it was consolidated first by the Tribunal and Inquiries Act in 1971, and then in 1992. Adequate judicial control over the administrative tribunals was provided for. The tribunals were established without affecting its special procedure and without introducing the system of administrative courts on the pattern of French Law. Thus, tribunalisation of justice was accepted as an important part of the judicial system of the United Kingdom.

At present, there are administrative tribunals in the United Kingdom to deal with personal welfare, service pension, education, employment, health service and immigration. There are also administrative tribunals, which deal with economic matters such as agriculture, commerce, transport, and housing. These are in addition to matters relating to revenue that cover taxation, statutory levies, industrial matters, etc.[36]

Besides, the English legal system, which was traditionally averse to any separate courts or tribunals for administrative law matters, is slowly moving towards establishment of such tribunals, although there are no separate Administrative Tribunals in the UK to deal with cases relating to the terms and conditions of service of civil servants. Ordinary courts have been dealing with these matters and that also in a limited way in view of Crown's prerogative and doctrine of master and servant. Recent development (making unfair dismissal justifiable) has made the civil servants subject to the jurisdiction of Industrial Tribunals from which appeals lie to the Employment Appeal Tribunal. Civil servants are being dealt with at par with the workmen, but jurisdiction in their case is mostly limited to awarding compensation.[37]

III. Origin and Development of Administrative Tribunals in the Subcontinent

The origin and development of Administrative Tribunals in the Subcontinent can be traced to the ancient[38] and medieval[39] periods

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[36] Chhabra, Sunil : *Administrative Tribunals*, (1990) p. 6.

[37] Rashid, Pirzada Mamoon : *Manual of Administrative Laws*, (1998) pp. 51-52.

[38] Ancient Period begins with the earliest known civilizations and extends to the fall of the Western Roman Empire in A. D. 476.

although their main developments have been made during the modern period.[40]

During the ancient period, the King's Court was the highest court of appeal as well as original court in the cases of vital importance. In the King's Court, learned Brahmins, judges, ministers, elders and representatives of trading community advised the King. The Court of Chief Justice was below the King's Court. Legally, the Chief Justice was empowered to constitute special tribunals to deal with the disputes of special nature among traders, craftsmen, artisans and artists. These special tribunals consisted of three to five members one of whom was to act as the President. They were from both technical professions as well as from the judiciary.[41] The decisions of these tribunals, as legal history reveals, were made appealable to local courts; the second appeal lay to Royal Judges and sometimes a special appeal in extra ordinary circumstances was also provided to the King's Court.[42]

During the medieval period, no imporant changes concerning tribunal system were made in the administration of justice. The earlier system, indeed, remained operative until the beginning of the modern period and the advent of the British in this Subcontinent.[43]

The British came to the Subcontinent in 1601 as a "body of trading merchants" in the name of East India Company.[44] At the beginning, the

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39 Medieval Period extends from the fall of the Western Roman Empire to the close of the 15th century, the period of Oceanic discoveries. Roughly, it extends from about A. D. 477 to about 1400.

40 In historical use, it is commonly applied (in contradistinction to Ancient Period and Medieval Period) to the time subsequent to the Medieval Period. It extends from about A. D. 1401 to the present day.

41 In the cases of disputes among traders, craftsmen, artisan, artists, etc., it was difficult for the courts to arrive at correct decisions in view of the technical problems involved. As such, the rule of associating technical experts in resolving disputes in such specialised fields had been recognised and adopted.

42 Kulshreshtha, V. D. : *Landmarks in Indian Legal and Constitutional History,* (1981) p. 6.

43 Chhabra, Sunil : *Administrative Tribunals,* (1990) p. 9.

44 The first Englishman to set foot on Indian soil was Thomas Stephens. He set sail to India from Lisbon in April 1579, and reached Goa in October 1579.

East India Company did not bother much about the administration of justice. In subsequent years the Company, when maintained its stronghold over the soil of the Subcontinent, began to think in terms of setting up courts at the three presidencies, viz., Bombay, Calcutta and Madras. As a result, Courts were established at the three presidencies. But, the matter regarding the establishment of tribunals for specified matters and disputes did not receive the attention of the British in the 17th and 18th century; the basic idea of the foreign rulers was to capture power and not to impart justice to the people of the Subcontinent.[45]

The East India Company's rule in India came to an end in 1858 and the Subcontinent was brought under the direct control of the British Government.[46] Thereafter, the enactment of the Indian High Courts Act in 1861 was the first major step in imparting justice to the people. Under the Indian High Courts Act, 1961, High Courts were established in some of the States.[47] These High Courts were empowered to decide all civil and criminal cases of civil servants. All the cases of serving personnel relating to different fields like labour, industry, income tax, railway and transport and commercial transaction fell within the overall jurisdiction of High Courts.

It was in the subsequent years that a thought was given to take some specialised matters out of the jurisdiction of the court to confer on tribunals. As a result, a number of tribunals were established in the Subcontinent under the British rule,[48] of which the Railway Rates

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Kulshreshtha, V. D. : *Landmarks in Indian Legal and Constitutional History,* (1981) p. 37.

45 Chhabra, Sunil : *Administrative Tribunals,* (1990) p. 9.

46 With the passing of the Government of India Act in 1858, the Government of India was transferred from the East India Company to the British Crown.

47 On the basis of the authority given by the Indian High Courts Act of 1861, the Crown issued Letters Patent dated the 14th May 1862, establishing the High Court of Judicature at Calcutta. The Letters Patent establishing the High Courts at Bombay and Madras were issued on June 26 1862. As the Letters Patent of 1862 were found defective in certain respects, fresh Letters Patent were granted in 1865 that revoked the earlier Letters Patent. They were identical in terms, and defined the jurisdiction and powers of the three Presidency High Courts.

48 British rule in the Subcontinent was ended in August 1947.

Tribunal, Motor Accident Claim Tribunal and Commissioner for Workmen's Compensation are noteworthy and important.[49]

The enactment of the Indian Independence Act in 1947 constitutionally ended about two hundred years' British rule in the Subcontinent in August 1947. As a result, two independent States, India and Pakistan came into existence in the geographical as well as political map of the world on the 15th and 14th August, 1947, respectively. Since then the process of development of tribunals continued under two separate legal systems of India and Pakistan. As such, an attempt is made in this part to examine the origin and development of Administrative Tribunals under both the Indian Legal System and Pakistan Legal System.

i) Under the Indian Legal System

In the post-independence era, some new tribunals have been established in India. Among the tribunals established, the Industrial Tribunal, the Copyright Board, the Rent Control Tribunal and the Income Tax Appellate Tribunal are of vital importance.[50]

A new phase of development of tribunal system began in India with the passing of its Constitution (42nd Amendment) Act, 1976. The Act, for the first time in the history of India, paved the way for the establishment of Administrative Tribunals to deal with disputes relating to service matters of civil servants.

Administrative Tribunal in India : New Phase of Development

In 1976, the Indian Parliament passed the Constitution (42nd Amendment) Act, 1976. The Act inserted a new Article 323A in the Constitution empowering the Parliament to establish by law Administrative Tribunals to deal with disputes relating to service matters of civil servants.[51] Accordingly, the Indian Parliament, in pursuance of Article 323A, enacted the Administrative Tribunals Act, 1985. The Act came into force on 01 July 1985, and an Administrative Tribunal was

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[49] The Railways Act, 1890; and the Motor Vehicle Act, 1939; and the Workmen's Compensation Act, 1923, established these tribunals respectively.

[50] The Industrial Disputes Act, 1947; the Copyright Act, 1951; the Delhi Rent Control Act, 1958; and the Income Tax Act, 1961, have established these tribunals respectively.

[51] Art. 323 A(1), *the Constitution of India* (1949).

established on 01 November 1985[52] with its benches in different parts of the country.

ii) Under the Pakistan Legal System

After the establishment of Pakistan in 1947, statutes have established many new tribunals.[53] These are, among others, Labour Court and Labour Appellate Tribunal established under the Industrial Relations Ordinance; Railway Rates Tribunal established under the Pakistan Railways Act; Election Tribunals established under the Representation of People Act; Mines Tribunal established under the Pakistan Mines Act; and the Rent Controller appointed under the Rent Restriction Ordinance.

Most of the tribunals established in Pakistan normally consist of a Chairperson (legally trained) and two other non-legally qualified people, who have some particular expertise in the particular field over which the tribunal has jurisdiction. For example, Labour Court, established in Pakistan under the Industrial Relations Ordinance, 1969,[54] consists of a Chairman and two members to advise the Chairman. It resolves, among others, industrial disputes and disputes arising out of employment of labour. Against an award given by a Labour Court, an appeal may be taken to the Labour Appellate Tribunal for decision.

In Pakistan, a new phase of development of tribunal system began in 1972. For, the 1972 Interim Constitution of Pakistan, for the first time in the history of Pakistan as well as of the Subcontinent, provided provisions for the establishment of Administrative Tribunals to deal with disputes relating to service matters of civil servants. The Interim Constitution of 1972, thus, paved the way for a new phase of development of Administrative Tribunals in Pakistan.

Administrative Tribunal in Pakistan : New Phase of Development

In legal sphere, neither the 1956-Constitution nor the 1962-Constitution of Pakistan had any provision for establishment of Administrative Tribunals pertaining to service matters of civil servants. For the first time, as mentioned earlier, Article 216 of the Pakistan Interim Constitution,

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52 Basu, Durga Das : *Administrative Law*, (1998) p. 636.

53 By virtue of the Indian Independence Act, 1947, Pakistan, consisting of East Pakistan (now Bangladesh) and West Pakistan (now Pakistan) came into existence on the 14th August, 1947, as an independent State.

54 Sec. 35, the Industrial Relations Ordinance, 1969.

1972, contained provisions for the establishment of Administrative Tribunals to resolve disputes concerning service matters of civil servants. Subsequently, the new Constitution of Pakistan, came into force on 12 April 1973, provided in Article 212 for the establishment of Administrative Courts or Tribunals to exercise exclusive jurisdiction in respect of matters relating to the terms and conditions of services of civil servants; claims arising from tortious acts of Government, or its servants while acting in exercise of their duties, or of any local or other authorities empowered to levy any tax or cess; or the acquisition, administration and disposal of enemy property under any law.

In pursuance of the provisions of Article 212 of the Constitution, the Service Tribunals Act, 1973, was enacted in Pakistan on 26 September, 1973, to provide for the establishment of Administrative Tribunals to exercise jurisdiction only in respect of matters relating to the terms and conditions of service of civil servants and for matters connected therewith or ancillary thereto. Accordingly, under Section 3(1) of the Service Tribunals Act, 1973, the Government of Pakistan by notification in the official Gazette established an Administrative Tribunal (statutorily called Service Tribunal) in the same year 1973.[55]

The British left the Subcontinent in 1947 giving independence to British India by dividing it into two independent States, India and Pakistan. Pakistan consisting of West Pakistan (presently Pakistan) and East Pakistan (since 1971 Bangladesh) existed together up to 1971, when independence of Bangladesh was declared on 26 March 1971 and Bangladesh emerged as an independent State free from occupation on 16 December 1971. An attempt is, therefore, made hereunder to examine the origin and development of Administrative Tribunals in Bangladesh under its legal system since independence.

iii) Under the Bangladesh Legal System

Apart from the tribunals inherited from Pakistan,[56] important tribunals e.g. Commissioner of Taxes and Taxes Appellate Tribunal[57] have been

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[55] Rashid, Pirzada Mamoon : *Manual of Administrative Laws*, (1998) p. 49.

[56] The Laws Continuance Enforcement Order, 1971, which was made effective from 26 March 1971, legalised all the tribunals inherited from Pakistan subject to the Proclamation of Independence, 1971. According to this Order, no tribunals would be valid if they were inconsistent with the consequential

established in Bangladesh since its independence. It should be mentioned here that during long past time, disputes arising out of the administrative actions both in the public and private sectors had been subject of judicial review in the courts of law. The courts with the growth of population and socio-economic complexities had been crowded with influx of cases of various nature. The volume of cases on the administrative sides also increased with considerable dimension occupying great chunk of court's time to deal with such cases. The result was that there was inordinate delay in the disposal of cases, which adversely reflected on the efficiency and sound functioning of the administration. Taking into account of these realities, the framers of the 1972 Constitution of Bangladesh included in it for the first time provisions concerning the establishment of Administrative Tribunals for the purpose of ensuring speedy and efficacious disposal of cases relating to service matters, by ousting the jurisdiction of the ordinary courts in respect of such matters.

Administrative Tribunal in Bangladesh : New Phase of Development

A new phase of development of tribunal system began in Bangladesh with the adoption of its new Constitution in November 1972. The Constitution in its Article 117 provides that the Parliament may, by law, establish one or more Administrative Tribunals to deal with disputes relating to, among others, service matters of civil servants. In pursuance of the provisions of Article 117 of the Constitution, the Bangladesh Parliament enacted the Administrative Tribunals Act, 1980 in 1981 (Act No. VII of 1981). The Government, in exercise of the powers conferred by Sub-section (1) of Section 3 of the Act, for the first time in the history of Bangladesh, established an Administrative Tribunal at Dhaka on 01 February 1982,[58] to resolve disputes merely relating to service matter of civil servants. The number of Administrative Tribunal has gradually been increased to seven,[59] which cover the whole country.

IV. Conclusions

The development of Administrative Tribunals in the Subcontinent have been influenced to a great deal by the French *Droit Administratif* with

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changes as would be necessary on account of the creation of Bangladesh as a sovereign State.

[57] The Income Tax Ordinance, 1984, has established these tribunals.

[58] Notification No. S.R.O. 58-L/82-JIV/IT-1/81, dated 01 February, 1982.

[59] Notification S.R.O. No. 288-Law/2001, dated 22 October, 2001.

Conseil d' Etat and *Tribunaux Administratif* having separate hierarchy to settle all administrative claims and disputes independent of any interference by judicial review by the ordinary court of law. Besides, the English legal system has also exerted considerable influence in shaping Administrative Tribunals in the Indo-Pak-Bangladesh Subcontinent.

During the British Rule in India, service rules in respect of private and industrial sectors were formulated. Labour Courts were established for adjudicating disputes relating to the terms and conditions of service in the private and industrial sectors. For the purpose of ensuring speedy and efficacious disposal of cases relating to the terms and conditions of service of persons appointed in the public service or any statutory body controlled by the government, provisions for the establishment of Administrative Tribunals were finally made in the Constitutions of the countries in the Subcontinent by ousting the jurisdiction of the ordinary courts in such matters.

Indeed, in respect of the specific matter of movement from courts to tribunals in the common law countries, Pakistan, India and Bangladesh made the most radical move in the field of service laws. Pakistan took the lead by providing for the establishment of tribunals for civil servants under Article 216 of the Interim Constitution of 1972, followed by Article 212 of the Constitution of 1973. Similar provisions were incorporated in Article 117 of the Constitution of Bangladesh 1972. India added Article 323A to its 1949 Constitution through Forty-Two Constitutional Amendment in 1976. Pakistan was the first country in the Subcontinent to pass federal and provincial laws establishing Service Tribunals for civil servants in the years 1973 and 1974. Bangladesh passed such a law in the year 1981 and India waited until 1985 to pass law providing for the establishment of Administrative Tribunals to deal with the disputes concerning the terms and conditions of service of civil servants.

But, in respect of vesting jurisdiction in the Administrative Tribunals, the legislatures of Pakistan and Bangladesh did not fully comply with all the provisions contained in their respective Constitutions. Despite having larger scope in constitutional provisions, Administrative Tribunals in Pakistan and Bangladesh have been entrusted with very limited jurisdiction.

REVISITING THE LEGAL FRAMEWORK OF FOREST MANAGEMENT CHALLENGES IN BANGLADESH

Arif Jamil*

1. Introduction

Forests serve significant social functions, provide homes and economic base for forest dwelling people, supply fuel wood and other products to households in villages near the forest. It is also important to the household economy of the rural poor. Natural forests are critical to preserving biodiversity because they provide refuge to wild animals and plants, including rare species found only in the forest. Trees- whether natural or cropped- act as a sink for carbon and help to regulate climate at the regional and global levels.[1]

According to an ESCAP (Economic and Social Commission for Asia and Pacific) survey, 5,00,000 to 6,00,000 people depend directly on the Sunderbans for their livelihood. This large population includes commercial and industrial enterprises dependent on the forest products.[2] Forest depletion not only contributes to extinction of wildlife and bio-diversity but also weakens the economic condition of forest dependent people and ethnic communities and their indigenous lifestyle. It is worth mentioning that changing concept of ownership and possession of forest land, with the change of law also makes their life insecure and sometimes eviction or migration becomes inevitable. Highly efficient and people friendly forest legislation is a constant demand of forest dependant people. Therefore, the legal regime should be human and environment[3]

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1 Mitchell, Robert, Property Rights and Environmentally Sound Management of Farmland and Forests, *Land Law Reform: Achieving Development Policy Objectives*, The World Bank, Washington, DC 20433, USA, 2006 at p. 207.

2 Kafiluddin, Dr. A.K.M., *Population Research, Environmental Conservation and Economic Development*, First edition 2001, Dhaka, ISBN 984-32-0226-5, at p. 341.

3 "Environment means the inter-relationship existing between water, air, soil and physical property and their relationship with human beings, other animals, plants and micro-organisms"- Section 2(d), The Bangladesh Environment Conservation Act, 1995, Act No. 1 of 1995.

friendly. The forest legal framework consists of laws on environment, property and forest. Since, forest has nexus with population, geographic location, global and regional climate and political stability of the region, the management of the same is subject to multifarious challenges. There are many legislations and government policies that have relevance to the forest management and its challenges.

The objective of this article is to address the question- to what extent forest related legislations are effective to encounter challenges involved in the forest management of Bangladesh. This article has six sections. Section 1 is an introductory one. Section 2 gives picture of forest and vegetation in Bangladesh and also discuss about forest produce and related statistics. Section 3 is the heart of this article and it deals with the legal framework of forest management. It includes the faulty areas of forest and environment related legislations and makes an effort to improve the condition. The next section is about forest management challenges in Bangladesh which attempts to discuss the problematic management framework and critical issues related to the forest management in Bangladesh. Section 5 is about findings and positive recommendations for a better and wider forest cover in Bangladesh and finally, section 6 is the conclusion. It is needed to be mentioned that author's personal experience of traveling and residing in different forest areas has also been reflected in this writing. Different books, articles, websites, newspapers have been consulted for completing this article.

2. Forests in Bangladesh

Studies of the fossils and other geological characters reveal that in the ancient period extensive tropical to sub-tropical forests existed in Banhladesh. Evidence from paleobotany indicates that fossilized angiosperms were recorded in the Jurassic and Triassic periods. Muslim rulers maintained a status quo on the forest. On the other hand, East India Company considered the forest and agriculture as commercial entity because the forest and the crops provided the timbers, fuel and food to improve the living standard of the Britons.[4] After the creation of Bangladesh the Forest Department was placed under the Ministry of Agriculture. A Forest College was established and placed under the Forest Department.[5]

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4 Hasanuzzaman, S.M., *Plant Genetic Resources in SAARC Countries: Their Conservation and Management,* SAARC Agricultural Information Centre (SAIC), Dhaka, Bangladesh, 2nd edition: December 2005, at p. 89.

5 *Ibid.* at p. 90.

In 1927, when the Forest Act of 1878 was reformed, there was about 20% forest in the territory of Bangladesh.[6] According to the Forestry Master Plan (1993), which is said to be the first step to link Bangladesh with the Tropical Forestry Action Plan (TFAP), total forest lands managed by the Forest Department, Land Ministry and individuals are 24,60,000 hectares or 16.85% of the land surface of the country.[7] The Compendium of Environment Statistics of Bangladesh 2004 shows that Bangladesh has 4477219.35 acres of reserve forest, 91381.89 acres of protected forest, 20859.66 acres of acquired forest, 9491.97 acres of vested forest, 1759456.83 acres of unclassed forest and 59510.84 acres of khas lands controlled by the Department of Forest. Therefore, the total forest land controlled by the Department of Forest is 6417920.54 acres[8]. The area under forest by the type of forest can be demonstrated in the following table: [9]

Year	WAPDA & Khas land (square miles)	Garden area (square miles)	Reserve forest (square miles)	Acquired forest (square miles)	Vested forest (square miles)	Protected forest (square miles)	Unclassed state forest (square miles)	Total (square miles)	% of total area
1975-76	47.75	0.33	4430	365	41	222	3502	8608	15.48
1980-81	47.80	-	5422	399	41	222	3440	9572	17.22
1985-86	54.71	0.34	5718	262	35	207	2443	8720	15.68
1990-91	369.00	na	5028	157	87	202	1335	7178	12.81
1995-96	272.55	na	5643	372	33	149	1840	8461	13.60
2002-03	92.99	na	6996	33	15	143	2749	10028	17.50

2.1 Classes of forests

The forests in Bangladesh are found to be classified as reserve forests, protected forests, privately owned forests, unclassed state forests (USF) and public forests. Reserve forest is the largest category of forest in Bangladesh. The Sunderbans, Chitagong Hill Tracts (CHT) and

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6 Gain, Philip, *Bangladesher Biponno Bon (The Endangered Forests of Bangladesh)*, Society for Environment and Human Development (SEHD), Dhaka, Bangladesh, 2005 at p.V.

7 Gain, Philip, Forest and Forest People of Bangladesh, *Bangladesh Land Forest and Forest people*, Society for Environment and Human Development (SEHD), Dhaka, Bangladesh, 1995 at p. 30.

8 Compendium of Environment Statistics of Bangladesh 2004, Sustainable Environment Management Programme Component 1.3, Bangladesh Bureau of Statistics, Planning Division, Ministry of Planning, Government of the People's Republic of Bangladesh, Dhaka, Bangladesh at p.155.

9 *Ibid.* at p. 156, Source: Department of Forest.

Modhupur tracts fall under this category. Where private forests comprise of forest type of lands owned by individuals and companies, village common forest of the indigenous groups in the CHT include land of unclassed state forests.

The three main types of public forests are:

(i) Tropical evergreen or semi evergreen forests (640,000 ha) in the eastern districts of Chittagong, Cox's Bazar, Sylhet and the CHT region, (hill forest);[10]

(ii) Moist or dry deciduous forests also known as *sal (Shorea robusta)* forest (122,000 ha) located mainly in the central plains and the freshwater areas in the northeast region; [11]and

(iii) Tidal mangrove forests along the coast (520, 000 ha) – the Sunderbans in the Southwest of the Khulna and other mangrove patches in the Chittagong, Cox's Bazar and Noakhali coastal belt. [12]

However, Bangladesh has around 80 thousand villages and each of them is rich in trees, shrubs and herbs. Khan and Alam (1996)[13] compiled a report on the "Homestead Flora of Bangladesh". They enlisted 217 floras found in the village homestead forest.[14]

2.1.1. Tropical evergreen or semi-evergreen forests

The forests of Chittagong Hill Tracts (CHT) fall under this category of forests and they have been classified as reserved forests (RF), protected forests (PF), unclassed state forests (USF). The reserved forests of CHT covers 796,160 acres or 1,244 square miles (about 24% of the CHT),[15] the protected forests covers 34,688 acres or 54.20 square miles (about 1%

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10 Gain, Philip, *Stolen Forests*, Society for Environment and Human Development (SEHD), Dhaka, Bangladesh, 2006, at p. 26.

11 *Ibid.*

12 *Ibid.*

13 Khan, Salar M. & Alam, Khairul M., (1996), *Homestead Flora of Bangladesh*, International Development Research Centre (IDRC), Village-Farm Forestry Project, SDC, Dhaka, Bangladesh, Forestry Div. BARC.

14 See, Hasanuzzaman, S.M., *Plant Genetic Resources in SAARC Countries: Their Conservation and Management*, SAARC Agricultural Information Centre (SAIC), Dhaka, Bangladesh, Second edition: December 2005, at p. 97.

15 Gain, Philip, *Stolen Forests*, Society for Environment and Human Development (SEHD), Dhaka, Bangladesh, 2006, at p.28.

of the CHT),[16] and the unclassed state forests covers 2,463,000 acres or 3, 848 square miles (about 75% of the CHT).[17] CHT is capable to produce variety of plants and timber. CHT also used to produce commercial plants like *Jarul, Gamar, Garjan, Koroi and Chapalish.* Bamboo grows in enormous number in the hills and valleys of CHT. Bamboo is also used as raw material in the paper mills.

The forests of CHT provided habitat for variety of wildlife which included abundant number of tigers, panthers and leopards. The population of tigers has drastically reduced and the tiger species is believed to be extinct in CHT's forest. The last species of Bengal tigers are surviving in the south-western part of the country, in the Sunderbans and they are also believed to be in bad physical condition. The forests of CHT were also home to wild elephant, bison, sambur, deer, imperial green pigeon, wood-duck, hill mynah and many other animals and birds. The rich volume of flora and fauna of CHT not only maintained the balance of ecosystem, it also had been a customary source of livelihood of indigenous communities. The enhanced communal tensions, ethnic conflicts, forest depletion, extinction of wildlife in the entire region are the indicators of improper management of land and forest of CHT over the years.

The CHT constitutes ten per cent of the total land area of Bangladesh. The region comprises three hill districts: Rangamati, Khagrachari and Banderban. Geologically, it can be divided into two broad ecological zones: (a) hill valley, (b) agricultural plains.[18] The hill people do not have a documented history of their own; for this they rely on their oral traditions.[19] T.H. Lewin categorized the hill people as 'children of the river' and 'children of the hills'.[20] At the time of the incorporation of the Hills of Chittagong into the British Administration in 1860 the region was inhabited by thirteen ethnic groups.[21]

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16 *Ibid.*

17 *Ibid.*

18 Mohsin, Amena, *The Politics of Nationalism: The Case of the Chittagong Hill Tracts, Bangladesh,* The University Press Limited, Dhaka, Bangladesh, Second edition, 2002, at p. 11.

19 *Ibid.*

20 See, *Ibid* at p. 12.

21 *Ibid.*

2.1.2. Moist or dry deciduous forests (*sal* forest)

The *Sal* (deciduous) forest of Bangladesh has been found in the districts of Gazipur, Tangail, Sherpur, Netrokona, Rangpur and Dinajpur. The major quantity of *sal* plants are found in the districts of Tangail and Gazipur where the Modhupur tract is located. Areas like Arankhola, Shadhanapur, Bahera tail, Fatepur, Telihati and Singarsri of these two districts are main home to these plants.

A grown up *sal* tree produces thousands of seeds every rainy season. The mature seeds automatically drop on the ground from the top of the tree. If planted a seed becomes a sal tree in some years. [22] The *sal* is a good quality timber and a good material for house construction and support for piling. The life cycle of sal shows some unique characters for which the forests should have survived and increased, which practically not happening though. The forest can be replenished from the seeds of the plant. The plant, after it is cut, generates some coppices. The forest can be regenerated from the selected coppices of the remained stump. More importantly, the decomposed or burnt dead leaves of these plants can be good nutrient for the soil. The decomposition of leaves is a natural process whereas burning requires some human efforts but not more than only setting fire. The ashes, then, mixed with rain water make fertile forest floor.

These forests are also home to other plant species and medicinal plants. With the increasing forest depletion, the rich wildlife is also extinct. The village people depend on these forests for many reasons, mainly for the forest produce like wood, fruits, herbs and medicinal plants. One particular type of grass grown in the forests is used for making roofs of the village houses. Sal forest with adequate vegetation provides food for domestic animals too.

2.1.3. The mangrove forests

The mangrove forests are located in the southern part of the country and once this was a large forest. Now this forest is extremely threatened and its animals are almost endangered. The map of Renell (1785) shows the entire coastal areas of Bangladesh covering Khulna, Bakerganj, Noakhali and Chittagong along with shore islands were covered by this mangrove

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22 Gain, Philip, *Stolen Forests*, Society for Environment and Human Development (SEHD), Dhaka, Bangladesh, 2006, at p. 63.

forests. [23] Satkhira, Khulna and Bagerhat are the three district where the major part of natural mangrove forest is surviving in Bangladesh. In some parts of Patuakhali, Borguna, Bhola and Chittagong there are planted mangrove forests. Sunderbans, the largest mangrove forest in the world is spread over two countries- India and Bangladesh. Two-thirds of the Sunderbans forest, that spreads from the southern end of the Ganges Brahmaputra delta and stretches to the Hoogly river are in Bangladesh. The name is so perhaps because the main species of forest is *Sundari* tree which provides a heavy but excellent timber.[24]

Bangladesh has 6,017 sq. kilometers reserve forest in the Sunderbans of which the total land area is 4,143 sq. km. and the area covered by the forest is 4,069 sq. km (UNDP, FAO 1997:3).[25] Everyday the tidal water sweeps the whole forest twice, a unique characteristics of the mangrove.[26] This forest offers habitat to variety of flora and fauna. There are as many as 65 species of plant genetic resources in the mangrove forests.[27] The sunderbans is the last habitat of the man-eater species of tigers in the world. Tigers of other part of the world do not eat human as regularly as they do in the Sunderbans. It is believed that because of unfriendly environment and saline water, they become sick and hence they can manage to prey human more easily. The Sunderbans is home to crocodile, shark, water python, king cobra, monkey and thousands of deers and birds. It is an incredible resource, an amazing forest and it is dangerously threatened by global warming, state politics and policies, corruption in the forest department, in total, bad management. It is even home to pirates, as believed by many locals.

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23 See, Hasanuzzaman, S.M., *Plant Genetic Resources in SAARC Countries: Their Conservation and Management,* SAARC Agricultural Information Centre (SAIC), Dhaka, Bangladesh, Second edition: December 2005, at p. 95.

24 Kafiluddin, Dr. A.K.M., *Population Research, Environmental Conservation and Economic Development*, First edition 2001, Dhaka, ISBN 984-32-0226-5, at p. 341.

25 See, Gain, Philip, *Stolen Forests*, Society for Environment and Human Development (SEHD), Dhaka, Bangladesh, 2006, at p.82.

26 *Ibid.*

27 See, Hasanuzzaman, S.M., *Plant Genetic Resources in SAARC Countries: Their Conservation and Management,* SAARC Agricultural Information Centre (SAIC), Dhaka, Bangladesh, Second edition: December 2005, Appendix-5.3, at p. 248.

2.1.3.1 Chakaria Sunderban

Chakaria Sunderban mangrove forest area lies on the south of Sanga river covering Fashiakhali range and a series of islands on the delta of Matamuhuri river under the Chakaria thana. From 1903 a part of Chakaria mangrove forest covering an area of 7,400 ha became a reserve forest and another 1000 ha were protected by law. [28] Since 1911 to 1925 the forests have got reduced by 43 sq. miles. [29] The vegetation of Chakaria Sunderban as compiled by Ministry of Environment and Forest (2001) shows 20 species of mangrove flora which included Sundari, Rain tree, Patpati, Gewa and Mangium.[30]

3. The legal framework

The legal framework comprises of many Acts, Rules, Ordinance and Order. This chapter outlines the relevant provisions of concerned laws and aims to improve the condition by suggesting some of the changes that may take place in the near future.

3.1. The Forest Act, 1927

The Forest Act of 1927 is an Act to consolidate the laws relating to forest[31] and it has differentiated forests for the purpose of management by the Government, in the hereinafter stated expressions- Reserve Forest, Village Forest, Social Forestry and Protected Forest. The Government exercises absolute power to reserve forests. The Government may constitute any forest land or waste land (or any land suitable for afforestation) which is the property of the Government, or over which the Government has proprietary rights, or to the whole or any part of the forest produce of which the Government is entitled, a reserve forest[32]

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28 Hasanuzzaman, S.M., *Plant Genetic Resources in SAARC Countries: Their Conservation and Management,* SAARC Agricultural Information Centre (SAIC), Dhaka, Bangladesh, Second edition: December 2005, at p. 96.

29 *Ibid.*

30 See, *Ibid* at p. 96.

31 "Forest includes any land recorded as forest in a record-of- rights prepared under Chapter IV of the State Acquisition Tenancy Act, 1950 (E.B. Act XXVIII of 1951) or such other land containing tree growth as may by notification be declared as forest by the Government"- Section 2(5) of the Private Forests Ordinance, 1959, Ordinance No. XXXIV of 1959.

32 See, Section 3, The Forest Act, 1927, Act No. XVI of 1927.

The Government may assign to any village community the rights of Government to or over any land which has been constituted a reserve forest, and may cancel such assignment. All forests so assigned shall be called village forests. [33]

On any land which is the property of the Government or over which the Government has proprietary rights, and on any other land assigned to the Government by voluntary written agreement of the owner for the purpose of afforestation, conservation or management through social forestry, the Government may establish a social forestry programme under sub-section (2) of Section 28A.[34] A social forestry program is established when the Government by one or more written agreements assigns rights to forest produce or rights to use the land, for the purposes of social forestry, to person assisting the Government in management of the land.[35]

The Government may, by notification in the official Gazette, declare the provisions of chapter IV of the Forest Act, 1927 applicable to any forest land or waste land which is not included in a reserve forest, but which is the property of Government, or over which the Government has proprietary rights, or to the whole or any part of the forest produce of which the Government is entitled.[36] The forest land and waste lands comprised in any such notification shall be called a "protected forest".[37] However, it is pertinent to mention here that some of the specific areas of the existing Forest Act, 1927 require attention and they are discussed hereunder.

3.1.1. Practice of shifting cultivation

The Act provides that the practice of shifting cultivation shall in all cases be deemed a privilege subject to control, restriction and abolition by the Government.[38] It should be mentioned that shifting cultivation, traditionally known as *jum* in Bangladesh, is done in hill areas where no alternative method of cultivation has been so effective. The hill people are the pioneers of this cultivation process and their right on hill forest

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33 Section 28(1), *ibid.*
34 Section 28A(1), *ibid.*
35 Section 28A(2), *ibid.*
36 See, section 29(1), The Forest Act 1927, Act No. XVI of 1927.
37 Section 29(2), *ibid.*
38 Section 10(5), *ibid.*

land is historically established. Power of exercising extreme restrictions vested in the government officials may not ensure ethnic-friendly living conditions in these areas. Therefore, practice of *jum* should be the right of the indigenous people and be recognized by this Act.

3.1.2. Right to pasture or forest produce

In the case of a claim to rights of a pasture or to forest produce, the forest settlement officer shall pass an order admitting or rejecting the same in whole or in part.[39] Who is the person entitled to this right is needed to be clarified. Personal integrity of the forest settlement officer exercising this power can make a significant difference.

3.1.3. *Char* land as protected forest

Waste land or *char* land can be declared as protected forest under section 29 of the Forest Act, 1927. The Act mentions that a survey would be conducted but does not specify many things related to the process of survey. This Act should have been linked with State Acquisition and Tenancy Act, 1950 in this respect. A land survey is conducted by the Settlement office following the provisions of the State Acquisition and Tenancy Act relating to the preparation of record of rights. The Revenue Officer exercises the first right of possession and control over a newly emerged *char* land or alluvial land in accordance with section 86 of the State Acquisition and Tenancy Act, 1950.

In Bangladesh, fluvial and tidal actions of the main rivers along with the sea coast cause significant accretion and diluvion. Firm land is regularly swept away by the great rivers during the floods and new char lands are constantly being formed. In all, the area liable to frequent alluvion and diluvion actions accounts for about 15% of the total area. This factor gives rise to complex implications for land ownership and land management.[40] Sections 86 and 87 of the State Acquisition and Tenancy Act, 1950 deal with legal implications of alluvion and diluvion, management of these lands, and their possession and ownership. The law in this respect has been changed several times and till date it is not in its perfect condition, given the newness of complications of land-related matters. Management and disposal of *Khas* land by the Government is inseparably connected with this issue. Therefore, the Forest Act, if it

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39 Section 12, *ibid.*

40 See, Hussain, T., *Land Rights in Bangladesh: Problems of Management*, University Press Limited, Dhaka, Bangladesh, 1995, at p. 41.

intends to declare *char* land as protected forest, should establish coherence among the aforesaid laws and policies. Otherwise, section 29 of the Forest Act, 1927 can be contradictory to the land related laws.

3.1.4. Power to make rules for protected forests

The Government may make rules to regulate cutting and removal of trees and timber, granting of licences to take trees and timbers or other forest produce for their own use, granting of licences for the purposes of trade, clearing and breaking up of land for cultivation or other purposes in forests, cutting of grass and pasturing of cattle in forests and so on.[41] They are very vital issues and should be dealt with due amount of seriousness while making rules to regulate these abovementioned matters. Most importantly, the monitoring framework should be established to check corruption in this respect.

3.1.5. Seizure of property liable to confiscation

When there is a reason to believe that a forest offence has been committed in respect of any forest produce, such produce, together with all tools, vessels, vehicles or cattle used in committing any such offence may be seized by any Forest Officer or Police Officer.[42] All timber or forest produce which is not the property of Government and in respect of which a forest offence has been committed, and all tools, boats, vehicles used in committing any forest offence, shall be liable to confiscation. [43] While executing these aforesaid provisions the concerned officer should exercise highest caution, though there is provision for punishment for wrongful seizure. However, certain things should never be seized. In this respect, similar provision of Section 60[44] of the Code of Civil Procedure, 1908 should be included. Properties like tools of artisan, implements of husbandry of an agriculturist, his cattle which are necessary to earn his livelihood should not be seized or confiscated. They may directly affect the family members of the accused person.

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41 Section 32, The Forest Act 1927, Act No. XVI of 1927

42 Section 52(1), The Forest Act 1927, Act No. XVI of 1927.

43 Section 55(1), *Ibid.*

44 Section 60 of the Code of Civil Procedure, 1908 prescribes which properties are liable to attachment and which are not.

3.1.6. Offence relating to counterfeiting or defacing marks on trees and timber

Penalty for counterfeiting or defacing marks on trees and timber and for altering boundary marks may extend to seven years and shall not be less than two years and shall also be liable to fine which may extend to fifty thousand taka and shall not be less than ten thousand taka[45]. Despite significant punishment is provided for these types of offences, this provision could not fully restrain some of the corrupt forest officials and offenders to commit the offences. It is a common form of dishonest act that same number or marks is inscribed or written on two trees or timbers and one is sold by unfair means. The offender gets assistance from the corrupt forest officials in successful execution of the offence.

3.1.7. Power to prevent commission of offence

Every Forest Officer and Police Officer shall prevent and may interfere for the purpose of preventing, the commission of any forest offence.[46] To what extent use of force would be permitted or how would that power be exercised is not stated here. While interfering, what are the areas he can not enter and during which time, could also be specified.

3.1.8. Power to conduct survey

The Government may invest any forest officer with all or any of the powers mentioned in section 72 which includes power to enter upon any land and to survey, demarcate and make a map of the same. Survey is generally conducted by the settlement office and land demarcation is conducted by the *Amin*. Making a map of the land demarcated is a scientific process. The exact amount of land has to be there in the map and it is a more serious task than just showing how that land practically looks like. The same amount drawn in the map has to be available in the land that practically exists. It is a tremendous job and professionals should conduct this.

3.2. The Private Forests Ordinance, 1959

For the purposes of conservation of private forests and afforestation of waste lands the Government may require a working plan from the private forests owners under section 3(1) of the Private Forests Ordinance, 1959 which provides that the Government may, by notification, direct that

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45 See, Section 63, The Forest Act 1927, Act No. XVI of 1927.

46 Section 66, *Ibid.*

every owner of a private forest [47] which is not a vested forest, [48] but which is situated within such area as may be specified in the notification, shall prepare in the prescribed manner and submit within the period mentioned in the notification to the Regional Forest Officer a working plan for the conservation of such private forest. The punishment for noncompliance with the aforesaid provision is pecuniary and may extend to Tk.500. Moreover, the Government exercises the power of approving the working plans for the private forest [49] and a copy of the approved working plan shall be sent to the owner of the private forest by the Regional Forest Officer and the owner shall manage such forest in accordance with such plan and shall carry out all the terms and conditions thereof.[50] The penalty for the violation or neglecting any terms and conditions of the approved working plan by the owner of the private forest, may amount to five hundred taka.[51] However, the conservation of a private forest may be vested in the Regional Forest Officer, if the Government is satisfied that such private forest should not be left with its owner.[52] The above stated provisions of the Ordinance would have to be interpreted giving a new meaning after the insertion of section 38A in the Forest Act 1927, by the Forest (Amendment) Act, 2000[53]. Section 38A of the Forest Act, 1927[54] provides that after commencement of this section, the Government may no longer exercise authority under section 3 of the Private Forests Ordinance, 1959 to require private forests to have working plans. This section does not categorically prohibit the

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47 "Private forest means a forest which is not the property of the Government or over which the Government has no proprietary right"- Section 2(14), the Private Forests Ordinance, 1959.

48 "Vested Forest means a forest of which the control has been vested in a Regional Forest Officer by a notification under sub-section 2 of section 6 or under section 7 or under section 11 and includes any forest deemed to be or managed as a vested forest under this ordinance"- Section 2(19), the Private Forests Ordinance, 1959.

49 See, Section 4 of the Private Forests Ordinance, 1959, Ordinance No. XXXIV of 1959.

50 See, Section 4(2) of the Private Forests Ordinance, 1959, Ordinance No. XXXIV of 1959.

51 See, Section 6 of the Private Forests Ordinance, 1959, Ordinance No. XXXIV of 1959.

52 See, Section 7, *Ibid.*

53 Act No. X of 2000, section 10.

54 Act No. XVI of 1927.

authority to require working plan. This provision can also be interpreted by saying that the working plan may be required, if the Government desires. The provision should have categorically mentioned its intention in respect of working plan.

It is pertinent to mention that the powers of Forest Settlement Officer need to be specific and rephrased under this legislation. For the purpose of inquiry, the Forest Settlement Officer may exercise the powers of a Civil Court in the trial of suits. [55] The powers of an authority like this, needs to be expressed in unambiguous terms.

Any Forest or Police Officer may arrest any person against whom a reasonable suspicion exists of his having been involved in any forest offence punishable with imprisonment for one month or upwards under this ordinance without orders from a Magistrate and without a warrant.[56] That arrested person shall be sent before the Magistrate having jurisdiction or to the officer in-charge of the nearest police station without unnecessary delay.[57] This same clause should have mentioned the time limit within which the arrested person would be presented before the Magistrate, instead of saying 'without unnecessary delay'. The last phrase of section 46(2) seems to be unnecessary, as an arrested person should be presented before the Magistrate, not an officer in charge of the police station.

However, no suit shall lie against any public servant for anything done by him in good faith under this Ordinance.[58] This indemnity for acts done in good faith would not be a problem, if the public servant exercises powers prudently and judiciously.

3.3. The Forest Industries Development Corporation Ordinance, 1959

The Government of the East Pakistan by its Ordinance No. 67 of 1959 established a Forest Industries Development Corporation, an autonomous body under the name 'East Pakistan Forest Industries Development Corporation'. The name of the corporation was changed to

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55 See, Section 24 of the Private Forests Ordinance, 1959, Ordinance No. XXXIV of 1959.

56 See, Section 46, *Ibid.*

57 See, Section 46(2), *Ibid.*

58 Section 56, the Private Forests Ordinance, 1959, Ordinance No. XXXIV of 1959.

Bangladesh Forest Industries Development Corporation (BFIDC), under Presidential Order No. 48 of 1972 with its headquarters in Dhaka.[59] The major aims and objectives of Bangladesh Forest Industries Development Corporation are to extract timber from inaccessible and thinly populated natural forests of the Chittagong Hill Tracts and thus to make vacant land available to the Forest Department for raising dense and intensive forests with specified species of trees of both commercial and environmental value.[60]

Since its creation, the Corporation has so far received 70,729 acres of coupe (forest area) from the reserve forests of Kassalong, Ringkheng and Sangu Matamuhuri of Chittagong Hill Tracts and extracted timber from these areas and handed over the vacant land to the Forest Department for raising dense forests. From these coupes 28 million cft of timber was extracted till now.[61] In addition, the Corporation raised rubber plantation in 13,000 acres of land from 1962 to 1979 out of its own fund in the periphery of reserve forests of Chittagong and Sylhet region. In addition the corporation raised rubber plantation in 7 estates in greater Chittagong district, 4 estates in greater Sylhet district, 4 estates in greater Mymensingh district and 2 experimental estates in Rangpur and Chittagong with the financial assistance of Government of Bangladesh and Asian Development Bank.[62] The present rubber plantation of the Corporation is 32,665 acres in the fallow, hilly and semi-hilly areas of greater Chittagong, Sylhet and Mymensingh districts. In these estates there exist about 41,00,000 rubber trees.[63] Despite the growing number of rubber trees, it does not provide a healthy picture of forest. Rubber plantation never substitutes a natural forest and not at all capable to provide the natural habitat of wildlife.

The Ordinance provides that the general direction and administration of the Corporation and its affairs shall vest in a Board and the Board in discharging its functions shall act on commercial considerations and shall be guided on questions of policy involving the national interest (including

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59 See,http://banglapedia.search.com.bd/HT/B_0177.htm.Visited on 04.11.2008.

60 *Ibid.*

61 *Ibid.*

62 *Ibid.*

63 See,http://banglapedia.search.com.bd/HT/B_0177.htm, visited on 04.11.2008.

commercial and industrial interest) by such directions as the Government, which shall be the sole judge whether the national interest is involved, may give it from time to time.[64] This is perhaps, an improper direction and inadequate picture of a legal provision. This provision should have categorically mentioned the need of environmental conservation, which has been totally ignored by giving more importance to commercial and industrial interest. A forest can not serve commercial interest solely, ignoring environmental issues. However, the changing democratic Governments in Bangladesh, under these legal provisions, as a sole judge of 'national interest', are never beyond mistake and suspicion.

3.4. The State Acquisition and Tenancy Act, 1950

A *Malik* or an owner can not retain any land consisting of forest under section 20 sub-section 2a(iii) of the State Acquisition and Tenancy Act, 1950. The Act enumerates which land can be owned and possessed by an individual and which can not be kept under private ownership or possession. During the acquisition of the interests of rent-receivers in any area under this legislation, a rent-receiver, cultivating *raiyat*, cultivating under-*raiyat* or a non-agricultural tenant could not retain a forest land. This provision gives a clear indication that the State does not intend to allow a *Malik* or a private individual to own as owner, a land that consists of forest. Since right to property is subject to any restriction imposed by law, as mentioned in article 42 of the Constitution of the People's Republic of Bangladesh, any limitation imposed by the State Acquisition and Tenancy Act, 1950 regarding the right to own and use a land, is legitimate. Therefore, the State retains every right to control and manage forest lands by enacting laws and making policies.

3.5. The Environment Conservation Act, 1995

The Bangladesh Environment Conservation Act, 1995[65] provides for the conservation of environment, improvement of environmental standards and control and mitigation of environmental pollution.[66] The Act has a close relation with forest issues, as forest consists of different

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64 Section 5, The Forest Industries Development Corporation Ordinance, 1959, Ordinance No. LXVII of 1959.

65 Act No. 1 of 1995.

66 See, Preamble, The Bangladesh Environment Conservation Act, 1995, Act No. 1 of 1995.

components which are related to environment in many ways. [67] Legislations concerning forests and the environment should have coherence and therefore, environmental conservation[68] shall be the prime concern in guiding the behavior of the forest dependant people. It is needless to mention that the health of a forest largely depends on the behavior of the dependent people and the condition of environment.

This Act makes an attempt to identify and declare environmentally important sites as ecologically critical area and also attempts to restrict the activities in these areas. Section 5(1) of the Bangladesh Environment Conservation Act, 1995 provides that if the Government is satisfied that an area is in an environmentally critical situation or is threatened to be in such situation, the Government may, by notification in the official Gazette, declare such area as an ecologically critical area. Sub-section 2 of section 5 provides that the Government shall, in the notification published under sub-section 1 or in a separate notification, specify the activities or processes that can not be initiated or continued in an ecologically critical area. The Government can specify the activities or processes which can not be continued or initiated in an ecologically critical area.

Rule 3 of the Environment Conservation Rules, 1997[69] mentions the factors that have to be considered by the Government while declaring an area as Ecologically Critical Area. Under sub-section 1 of section 5 these factors are: (a) human habitat, (b) ancient monument, (c) archeological site, (d) forest sanctuary, (e) national park, (f) game reserve, (g) wild animals habitat, (h) wetland, (i) mangrove, (j) forest area, (k) bio-diversity of the relevant area, and (l) other relevant factors. It is evident that theses areas are mostly forest areas, as most of the factors relate to forest and bio-diversity. Therefore, ensuring an effective environmental legal

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67 "Environment means the inter- relationship existing between water, air, soil and physical property and their relationship with human beings, other animals, plants and micro-organisms"- Section 2(d), The Bangladesh Environment Conservation Act, 1995, Act No. 1 of 1995.

68 "Environmental conservation means improvement of the qualitative and quantitative characteristics of different components of environment as well as prevention of degradation of those components."- Section 2(f), The Bangladesh Environment Conservation Act, 1995, Act No. 1 of 1995.

69 Rules made in exercise of the powers conferred by section 20 of the Bangladesh Environment Conservation Act, 1995 (Act I of 1995).

framework should be a vital concern in ensuring a satisfactory forest legal regime.

However, environmental litigations are contested in the Environment Court. The Environment Court Act, 2000 says that a case shall in accordance with the provisions of this Act, be directly instituted in an Environment Court for trial of an offence or for compensation under an environmental law[70], and only that Court can take cognizance and hold proceedings for trial and disposal of those cases[71]. And the paradox situation is created by allowing a major role of Director General of the Department of Environment in justice system. It is a matter of great concern that the Environmental Courts do not function independently and even they do not entertain litigations directly from the aggrieved person. The formality relating to the written report of an inspector or any other person authorized by the Director General squeezes the power of the Court. Section 5(3) of the Environment Court Act, 2000[72] says that no Environment Court shall take cognizance of an offence or receive any suit for compensation except on the written report of an Inspector or any other person authorized by the Director General. However, there is a mandate given to the Court under the proviso to section 5(3) to entertain a case as an exception to the aforesaid provision and that option is also not a direct right to approach to a Court by an aggrieved person.

It is evident from the proviso to section 5(3) that even after a complaint is ignored by the inspector or no action is taken by him, the Court has to hear him before taking any action. The whole process could have been made better by giving aggrieved person right to file a suit or case directly to the Environment Court. This Court should have been made like a normal civil or criminal Court. This legislation has made the Environment Court different from the civil and criminal Courts in respect of exercising powers. Because of the hassles an aggrieved person has to face, he would not voluntarily come to the Court to address an issue of environmental degradation, where greater interest of large

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70 "Environmental law means this Act, the Bangladesh Environment Conservation Act, 1995 (Act No. 1 of 1995), any other law specified by the Government in the official Gazette for the purposes of this Act, and the rules made under these laws"- Section 2(bb), The Environment Court Act, 2000, Act No. 11 of 2000.

71 Section 5(1)

72 Act No. 11 of 2000.

number of people is concerned. Because of the procedural complications, people from the community feel less interested in environmental litigation. Victims of environmental degradation, forest depletion or actions threatening bio-diversity and eco-system could have been given right to file a complaint or suit for compensation directly without requesting the Inspector[73] or the Director General for investigation and that can ensure individuals' participation and justice. Unfortunately this Act gives certain amount of discretionary power to the Department of Environment and restricts the power of the Court which is clearly against the spirit of separation of judiciary. The role played by the Department of Environment, after a case is filed, certainly makes the law less effective, judicial process weak, enhances the hassles of the aggrieved person and the consequence is very poor number of environmental litigations in comparison with the number of civil suits and criminal cases.

3.6. Brick Burning (Control) Act, 1989

Eit Porano (Niontron) Ain is an Act to restrict burning of bricks and it has banned use of wood for burning bricks. Section 5 of this Act categorically said that nobody would use fuel wood for burning bricks. This restriction would lessen the pressure on wood, and in consequence, on forest. At least supply of wood for use in brickfields would be under constraint. More importantly, no license would be given allowing establishing a brickfield within 3km. of certain areas. Forests are the one kind of areas amongst others, within 3km. of which no brickfield would be allowed.[74] This provision would help forests survive and grow in pollution free environment, if other circumstances favour them. Moreover, the license given under this Act for burning brick shall be valid for a period of three years, and if anybody violates any provision of this Act or rules made hereunder or violates any condition mentioned in the license, his license can be cancelled by the Deputy Commissioner.[75] It is pertinent to mention that rule 2 of the Brick Burning (Control)

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73 "Inspector means an Inspector of the Department of Environment or any other person authorized by the Director General by a general or special order or a person authorized under any other environmental law to inspect or investigate"- Section 2(b), The Environment Court Act, 2000, Act No. 11 of 2000.

74 See, Section 4(5) of the Brick Burning (Control) Act, 1989, Act No. 8 of 1989.

75 See, Section 4(4) of the Brick Burning (Control) Act, 1989, Act No. 8 of 1989.

Rules, 1989[76] prescribes the form in which an application would be made for brick burning license. The prescribed form[77] of application contains the information regarding source of energy / fuel and its type, and thereafter, on the basis of investigation, license is supposed to be issued, and finally a restriction banning the use of fuel wood for the purpose of brick burning is inserted in the license itself. Therefore, existence of these provisions show significant legal achievement, but the enforcement and strict observation of the same is even more important.

3.7. The Building Construction Act, 1952

The Building Construction Act, 1952[78] was enacted for the prevention of haphazard construction of buildings and excavation of tanks and cutting of hills which are likely to interfere with the planning of certain areas in Bangladesh.[79] Section 3C of this Act restricts cutting of hills but this restriction is not absolute. After obtaining previous sanction of an Authorised Officer and approval of the Government, one can cut or raze hills[80]. Before granting a sanction, the Authorised Officer and the Government has to be satisfied about following things -

(a) the cutting or razing of the hill shall not cause any serious damage to any hill, building, structure or land adjacent to or in the vicinity of the hill; or

(b) the cutting or razing of the hill shall not cause any silting of or obstruction to any drain, stream or river; or

(c) the cutting or razing of the hill is necessary in order to prevent the loss of life or property; or

(d) the cutting of the hill is such as is normally necessary for construction of dweling house without causing any major damage to the hill; or

(e) the cutting or razing of the hill is necessary in the public interest.[81]

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76 Made under section 9 of the Brick Burning (Control) Act, 1989, Act No. 8 of 1989.

77 Form *Ka,* See, Rule 2(1) of the Brick Burning (Control) Rules, 1989.

78 Act No. E.B. II of 1953.

79 See, Preamble to the Building Construction Act, 1952, Act No. E.B. II of 1953.

80 See, Section 3C (1), The Building Construction Act, 1952, Act No. E.B. II of 1953.

81 Section 3C (1), the Building Construction Act, 1952, Act No. E.B. II of 1953.

The aforesaid provision relaxes the restriction and makes room for application of discretion of the concerned authority, which can often be dishonestly used. It is worth mentioning that hills in this country are mostly located in the forest areas and the hills are mostly dense forest in some parts of the country. Cutting or razing hills not only threatens the environment in different forms, but also shrinks the forest. Therefore, this Act needs to be revised and amended.

3.8. The Bangladesh Wildlife (Preservation) Order, 1973

Wild animal,[82] national park and wildlife sanctuary has been defined by the Bangladesh Wildlife (Preservation) Order, 1973.[83] Article 2(p) provides that wildlife sanctuary means an area closed to hunting, shooting or trapping of wild animals and declared as such under Article 23 by the Government as undisturbed breeding ground primarily for the protection of wildlife inclusive of all natural resources such as vegetation, soil and water. The Government may by notification in the official Gazette, declare any area to be wildlife sanctuary[84] and restrict activities in those areas. This Order also restricts actions in areas declared as national park.[85] No person shall-

a) enter or reside in any wildlife sanctuary,
b) cultivate any land in any wildlife sanctuary,
c) damage or destroy any vegetation in any wildlife sanctuary;
d) hunt, kill or capture any wild animal in any wildlife sanctuary or within one mile from the boundaries of a wildlife sanctuary;
e) cause any fire in a wildlife sanctuary;

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82 "Wild animal means any vertebrate creature other than human beings and animals of usually domesticated species or fish, and includes the eggs of birds and reptiles"-Article 2(o), Bangladesh Wildlife (Preservation) Order, 1973, P.O. No. 23 of 1973.

83 P.O. No. 23 of 1973.

84 Article 23(1), Bangladesh Wildlife (Preservation) Order, 1973, P.O. No. 23 of 1973.

85 "National park means comparatively large areas of outstanding scenic and natural beauty with the primary object of protection and preservation of scenery, flora and fauna in the natural state to which access for public recreation and education and research may be allowed"- Article 2(h), Bangladesh Wildlife (Preservation) Order, 1973, P.O. No. 23 of 1973.

f) pollute water flowing in or through a wildlife sanctuary.[86]

The proviso to Article 23(2) provides that the Government may for scientific purposes or for aesthetic enjoyment or betterment of scenery, relax all or any of the prohibitions specified above. This proviso is very vague and what really would amount to aesthetic enjoyment for which the abovementioned provisions would be relaxed is not identified, and hence, makes scope of exercising discretionary power of the authority. The practical conditions of these areas clearly show the loopholes of these words. The enormous corruption in wildlife sanctuaries is just an effect of weak legislations and poor condition of implementation of those legislations.

National park comprises of vast areas of scenic and natural beauty with the main objective of protection and preservation of flora and fauna in the natural state where public recreation and education and research would be allowed. Like forest it also plays a notable role in environmental conservation. The Government may declare any area to be a national park where the following acts shall not be allowed:

a) hunting, killing or capturing any wild animal in a national park and within the radius of one mile outside its boundary;
b) firing any gun or doing any other act which may disturb any wild animal or doing any act which may interfere with the breeding places of any wild animal;
c) feeling, tapping, burning or in any way damaging or destroying, taking, collecting or removing any plant or tree therefrom;
d) clearing or breaking up any land for cultivation, mining or for any other purpose;
e) polluting water flowing in and through the national park.[87]

The proviso to Article 23(3) mentions that the Government may for scientific purposes or for betterment of the national park or for aesthetic enjoyment of scenery or for any other exceptional reasons relax all or any of the prohibition specified above. This clause is very similar to the earlier one relating to the wildlife sanctuary. These relaxations of

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[86] See, Article 23(2), Bangladesh Wildlife (Preservation) Order, 1973, P.O. No. 23 of 1973.

[87] Article 23(3), Bangladesh Wildlife (Preservation) Order, 1973, P.O. No. 23 of 1973.

restrictions in national parks will not ensure its best condition and the relaxation of prohibitions in wildlife sanctuaries shall always carry the risk of maximum environmental and economic loses.

4. Forest management challenges

Bangladesh is one of the most densely populated countries in the world having a population of about 130 million at present within a total surface area of 1,47, 570 sq.km.[88] This population is increasing at an alarming rate. Any increase of population increases demands for consumption of material goods and services that enhance over exploitation of natural resources including land, water, fisheries, forest etc. leading to degradation of resource base and depleting both ecosystems and environment of the country. On the other hand, a degraded environment might have many negative impacts on population in different forms and degrees.[89] Forest management, for being closely connected with issues of environment and human life has multi-dimensional challenges, of which a significant part is wildlife conservation.

4.1. Forest depletion in Bangladesh

It is not the inherent nature of people to destroy forests for pleasure. Forest degradation and deforestation are usually the result of overexploitation in search of income. [90] Without alternative income generating options, people have little choice but to resort to whatever livelihood opportunities that forests offer, often with severe negative repercussions on the forests.[91] Some simplistic reasons for depletion and degradation of forest resources are growing population, wide spread poverty, migration of landless people in the forest areas, shifting cultivation, inappropriate exploitation of forest resources, grazing, illegal felling, fuel wood collection, uncontrolled and wasteful commercial

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88 Kafiluddin, Dr. A.K.M., *Population Research, Environmental Conservation and Economic Development*, 1st edition 2001, Dhaka, ISBN 984-32-0226-5, at p. 364.

89 See, *Ibid.*

90 Chris Brown, Patrick B. Durst and Thomas Enters, "Perceptions of Excellence: Ingredients of good Forest Management", *In Search of Excellence: Exemplary forest management in Asia and the Pacific*, Asia-Pacific Forestry Commission, Food and Agriculture Organization of the United Nations Regional Office for Asia and the Pacific, Bangkok, 2005, ISBN 974-7946-68-8 at p. 18.

91 *Ibid.*

exploitation etc.[92] In the mangrove forests, the surveyors during the early part of 1900 AD recorded 334 spp. Spermatophytes and Pteridophytes[93]. At present, due to increase in human habitation and encroachment of forest area there are only 66 spp. of climbers, herbs, shrubs and trees.[94] This extinction of species not only reveals the picture of forest depletion, but also portrays irrecoverable gene loss. Loss of forests can contribute to local flooding, regional and global climate change and loss of animal and plant species dependent on natural forests. [95] Animal and plant species may also be threatened by replacement of natural forest with monoculture tree crops.[96]

Bangladesh, over a period of less than 200 years, has lost most of its historical forests and their associated biodiversity assets. One of the world's greatest swamp-reed forests that covered much of the Sylhet Basin and the areas north of Dhaka is gone, with only a few trees remaining.[97] Apart from the protected Sunderbans forest, the Tropical Mangrove Forests that covered the entire coastal belt no longer exist.[98] In Chokoria Sunderban, shrimp cultivation funded by donor agencies has extinct the forest which was once full of fish, naturally grown shrimp and aquatic reptiles. The Chokoria Sunderban, which once had a unique and balanced ecosystem[99], now has turned into a forest without tree and a land with completely ruined soil.

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92 See, Kafiluddin, Dr. A.K.M., *Population Research, Environmental Conservation and Economic Development*, 1st edition 2001, Dhaka, ISBN 984-32-0226-5, at p. 341.

93 One of the plant groups of the forest.

94 See, Hasanuzzaman, S.M., *Plant Genetic Resources in SAARC Countries: Their Conservation and Management,* SAARC Agricultural Information Centre (SAIC), Dhaka, Bangladesh, 2nd edition: December 2005 at p. 95.

95 Mitchell, Robert, Property Rights and Environmentally Sound Management of Farmland and Forests, *Land Law Reform: Achieving Development Policy Objectives*, The World Bank, Washington, DC 20433, USA, 2006 at p. 179.

96 *Ibid.* at p. 180.

97 See, Hasanuzzaman, S.M., *Plant Genetic Resources in SAARC Countries: Their Conservation and Management,* SAARC Agricultural Information Centre (SAIC), Dhaka, Bangladesh, Second edition: December 2005, at p. 157.

98 Bangladesh, Environment and Natural Resource Assessment 1990

99 "Ecosystem means the inter-dependent and balanced complex association of all components of the environment which can support and influence the conservation and growth of all living organisms"- Section 2(g), The Bangladesh Environment Conservation Act, 1995, Act No. 1 of 1995

For combating deforestation, the Bangladesh Government policies in the forestry sector as embodied in the Environment Policy, 1992 are to:

(i) conserve, develop and augment forests with a view to sustain the ecological balance;
(ii) include tree plantation programs in all relevant development schemes;
(iii) stop shrinkage and depletion of forest-land and forest resources; and
(iv) develop and encourage use of substitutes of forest products. [100]

4.2 *Jum* cultivation (swidden cultivation)

Jum is a form of ecological agriculture traditionally practiced by the ethnic communities living in the Chittagong Hill Tracts. The term *Jum* refers to both the agricultural land on hill slopes, and the rotation of mixed crop and vegetation cultivation which is done on this land. [101] After the crops are harvested the *Jum* is left fallow for a certain period to regain its soil fertility before the next cultivation. The practice of this shifting cultivation was found to be ecologically stable and sustainable when the fallow period was about 10 to 15 years. But in recent years, the erosion and soil fertility problems have become severe with decreased fallow period due to increased population – thus not allowing enough time for replenishment of soil fertility through natural process.[102] The reduction of fallow period is responsible for decreasing soil fertility, landslide, siltation in the lakes and reduction of forest covers; though *Jum* is not the major responsible factor behind reduction of forest cover. *Jum* is definitely a very suitable and appropriate method of cultivation in the hills but the method must allow adequate fallow period. Moreover, the indigenous communities have no better alternative to *Jum* and they believe it is good for them and is an ecologically sound agricultural system. Therefore,

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[100] See, Kafiluddin, Dr. A.K.M., *Population Research, Environmental Conservation and Economic Development*, First edition 2001, Dhaka, ISBN 984-32-0226-5, at p. 342.

[101] Chakma, Kabita and Hill, Glen, Thwarting the Indigenous Custodians of Biodiversity, *Bangladesh: Land, Forest and Forest People*, Society for Environment and Human Development (SEHD), Dhaka, 1995, at p. 149.

[102] Rahman, Anisur, CHT heads toward ecological disaster, *Chittagong Hill Tracts: State of Environment*, Forum of Environmental Journalists of Bangladesh (FEJB), Dhaka, 2001, at p. 96.

alternative recourses have to be evolved to reduce pressure on the *Jum* land instead of banning overnight. Moreover, the increasing population other than the indigenous people has caused grievance amongst the native indigenous communities over the years, and this enhanced population has caused enormous pressure on *Jum* land.

4.3. Watershed management

Watershed[103] management implies rational utilization of land and water resources. The watershed areas of Bangladesh are about 12 per cent of the total land area. Forest is an integral component of watershed management which is beset with large and increasing population.[104] Watershed management is more important in hilly areas where rate of depletion of soil and forests are frightening. Therefore, scientific watershed management is considered as a holistic approach for the environmental conservation and ecological balance. Forest management policies should not overlook this challenging and integral part of it.

4.4. Development projects and the influx of settlers in the Chittagong Hill Tracts

In the land system of the CHT, hill people could only subsist from their fields as a part of a community, bound in ties of mutual reciprocity. For the shifting cultivators of the Hill Tracts, land is common property, belonging to the community, kinship groups and even members of the spirit world, with individual families exercising the right to use the land- in western terms, a usufruct.[105]

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[103] Watershed is a natural contiguous geographical area enclose by ridge or boundary line from where all the runoff drains into a common channel or outlet. See, *Participatory Approaches to Integrated Watershed Management in Bangladesh*, Proceedings of the National Workshop held at Bangladesh Forest Academy, Chittagong from 01 July to 05 July, 1997, Organized by Bangladesh Forest Department, Dhaka, p. iv.

[104] See, *Participatory Approaches to Integrated Watershed Management in Bangladesh*, Proceedings of the National Workshop held at Bangladesh Forest Academy, Chittagong from 01 July to 05 July, 1997, Organized by Bangladesh Forest Department, Dhaka, p. vii.

[105] *'LIFE IS NOT OURS', Land and Human Rights in the Chittagong Hill Tracts, Bangladesh*, The Report of the Chittagong Hill Tracts Commission, May 1991, Distributed by IWGIA, Kopenhagen K, Denmark and Organising Committee, Chittagong Hill Tracts Campaign, Amsterdam, The

Between 1957 and 1963 a dam and hydro-electric plant was built at Kaptai. The artificial lake flooded just under half of all the available cultivable land in the Hill Tracts. 100,000 hill people were displaced by the dam. Compensation for lost land was negligible and over 40,000 Chakma crossed the border into India. Many still live stateless in Arunachal Pradesh.[106] At the same time as the dam was built, the then Pakistan Government began to encourage poor Bengali families to enter the Hill Tracts. Throughout the 1970s the numbers of Bengali settlers increased gradually, particularly after the liberation war when 50,000 Bengalis entered the Ramgarh area.[107] Bengali settlers were transmigrated primarily from the plains regions in three waves, 1979-1980, 1981 and 1982-1983. This massive increase of Bengali settlers had a devastating effect on the hill people, who in a few years became almost a minority in their own districts. The shortage of land became more acute as the Bengalis from the plains sought land on which to settle. The only available lands were the forest lands held by the State and the land which hill people held.[108] Therefore, the inevitable consequence was land grabbing, land dispute, ethnic conflicts, human rights violation and enormous pressure on forest and *Jum* lands. Gautam Dewan [109] said, "We have a land crisis because of the dam and the settlers".

The Chittagong Hill Tracts Commission, an independent body, was formed to investigate allegations of human rights violations in the hill region of southeast Bangladesh. [110] The Commission received detailed

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Netherlands, Printed by Calvert's Press (TU) Workers' Co-operative, at p. 60.

106 *Ibid.* at p. 62.

107 *Ibid.* at p. 63.

108 See, *Ibid* at pp. 63-64.

109 Rangamati District Council Chairman; See, *'LIFE IS NOT OURS', Land and Human Rights in the Chittagong Hill Tracts, Bangladesh,* The Report of the Chittagong Hill Tracts Commission, May 1991, Distributed by IWGIA, Kopenhagen K, Denmark and Organising Committee, Chittagong Hill Tracts Campaign, Amsterdam, The Netherlands, Printed by Calvert's Press (TU) Workers' Co-operative, at p. 62.

110 The International Commission on the Chittagong Hill Tracts was established at the end of 1989. Joint Chairs of the Commission are Douglas Sanders (Professor of Law) from Canada and Wilfried Telkaemper (Vice President of the European Parliament) from Germany. The other Commissioners are Rose Murray (Aboriginal Community Worker) from

information about the implementation and effect of the various development programmes from hill people and from Government and military sources. The Commission's assessment of the findings was:

> Time and again two underlying motives for the development programmes were emphasized: to stop *jum* cultivation in order to restore the ecological balance, and the aim to bring the 'backward' tribal population into the mainstream. From its observations the Commission learnt that the socio-economic changes that are taking place in the Hill Tracts, rather than restoring the ecological balance and benefiting the hill people, have the opposite effect. [111]

Over the last three decades the ecology of the CHT has been severely degraded. The worsening ecological imbalance in the environment of CHT in last three decades is deeply rooted in so-called 'development' programs such as those for 'jungle clearing' and 'logging'. The development projects are generally legitimized in the name of 'poverty and development' which effectively devalue the subsistence practices of the indigenous groups. The authority implementing the development process then introduces own agenda into the structure of the legitimized project.[112] This includes dislocation and intimidation of the ethnic communities in most cases.

4.5. Plantation practices

Plantation of exotics- rubber, acacia and eucalyptus, in particular, is major factor that has changed the Modhupur *Sal* forest for ever, with severe consequences for the ethnic communities- Garos and Koch, who have

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Western Australia, Leif Dunfjeld from Norway and Hans Pavia Rosing (Representative in the Danish Parliament) from Greenland.

111 *'LIFE IS NOT OURS', Land and Human Rights in the Chittagong Hill Tracts, Bangladesh,* The Report of the Chittagong Hill Tracts Commission, May 1991, Distributed by IWGIA, Kopenhagen K, Denmark and Organising Committee, Chittagong Hill Tracts Campaign, Amsterdam, The Netherlands, Printed by Calvert's Press (TU) Workers' Co-operative, at p. 81.

112 See, Chakma, Kabita and Hill, Glen, Thwarting the Indigenous Custodians of Biodiversity, *Bangladesh: Land, Forest and Forest People*, Society for Environment and Human Development (SEHD), Dhaka, 1995, at pp. 150-152.

lived in the forest for centuries.[113] With loan money from the Asian Development Bank and the World Bank in particular, the Government has actually established plantations of alien species all over the public forest land.[114] Native species and complex plantation practices could have been beneficial in every way, in particular, for conservation purposes, instead of simple plantation forestry practices. However, tobacco cultivation is an emerging threat to forests of Chittagong, Cox's Bazar and CHT.

4.6. Climate change and salinity

The adverse impact of global warming and sea level rise would affect coastal forest areas of Bangladesh. The increasing salinity is believed to be responsible for top-dying disease of trees and decreasing plant genetic resources in the Sunderbans. After the construction of the Farakka Barrage the fresh water flow through the Sunderbans has further decreased causing the salinity increase in the forest.[115] It is needless to mention that if sea level rises this mangrove forest can go under water permanently. 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.[116]

4.7. Oil and gas exploration

Bangladesh seems to be a prospective land for gas and oil, and hence exploration, examination and excavation in search of wealth have left some of its forests burnt and disturbed. Accidents caused by the negligence of the giant companies that operate in the forests have never been appropriately compensated. The forest fire at Magurchara in 1997 is an unforgettable and horrific experience of the forest and inhabitants of the adjacent area and also of the wildlife. They had to pay a heavy price for the mistakes and misdeeds of somebody else.

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113 Gain, Philip, Policies and Practices Concerning Forests and Ethnic Communities of Bangladesh, *Critiques of Policies and Practices: The Case of Forests, Ethic Communities and Tea Workers of Bangladesh*, Society for Environment and Human Development (SEHD), Dhaka, 2005, at p. 18.

114 *Ibid.*

115 See, Gain, Philip, *Stolen Forests*, Society for Environment and Human Development (SEHD), Dhaka, Bangladesh, 2006, at p.87

116 The Daily Star, Vol. XVI, No. 334, December 22, 2006, at p. 1.

Lawachhara National Park (1250 ha) is one of the protected areas has witnessed installation of gas pipeline which has crossed through the heart of the park. Fire accidents can burn the entire forest within short time and the pipeline for the transport of gas is a live threat to the forest. The gas pipeline was set up in violation of the Bangladesh Wildlife (Preservation) Order of 1973. This Order prohibits any type of hunting, killing or capturing of wild animal or making disturbances within the park. Environmentalists believe that according to the Environment Conservation Act, 1995 and the Environment Conservation Rules, 1997, no commercial activity such as setting up a gas pipeline can be carried out through the Lawachhara National Park.[117]

4.8. Corruption in the Department of Forest

Corruptions in Forest Department need to be addressed. For making money, forest officials get involved in stealing timber and forest produce, tourism business during working hours. It is believed by the locals nearby sunderbans that forest officials have friendly connections with pirates living inside the deep forest. Pirates make money by demanding ransom to the fishermen and tourists. However, forest guards and officials sometimes put same marks or number on two trees and sell one on suitable time. The various forms of corruption by the forest officials are just ever innovative. They sometimes take money from the tourists as fees and never pay the same to the Government. Therefore, the Anti-Corruption Commission should also pay special attention to this sector. However, bringing one or two top corrupt forest officials to justice is not enough to change the tradition and legacy of corruption.

5. Findings and recommendations

The statistics mentioned in section two of the article shows that from the year 1975 to 1980 the percentage of forest increased from 15 to 17 and then reduced to 15 in 1985. From 1985 to 1995, it was erratic but decreasing and finally in 2002 it rose to 17%. The forest areas were between 12 to 17 percent from the year 1975 to 2003 and this is not a satisfactory figure to show that the country has enough greenery.

Forests in Bangladesh have been classified in different categories. They are different from many aspects and there are differences in legal

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[117] See, Gain, Philip, *Stolen Forests*, Society for Environment and Human Development (SEHD), Dhaka, Bangladesh, 2006, at p.122.

frameworks too. The Chittagong Hill Tracts (CHT) has unique pluralistic form of legal and administrative framework where most of the laws of the country have no substantial means of application. There are some laws that are applicable to CHT only, and at the same time CHT is supposed to abide by the law of the country too. The CHT and Sunderbans are the major forest patch of Bangladesh. The largest mangrove forest named after a tree spreads over the southern districts providing a wide range of wildlife. The *Sal* forest is situated in the middle of the country. All of these forests have their distinct features.

The forest legal framework is a combination of laws relating to environment, property, wildlife, forest and forest produce. The Forest Act, 1927 alone provides maximum instructions for forest related activities. Nevertheless, the Environment Conservation Act, 1995, the Environment Conservation Rules, 1997, the Environment Court Act, 2000 have some mentionable role to play where environment in general is a serious concern. The country has a good number of legislations which have direct or indirect connection with the forest management. The State Acquisition and Tenancy Act, 1950 provides the provision on title of land consisting of forest. However, Forest Industries Development Corporation Ordinance, 1959 deals with management and utilization of forest produce and the Private Forests Ordinance, 1959 serves the purpose of conservation of private forests. These legislations need to be made timely and proposed changes keeping the contemporary circumstances in mind has been addressed in this article.

Forest management challenges of the country vary due to the context of particular forest. There are many complicated and unresolved issues like migrated *Bangali* and ethnic tension, military camps in the forest, land crises and land disputes, *Jum* cultivation and so on. in the Chittagong Hill Tracts. The Chittagong Hill Tracts Peace Accord 1997 was supposed to solve many problems in the region but it is believed by many indigenous people that the true spirit of the peace accord has not been materialized. Therefore, many rebel groups are emerging even after the peace accord, which are acting and demanding beyond that treaty. Development plans undertaken by the series of Governments in the forest areas, oil and gas exploration, commercial plantation, impacts of global warming, complicated property laws, deprivation of fundamental rights of ethnic minority, corruption and many other problematic areas have been the critical challenges for the forest management of the rest of the country.

This article offers hereinafter stated recommendations:

Creating new means or alternative ways of livelihood for forest dependent people would prevent forest depletion. Forming and establishing ecotourism related enterprises and forest protection business can be alternative to extracting forest directly. For an example, wildlife spotting excursions for tourists, selling souvenirs, providing accommodation and food, transport services for tourists can be alternative profession for the people exclusively dependent on mangrove forests now. Concerted effort is required to create new livelihood opportunities for the local people and training is also needed in respective fields. Therefore, a holistic approach to forest management should comprise of dedication, property rights, ecosystem management, focus on the livelihood of the local people, sound legal and institutional framework and most importantly, sensible management plans and philosophies. Cultural integrity, indigenous knowledge, ancient ways of life and system, traditional property rights should never be ignored in forest management. Survival of the dependant people and the forest both are important. Sometimes, in some cases, local inhabitants can be granted the right to manage the forest land. Without their participation, management plans may not be possible to be executed perfectly. Social forestry program existing under the Forest Act can be strengthened by ensuring participation of communities living nearby forests.

Razing or cutting of hills should be totally banned and afforestation programme will help maintain environmental balance creating positive microclimatic environment for better rainfall. It should also be mentioned that farmers in hill areas need to be taught how to cultivate and what to cultivate and which would be friendly to water conservation, soil fertility and would reduce erosion. Farmers should also organize themselves and share information and knowledge on how to cultivate and market forest based produce.

The growth of large scale commercial timber plantations in the CHT, to some extent, undermines the social equity and sustainability of the CHT's environment. Therefore, large scale private and corporate forestry should not be allowed in the CHT region. The grant of leases for private rubber plantations should be stopped in the forest areas of CHT. Logging and clearing of the remaining natural forest should be stopped.

Commercial shrimp cultivation within mangrove areas should be banned. Mangrove rehabilitation in Chakaria Sunderbans should be in the

reforestation agenda. The State can undertake plantation of mangroves program in the original sites, before it is too late. The Sunderbans should no longer be safe home to pirates. The Sate has to keep control of forests for all practical purposes and all forests should be utilized for the purpose of poverty alleviation, environmental conservation and sustainable development, though these terms have been widely and indiscriminately used without understanding them properly. It is pertinent to mention here that corruption in the department of forest should be taken very seriously, because implementation of policies will depend on their meaningful participation.

Department of Environment should be separated from the judicial process. Their job should be identified with clarity and precision. The Environment Court should be allowed to proceed independently without imposed assistance from executive body of the Government. Some of the Government and non-government actors, institutions and organizations can work together to built a healthy forest cover in Bangladesh. Ministry of Environment and Forest, Department of Forest, The Bangladesh Forest Industries Development Corporation, NGOs like Bangladesh Poribesh Andolon (BAPA), Bangladesh Environmental Lawyers Association (BELA) can be rightly mentioned in this respect.

The Forest Act is needed to be amended in an indigenous friendly fashion. The ethnic communities believe that this is a problematic and anti-people legislation. In fact, improper implementation of any legislation and abuse of power automatically leaves negative marks in people's mind. Hence, actions justified under this Act are needed to be monitored for the sake of justice and accountability should truly be established. Moreover, Department of Forest should act wisely in acquiring new lands for reserve forest which are currently owned by the indigenous people.

Development has posed highest amount of threat to forest, forest dependant people and indigenous life in this country. Despite thousands of instances of failure to do sustainable development, series of Governments have promised better life to people and sold fairy-tale stories of development and till date it is the sweetest term to politicians and donor agencies. The consequence of development in this country, believed by many, in respect of forest and land management, is forest depletion, commercial plantation, landlessness, endangered ethnicity and threatened wildlife with significantly reduced vegetation. Now it is time

to do some real work because 'awareness' is the term which is no longer saleable. People are already aware of the past. However, thorough environmental impact assessment should be a mandatory precondition of conducting experimental development works in the forest zones and compensation for the adverse impacts of experiments should also be mandatory.

Population is the vital problem in this country. Bangladesh is yet not capable to undertake responsibility to fulfill the basic needs of its citizens. It is just not simple and wise to make more children without plans for their future. The more population we make, the less land we get. It is just needless to say that forest, wildlife and environment face the enormous pressure of the increasing number of population. Ecological balance can not be maintained by making innovative policies only, where the population is out of proportion. Declining agricultural productivity and increasing food shortage in the face of rising population is a critical issue in forestry of hilly areas.

Political stability and will is needed like any other sectors. CHT offers a variety of dimension of ethnic conflicts. The existing land dispute in the region is crux of variety of critical problems. However, participatory integrated approaches involving land, water, forest, agriculture, livestock, wildlife, human resources and their activities can be promoted and utilized for sustainable and futuristic watershed management.

The draft Bangladesh Water Act, 2008 contains various provisions relating to the protection of the environment. The draft Act contains provisions for the bio-environment of the Sunderbans, its resources-forest and fisheries. However, it is too early to discuss about a draft Act, but it is under active consideration of the Government and hence, it is expected that it would address the conservation of forest, watersheds and rights of the dependent population.

6. Conclusion

It is distressingly clear that Bangladesh is in imminent danger of losing its remaining forest based biodiversity assets. [118] Tropical forests directly provide food, medicines, industrial raw materials and energy. In addition they provide essential environmental services in recharging ground water,

[118] See, Hasanuzzaman, S.M., *Plant Genetic Resources in SAARC Countries: Their Conservation and Management,* SAARC Agricultural Information Centre (SAIC), Dhaka, Bangladesh, Second edition: December 2005, at p. 157.

preventing erosion through watershed protection, reducing flooding, helping to prevent drought and reducing atmospheric $C0_2$.[119]

Bangladesh is a forest-poor country despite it looks to have lush green vegetation all over its body. The country is densely populated and poverty affected. It is needless to mention that there is a close nexus between poverty and environmental stresses. The poor are the most vulnerable to environmental challenges like depletion of forests, global warming and climate change and hence, least able to adapt and cope with any catastrophic situation. Mischievous acts contributing to forest depletion is an indicator that present situation calls for a concerted effort to help forest survive the present and future challenges.

In considering options for managing forests to protect them, it is important to keep in mind how management regimes affect the poorest of the poor.[120] One method of preserving forest resources is to establish protected forests in which officials restrict and closely monitor human access and harvest of forest products.[121] Where forests are located in areas with established communities, forestry officials often find it difficult to protect the forest from harvesting by local communities that are aware of the State's claims and prohibitions but nevertheless feel justified in gathering food, fodder and fuel from the forest to meet their subsistence needs, as they have for generations, especially where the risk of detection is low.[122] Gururani recounts practices in a village of the Kumaon Himalaya of India:

> To avoid the guard, women time their trips to the reserved forest carefully and go to the forest only after they have made sure that the forest guard has gone past their patch of the forest. The activities of the forest guard are persistently monitored and even men and women who do not go to the forest keep track of the forest guard. Discussions about the forest guard constitute a significant part of the conversation among Bankhali men and women.[123]

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119 *Ibid.*

120 Mitchell, Robert, Property Rights and Environmentally Sound Management of Farmland and Forests, *Land Law Reform: Achieving Development Policy Objectives*, The World Bank, Washington, DC 20433, USA, 2006 at p. 208.

121 See, *Ibid.*

122 J.I.O. Abbot & R. Mace, *Managing Protected Woodlands: Fuelwood Collection and Law Enforcement in Lake Malawi National Park*, 13(2) Cons. Biol. 418 (1999).

123 S. Gururani, *Regimes of Control, Strategies of Access: Politics of Forest Use in the Uttarakhand Himalaya, India in Agrarian Environments: Resources, Representations*

Where the Bankhali villagers regarded the forest guard for the state reserve as a government employee who had no real stake in or understanding of the forest and its products, similar views are prevalent in Bangladesh too. The indigenous people who are dependant on forest believe that their voices have never been exactly heard and therefore, the forest legislations are faulty and atrocious. They blame the Forest Act, 1927 most. In the first Conference on Indigenous People and Bangladesh Environment held from December 17 to December 18, 2007, organized by Bangladesh Poribesh Andolon (BAPA) and Bangladesh Environment Network (BEN), representatives of the indigenous communities expressed their anguish and resentment caused by the forest related legislations and reiterated their ancestral right to possess and take care of the forests. This reminds that the practical condition of the forest dependant communities needs to be addressed too.

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and Rule in India, at p.170, 177-178 (A. Agrawal & K. Sivaramakrishanam, eds., Duke U. Press 2000).

UNCITRAL MODEL LAW AND ARBITRATION LAW IN BANGLADESH: AN ANALYTICAL STUDY OF MAJOR DISPARITIES

Raushan Ara and Sikder Mahmudur Razi*

1. Introduction:

Since it is equitable to be willing that a difference shall be settled by discussion rather than by force, in recent years, there have been more discussions about taking a systems approach in order to offer different kinds of options to people who are in conflict; to foster appropriate dispute resolution, and obviously those will be the processes and techniques that fall outside of the government judicial processes; and alternatives to litigation. As our system is too costly and too painful, we need to provide mechanisms that can produce an acceptable result in the shortest possible time, with the shortest possible expense and with a minimum of stress on the participants; a system of law which comes to achieve the aims of combining strength with flexibility; a system that yields enforceable decisions backed by a judicial framework with the authority of calling upon the coercive powers of the state and allows the contestant to choose procedures which fit the nature of the dispute and the business context in which it occurs. Among all the forms of alternative dispute resolution, it is only the arbitration which is offering that desired system with the aim of achieving strength with flexibility.[1] The law makers are coming to a consensus that even if the issues are complex and that litigation is inevitable, the issues can be narrowed and even settled by first submitting the dispute to arbitation. However, the success of arbitratin in effective and quicker disposal of disputes has facilitated this form of dispute settlement as a serious alternative to litigation.

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1 In its broadest sense, arbitration is a vehicle of dispute resolution in which parties to a contract select a neutral arbitrator (or a panel of arbitrators) to present their dispute for a legally binding ruling.

However, it is not known exactly when formal non-judicial arbitration of disputes first began but it can be said with some certainty that arbitration, as a way of resolving disputes predates formal courts. The growth of international trade however, brought greater sophistication to a process that had previously been largely *ad hoc* in relation to disputes between merchants resolved under the auspices of the *lex mercatoria.* As trade grew, so did the practice of arbitration, eventually leading to the creation of a variant now known as international arbitration, as a means for resolving disputes under international commercial contracts.[2] However, there are different arbitration treaties and conventions to which a party or nation may adhere. One of the most important is the Convention on the Recognition and Execution of Foreign Arbitral Awards of 1958, known as the New York Convention. More than 130 countries have agreed to abide by the terms of this Convention. The New York Convention is promoted by UNCITRAL, the United Nations Commission on International Trade Law. UNCITRAL was established by a resolution of the UN General Assembly in 1966 to promote harmony and unity in international trade. While it does not administer arbitration disputes, UNCITRAL has produced arbitration rules in accordance with which parties may choose to arbitrate. These rules may be used by any public or private entity. In addition, UNCITRAL has issued a Model Law on International Commercial Arbitration that has influenced the national arbitration legislation of more than 45 countries including Bangladesh.

2. The UNCITRAL Model Law: A Sound and Promising Basis for Harmonization and Improvement of National Laws[3]

The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, at the close of the Commission's 18th annual session. The General Assembly, in its resolution 40/72 of 11 December 1985, recommended "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice". It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of

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2 See for details, http://en.wikipedia.org/wiki/Arbitration

3 Visit for details, http://www.madaan.com/uncitral.html

international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world.

2.1. Background to the Model Law:

The Model Law is designed to meet concerns relating to the current state of national laws on arbitration. The need for improvement and harmonization is based on findings that domestic laws are often inappropriate for international cases and that considerable disparity exists between them.

2.1.1. Inadequacy of Domestic Laws:

A global survey of national laws on arbitration revealed considerable disparities not only as regards individual provisions and solutions but also in terms of development and refinement. Some laws may be regarded as outdated, sometimes going back to the nineteenth century and often equating the arbitral process with court litigation. Other laws may be said to be fragmentary in that they do not address all relevant issues. Even most of those laws which appear to be up-to-date and comprehensive were drafted with domestic arbitration primarily, if not exclusively, in mind.

The expectations of the parties as expressed in a chosen set of arbitration rules or a "one-off" arbitration agreement may be frustrated, especially by a mandatory provision of the applicable law. Unexpected and undesired restrictions found in national laws relate, for example, to the parties' ability effectively to submit future disputes to arbitration, to their power to select the arbitrator freely, or to their interest in having the arbitral proceedings conducted according to the agreed rules of procedure and with no more court involvement than is appropriate. Frustrations may also ensue from non-mandatory provisions which may impose undesired requirements on unwary parties who did not provide otherwise. Even the absence of non-mandatory provisions may cause difficulties by not providing answers to the many procedural issues relevant in an arbitration and not always settled in the arbitration agreement.

2.1.2. Disparity between National Laws:

Problems and undesired consequences, whether emanating from mandatory or non-mandatory provisions or from a lack of pertinent provisions, are aggravated by the fact that national laws on arbitral procedure differ widely. The differences are a frequent source of concern in international arbitration, where at least one of the parties is, and often

both parties are, confronted with foreign and unfamiliar provisions and procedures.Uncertainty about the local law with the inherent risk of frustration may adversely affect not only the functioning of the arbitral process but already the selection of the place of arbitration. A party may well for those reasons hesitate or refuse to agree to a place which otherwise, for practical reasons, would be appropriate in the case at hand. The choice of places of arbitration would thus be widened and the smooth functioning of the arbitral proceedings would be enhanced if States were to adopt the Model Law which is easily recognizable, meets the specific needs of international commercial arbitration and provides an international standard with solutions acceptable to parties from different States and legal systems.

2.2. Salient Features of the Model Law:

2.2.1. Special Procedural Regime for International Commercial Arbitration:

The principles and individual solutions adopted in the Model Law aim at reducing or eliminating the above concerns and difficulties. As a response to the inadequacies and disparities of national laws, the Model Law presents a special legal regime geared to international commercial arbitration, without affecting any relevant treaty in force in the State adopting the Model Law. While the need for uniformity exists only in respect of international cases, the desire of updating and improving the arbitration law may be felt by a State in respect of non-international cases and could be met by enacting modern legislation based on the Model Law for both categories of cases.

2.2.1.1. Substantive and Territorial Scope of Application:

The Model Law defines an arbitration as international if "the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States".[4] The vast majority of situations commonly regarded as international will fall under this criterion. In addition, an arbitration is international if the place of arbitration, the place of contract performance, or the place of the subject-matter of the dispute is situated in a State other than where the parties have their place of business, or if the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

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4 Article 1(3) of the UNCITRAL Model Law on International Commercial Arbitration, 1985.

As regards the term "commercial", no hard and fast definition could be provided. Article 1 contains a note calling for "a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not". The footnote to article 1 then provides an illustrative list of relationships that are to be considered commercial, thus emphasizing the width of the suggested interpretation and indicating that the determinative test is not based on what the national law may regard as "commercial".

Another aspect of applicability is what one may call the territorial scope of application. According to article 1(2), the Model Law as enacted in a given State would apply only if the place of arbitration is in the territory of that State. However, there is an important and reasonable exception. Articles 8(1) and 9 which deal with recognition of arbitration agreements, including their compatibility with interim measures of protection, and articles 35 and 36 on recognition and enforcement of arbitral awards are given a global scope, i.e. they apply irrespective of whether the place of arbitration is in that State or in another State and, as regards articles 8 and 9, even if the place of arbitration is not yet determined.

The strict territorial criterion, governing the bulk of the provisions of the Model Law, was adopted for the sake of certainty and in view of the following facts. The place of arbitration is used as the exclusive criterion by the great majority of national laws and, where national laws allow parties to choose the procedural law of a State other than that where the arbitration takes place, experience shows that parties in practice rarely make use of that facility. The Model Law, by its liberal contents, further reduces the need for such choice of a "foreign" law in lieu of the (Model) Law of the place of arbitration, not the least because it grants parties wide freedom in shaping the rules of the arbitral proceedings. This includes the possibility of incorporating into the arbitration agreement procedural provisions of a "foreign" law, provided there is no conflict with the few mandatory provisions of the Model Law. Furthermore, the strict territorial criterion is of considerable practical benefit in respect of articles 11, 13, 14, 16, 27 and 34, which entrust the courts of the respective State with functions of arbitration assistance and supervision.

2.2.1.2. Delimitation of Court Assistance and Supervision:

As evidenced by recent amendments to arbitration laws, there exists a trend in favour of limiting court involvement in international commercial arbitration. This seems justified in view of the fact that the parties to an

arbitration agreement make a conscious decision to exclude court jurisdiction and, in particular in commercial cases, prefer expediency and finality to protracted battles in court.

In this spirit, the Model Law envisages court involvement in the following instances. A first group comprises appointment, challenge and termination of the mandate of an arbitrator (articles 11, 13 and 14), jurisdiction of the arbitral tribunal (article 16) and setting aside of the arbitral award (article 34). These instances are listed in article 6 as functions which should be entrusted, for the sake of centralization, specialization and acceleration, to a specially designated court or, as regards articles 11, 13 and 14, possibly to another authority (e.g. arbitral institution, chamber of commerce). A second group comprises court assistance in taking evidence (article 27), recognition of the arbitration agreement, including its compatibility with court-ordered interim measures of protection (articles 8 and 9), and recognition and enforcement of arbitral awards (articles 35 and 36).

Beyond the instances in these two groups, "no court shall intervene, in matters governed by this Law". This is stated in the innovative article 5, which by itself does not take a stand on what is the appropriate role of the courts but guarantees the reader and user that he will find all instances of possible court intervention in this Law, except for matters not regulated by it (e.g., consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits). Especially foreign readers and users, who constitute the majority of potential users and may be viewed as the primary addressees of any special law on international commercial arbitration, will appreciate that they do not have to search outside this Law.

2.2.2 Arbitration Agreement:

Chapter II of the Model Law deals with the arbitration agreement, including its recognition by courts. The provisions follow closely article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (hereafter referred to as "1958 New York Convention"), with a number of useful clarifications added.

2.2.2.1. Definition and Form of Arbitration Agreement:

Article 7(1) recognizes the validity and effect of a commitment by the parties to submit to arbitration an existing dispute ("compromis") or a

future dispute ("clause compromissoire"). The latter type of agreement is presently not given full effect under certain national laws.

While oral arbitration agreements are found in practice and are recognized by some national laws, article 7(2) follows the 1958 New York Convention in requiring written form. It widens and clarifies the definition of written form of article II(2) of that Convention by adding "telex or other means of telecommunication which provide a record of the agreement", by covering the submission-type situation of "an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another", and by providing that "the reference in a contract to a document" (e.g. general conditions) "containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract".

2.2.2.2. Arbitration Agreement and the Courts:

Articles 8 and 9 deal with two important aspects of the complex issue of the relationship between the arbitration agreement and resort to courts. Modelled on article II(3) of the 1958 New York Convention, article 8(1) of the Model Law obliges any court to refer the parties to arbitration if seized with a claim on the same subject-matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The referral is dependent on a request which a party may make not later than when submitting his first statement on the substance of the dispute. While this provision, where adopted by a State when it adopts the Model Law, by its nature binds merely the courts of that State, it is not restricted to agreements providing for arbitration in that State and, thus, helps to give universal recognition and effect to international commercial arbitration agreements.

Article 9 expresses the principle that any interim measures of protection that may be obtained from courts under their procedural law (e.g. pre-award attachments) are compatible with an arbitration agreement. Like article 8, this provision is addressed to the courts of a given State, insofar as it determines their granting of interim measures as being compatible with an arbitration agreement, irrespective of the place of arbitration. Insofar as it declares it to be compatible with an arbitration agreement for a party to request such measure from a court, the provision would apply irrespective of whether the request is made to a court of the given State or of any other country. Wherever such request may be made, it may not

be relied upon, under the Model Law, as an objection against the existence or effect of an arbitration agreement.

2.2.3. Composition of Arbitral Tribunal:

Chapter III contains a number of detailed provisions on appointment, challenge, termination of mandate and replacement of an arbitrator. The chapter illustrates the approach of the Model Law in eliminating difficulties arising from inappropriate or fragmentary laws or rules. The approach consists, first, of recognizing the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an *ad hoc* agreement, the procedure to be followed, subject to fundamental requirements of fairness and justice. Secondly, where the parties have not used their freedom to lay down the rules of procedure or a particular issue has not been covered, the Model Law ensures, by providing a set of suppletive rules that the arbitration may commence and proceed effectively to the resolution of the dispute.

Where under any procedure, agreed upon by the parties or based upon the suppletive rules of the Model Law, difficulties arise in the process of appointment, challenge or termination of the mandate of an arbitrator, Articles 11, 13 and 14 provide for assistance by courts or other authorities. In view of the urgency of the matter and in order to reduce the risk and effect of any dilatory tactics, instant resort may be had by a party within a short period of time and the decision is not appealable.

2.2.4. Jurisdiction of Arbitral Tribunal:

2.2.4.1. Competence to Rule on Own Jurisdiction:

Article 16(1) adopts the two important (not yet generally recognized) principles of "*Kompetenz-Kompetenz*" and of separability or autonomy of the arbitration clause. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause shall be treated as an agreement independent of the other terms of the contract, and a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. Detailed provisions in paragraph (2) require that any objections relating to the arbitrators' jurisdiction be made at the earliest possible time.

The arbitral tribunal's competence to rule on its own jurisdiction, i.e. on the very foundation of its mandate and power, is, of course, subject to court control. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16(3) provides for instant court control in order to avoid unnecessary waste of money and time. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision is not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending with the court. In those less common cases where the arbitral tribunal combines its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36.

2.2.4.2. Power to Order Interim Measures:

Unlike some national laws, the Model Law empowers the arbitral tribunal, unless otherwise agreed by the parties, to order any party to take an interim measure of protection in respect of the subject-matter of the dispute, if so requested by a party.[5] It may be noted that the article does not deal with enforcement of such measures; any State adopting the Model Law would be free to provide court assistance in this regard.

2.2.5. Conduct of Arbitral Proceedings:

Chapter V provides the legal framework for a fair and effective conduct of the arbitral proceedings. It opens with two provisions expressing basic principles that permeate the arbitral procedure governed by the Model Law. Article 18 lays down fundamental requirements of procedural justice and article 19 the rights and powers to determine the rules of procedure.

2.2.5.1. Fundamental Procedural Rights of a Party:

Article 18 embodies the basic principle that the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. Other provisions implement and specify the basic principle in respect of certain fundamental rights of a party. Article 24(1) provides that, unless the parties have validly agreed that no oral hearings for the presentation of evidence or for oral argument be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the

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5 Article 17, ibid.

proceedings, if so requested by a party. It should be noted that article 24(1) deals only with the general right of a party to oral hearings (as an alternative to conducting the proceedings on the basis of documents and other materials) and not with the procedural aspects such as the length, number or timing of hearings.

Another fundamental right of a party of being heard and being able to present his case relates to evidence by an expert appointed by the arbitral tribunal. Article 26(2) obliges the expert, after having delivered his written or oral report, to participate in a hearing where the parties may put questions to him and present expert witnesses in order to testify on the points at issue, if such a hearing is requested by a party or deemed necessary by the arbitral tribunal. As another provision aimed at ensuring fairness, objectivity and impartiality, article 24(3) provides that all statements, documents and other information supplied to the arbitral tribunal by one party shall be communicated to the other party, and that any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. In order to enable the parties to be present at any hearing and at any meeting of the arbitral tribunal for inspection purposes, they shall be given sufficient notice in advance.[6]

2.2.5.2. Determination of Rules of Procedure:

Article 19 guarantees the parties' freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to a few mandatory provisions on procedure, and empowers the arbitral tribunal, failing agreement by the parties, to conduct the arbitration in such a manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Autonomy of the parties to determine the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional domestic concepts and without the earlier mentioned risk of frustration. The supplementary discretion of the arbitral tribunal is equally important in that it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case without restraints of the

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6 Article 24(2), ibid.

traditional local law, including any domestic rules on evidence. Moreover, it provides a means for solving any procedural questions not regulated in the arbitration agreement or the Model Law.

In addition to the general provisions of article 19, there are some special provisions using the same approach of granting the parties autonomy and, failing agreement, empowering the arbitral tribunal to decide the matter. Examples of particular practical importance in international cases are article 20 on the place of arbitration and article 22 on the language of the proceedings.

2.2.5.3. Default of a Party:

Only if due notice was given, may the arbitral proceedings be continued in the absence of a party. This applies, in particular, to the failure of a party to appear at a hearing or to produce documentary evidence without showing sufficient cause for the failure.[7] The arbitral tribunal may also continue the proceedings where the respondent fails to communicate his statement of defence, while there is no need for continuing the proceedings if the claimant fails to submit his statement of claim.[8]

Provisions which empower the arbitral tribunal to carry out its task even if one of the parties does not participate are of considerable practical importance since, as experience shows, it is not uncommon that one of the parties has little interest in co-operating and in expediting matters. They would, thus, give international commercial arbitration its necessary effectiveness, within the limits of fundamental requirements of procedural justice.

2.2.6. Making of Award and Termination of Proceedings:

2.2.6.1. Rules Applicable to Substance of Dispute:

Article 28 deals with the substantive law aspects of arbitration. Under paragraph (1), the arbitral tribunal decides the dispute in accordance with such rules of law as may be agreed by the parties. This provision is significant in two respects. It grants the parties the freedom to choose the applicable substantive law, which is important in view of the fact that a number of national laws do not clearly or fully recognize that right. In addition, by referring to the choice of "rules of law" instead of "law", the Model Law gives the parties a wider range of options as regards the

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7 Article 25(c), ibid.

8 Article 25(a), (b), ibid.

designation of the law applicable to the substance of the dispute in that they may, for example, agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system. The power of the arbitral tribunal, on the other hand, follows more traditional lines. When the parties have not designated the applicable law, the arbitral tribunal shall apply the law, i.e. the national law, determined by the conflict of laws rules which it considers applicable.

According to article 28(3), the parties may authorize the arbitral tribunal to decide the dispute *ex aequo et bono* or as *amiables compositeurs*. This type of arbitration is currently not known or used in all legal systems and there exists no uniform understanding as regards the precise scope of the power of the arbitral tribunal. When parties anticipate an uncertainty in this respect, they may wish to provide a clarification in the arbitration agreement by a more specific authorization to the arbitral tribunal. Paragraph (4) makes clear that in all cases; i.e. including an arbitration *ex aequo et bono*, the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

2.2.6.2. Making of Award and Other Decisions:

In its rules on the making of the award (articles 29-31), the Model Law pays special attention to the rather common case that the arbitral tribunal consists of a plurality of arbitrators (in particular, three). It provides that, in such case, any award and other decision shall be made by a majority of the arbitrators, except on questions of procedure, which may be left to a presiding arbitrator. The majority principle applies also to the signing of the award, provided that the reason for any omitted signature is stated.

Article 31(3) provides that the award shall state the place of arbitration and that it shall be deemed to have been made at that place. As to this presumption, it may be noted that the final making of the award constitutes a legal act, which in practice is not necessarily one factual act but may be done in deliberations at various places, by telephone conversation or correspondence; above all, the award need not be signed by the arbitrators at the same place.

The arbitral award must be in writing and state its date. It must also state the reasons on which it is based, unless the parties have agreed otherwise or the award is an award on agreed terms, i.e. an award which records the terms of an amicable settlement by the parties. It may be added that the Model Law neither requires nor prohibits "dissenting opinions".

2.2.7. Recourse against Award:

National laws on arbitration, often equating awards with court decisions, provide a variety of means of recourse against arbitral awards, with varying and often long time-periods and with extensive lists of grounds that differ widely in the various legal systems. The Model Law attempts to ameliorate this situation, which is of considerable concern to those involved in international commercial arbitration.

2.2.7.1. Application for Setting Aside as Exclusive Recourse:

The first measure of improvement is to allow only one type of recourse, to the exclusion of any other means of recourse regulated in another procedural law of the State in question. An application for setting aside under article 34 must be made within three months of receipt of the award. It should be noted that "recourse" means actively "attacking" the award; a party is, of course, not precluded from seeking court control by way of defence in enforcement proceedings (article 36). Furthermore, "recourse" means resort to a court, i.e. an organ of the judicial system of a State; a party is not precluded from resorting to an arbitral tribunal of second instance if such a possibility has been agreed upon by the parties (as is common in certain commodity trades).

2.2.7.2. Grounds for Setting Aside:

As a further measure of improvement, the Model Law contains an exclusive list of limited grounds on which an award may be set aside. This list is essentially the same as the one in article 36(1), taken from article V of the 1958 New York Convention: lack of capacity of parties to conclude arbitration agreement or lack of valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present his case; award deals with matters not covered by submission to arbitration; composition of arbitral tribunal or conduct of arbitral proceedings contrary to effective agreement of parties or, failing agreement, to the Model Law; non-arbitrability of subject-matter of dispute and violation of public policy, which would include serious departures from fundamental notions of procedural justice.

Such a parallelism of the grounds for setting aside with those provided in article V of the 1958 New York Convention for refusal of recognition and enforcement was already adopted in the European Convention on International Commercial Arbitration (Geneva, 1961). Under its article IX, the decision of a foreign court setting aside an award for a reason

other than the ones listed in article V of the 1958 New York Convention does not constitute a ground for refusing enforcement. The Model Law takes this philosophy one step further by directly limiting the reasons for setting aside.

Although the grounds for setting aside are almost identical to those for refusing recognition or enforcement, two practical differences should be noted. Firstly, the grounds relating to public policy, including non-arbitrability, may be different in substance, depending on the State in question (i.e. State of setting aside or State of enforcement). Secondly, and more importantly, the grounds for refusal of recognition or enforcement are valid and effective only in the State (or States) where the winning party seeks recognition and enforcement, while the grounds for setting aside have a different impact: the setting aside of an award at the place of origin prevents enforcement of that award in all other countries by virtue of article V(1)(e) of the 1958 New York Convention and article 36(1)(a)(v) of the Model Law.

2.2.8. Recognition and Enforcement of Awards:

The eighth and last chapter of the Model Law deals with recognition and enforcement of awards. Its provisions reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the 1958 New York Convention.

2.2.8.1. Towards Uniform Treatment of All Awards Irrespective of Country of Origin:

By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law draws a new demarcation line between "international" and "non-international" awards instead of the traditional line between "foreign" and "domestic" awards. This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration takes place. Consequently, the recognition and enforcement of "international" awards, whether "foreign" or "domestic", should be governed by the same provisions.

By modelling the recognition and enforcement rules on the relevant provisions of the 1958 New York Convention, the Model Law supplements, without conflicting with, the regime of recognition and enforcement created by that successful Convention.

2.2.8.2. Procedural Conditions of Recognition and Enforcement:

Under article 35(1), any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of article 35(2) and of article 36 (which sets forth the grounds on which recognition or enforcement may be refused). Based on the above consideration of the limited importance of the place of arbitration in international cases and the desire of overcoming territorial restrictions, reciprocity is not included as a condition for recognition and enforcement.

The Model Law does not lay down procedural details of recognition and enforcement since there is no practical need for unifying them, and since they form an intrinsic part of the national procedural law and practice. The Model Law merely sets certain conditions for obtaining enforcement: application in writing, accompanied by the award and the arbitration agreement.[9]

2.2.8.3. Grounds for Refusing Recognition or Enforcement:

As noted earlier, the grounds on which recognition or enforcement may be refused under the Model Law are identical to those listed in article V of the New York Convention. Only, under the Model Law, they are relevant not merely to foreign awards but to all awards rendered in international commercial arbitration. While some provisions of that Convention, in particular as regards their drafting, may have called for improvement, only the first ground on the list (i.e. "the parties to the arbitration agreement were, under the law applicable to them, under some incapacity") was modified since it was viewed as containing an incomplete and potentially misleading conflicts rule. Generally, it was deemed desirable to adopt, for the sake of harmony, the same approach and wording as this important Convention.

3. Arbitration Act in Bangladesh: A Near Mirror Image of the Model Law

Along with the recommendation of the legislative authorities, various representations by the bodies of commerce and industry stressed the

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[9] Article 35(2), ibid.

need for replacing the existing law of arbitration with a new legislation amending and consolidating the law relating to arbitration. Furthermore, in view of the desirability of adopting the Model Law and Rules as adopted by the UNCITRAL, with appropriate modification, to serve as a model for legislation on domestic arbitration, the Bill was introduced to enact the law relating to international commercial arbitration, recognition and enforcement of foreign arbitral award and all other arbitrations of domestic nature[10] taking into account the UNCITRAL Model Law and Rules. However, the law on arbitration in Bangladesh was substantially contained in two enactments, namely, the Arbitration (Protocol and Convention) Act, 1937 and the Arbitration Act, 1940 and those were operative side by side in their respective area. It was widely felt that the 1940 Act, which contains the general law of arbitration, has become outdated and amendments were proposed to this Act to make it more responsive to contemporary requirements as well as since, the Act was not applicable to foreign arbitration, [11] to enact the law relating to international commercial arbitration and recognition and enforcement of foreign arbitral award. Thus, the newly re-enacted Arbitration Act, 2001 was enacted by the parliament, which received assent of the President and was published in the Bangladesh Gazette on 24 January 2001 for general information. It extends to the whole of Bangladesh and came into force on and from the 10th day of April 2001 vide notification No. SRO 87 Law/2001 dated 09.04.2001 published in the Bangladesh Gazette Extraordinary dated 10.04.2001 as required under sub-section (3) of section 1. On the commencement of the Arbitration Act, 2001, the Arbitration Act, 1940 and the Arbitration (Protocol and Convention) Act, 1937 stand repealed.

However, the main objectives of the Act are as under:

(i) to comprehensively cover international commercial arbitration, recognition and enforcement of foreign arbitral award and all other arbitrations of domestic nature;

(ii) to make provisions for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;

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10 Preamble of the Arbitration Act, 2001.

11 AIR 1960 Cal 47 (DB).

(iii) to provide that the arbitral tribunal gives reasons for its arbitral award;

(iv) to ensure that the arbitral tribunal remains with in the limits of its jurisdiction

(v) to minimize the supervisory role of courts in the arbitral process

(vi) to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes; and

(vii) to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court.[12]

3.1. Adoption of Model Law:

The Arbitration Act of 2001 marks a radical departure from the earlier arbitration law. It is a combination of the arbitration law evolved over the years and except a few important alterations, it is a near mirror image of the Model Law. The Model Law itself is a revolutionary instrument aimed at uniformity of the law of arbitral procedure and specific needs of international commercial practice. Though the Model Law cannot be said to be comprehensive, as it leaves many important areas of arbitration law and practice untouched, it has served as a model or prototype for many states that have adopted it including Bangladesh by legislation or founded their legislation on it to varying degrees.[13] Adopting the Model Law almost in its entirety not only makes the Bangladeshi arbitration law more accessible and comprehensible, but also makes it more up to date and consistent with international practice.[14] The Bangladeshi Act adopts the following provisions from the Model Law:

(i) The definition and form of arbitration agreement;[15]

(ii) The duty of the judicial authority to refer the parties to arbitration where an action is brought before it in breach of the arbitration agreement;[16]

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12 Malhotra, O P; *The Law and Practice of Arbitration and Conciliation*, first edn, LexisNexis(A division of Reed Elsevier India Pvt. Ltd.), New Delhi, India, 2002, p. 30.

13 Ibid, p. 42.

14 Cf Dicey and Morris, *The Conflict of Laws,* thirteenth edn, 2000, Vol 1, p 595, para 16-007.

15 Section 2(n) and section 9, the Arbitration Act, 2001.

16 Section 10, ibid.

(iii) The power of the tribunal[17] and of the court[18] to grant interim measures of protection in support of an arbitration;
(iv) The composition of the arbitral tribunal;[19]
(v) Appointment of arbitrators;[20]
(vi) Grounds of challenge to an arbitrator;[21]
(vii) Procedure to challenge an arbitrator;[22]
(viii) Termination of the mandate of an arbitrator for failure or impossibility to act;[23]
(ix) Substitution of an arbitrator on termination of his mandate;[24]
(x) The competence of the arbitral tribunal to rule on its own jurisdiction;[25]
(xi) Procedure of arbitration;[26] and
(xii) The grounds for setting aside the arbitral awards.[27]

In addition to the aforesaid provisions, this Act also provides for finality[28] and enforcement[29] of the awards. It makes further provision for appeals against the arbitral awards.[30]

4. Major Disparities between the Model Law and the Arbitration Law in Bangladesh:

The Model Law came at the opportune time and provided main inspiration for enactment of the Arbitration Act, 2001. In structure and content, the Bangladeshi Act greatly draws on the Model Law. It may be noted that though this Act adopts the Model Law as a model or prototype, it is not simply a mirror of the Model Law. There are

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17 Section 21, ibid.
18 Section 7A, ibid.
19 Section 2(o) and section 11, ibid.
20 Section 12, ibid.
21 Section 13, ibid.
22 Section 14, ibid.
23 Section 15, ibid.
24 Section 16, ibid.
25 Section 17, ibid.
26 Sections 23 to 27, 29, 30, 32, 33-37, ibid.
27 Section 43, ibid.
28 Section 39, ibid.
29 Section 44, ibid.
30 Section 48, ibid.

important differences in the two instruments on account of their origins, aims and the local conditions, namely:

4.1. Party Autonomy and Uneven Number of Arbitrators:

The definition of an arbitral tribunal in s 2(o) and the composition of the arbitral tribunal in section 11 of the Arbitration Act, 2001 are modelled on article 2(b) and article 10 of the UNCITRAL Model Law. Section 2(o) of this Act verbatim adopts the definition of an arbitral tribunal in article 2(b)-'a sole arbitrator or a panel of arbitrators'. Article 10 of the UNCITRAL Model Law grants to the parties the greatest possible freedom in the choice of the number of arbitrators to constitute the arbitral tribunal. That is to say, the parties may choose a sole arbitrator or any number of arbitrators including even numbers. In the absence of an agreement of the parties, the default number is three arbitrators. Thus, the minimum number of the panel of arbitrators is a sole arbitrator, default number is three and the maximum number is that which the parties may determine. This article was drafted to accord with article 5 of the UNCITRAL Arbitration Rules which reads, 'if the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrator shall be appointed'.

However, section 11 departs from its Model Law on two aspects; firstly, it provides that the number of arbitrators constituting the arbitral tribunal shall not be an even number unless otherwise agreed by the parties.[31] Secondly, like the Model Law, failure to the determination of the parties the tribunal shall consist of three arbitrators[32] and unlike the Model Law, where they appoint an even number of arbitrators, the appointed arbitrators shall jointly appoint an additional arbitrator who shall act as a Chairman of the tribunal.[33] Thus, the default number is three arbitrators while the maximum number is any uneven number that may be determined by the parties. It is thus evident that the intention of the Parliament was to follow the lead of other countries, which have made it compulsory for an uneven number of arbitrators to be appointed,

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31 Section 11(3), ibid.

32 Section 11(2), ibid.

33 Section 11(3), ibid.; *Krishak Bharati Coop. v. Alutu Inc.* (2002) 3 Arb LR 302 (Del DB).

minimum number being a sole arbitrator.[34] The object of this is to avoid tribunal deadlock in decision making if a simple majority cannot be reached.[35] In an ad hoc arbitration, the parties will have to follow the procedure, agreed upon by them, for appointment of the arbitrator and the presiding arbitrator, but that is rare. Section 4 grants the freedom to the parties to authorize any person to determine the number of arbitrators. The arbitral institutions generally appoint not more than three arbitrators including the presiding arbitrator. However, these provisions are mandatory from which parties cannot derogate.[36] This is also compatible with the main stream of international commercial arbitration.

In a case where the parties, in the exigencies of a situation, decide to have more than one arbitrator, the next number they can opt for is three. Despite the advantage of a sole arbitrator, in modern practice preference is for appointment of three arbitrators, albeit not without rationale. Particularly in the area of commercial arbitration involving complex problems peculiar to special types of disputes e.g. engineering, construction, maritime and trading disputes, a sole arbitrator many times may or may not be suitable for resolution of disputes. In an international commercial arbitration, where large sums of money are at stake, the common practice is to appoint a tribunal comprising of three arbitrators. Even though it may involve more expense and delay than a sole arbitrator arbitration. It is still preferred as it is more effective. 'An arbitral tribunal of three arbitrators is likely to prove more satisfactory to the parties and the ultimate award is more likely to be acceptable to them'.[37] The UNCITRAL Rules reflect this trend in article 5 and a similar provision is contained in the Model Law in article 10(2)[38].

Though the Act permits the parties to determine any odd number of arbitrators, the statutory procedure provided in it does not relate to the appointment of more than a three-arbitrator tribunal.[39] In domestic as well as international commercial arbitrations, an arbitral tribunal with

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34 Section 2(o) of the Arbitration Act, 2001.

35 Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, third edn, 1999, pp. 194-95, para 4-19.

36 *Narayan Prasad Lohia v Nikunj Kumar Lohia* (2002) 1 Raj 381 (SC), per Variava J.

37 Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, third edn, 1999, pp 194, para 4-18.

38 *Ranwa Constn. Co. v. Pant Krishi Bhavan* (2006) 1 Arb LR 209 (Raj).

39 Section 10(3) and section 12(3)(a) of the Arbitration Act, 2001.

more than three arbitrators is not a general norm, because normally there is no reasonable justification for appointing an arbitral tribunal of more than three arbitrators. The mode of appointing more than three arbitrators is almost invariably prescribed in the contract.[40] However, in international commercial arbitration, particularly where a state or a state agency is a party, arbitral panels, though rarely, comprise of even much larger numbers. It may, however, be necessary or even desirable, in some exceptional cases to appoint an arbitral tribunal of five, seven or more arbitrators in a multi-party arbitration. The practice of states in appointing arbitral tribunal of five, seven or more is usually dictated by the political rather than practical considerations. It may relevant to note that the special considerations that apply to inter-state arbitrations do not apply to international commercial arbitration. The greater the number of arbitrators appointed, the greater the delay and expense likely to be incurred in the proceedings. Even in a case of major importance, three carefully chosen and appropriately qualified arbitrators should be sufficient to dispose of the issue in dispute satisfactorily. [41]

However, according to the analytical commentary on article 10, the 'two-level system' is a way of drafting a legislative provision where the first part grants the parties general freedom in regulating an issue while the second part sets forth the default rules which apply only when no such party stipulation is made. The hallmark of these provisions is the combination of the wording 'the parties are free to agree' (including the parties freedom of choice) and 'failing such an agreement' (setting out the default provisions).[42] The purpose of the parties choosing arbitration as against ordinary court litigation is that they expect a hand-picked expert tribunal to be able to resolve their dispute more proficiently, economically and expeditiously than the court litigation. The parties, therefore, have been given utmost freedom not only to choose their arbitrators but also to determine the number of arbitrators constituting the arbitral tribunal and the default tribunal shall consist of three arbitrators as well as unless otherwise agreed by the parties, where they appoint an even number of arbitrators, the appointed arbitrators shall

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40 Muatill and Boyd, *Commercial Arbitration,* second edn, 1989, pp 174, 189.

41 Redfern and Hunter, *Law and Practice of International Commercial Arbitration,* third edn, 1999, pp 195, para 4-19.

42 Peter Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions*, first edn, 2000, p 71, para 3-004.

jointly appoint an additional arbitrator who shall act as a Chairman of the tribunal[43] with a view to assure speed and proficiency.

4.2. Appointment of the Arbitrators:

Sub-sections (1) to (5), (7), (9) and (10) of section 12 of this Act adopt the substance of all the five sub-sections of article 11 of the UNCITRAL Model Law.

4.2.1. Party Autonomy and the Appointment Procedure:

The parties are free to agree on a procedure for appointing the arbitrator or arbitrators by making appropriate provision in the 'arbitration clause' or the agreement to submit.[44] In such a situation, the assistance of the third party is not necessary.[45] This freedom of the parties is to be given a wide interpretation. The most satisfactory result is where the parties agree on their tribunal...because if parties' do not agree on whom to appoint, they lose control over the composition of tribunal. The control then passes on to an appointing authority.[46]

4.2.2. Default Power to Appoint Arbitrators:

The most significant deviation from the Model Law is that section 12 uses the words 'District Judge and Chief Justice' instead of the word 'court' used in article 11. In other words, the Model Law permits court intervention in the matter of appointment of arbitrators, while this section abjures court intervention and vests the default power to appoint arbitrators in the 'District Judge in case of arbitration other than international commercial arbitration and in the Chief Justice or a Judge of the Supreme Court designated by the Chief Justice in case of international commercial arbitration'.[47]

The freedom of the parties under section 12, to agree upon appointment procedure is not unfettered. This freedom is restricted and subject to sub-section (4) of section 12. It states that unless the agreement on the appointment procedure provides other means for securing the appointment, a party may apply[48] to the District Judge in case of

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43 Section 11(3) of the Arbitration Act, 2001.

44 *National Sports Council Vs. A. Latif & Co.* 6 MLR (HC) 327.

45 *Iron & Steel Co. Ltd. v. Tiwari Road Lines* (2007) 5 SCC 703.

46 *Russell on Arbitration*, twenty-first edn, p 123, para4-050.

47 *Government of Bangladesh & others Vs. Samir and Co* 28 DLR (AD) 21.

48 *Glencore Int'l AG v. Hindustan Zinc Ltd.* (2003) 7 SCC 99; *D.S. Gupta v. Unions Hotels* (2002) 3 Arb LR 36 (Del).

arbitration other than international commercial arbitration or the Chief Justice or a Judge of the Supreme Court designated by the Chief Justice[49] in case of international commercial arbitration, in order to avoid deadlock or undue delay in securing the appointment of the arbitrator or arbitrators by enforcing the procedure agreed upon by the parties. Such application can be made in the following situations, viz, (i) where a party fails to appoint an arbitrator within thirty days of the receipt of a request to do so from the other party or, (ii) where the appointed arbitrators fail to agree on the third arbitrator within thirty days of their appointment. The power of the District Judge or Chief Justice or any other Judge of the Supreme Court designated by the Chief Justice, as the case may be, to appoint an arbitrator under sub-sections (3), (4) and (7) of section 12 can be invoked only on the request of a party. It is not an *ex officio* power.[50] In addition, the power exercisable by the Chief Justice under section 12(7) is not the power of the Supreme Court under the Constitution, but the power of a designate referred to under the section, albeit that it has now been held that the order has judicial characteristic. The Chief Justice by his designated nominee is not a *'persona designata'*, not an individual but a 'class'. Although the 'class' is not declared a 'court' but it is implied in the judgment which requires the Chief Justice to adjudicate all issue after giving proper hearing to the opposite party.[51]

4.2.3. Right to Appoint when Forfeited:

The analytical commentary on article 11(4) and (5) which correspond to sub-sections (7) and (12) support the view that the parties, by agreement, may not exclude the intervention by the District Judge in case of domestic arbitration and by the Chief Justice or any judge of the Supreme Court designated by the Chief Justice in case of international commercial arbitration.[52] In cases falling under section 12(7), no time limit has been prescribed under the Act, whereas a period of thirty days has been prescribed under section 12(3) and (4) of the Act. Therefore, if a party

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49 *S.B.P. & Co. v. Patel Engg. Ltd.* (2005) 8 SCC 618: (2005) 3 RAJ 388 (SC); *Kanagarani v. Dawarangan* 1998 Supp Arb LR 431 (Mad).

50 Malhotra, O P; *The Law and Practice of Arbitration and Conciliation*, first edn, LexisNexis(A division of Reed Elsevier India Pvt. Ltd.), New Delhi, India, 2002, p 404.

51 *S.B.P. & Co. v. Patel Engg. Ltd.* (2005) 8 SCC 618: (2005) 3 RAJ 388.

52 Peter Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions*, first edn, 2000, p 79-80, paras 3-028 and 3-029.

demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within thirty days of the demand, the right to appoint does not automatically forfeited after expiry of thirty days. If, however, the party makes an appointment even after thirty days of the demand, but before the first party apply to the District Judge or the Chief Justice or any other Judge of the Supreme Court designated by the Chief Justice, as the case may be, under section 12, that would be sufficient. That is to say, in cases arising under this provision, if the opposite party has not made an appointment within thirty days of demand, the right to make appointment is not forfeited but continues. But, the appointment has to be made before the former makes the application to the District Judge or the Chief Justice or any other Judge of the Supreme Court designated by the Chief Justice, as the case may be. And in case of failure[53] in this case, only then, the right of the opposite party ceases.[54]

4.2.4. Non-Discriminatory Approach Unless Otherwise Agreed By Parties:

Section 12(2) states that 'a person of any nationality may be an arbitrator, unless otherwise agreed by the parties' and article 11(1) of the Model Law says that 'no person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties'.

Sub-section (2) of section 12 appears to be somewhat misfit in the context of this section because it is more concerned with personal characteristics of an arbitrator, while all other provisions of this section are of a procedural nature.[55] This provision is primarily directed at the state rather than at the parties. The legislature considered this provision necessary to overcome the bias against foreign nationals. It was designed to allow foreign nationals to act as arbitrators under this Act. It is not

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53 *Econ Consortium v. Delhi Metro Railway* (2006) 1 RAJ 554 (Del); *Indiana Engg. Wks. V. Cola India* (2003) 1 Arb LR 443 (Jhar); *S.P. Siva Prasadv. S.C. Rly.* (2002) 2 Arb LR 357 (AP).

54 *Union of India v. Bharat Battery Mfg. Co. (2007) 7 SCC 684; Punj LLOYD Ltd. v. Petronet MHB Ltd. (2006) 2SCC 638; Nucon India P Ltd v Delhi Vidyut Board (DESU)* AIR 2001 Del 227; *Datar Switcheears Ltd v Tata Finance Ltd* (2000) 8 SCC 151.

55 Peter Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions*, first edn, 2000, p 77, para 3-022.

mandatory[56] and is subject to the party autonomy. In other words, the parties by agreement can include or exclude persons of any nationality from being arbitrators in a domestic or international commercial arbitration under this Act. In the absence of such agreement to the contrary, a person of any nationality may be appointed as an arbitrator in arbitration held in Bangladesh under this Act. In an international commercial arbitration, the parties belong to different countries. They can appoint an arbitrator from another country or request an international arbitral institution to make the appointment either of the sole arbitrator or one or more members of the tribunal to assure equality of treatment.[57] Nevertheless, the practice usually followed in international commercial arbitration is to appoint a sole arbitrator or a presiding arbitrator of a different nationality from that of the parties to the dispute. In most of the institutional rules, the current practice is that the sole or presiding arbitrators will almost certainly be someone of a different nationality from that of the parties to the dispute. [58] However, the fact that an arbitrator is of a neutral nationality does not guarantee his independence or impartially. Nevertheless, the appearance is better and thus, it is a practice that is generally followed.[59]

4.2.5. Acceptance of Appointment:

However, there is no specific provision in the Act requiring acceptance of appointment by the person to be appointed as an arbitrator. Acceptance of the offer to be appointed as an arbitrator is not necessary to complete the appointment.[60] The appointment is complete as soon as it is made.

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56 *M.S.A. Nederland v. Larsen Turbo* (2005) 13 SCC 719: (2006) 2 RAJ 509 (SC); *Grid Corpn. V. ASE Corpn.* (2002) 7 SCC 636; *Malayasian Airlines Systems BHD(II) v. Stic Travels (P) Ltd.* (2000) 3 Arb LR 701 (SC).

57 *Russell on Arbitration,* twenty-first edn, 1997, p 10, para 1-016. The ICC Rules of Arbitration provide expressly that where the circumstances so demand, the sole arbitrator chairman of the arbitral tribunal shall be of a different nationality to that of the parties (art 2.6); Cf art 3.3 of the LCIA Rules'; art 20 (6) of the WIPO Arbitration Rules; art 6(40 of the AAA's International Arbitration Rules; Lalive, 'On the Neutrality of the Arbitrator and of the Place of Arbitration', *Swiss Essays on International Arbitration,* 1984, pp 23,25.

58 Redfern and Hunter, *Law and Practice of International Commercial Arbitration,* third edn, 1999, pp 215-16, paras 4-55 and 4-56.

59 Ibid., p216, paras 4-56.

60 *Keshav Singh Dwarka Dass Kapadia v Indian Engineering Co* AIR 1969 Bom 227, affairmed by the Supreme Court in *Keshav Singh Dwarka Dass Kapadia v Indian Engineering Co* AIR 1972 sc 1528.

Nevertheless, in practice, it is advisable to indicate acceptance in some form or other. It need not be in writing. It may be made orally or may be inferable from the conduct of the parties. Appointment of an arbitrator by a party is complete only on its communication to the other party. That is, nomination of the arbitrator should not only be made but, in order[61] to make the appointment effective, it must also be communicated to the other party within the period of thirty days.

4.2.6. Due Regard to Qualifications of Arbitrators:

Section 12(9), which adopts the substance of the second sentence of article 11(5) of the Model Law based on article 6(4) of the UNCITRAL Arbitration Rules, provides that the Chief Justice or a Judge of the Supreme Court designated by the Chief Justice, or the District Judge, as the case may be, in appointing an arbitrator under this section, shall have due regard to any qualifications required of the arbitrator under the agreement between the parties, and to such consideration as are likely to secure the appointment of an independent and impartial arbitrator. These criteria are obligatory because they flow from the 'arbitration agreement' and the statutory requirement of section 13 as well as section 23. In *Skankar Traders v. U.O.I.* (2007) 2 RAJ 549 (Cal) held, 'the Chief Justice would be entitled to appoint an independent arbitrator of his choice to decide the dispute. The wording of sec. 12(7) cannot be narrowly interpreted; the Chief Justice would have the discretion to appoint an arbitrator as per his own choice in his own discretion'. His Lordship laid down the qualification required of the arbitrator in this case and held that 'an experienced High Court Judge would be proper person to act as an independent arbitrator'. Regarding the delegation of power to a Judge of the Supreme Court by the Chief Justice under this section, the Seven Judges Bench has held in *S.B.P. & Co. v. Patel Engg. Ltd* (2005) 8 SCC 618: (2005) 3 RAJ 388 (SC) that 'the Chief Justice cannot designate a District Judge or non-judicial body to perform the functions under section 12 but the Chief Justice would be entitled to designate another Judge of his Court for exercising that power.'[62]

4.2.7. Finality of the Decision:

The decision of the Chief Justice or a Judge of the Supreme Court designated by the Chief Justice, or the District Judge, as the case may be,

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61 *James Finlay and Co Ltd v Gurdyal* AIR 1924 Sind 91.

62 Malhotra, O P; *The Law and Practice of Arbitration and Conciliation*, first edn, LexisNexis(A division of Reed Elsevier India Pvt. Ltd.), New Delhi, India, 2002, p. 414.

on a matter entrusted to him under sub-sections (3), (4) and (7) of sections 12, is final. In view of the mandatory requirements of statute, finality is essential so that the arbitral tribunal can be constituted as soon as possible. It is neither amenable to judicial review nor is there any provision for setting aside or appeal against such order in the Act.[63]

4.2.8. Rule Making Power:

Section 12(11) empowers the Chief Justice or the District Judge, as the case may be, to make such **scheme** as he may deem appropriate for dealing with matters under this section. However, a scheme made by the Chief Justice cannot govern the interpretation of section 12. If a scheme goes beyond the terms of section 12, it is bad and needs amendment.[64]

4.2.9. Provisions Not Basing on the Model Law:

The provisions of sub-sections 12(6), (8) and (13) are not based on any provision of the Model Law. Sub-section (6) states the situation where more than one arbitrators are appointed under sub-section (4), the District Judge or the Chief Justice or any other Judge of the Supreme Court designated by the Chief Justice, as the case may be, shall appoint one person from among the said arbitrators to be the Chairman of the arbitral tribunal. Regarding the duties of any other Judge of the Supreme Court as designated by the Chief Justice, sub-section (13) provides that the Chief Justice may entrust a Judge with the duties for a particular case or cases or for discharging the entire duties and may fix up the tenure of that Judge for the purposes of this section. The time limit for the appointment of arbitrator or arbitrators under sub-sections (3), (4) and (7) is provided in sub-section (8) stating that the appointment shall be made within sixty days from the receipt of the application thereof.

4.3. Matters dealt with by the 2001 Act on Which the Model Law is Silent:

4.3.1 Award of Interest by the Tribunal:

Section 38 of the Arbitration Act adopts the substance of Article 31of the UNCITRAL Model Law related with form and contents of the award. However, the matters like interest payable on the money where the arbitral award is for the payment of money and about the cost of

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63 Ibid., p. 407.

64 *Konkan Railway Corp Ltd v Mehul Construction Co* (2000) 7 SC 201.

arbitration, dealt under sub-sections 38(6) and (7) are not there in the Model Law, it is silent about these matters.

Article 31 sets forth the requirements of an arbitral award under the Model Law. These requirements, most of which are mandatory, range from the written form of the award and its signature to the delivery of the award.[65] Article 31(1) is modeled on art. 32(4) of the UNCITRAL Arbitration Rules; it requires that an arbitral award shall be signed by the arbitrators. For the sake of certainty, this provision is to be regarded as mandatory. The second sentence of this provision provides that in an arbitral proceeding with more than one arbitrator, the signature of the majority of all members of the arbitral tribunal shall sign, provided that the reason for any omitted signature is stated. Article 31(2) is based on art. 32(3) of the UNCITRAL Arbitration Rules, which provides that the arbitral award must state the reason upon which it is founded. Article 31(3) requires that an award should state the date and place of arbitration as determined by art. 20(1). Lastly, article 31(4) states that the signed award is to be delivered to each party.

4.3.1.1. Payment of Money and Interest:

Probably award for payment of money is the most common type of award. Such award directs one or more parties to pay certain sums of money to one or more other parties. Apart from the debt, it may include the amount computed by way of damages and interest. [66] Section 29 of the Arbitration Act 1940 authorized the court to order payment of interest on the decretal amount from the date of the decree at such rate as it deemed reasonable. Evidently, this was the power conferred by the statute on the court and not on the tribunal. However, on the principal that the arbitral tribunals have been awarding interests in different situations, this legislation generated a sizeable judicial gist on various aspects of awarding interests on the awarded amount of money. The earlier authorities were reviewed by a Constitutional Bench of five Judges of the Supreme Court.[67] Following that decision, a two-judge Bench of

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65 Peter Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions*, first edn, 2000, p 186, para 6-048.

66 *Russell on Arbitration*, twenty-first edn, 1997, p. 288 paras 6-119 to 6-121; Robert Merkin, *Arbitration Law*, Lloyd's Commercial Law Library, para 16-53.

67 *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa v NC Budharaj* (2001) 2 SCC 721.

the court[68] held that on the basis of the earlier authorities, the arbitral tribunal can validly award interest at all the four stages, viz, (i) from the stage of accrual of cause of action till the filing of the arbitral proceeding; (ii) during the pendency of the proceedings before the arbitrator; (iii) future interest arising between the date of the award and the date of the decree; and (iv) interest arising from the date of the decree till the realization of the award. These four situations have now been codified and conflated in two situations in s 38(6), viz, (i) period between the date on which the cause of action arose and the date on which the award is made; and (ii) from the date of the award to the date of payment.

4.3.1.2. Party Autonomy Regarding the Award of Interest:

Section 38(6) makes it clear that party autonomy prevails and preserves the parties' right to agree what powers, if any, the arbitral tribunal shall have as regards the award of interest.[69] Furthermore, the parties may also confer powers on the arbitral tribunal, which may not be available to the court. In other words, the powers of the tribunal are flexible and can be made greater or narrower, more by agreement of the parties, then by the powers of the courts. For instance, parties can confer the power on the arbitral tribunals to award compound interest, which the courts may not be able to do. This means that by agreement, the parties may authorize the arbitral tribunal to award large sums in a way, which the courts cannot. Furthermore, the parties may also agree on the rate of interest to be paid on the awarded money from the date of the award to the date of the payment. The intention of the party may be contained in the arbitration agreement or submission to arbitration. However, the intention to exclude interest need not be contained in the arbitration clause itself, provided it can be construed as part of the arbitration agreement.[70]

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68 *TP George v State of Kerala* (2001) 2 SCC 758; *Exec. Engr. v. J.C. Budhiraj* AIR 2001 SC 626.

69 *Russell on Arbitration,* twenty-first edn, 1997, p. 295, para 6-140; *T.P. George v State of Kerala* AIR 2001 SC 861; *Socony Mobil Oil Co Inc v West of England Ship Owners Mutual Insurance Association Ltd (The Padre Island)* (NO 2) (1989) 1 Lloyd's Rep 239 (CA).

70 *Russell on Arbitration,* twenty-first edn, 1997, p. 295, para 6-140.

4.3.1.2. Defaulting Power to Include Interest at a Reasonable Rate:

In the absence of any agreement by the parties, this provision confers the default discretionary power to include in the arbitral award for payment of money, interest calculated at the rate as it deems reasonable.[71] The interest may be awarded on the whole or part of the awarded money. The tribunal has further discretion to award interest for the whole or any part of the period between the date on which the cause of action arose and the date on which the award was made. However, the interest on the awarded money shall be at the rate of two percent per annum, which is more than the usual Bank rate[72] from the date of the award to the date of payment.[73] This rate of interest, in the absence of any agreement by the parties to the contrary, is mandatory. It cannot be varied by the arbitral tribunal.[74] This discretion of the tribunal to award the rate of interest has to be judicially exercised on the principles of fairness, equity and good conscience.[75] The tribunal therefore has to bear in mind that 'the purpose of interest is to compensate the successful party for not having had at his disposal the amount awarded for a period of time.[76]

4.3.1.3. Interest *Pendente Lite:*

The question as to whether the arbitration tribunal has the power to award interest *pendente lite* generated a lot of decisional grist. In *Secretary, Irrigation Department, Orissa v DC Roy,*[77] *the arbitration agreement was silent* as to the award of interest. It did not provide for grant of such interest nor did it prohibit such grant. In this fact-situation the Supreme Court held to decide the question as to whether the arbitrator has the power to award interest *pendent elite*, and if so, on what principles. On a conspectus of the earlier authorities, the court stated the following principles:

(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it

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71 *S. Kumar v. D.D.A.* (2003) 1 Arb LR 665 (Del).

72 Explanation of section 38 of the Arbitration Act, 2001 clarifies the word 'Bank Rate' under this sub-section which means the rate of interest as determined by the Bangladesh Bank from time to time.

73 *M/s. Bax Shipping Line v Bangladesh Water Development Board & another,* 7 MLR (AD) 37; *U.O.I. v. Arctic India* (2006) 4 RAJ 223 (Cal DB).

74 *Maharashtra Apex Corpn. Ltd. v. Sandesh Kumar* AIR 2006 Kant 138.

75 *Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.* (2007) 8 SCC 466.

76 *Russell on Arbitration,* twenty-first edn, 1997, p. 296, para 6-144.

77 (1992) 1 SCC 508, 532-33.

by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of the Code of Civil Procedure, 1908 and there is no reason or principle to hold otherwise in the case of arbitration.

(ii) An arbitrator is an alternative form for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest *pendent elite*, the party claiming it would have to approach the court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.

(iii) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. All the same, the agreement must be inconformity with the law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

(iv) Over the years, the courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest *pendene lite*. *Thawardas*[78] has not been followed in the later decisions of this court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until *Jena case*[79] almost all the courts upheld the power of the arbitrator to award interest *pendent elite*. Continuity and certainty is a highly desirable feature of law.

(v) Interest *pendent elite* is not a matter of substantive law, like interest for the period anterior to reference. For doing complete justice between the parties, such power has always been inferred.

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78 *Seth Thawardas Pherumal v Union of India* AIR 1955 SC 468.

79 *Executive Engineer (Irrigation) Balimela v Abhaduta Jena* (1988) 1 SCC 418, 435.

4.3.2. Costs of Arbitration: Cost of Award and Cost of Reference

There was no specific provision in the Arbitration Act of 1940, with respect to awarding costs by the arbitral tribunal. The costs used to be awarded on general principles of law. Even in the UNCITRAL Model Law, there is no provision for awarding costs. Article 38 of the UNCITRAL Arbitration Rules requires the arbitral tribunal to fix the costs of arbitration in its award and defines the term 'costs'. Besides, there are ICC Rules, AAA Rules, LCIA Rules, SCC Rules and WIPO Rules, which authorizes the arbitral tribunal to fix costs of arbitration.

Under the Arbitration Act of 2001, the entire gamut of costs is covered in section 38(7). Subject to an agreement between the parties to the contrary, the tribunal is required to fix the costs of arbitration.[80] It further requires the tribunal to specify the party entitled to costs; the party who shall pay the costs; the amount of costs; or method of determination of determining that amount, and the manner in which the costs shall be paid.[81] It also defines the term 'costs' used in the expression 'costs of an arbitration' in the Explanation of the sub-section.

Before the enactment of this Act, there used to be a traditional distinction between 'costs of award' and 'costs of reference'. The former, broadly referred to the costs relating to administration of the arbitration and the latter referred to the costs incurred by the parties in preparation and presentation of their respective cases before the arbitral tribunal. This distinction, in practice, was relevant because usually tribunals used to assess the 'costs of the awârd' on a lump sum basis while the 'costs of reference' were awarded as agreed or taxed.[82]

4.3.2.1. Costs of the Award: Tribunal-Related Costs

The costs of the award are the expenses incurred for setting up and administration of the arbitration. Largely, these expenses are incurred for payment of the fees and expenses of the arbitrators and witnesses. They also include any other expenses incurred in connection with the arbitral proceedings and the arbitral award. These are termed as the 'costs of the award'. These are 'tribunal- related costs'.

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80 Section 38(7) (a), the Arbitration Act, 2001; *Prasar Bharati v. Stracon Ltd.* (2004) 3 RAJ 660 (Del).

81 Section 38(7) (b), ibid.

82 *Russell on Arbitration,* twenty-first edn, 1997, p. 300, para 6-155.

4.3.2.2. Costs of Reference: Party-Related Costs

The 'costs of reference' comprises of the expenses incurred for legal fees payable by the parties to their lawyers, other professionals and experts. They also include any fees payable to an arbitral institution for administration and supervision of the arbitration. These are the expenses incurred by the parties for preparation and presentation of their respective cases before the tribunal, generally termed as 'costs of reference'. These are the 'party- related costs'.

Sometimes the term 'costs of reference' was given wider connotation so as to include even the 'costs of the award' viz, all costs incurred in connection with the arbitration. These two terms are now been conflated to a single entity called the 'costs of arbitration'. The Arbitration Act 2001 has used the compendious phrase 'costs of arbitration' comprehending both the 'cost of award' and 'cost of reference'. The Explanation to section 38(7) defined the term 'costs' used in the expression 'costs of arbitration' to mean reasonable costs relating to –

(i) the fees and expenses of the arbitrators and witnesses,
(ii) legal fees and expenses,
(iii) any administration fees of the institution supervising the arbitration,
(iv) any other expenses incurred in connection with the arbitral proceedings and arbitral award.

4.3.2.3. Fees and Expenses of the Tribunal:

In the absence of any agreement by the parties to the contrary, the fees and expenses of the arbitrators have to be determined by the arbitral tribunal itself.[83] In exercising this jurisdiction, the tribunal has to perform a very delicate task particularly where the tribunal comprises of a sole arbitrator.

This responsibility has to be discharged with utmost sense of objective detachment. The tribunal's power to determine costs includes the power to determine the extent to which its own fees and expenses should be awarded. An arbitrator occupies a position of trust in respect to the parties. In charging for expenses and services he must be governed by the same high standards of honor and integrity as applies to legal and other professions. He must endeavor to keep the charges and expenses

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[83] Section 38(7) (a).

reasonable and commensurate with the nature of the services rendered by him. To avoid embarrassment of determining its own costs, it is wise to determine the level of fees of the members of the tribunal and the relevant expenses in an express agreement with the parties not later than the time of the tribunal's appointment. This protects a party from liability for the high level of fees of the arbitrator appointed by the other party, for which excess the appointing party remains liable to the arbitrator.[84]

In the absence of any express agreement about fees and expenses, the tribunal has to infer from the appointment of an arbitrator that he is entitled to reasonable fees for his services and the expenses incurred by him. However, from the appointment of an arbitrator it cannot be implied that he can increase his fees at the tie of awarding costs merely because the arbitration continued over a long period. The law of contract does not permit an arbitrator to impose an increase in its fees at the time of awarding costs. On the other hand, an attempt to increase fees while awarding costs is apt to justify the allegation of bias and vitiate the award as violative of the requirements of section 23.[85]

4.3.2.4. Reasonable Costs:

The definition of the term 'cost' in the Explanation to section 31(7) relating to the expenses incurred as specified in this provision, is preambled with the significant phrase 'reasonable costs relating to such expenses. The expression 'reasonable' has been judicially defined in the following words- 'we called that action reasonable which an informed, intelligent, just-minded, civilized man could rationally favor.[86] Socially, in contrast to logic there is common sense, or still better the spirit of reasonableness...the highest and sanest ideal of human culture and the reasonable man as the highest type of cultivated human being. No one can be perfect; he can only aim at being a likeable, reasonable being. The tribunal has to assess all the fees and expenses claimed, for determining the 'costs of arbitration' bearing in mind these guidelines.[87]

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84 *Russell on Arbitration,* twenty-first edn, 1997, p. 136-37, para 4-090.

85 Malhotra, O P; *The Law and Practice of Arbitration and Conciliation*, first edn, LexisNexis(A division of Reed Elsevier India Pvt. Ltd.), New Delhi, India, 2002, p. 728.

86 *Quaker City Cab Co v Penna* (1928) 277 US 389, 406.

87 Lin Yutang, *The Importance of Living,* Reynal & Hitchcock, New York, 1937, p 421.

4.3.2.5. Party Autonomy to Determine the Mode and Manner of Payment of Costs:

The parties are at liberty to agree upon the quantum, apportionment and determination of the mode and manner of payment of costs. An agreement between the parties with respect to payment of costs, even if not communicated to the tribunal, will prevail over the award ordering that each party should bear his own costs. However, if the administration of arbitration is entrusted to an arbitral institution, the problems relating to such arbitration will be dealt with according to the rules of the institution.[88] The arbitral tribunal must confine its attention strictly to facts connected with or leading up to the arbitration which have been proved before it or which it has itself observed during the arbitration proceedings and must not take into account consideration extraneous to the dispute, such as the prejudice of race or religion or sympathy with the unsuccessful party.[89] Though the expenses are incurred indirectly, they may far more exceed the expenses directly in arbitrations, particularly international commercial arbitrations involving large stakes. If these expenses are reckoned, perhaps, such arbitration may be much more costly than court litigation. Like litigation, even in arbitration, ultimately, as a loser is not a winner, even a winner is not a winner.[90]

4.3.3. Enforcement of Arbitral Award:

Prior to the Arbitration Act of 1940, an award could be executed in the same manner, to the same extent and subject to the same limitations as a decree of the court. However, under the Arbitration Act 1940, an award could be enforced by filing it in the court and obtaining a judgment and decree on it. Therefore, the order in execution of an award was appealable to the same extent as in execution of a decree.[91]

The parties to an arbitration agreement impliedly promise to one another to perform a valid award.[92] If the award is not performed by the losing party, the successful claimant can enforce it 'in the same manner as if it were a decree of the court', under the Code of Civil Procedure 1908. An arbitral award represents an agreement made between the parties, and is

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88 *Mansfield v Robinson* (1928) 2 KB 353. *malhotra 729.*

89 Mustill and Boyd, *Commercial Arbitration*, second edn, 1989, p 395.

90 Malhotra, O P; *The Law and Practice of Arbitration and Conciliation*, first edn, LexisNexis(A division of Reed Elsevier India Pvt. Ltd.), New Delhi, India, 2002, p. 728.

91 *Kanhaya Lal Cauba v Peoples Bank of Norther India* AIR 1934 Lah 49.

92 Mustill and Boyd, *Commercial Arbitration*, second edn, 1989, p 417.

no more and is no less enforceable than any agreement made between the parties.[93] Section 44 provides the summary procedure for enforcement of an award made under this Act; this is because the object of arbitration would be defeated if the successful claimant, having succeeded in an arbitration, had again to litigate to enforce his agreement. The parliament, therefore, has provided summary procedure excluding court intervention.

Generally, the arbitral awards are implemented without resorting to execution proceedings. This procedure, however, is available only where the arbitral award emanates from an arbitration conducted pursuant to an arbitration agreement within the meaning of section 2(n) and section 9 of the Act. If the arbitration agreement, on which the arbitration is based, is *de hors* the statutory definition, the procedure postulated by section 44 will not be available because the provisions of this Act will not be applicable to such agreement. The award creates a new right or rights in favour of the successful party, which he can enforce in the courts in substitution for the rights upon which the claim or the defence respectively were founded. The award has two further consequences. First, it precludes either party from contradicting the decision of the arbitrator on any issue decided by the award, and also upon any issue that was within the jurisdiction of the arbitrator to decide but which, whether deliberately or accidentally, he was not asked to decide. Secondly, the award can operate to bar the claimant, whether successful or unsuccessful, from bringing the same claim again in a subsequent arbitration or action.[94]

4.3.3.1. International Commercial Arbitration:

An award relating from an international commercial arbitration will have to be enforced according to the international treaties and conventions. Important regional and international treaties and conventions relate to the recognition and enforcement of foreign arbitral awards. The New York Convention 1958 is one of the most widely used conventions for recognition and enforcement of foreign awards. It sets forth the procedure to be followed for this purpose, whilst specifying the limited grounds on which recognition and enforcement of such awards may be refused by a court of the contracting state.[95]

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93 Bernstein, *Handbook of Arbitration Practice,* third edn, 1998, p 260, para 2-883.

94 Bernstein, *Handbook of Arbitration Practice,* third edn, 1998, p 259.

95 Redfern and Hunter, *Law and Practice of International Commercial Arbitration,* third edn, 1999, p 10, para 1-15

However, Section 45 of the Arbitration Act 2001 provides that unless there is any of the ground enumerated under section 46 for refusal, any foreign award shall be executed upon an application made to the Court of the District Judge, Dhaka by any party in accordance with the Provision of the Code of Civil Procedure 1908 as if it were a decree of the Court.[96]

4.3.3.2. Time limit:

An award can be enforced only after 'the time for making an application to set aside the arbitral award[97] under section 42 has expired or such application having been made has been refused'.[98] An application to the court for setting aside the award has to be made within sixty days from the date on which the applicant had received the arbitral award.[99] The expression 'such application having been made has been refused' implies that if the parties making the application fail to proof the grounds as enumerated in section 43(1) (a)[100] or fail to satisfy the Court or the High

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96 *Banerjee v M.N. Bhagwata* (2002) 3 Arb LR 113 (Gau).

97 *Adamjee Sons Ltd. v Jiban Bima Corporation,* 45 DLR 89 ; *A Latif and Company Ltd. Project Director P.L. 480 LGED & others,* 9 MLR (HC) 137; *Chittagong Steel Mills Ltd. & another v M/s MEC, Dhaka 7 others,* 10 MLR (HC) 113.

98 *Morgan Securities v Modi Rubber Ltd.* AIR 2007 SC 183; *NALCO v Pressteel & Foundations Ltd.* (2004) 1 RAJ 1; *Vipul Agarwal v Atul Kanodia* AIR 2004 All 205; *City Scope Developers Ltd. v Alka Builders* (2000) 1 Cal HN 381; *Delta Constn. V Narmada Cement* (2002) 2 Arb LR 47 (Bom).

99 Section 42, the Arbitration Act, 2001.

100 An arbitral award may be set aside if the party making the application furnishes the proof that –

(i) a party to the arbitration agreement was under some incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it ;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable due to some reasonable causes to present his case;

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or it contains decision on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which, contains decisions on matters not submitted to arbitration may be set aside;

Court Division, as the case may be, about the matter as stated in section 43(1) (b),[101] the application for setting aside the arbitral award may be refused. However, in a case it was held that an award can be enforced even if the appeal against the order refusing to set aside the award is pending.[102] Thus, an award, which has become 'final and binding', can be enforced in accordance with the provision of Part II and Order 21 of the Code of Civil Procedure 1908.

4.3.3.3. Decree of the Court:

The expression 'decree' has been defined in section 2(2) of the Code of Civil Procedure 1908 in the following words-

'Decree' means the formal expression of an adjudication, which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include-

(a) any adjudication from which an appeal lies in an appeal from an order, or

(b) any order of dismissal for default.

Explanation: A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of this Act.

[101] The Court or the High Court Division, as the case may be, is satisfied that-

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force in Bangladesh;

(ii) the arbitral award is prima facie opposed to the law for the time being in force in Bangladesh;

(iii) the arbitral award is in conflict with the public policy of Bangladesh; or

(iv) the arbitral award is induced or affected by fraud or corruption.

[102] *Vipul Agarwal v Atul Kanodia* AIR 2004 All 205.

4.3.3.4. Ex- Parte Decree:

Section 35(4) provides that if without sufficient cause a party fails to attend or be represented at an oral hearing of which due notice is given or where matters are to be dealt with in writing fails, after due notice, to submit written evidence or make written submissions, the arbitral tribunal may continue the proceedings in the absence of that party or , as the case may be, without any written evidence or submissions on his behalf, and may make an award on the basis of the evidence before it. The ex-parte award made by the tribunal in such proceedings will be enforceable under section 44.

4.3.3.5. Settlement Award:

From a juxtaposition of section 2(b) and section 22, it would appear that the settlement award shall be enforced in the same manner as if it were a decree made by a court having jurisdiction to decide questions forming the subject-matter of the arbitration if the same had been the subject matter of the suit. Section 22 has been designed to encourage settlement of a dispute, with the agreement of the parties by alternative methods of dispute resolution by using mediation, conciliation or any other procedures at any time during the arbitral proceedings.[103] The settlement arrived at between the parties will be recorded by the tribunal 'in the form of an arbitral award on agreed terms'.[104] The award on agreed terms shall be made in accordance with section 38 stating that it is an arbitral award on agreed terms[105] and such award shall have the same status and effect as any other arbitral award on the substance of the dispute.[106]Such award shall be enforceable under section 44 in the same manner as if it were a decree of the court.

4.3.3.6. Executing Court:

From the relevant provisions of the Code of Civil Procedure 1908, [107] it would appear that the court which can entertain a suit with respect to the subject-matter of the dispute in arbitration alone can exercise the executing power under section 44 of this Act. This is implied in the language of section 44 itself. Explanation to section 44 provides that the

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103 Section 22(1), the Arbitration Act, 2001.
104 Section 22(2), ibid.
105 Section 22(3), ibid.
106 Section 22(4), ibid.
107 Sections 14, 15 to 20 and section 38 of the Code of Civil Procedure, 1908.

expression 'court' in this section means the court within the local limits of whose jurisdiction the arbitral award has been finally made and signed and in case of enforcement of foreign arbitral awards under section 45 the concerned court is the District Judges Court exercising the jurisdiction with in the district of Dhaka for the purpose of this section.[108]

4.3.4. Appeals in Respect of Certain Matters:

In the arbitration Act, 1940 section 39 contained provisions of appeal against certain orders in different tiers in the hierarchy of the ordinary courts.[109] Section 48 of newly enacted Arbitration Act, 2001 provides for appeal only to the High Court Division against certain specific orders[110] passed by the Court of District Judge. The orders against which appeal lies to the High Court Division include an order made under section 42(1) by the District Judge setting aside or refusing to set-aside an arbitral award[111] other than international commercial award,[112] against an order

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[108] Explanation to Section 45, the Arbitration Act, 2001.

[109] *MLR on Law of Arbitration,* first edn, Mainstream Printing and Publications, Dhaka, Bangladesh, 2005, p. 93.

[110] *Great Eastern Shipping Co. v Board of Trustee Port of Calcutta* (2005) 1 Arb LR 389 (Cal DB); *Sudarshan Chopra v Vijaya* Chopra (2003) 117 Comp Cas 660 (P&H); *U.O.I. v Monoranjan Mondal* (2000) 1 Arb LR 326 (Cal).

[111] Section 43(1): Grounds for setting aside arbitral award- An arbitral award may be set aside if the party making the application furnishes the proof that –

(i) a party to the arbitration agreement was under some incapacity;
(ii) the arbitration agreement is not valid under the law to which the parties have subjected it ;
(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable due to some reasonable causes to present his case;
(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or it contains decision on matters beyond the scope of the submission to arbitration;
Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which, contains decisions on matters not submitted to arbitration may be set aside;
(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or, in the

passed by the District Judge[113] refusing to enforce an arbitral award under section 44,[114] against an order passed by the District Judge, Dhaka under section 45 refusing to recognize or enforce[115] any foreign arbitral

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absence of such agreement, was not in accordance with the provisions of this Act.

112 Section 48(a), the Arbitration Act, 2001.

113 According to Explanation to Section 44 of the Arbitration Act, 2001, here the District Judge shall be the person under whose local jurisdiction the arbitral award is finally made and signed.

114 Section 48(b), the Arbitration Act, 2001.

115 Section 46(1) provides the grounds for refusing recognition or execution of foreign arbitral awards stating that- recognition or execution of foreign arbitral awards may be refused only on the following grounds, namely-

a. if the party against whom it is invoked furnishes proof to the Court that-

(i) a party to the arbitration agreement was under some incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it ;

(iii) the party against whom it is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable due to some reasonable causes to present his case;

(iv) the concerned foreign arbitral award contains decision on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those

not so submitted, only that part of the arbitral award which, contains decisions on matters submitted to arbitration may be recognized and enforced;

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, in the absence of such agreement, was not in accordance with the law of the country where the arbitration took place;

(vi) the award has not yet become binding on the parties, or has been set-aside or suspended by a competent authority of the country in which, or under the law of which, that award was made; or

b. the court in which recognition or execution of the foreign arbitral award is sought, finds that-

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force in Bangladesh; or

(ii) the recognition and execution of the foreign arbitral award is in conflict with the public policy of Bangladesh.

award.[116] However, an appeal against the decision of the High Court Division shall lie to the Appellate Division of the Supreme Court as per Article 103 of the Constitution of the People's Republic of Bangladesh.

4.3.4.1. Time for Preferring Appeal:

There is no provision in this section specifying the period of limitation within which a party is required to appeal from the decision of the court. However, section 55(1) makes the Limitation Act applicable to the arbitrations subject to the provisions of this Act in the same manner as they apply to the court proceedings. By virtue of this provision, an appeal to the High Court Division from any decree or order has to be filed within 90 days from the date of the decree or order.[117] Under sub-section (3), the court can extend the period of limitation in appropriate cases where it thinks proper for the interest of justice. Sub-section (4) provides for the exclusion of the period between the commencement of the arbitration under section 27 and the date of the order of the court setting aside the award in computing the period of limitation.

4.3.5. Fixing the Amount of Deposit as an Advance for the Cost of Arbitration:

This provision appears to have been inspired by the modern practice in various jurisdictions, particularly the arbitral institutions, authorizing the arbitral tribunal to require the parties to make a deposit, as an advance for costs of arbitration. In many instances nowadays, particularly in the case of long arbitrations, the arbitrator makes sure of his fees, either by causing them to be secured by a deposit or otherwise, or by requiring payments on account. It is common practice for arbitration institutions and arbitral tribunals to make steps to secure their fees in advance.[118] This purpose is achieved by conferring power on the arbitral tribunals to call for advance payments for covering the costs, which it expects to be incurred in respect of the arbitration of the claim submitted. For judicious exercise of this power, it will be opportune that the question of deposits is discussed not only with members of the tribunal but with the parties to the arbitration to assess the amount of work and time involved

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116 Section 48(c), the Arbitration Act, 2001.

117 *O.N.G.C. v Jagson Int'l. Ltd.*(2005) 3 RAJ 555 (Bom).

118 *Rickmers Verwulting Gmb. H. v I.O.C.* (1998) 6 scale 197; Eacom's *Controls Ltd. v Boiey Controls Co.* AIR 1998 Del 365; *S.T.C. v Vishwa Oil Products* (1992) 2 Arb LR 191.

from which a fair estimate of the costs may be ascertainable. [119] In institutional arbitrations, the parties are required to deposit with the institution supervising the arbitration an estimated amount as advance, on account of arbitrators' fees and administrative expenses of the arbitration.[120] If along with the response to the claim of the claimant, the respondent submits a counter-claim, the tribunal may fix separate amount of deposit for the counter-claim as well. Thus, the deposit for the claim and the deposit for the counter-claim will be separately assessed and fixed by the tribunal in consonance with their respective incidents.[121] The mandate of this provision requires that the amount of deposit towards the claim and counter claim 'shall be payable in equal share by the parties'. If however, one party fails to pay his share of the deposit, the other party, in the exigencies of the situation, with a view to facilitate further movement of arbitral proceedings, has the option to pay the share of the defaulting party as well.[122] Thus, the liability of the parties to pay the fee of the arbitrators and the cost of arbitration is joint and several.

4.3.5.1. Consequence of Non-Deposit:

In a possible, though normally unlikely situation, where the parties fail to deposit the amounts as assessed and required to be deposited, the arbitral tribunal may terminate the arbitral proceedings once and for all. After the proceedings are terminated, the tribunal becomes *functus officio*, in respect of the claim or counter-claim, as the case may be.

Alternatively, it may refuse to make an award to the parties. This is known as lien on the arbitral award sanctioned by section 50 of the Arbitration Act, 2001. This is now almost a universal method for securing payment of any unpaid costs of arbitration that the tribunal has a mandatory lien on the arbitral award. This right, however, is subject to two elements namely,[123] (i) an arbitration agreement by the parties to the contrary i.e the party autonomy and (ii) the provisions of sub-section (1) i.e. court intervention. The traditional method by which arbitral tribunals have secured payment has been to with hold the award from the party

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119 Malhotra, O P; *The Law and Practice of Arbitration and Conciliation*, first edn, LexisNexis(A division of Reed Elsevier India Pvt. Ltd.), New Delhi, India, 2002, p. 861.

120 Bernstein, *Handbook of Arbitration Practice,* third edn, 1998, p 286.

121 Proviso of section 49(1), the Arbitration Act, 2001.

122 Section 49(2), ibid.

123 Section 50(4), ibid.

seeking to take it up until any outstanding fees have been paid, effectively to exercise a lien over the award.[124]

4.3.5.2. Judicial Intervention in Unreasonably Exorbitant or Unwarranted Costs:

If a party feels that the costs of arbitration demanded by the tribunal are unreasonably exorbitant or unwarranted, it may make an application to the court for directions to deliver the award. On receipt of such application, in the first instance, the court will order the applicant to deposit the entire amount of costs, as demanded by the tribunal, into the court. After the amount demanded by the arbitral tribunal has been deposited, the court may hold such enquiry into the matter as it thinks fit, and further order that out of the money deposited by the applicant into the court, such amount as it may consider reasonable should be paid to the tribunal and the balance money, if any, shall be refunded to the applicant.[125]

However, if the fee demanded by the tribunal has been fixed by written agreement between the applicant and the arbitral tribunal, the provisions of section 50(1) won't be applicable. In other words, where the parties have agreed to the level of fees with the tribunal, the agreement cannot be reviewed by the court. In the absence of such agreement, in an application under section 50(1) with respect to the fee of the arbitral tribunal and cost of the arbitration, by default, the arbitral tribunal shall be entitled to appear and make its presentation contesting the application.[126] If a question with respect to the costs of arbitration demanded by the arbitral tribunal arises before the court and the award does not contain sufficient provisions concerning them, the court has the power to make such orders as it thinks fit in this connection.[127]

However, the adjustment procedures of the court help a party who has not agreed to the level of fees with the tribunal is unable to obtain delivery of the award without paying those fees in full because the tribunal is exercising its lien, and claims that the tribunal's demand is excessive. There is authority that a party who has paid an excessive sum

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124 *Russell on Arbitration,* twenty-first edn, 1997, p 140, para 4-099.
125 Section 50(1), the Arbitration Act, 2001.
126 Section 50(2), ibid.
127 Section 50(3), ibid.

to obtain delivery of an award may recover the excess beyond what is reasonable in an action against the tribunal in restitution.[128]

4.3.6. Non-Discharge of Arbitration Agreement by Death of a Party:

This section re-enacts the provisions of section 6 of the Arbitration Act 1940 under the same heading-arbitration agreement not to be discharged by death of a party thereto with minor variations like the words 'revoked' and 'authority' in 1940's Act have been replaced with the words 'affected' and 'mandate' in section 51(1)(b) of the new Act.

4.3.6.1. Effect of Death on Arbitration Agreement:

The provisions of this section which provide that an arbitration agreement is not discharged by the death of a party to the arbitration agreement[129] either with respect of the deceased or any other party unless otherwise agreed by the parties is mandatory. After the death of a party, the arbitration agreement is enforceable by or against the legal representatives of the deceased[130] provided that the right to sue or be sued survives.

4.3.6.2. Effect of Death on Mandate of Arbitrator:

The death of a party will also not affect the mandate of an arbitrator whom he had appointed unless otherwise agreed by the parties.[131] This is because an arbitrator appointed by a party is not a representative of the party appointing him. However, this is subject to the operation of any law relating to abatement of right through the death of a person.[132]

4.3.6.3. Effect of Operation of Other Law:

The provisions of this section will not affect the operation of any law relating to abatement of right through the death of a person codifies the maxim *actio personalis moritur cum persona*-the cause of action dies with a person. That is to say, when the right of a party to sue or be sued does not survive, the arbitration agreement will be discharged or if the reference has already been made, the arbitrators mandate will be terminated on the death of that party.[133] Conversely, if the right is not extinguished by the death of the party in the arbitration, the arbitration

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128 *Russell on Arbitration,* twenty-first edn, 1997, p 140-41, para 4-100.

129 *Chandra Nath v Suresh Jhalani* (1999) 8 SCC 628.

130 Section 51(1) (a), the Arbitration Act, 2001.

131 Section 51(1) (b), ibid,; *Brimco Bricks v Sitaram Agarwal* AIR 1998 RAJ 71.

132 Section 51(2), ibid.

133 *Balika Devi v Kedar Nath Puri* AIR 1956 All 377.

agreement or the arbitral proceedings, as the case may be, shall not be terminated. The deceased party's legal representatives will have to be brought on record as parties to the arbitration in order to make the award binding on them.[134] A legal representative[135] may submit to arbitration any matter relating to the state of the deceased or may enter into agreements without being personally liable, provided he acts in good faith. It is the duty of the arbitrator to serve notice on the legal representatives of the deceased parties calling upon them to appear before him and to continue with the reference.[136] The legal representative must be given reasonable time to participate in the proceedings. On being notified, the representatives of the deceased have the right to oppose the arbitral proceedings. If these requirements of due process are not complied with, the legal representative is not bound by the award resulting from the arbitral proceedings.[137] In a case where the arbitral proceedings concluded before the death of a party and nothing remains further to be done by the arbitrator except making the award, the award would be binding on the legal representatives of the deceased party.[138] However, before making the award, the arbitral tribunal will require the legal representatives of the deceased party to establish his right to enforce the award.[139]

4.3.7. Rights Regarding Bankruptcy Proceedings:

In a case where the arbitration clause in a contract, to which an insolvent is a party, provides that any dispute arising out of or in connection with such contract, shall be submitted to arbitration, it will be enforced by or against the receiver,[140] in so far as it relates to any such dispute, if he adopts the contract.[141] That is to say, if the receiver does not adopt the contract, the arbitration clause cannot be enforced by or against the

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134 *Ramniwas Jhunjhunwalla v Benarshi L Jhunjhunwalla* AIR 1968 Cal 314.

135 Section 2(a) of the Arbitration Act, 2001 defines 'legal representative' meaning 'a person who in law represent the estate of a deceased person, and includes any person who intermeddles with the state of the deceased and where a party acts in a representative character the person on whom the estate devolves on the death of the party so acting.

136 *Lilawati v U.O.I.* (2004) 3 RAJ 214 (Gau).

137 *Tirtha Lal v Bhusan Moye Dasi* AIR 1949 FC 195.

138 *Beni Datt v Baijnath* AIR 1938 Odhu 125.

139 *Shivchandraj Jhunjhunwalla v Panno Bibi* AIR 1943 Bom 197.

140 According to Explanation to section 52 of the Arbitration Act, 2001, the expression 'receiver' means the receiver as explained in clause (4) of section 2 of the Bankruptcy Act.

141 Section 52(1), the Arbitration Act, 2001.

receiver. An insolvent is not deprived of his right to the contract, but his estates passes to the receiver in insolvency proceedings subject to the insolvency legislation. From the language of the statute, it is evident that an insolvent can refer any dispute arising out of or in connection with the contract containing the arbitration clause. However, a receiver cannot enter into a fresh agreement.[142] If a party becomes insolvent during the course of the arbitration proceedings, the resulting award will not be binding on the receiver if he has not been given notice.

4.3.7.1. Judicial Intervention in Referring the Matter to Arbitration:

In a case where a person who has been adjudged an insolvent had become a party to an arbitration agreement, before the commencement of the insolvency proceedings, and any matter to which the agreement applies is required to be determined in connection with, or for the purpose of bankruptcy proceedings, then, if the case is one to which sub-section (1) does not apply, any other party or the receiver may apply to the judicial authority having jurisdiction in the bankruptcy proceedings for an order directing that the matter in question shall be submitted to arbitration in accordance with the arbitration agreement and the Bankruptcy Court may, if it is of opinion that, having regard to all circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.[143]

4.3.8. Court Having Exclusive Jurisdiction over the Arbitral Proceedings:

4.3.8.1. Jurisdiction over Arbitral Proceedings:

Section 53 opens with a *non obstante* clause and is comprehensive in scope. That is to say the provisions of this section will have overriding effect on anything contained in this Act or any other law for the time being in force, 'where with respect to an arbitration agreement any application under this Act has been made in a court, that court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that court and in no other court.[144] To that extent, it carves out an

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142 *Re Debra Dun Mussoorie Tramway Co Ltd* AIR 1928 All 553.

143 Section 52(2)(a) and (b), the Arbitration Act, 2001.

144 Section 53(a) & (b), ibid.; *Punjab Land Development & Reclamation Corpn v Jai Shankar Transport* (2001) 1 Arb LR 474, 476 (P&H); *DLF Industries Ltd v Standard Chartered Bank* AIR 1999 Del 11; *ITI Ltd v District Judge, Allahabad*

exception to the general rule of jurisdiction of the court in which an application may be filed elsewhere provided in this Act in respect of the proceedings referred therein. [145]

The use of the expression 'with respect to an arbitration agreement' in section 53 of this Act makes it clear that where, at any time, after the arbitration agreement has come into existence, any one of the parties makes an application to a court 'with respect to the arbitration agreement', that court alone[146] shall have the jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings'[147] to the exclusion of any other court. Sections 7A, 10 of this Act contemplate pre-award applications to be filed before submission of the dispute to arbitration. Post-award applications are to be filed under section 42 for setting aside the award and under section 50, in connection with the lien of the arbitrator. Therefore, if an application has been filed in a court under section 10, all subsequent applications will have to be filed in the same court. [148]However, courts cannot assume jurisdiction where the statute contains a specific section conferring jurisdiction on a particular court to decide a matter. Such a provision automatically ousts jurisdiction of other courts.[149]

This section has to be read with the definition of 'court' in section 2(b)[150] along with the explanations at the end of the sections 15,[151] 43,[152] 44[153]

AIR 1998 All 313, 316; *Sirojexport Co Ltd v Indian Oil Corpn Ltd* AIR 1997 RAJ 120;

145 Malhotra, O P; *The Law and Practice of Arbitration and Conciliation*, first edn, LexisNexis(A division of Reed Elsevier India Pvt. Ltd.), New Delhi, India, 2002, p. 873.

146 *Pandey & Co v State of Bihar* (2006) 2 RAJ 285 (Pat DB); *Sasken Communications v Prima Telesystems* (2002) 3 Arb LR 388 (Del).

147 *Amarchand v U.O.I.* (2004) 2 Arb LR 231 (P&H).

148 Malhotra, O P; *The Law and Practice of Arbitration and Conciliation*, first edn, LexisNexis(A division of Reed Elsevier India Pvt. Ltd.), New Delhi, India, 2002, p. 874.

149 *Rite Approach Group v Rosoborow Export* (2006) 1 SCC 206.

150 'Court' means District Judge's Court and includes Additional Judge's Court appointed by the Government for discharging the functions of District Judge's Court under this Act through Gazette Notification.

151 Explanation to section 15 provides that 'District Judge' means District Judge within whose local jurisdiction the concerned arbitration agreement has been entered into.

and 45[154] respectively where the expression 'court' means the District Judge's Court within whose local jurisdiction the concerned arbitration agreement has been entered into or within the local limits of whose jurisdiction the arbitral award has been finally made and signed or District Judge's Court exercising the jurisdiction within the district of Dhaka.

4.3.9. Applicability of the Limitation Act, 1908 to Arbitrations:

Section 55 makes the Limitation Act applicable to arbitrations 'subject to' the provisions of the Arbitration Act, 2001 as it applies to proceedings in court.[155] That is to say, the provisions of the Limitation Act shall not apply where the special enactment makes a specific provision prescribing period of limitation or for condonation of delay, but it may apply where there is no specific prohibition and the provision would advance the cause of justice.[156] This indicates that the statute of limitation applies to the arbitral proceedings as well as to the proceeding in court. For the purpose of section 55 and the limitation act, an arbitration shall be deemed to have commenced on the date referred to in section 27,[157] which provides that the parties have the opinion to agree upon the point of time for commencement of the arbitral proceedings. In the absence of such agreement, by default, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by any party to the agreement or any party to the agreement has received from another party to the agreement a notice requiring that party to appoint an arbitral

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152 Explanation to section 43 states that the expression 'court' in this section means the court within the local limits of whose jurisdiction the arbitral award has been finally made and signed.

153 Explanation to section 44 states that the expression 'court' in this section means the court within the local limits of whose jurisdiction the arbitral award has been finally made and signed.

154 Explanation to section 45 provides that the expression 'court' shall mean the District Judge's Court exercising the jurisdiction within the district of Dhaka for the purposes of this section.

155 Section 55(1), the Arbitration Act, 2001.

156 *State of Goa v Western Builders* (2006) 6 SCC 293; *U.O.I. v Shring Construction Co* (2006) 8 SCC 18: (2006) 3 RAJ 580 (SC); *Anus Khader v Abdul Nasar* (2000) Supp Arb LR 382.

157 Section 55(2), the Arbitration Act, 2001.

tribunal or to join or concur in or approve the appointment of, an arbitral tribunal in relation to the dispute.[158]

4.3.9.1. Extension of Limitation Period:

Section 55(3) provides for the extension of the period of limitation as the interest of justice may require, for such period on such terms, if any, as the court thinks proper. Therefore when an arbitration 'agreement to submit' , future disputes to arbitration, provides that any claim to which the agreement applies shall be barred unless some steps to commence arbitration proceedings is taken within the time fixed by the agreement, it is in the discretion of the court to extend the time for such period as it thinks proper . However, before exercising this discretion, the court must be of the opinion that, in the circumstances of the case, extension of time is required for the interest of justice. Then, notwithstanding the fact that the time limit has already expired, the court may extend the time for such period as it thinks proper and time may be granted subject to such terms, as the justice of the case may require.[159] However, the discretion to extend the time is neither automatic nor *ex officio*. It has to be granted by the court on an application being made by a party to the agreement responsible for the expiry of the prescribed time limit. In the absence of an application, the court will not entertain the request for extension of time.[160] Such party not only must promptly apply for extension after expiry of time or as soon as he comes to know of it but he must also satisfy the court that the extended time is required for the interest of justice.[161]

4.3.9.2. Computation of Time:

Section 55(4) provides that for the purpose of computing the period of limitation, where the court orders that an arbitral award be set aside, the period of time between the commencement of arbitration and the date of the order of the court setting aside the award shall be excluded. The expression 'court' used in this provision means not only the court under section 44 but it also includes the Court of Appeal under section 48. It

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158 *Hari Shankar Singhania v Gour Hari Singhania* AIR 2006 SC 2488; (2006) 4 SCC 658/679; Mir *Gulam Hasan v State* (2005) 4 RAJ 536 (J&K); *Municipal Corpn. V Jasbir Singh* (2003) 1 RAJ 420 (Del).

159 Section 55(3), the Arbitration Act, 2001.

160 *State of Gujarat v Sheth Construction Co* (1990) 1 Arb LR 387 (DB).

161 *Raymond and Reid v Grange* 1952) 2 All ER 152.

has to be borne in mind that such exclusion of time is in terms of section 55 and not under section 14 of the Limitation Act, 1908.[162]

5. Concluding Observations:

In this year i.e. in 2008, the Arbitration Act, 2001 having completed seven eventful years, enters upon the eighth year of its life. This Act as we know that with significant interpolations, adopts the Model Law in its entirety. However, as its name suggest, the Model Law is only a 'model' of law on international commercial arbitration, it is far from comprehensive leaving many important areas of arbitration law and practice unexplored since its promoters had limited their aims only to provide a model for the states desiring uniformity with harmonization in arbitration legislation. This Act, therefore, inherits all the weaknesses and shortcomings of its model. From the beginning of the enforcement, it revealed a host of problems of application and interpretation of its various provisions, which are now solving by the courts through judicial legislations. Though these are noble and benevolent predilections by the Judges, then also they should not trespass into the forbidden territory of legislation in the guise of interpretation and bend the arm of law only for adjusting equity. On the other hand, about the major disparities and deviations, one of the inexcusable disparities is related to the appointment of arbitrators in international commercial arbitration, which causes a deprivation to Bangladeshi citizens excluding them to be appointed as an arbitrator in an international commercial arbitration between a Bangladeshi and a foreign person. In allowing unrestricted freedom to appeal against certain orders, the drafter failed to imagine that it would in effect make the award inoperative which the legislature seems to have overlooked its implications, which among the other things defeat the purpose of such an order. Therefore, it is the duty of the Legislature to fix this leaking umbrella and remove all the lacunas through radical amendments with the assistance of highly powered Commission constituted of the available jurists, judges, professors, legislators and other persons who are well-versed in the subject and guidance may even be sought from the English Arbitration Act, 1996 which is, in fact, a masterly product in arbitration.

Nevertheless, some outstanding provisions like, stating the law in plain and simple language, settlement other than arbitration during the arbitral proceeding, global approach of the Act making the Act and some specified provisions of the Act applicable where the place of arbitration is

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[162] *State of Goa v Western Builders* (2006) 5 SCC 274; *Jugal Kishore Asati v State of Madhay Pradesh* AIR 1979 MP 89, 93.

in or outside Bangladesh respectively, judicial intervention in unreasonably exorbitant or unwarranted costs, legal or other representation, uneven number of arbitrators, contribution in raising the parties' confidence in arbitration by guaranteeing them a formal award, covering international commercial arbitration, recognition and enforcement of foreign arbitral award and all other arbitrations of domestic nature, making provisions for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration, providing that the arbitral tribunal gives reasons for its arbitral award, ensuring that the arbitral tribunal remains with in the limits of its jurisdiction and minimizing the supervisory role of courts in the arbitral process are brining a silver lining to the cloud which, will in future, if properly implemented, makes it more responsive to contemporary requirements and represent it as an striking innovation in the specified field of arbitration.

ELIMINATION OF THE WORST FORMS OF CHILD LABOUR THROUGH LAW IN BANGLADESH: A CRITIQUE

Ridwanul Hoque*

1. Introduction

The elimination of child labour is not a purely legal issue, but rather a socio-legal issue, requiring a pluralistic and not a 'one size fits all' treatment. The fundamental premise of this paper is that, although 'law' has become a dominant mechanism in the global fight against child labour which exists everywhere in various forms and degrees, there are many limits of law vis-à-vis the elimination of the worst forms of child labour' (hereafter WFCL) in Bangladesh and elsewhere.[1]

Given that hazardous work or worst forms of labour harmfully impact the child's health and development, the elimination of the worst forms of child labour has turned out to be a universal concern. The elimination of this evil, however, is not as easy a task as it appears to be, which becomes clear when one looks at the record. Nearly or over 250 million children between 5 and 14 years of age are working world-wide, which is 20% of the total number of children of this age group, while about 45% of the working children are engaged in 'hazardous work'. The picture of working children in Asia is alarming; the region produces about 62% of world's working children.[2] To take the case of Bangladesh, which seems worse than some others, about 6.5 million children (5 to 14 years of age) of the country are working children, which constitutes 16.6% of the total labour force.[3] Of these working children, about 3.2 million are reportedly

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1 As Banu *et al* comment, "(l)egislation alone has proved insufficient for eradication of child labour in less developed countries". See Banu, Nasim *et al* (1998), below note 9, at p. 86. For a leading study of limits of law, see Allott, Antony N. 1980. *The Limits of Law*. London: Butterworths.

2 See Bangladesh Bureau of Statistics (2003), below note 4.

3 Children below the age of 15 constitute 39.9% of the total population, and 19.23% of them are engaged in work. See *UNDP Human Development Report 2006*.

engaged in labour in both rural and urban areas,[4] while about 40% of them are found in 'hazardous' occupations,[5] and approximately 20% in seriously risky or worst forms of labour.[6]

International and national efforts towards eliminating child labour have an old history.[7] Several international instruments and policies seek to address the problem of child labour including the WFCL. Most significant of these instruments have been the United Nations Convention on the Rights of the Child 1989 and the two ILO Conventions, namely, the Minimum Age Convention 1973 (No. 138) and the Worst Forms of Child Labour Convention 1999 (No. 182). These Conventions have basically sought to infuse rights-based arguments into the child labour debates, there being other important dimensions such as economic and social dimensions in the issue of child labour, analyses of which need further improvisation.[8]

In trying to analyse the complex but live issue of WFCL in Bangladesh, the present paper adopts a justice-based and socially relevant approach to the problem. My modest aim here is to revisit the issue with a practical note on the limits of law as the eliminator of WFCL, but renew focus on the role of all duty-holders, especially of the public agencies and non-government organizations.[9]

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4 See Bangladesh Bureau of Statistics (BBS). 2003. *Report on National Child Labour Survey 2002-03*. Dhaka: BBS. *See* further Khan, Mohammad Ali. 2001. *Child Labour in Dhaka City*. Dhaka: Hakkani Publishers; and International Labour Office. 2007. *Bangladesh Child Labour Data Country Brief*. Geneva: ILO.

5 Bangladesh Bureau of Statistics, *id.*

6 See the *Daily Star*, Dhaka, 10 June 2008.

7 On international legal efforts in this area see generally, Cullen, Holly. 2007. *The Role of International Law in the Elimination of Child Labor*. Leiden: Martinus Nijhoff.

8 Rights and economics perspectives have attained the central place in the recent global discourse on labour law. See Davies, A. C. L. 2004. *Perspectives on Labour Laws*. Cambridge: Cambridge University Press.

9 This is to note that existing Bangladeshi literature in this field predominantly place reliance on the law-tool in eliminating the WFCL. See, among others, Mandal, Gobinda C. and Shima Zaman. 2004. "Child Labour in Bangladesh: Facts and Laws", *The Chittagong University Journal of Law*, vol. 9: 125-42; Rahman, Wahidur. 1996. *Hazardous Child Labor in Bangladesh*. Dhaka: ILO/IPEC and Department of Labour, Government of Bangladesh; and Ahmed, A. and M. A. Quasem. 1991. *Child Labour in Bangladesh*. Dhaka: Bangladesh Institute of Development Studies. For an analysis of different

2. WFCL: The Global Legal Regime and Bangladesh's Obligations

2.1 The WFCL Convention

International efforts in eliminating the WFCL gained momentum in the 1990s. The most notable instrument seeking to achieve this objective is the ILO Convention 182, i.e., the WFCL Convention.[10] According to this Convention, WFCL comprises all forms of slavery, bonded or forced labour, the use or procurement of children for prostitution or for the production of pornography, and work which, "by its nature or the circumstances in which it is worked out, is likely to harm the health, safety or morals of children".[11] This is not an exhaustive definition, and the phenomenon of worst form of child labour continues to be a contested one particularly in developing countries. Before taking up this definitional problem concerning the WFCL, the legal regime provided for by the WFCL Convention can be analysed.

The Convention No. 182 provides both for the prohibition and effective elimination of the WFCL, requiring immediate and comprehensive actions by member states to that effect.[12] Defining the 'child' as a person under the age of 18,[13] the Convention adopts the policy that, while taking actions to eliminate the WFCL each member state will take into account free basic education of the children and removal of the children concerned from all such work followed by their rehabilitation and social integration.[14] Member states are also to address the needs of families of the concerned children. The specific obligation clause of the Convention, i.e., Article 7, provides that each member is obliged to take necessary measures effectively to enforce domestic legal provisions giving effect to the Convention. Each member-state is also mandated (i) to take effective and time-bound measures to prevent the engagement of children in the worst form of child labour, (ii) to provide direct and appropriate incentives for the removal of children from WFCL as well as for their

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genre see Banu, Nasim, Shahjahan Bhuiyan, and Smita Sabhlok. 1998. "Child Labour in Bangladesh", *International Journal of Technical Cooperation*, vol. 4(1): 83-95.

10 Formally the Convention's broad objective has been to provide for the prohibition and immediate action for the elimination of the worst forms of child labour. It entered into force on 19 November 2000.

11 *Ibid.*, Art. 3; the quoted phrases are in Art. 3 (d).

12 *Ibid.*, Art. 1.

13 *Ibid.*, Art. 2.

14 *Ibid.*, Art. 2.

rehabilitation and social integration, and (iii) to provide for appropriate education and training for children so removed.[15]

Bangladesh ratified the Worst Form Convention on 12 March 2001, and its obligations under the Convention came into effect on 12 March 2002. Like any other ratifying state, Bangladesh's obligation under this Convention is to eliminate WFCL by taking appropriate participative actions, and to effectively implement domestic legal and policy provisions giving effect to this Convention, which will, among others, prevent the engagement of children in the WFCL.[16]

2.2 The Minimum Age Convention

The Minimum Age Convention 1973 (No. 138) of the ILO, which till date remains another fundamental instrument on child labour, prescribes the minimum age of 15 for admission to employment,[17] with exceptions for the least developing countries, and for 'light work'. Under this Convention, which Bangladesh has yet to ratify,[18] a member state whose economy and educational facilities are "insufficiently developed" may provide for a minimum age of 14 years for work.[19] It further provides that minimum age for certain types of work that by their 'nature' and 'circumstances' under which they are carried out are likely to jeopardise the health, safety and morals of young persons (i.e., the worst forms of child work) must not be less than 18 years.[20] The government of a ratifying state is obliged to publish a list of these types of employment or work. By virtue of this provision, the Minimum Age Convention has virtually prohibited the engagement of children in 'hazardous' work or worst forms of labour.

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15 *Ibid.*, Art 7.2.

16 See *ibid.*, Articles 5-8, for other obligations concerning the WFCL.

17 See Art. 2, paragraph 3. This minimum age is equal to the age of compulsory schooling, if it is not less than the threshold of 15 years.

18 Bangladesh has ratified or acceded to some important minimum age Conventions such as the Convention fixing the Minimum Age for Admission to Industrial Employment (No. 59) 1937.

19 *Ibid.*, Art. 2, paragraph 4.

20 *Ibid.*, Art. 3, paragraph 1. However, Art. 3, para. 3, makes an exception that this age may be fixed at 16 when it is guaranteed that health and safety of the workers are adequately protected and they are trained of the techniques of use and consequences of faults.

2. 3 The Child Rights Convention

The next important international instrument prohibiting hazardous child labour is the UN Convention on the Rights of the Child 1989 (hereafter 'CRC'). The CRC, which has achieved a nearly universal ratification, obliges States Parties including Bangladesh, which ratified the CRC in 1991, to take legislative, administrative, social and educational measures so as to implement the child's right to be protected from economic exploitation and from performing any work that is likely to be 'hazardous' or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.[21] Thus, without using the nomenclature 'WFCL', the CRC has unequivocally established the child's right against worst form of child labour through this broad-based legal prescription.

2.4 Bangladesh's Obligation to Eliminate Child Labour under Other Human Rights Instruments

In addition to obligations under the above specific Conventions,[22] Bangladesh has certain other obligations concerning the elevation and protection of child rights under major international human rights instruments and declarations such as the Universal Declaration of Human Rights 1948,[23] the International Covenant on Civil and Political Rights 1966 (ICCPR), the International Covenant on Social, Economic, and Cultural Rights 1966 (ICESCR), and so on. Particularly, a number of obligations under the binding treaties ICCPR and ICESCR, to which Bangladesh has acceded,[24] pertain to the protection of child rights, which can be interpreted as having restricted the WFCL. For example, the ICESCR's Article 10 generally provides for the right to education, with a specific mandate for "[s]pecial measures of protection on behalf of all children and young persons without any discrimination for reasons of parentage and other conditions".

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21 The United Nations Convention on the Rights of the Child 1989, Article 32. The CRC also specifically provides for the child's rights to primary education (Art. 28), to rest and leisure (Art. 31), and to protection from sexual exploitation (Art. 34) and trafficking (Art. 35).

22 While Bangladesh has ratified some other instruments in this field such as the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography, it has yet to ratify the United Nations Convention against Transnational Organized Crime (CTOC) and related protocols.

23 Amongst others, it provides for the protection against slavery and servitude.

24 Bangladesh acceded to the ICCPR on 6 September 2000, and to the ICESCR on 5 October 1998.

It is of particular concern that although Bangladesh has ratified a number of international treaties concerning child labour and/or the protection of child rights, there is virtually no domestic statute incorporating its international obligations and commitments. This is, however, not to deny that some domestic legal provisions are largely in accord with international labour rules and standards with regard to child labour or WFCL. That, in itself, is not surely enough. It is argued that in order for Bangladesh to optimally discharge international obligations vis-à-vis child labour, there is the need for specifically incorporating them into domestic law.[25]

3. Legal Prohibition or Regulation of the WFCL in Bangladesh

In Bangladesh, there is no general statutory or constitutional prohibition of work/labour likely to harm the health, safety or morals of children less than 18 years old. The Bangladeshi Constitution and other laws, however, seek significantly to regulate the exploitative child labour or the worst forms of child labour. Below, I discuss the legal prohibition or regulation of the WFCL.

The most important document concerning the issue of child labour or the WFCL is the Constitution of the People's Republic of Bangladesh (hereafter 'the Constitution'). Although the Constitution has not directly outlawed the WFCL, it remains the edifice of state responsibility vis-à-vis the WFCL as well as of public duties concerning the general welfare of children. This is reflected in the formulation of National Children Policy 1994,[26] which is based on the recognition of the child's rights to survive, to education and physical safety, and to other social and legal rights and

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[25] It is relevant to note that against the argument that state-obligations under international human rights treaties are not enforceable without their domestic legislative incorporation, there is also an increasingly strong argument that irrespective of such local incorporation a state ratifying an international human rights treaty has a continuing duty to honour obligations there-under, specially when the obligations pertain to universally accepted human rights values. See further, Hoque, Ridwanul and Mostafa M. Naser. 2006. "The Judicial Invocation of International Human Rights Law in Bangladesh: Questing a Better Approach", *Indian Journal of International Law,* vol. 46 (2): 151-84.

[26] *See* The Government of Bangladesh. 1994. *The National Children Policy.* Dhaka: Ministry of Women and Children Affairs. The Policy proposed that there would be formed a National Children Council to monitor the implementation of children's rights and to "ensure" the implantation of the CRC. The Council has not yet been brought into being.

essential privileges. The Children Policy also categorically pledges to eradicate child labour gradually.

As per Article 14 of the Constitution of Bangladesh, a fundamental state responsibility is to protect citizens from exploitation, while Article 15 burdens the State with another fundamental responsibility to ensure basic necessities for all. Article 17 imposes a duty on the State to adopt effective measures to ensure free and compulsory primary education for children,[27] while Article 18 mandates the maintenance of public health and morality. At a more positivist level, every one including the child has the right to be protected against discrimination by the State in particular as per Article 28 of the Constitution, and by other actors generally as per the constitutional equality and legal protection clauses.

Importantly, Article 28 (4) of the Constitution, making leverage for state actions in favour of backward or underprivileged sections of society, empowers the state to employ positive discrimination through affirmative actions in order to uplift the fate and living standards of children.[28] There are other foundational constitutional values such as the prominence of the rule of law, democracy and justice in state governance and the respect for human dignity and human rights,[29] which are decisively relevant in addressing the problem of WFCL.

It is clear that the Constitution speaks for a general state duty against WFCL. But this conclusion should be balanced with possible severe social consequences likely to arise from constitutional banning of the WFCL without eradicating the root causes of children's engagement in child labour and improving the government's social service capacity. This perplexing legal conundrum becomes more evident when one comes to the question of the value or implication of one's fundamental constitutional 'right to life'.[30] The perplexity lies in the fact that while allowing children in WFCL is incompatible with human dignity, pushing

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27 Governmental action in view of this mandate first came in 1990 through the enactment of the Compulsory Primary Education Act 1990. See below note 31.

28 Article 28 of the Constitution guarantees a general protection from discrimination by the State. Article 28(4) provides an exception to this rule. It reads: "Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens".

29 The Constituion of Bangaldesh, Preamble and Article 11.

30 For the right to life see Article 32 of the Constitution. See also Article 31.

some of them to the brink of non-survival by disallowing them to take up such works of 'worst forms' might be seen as equally undignified and even violative of 'the right to life' of those children.

Apart from the Constitution's generalised provisions vis-à-vis child labour or WFCL, the Bangladesh Labour Act 2006, the major relevant statute, prohibits the employment of children below 12 years of age in any work other than light work. Section 44 of the 2006 Act provides that a child at the age of 12 can take light work not detrimental to his health and development, and not at the cost of his education. Taking the prevailing social context of child employment into account, the law also provides that when such a child worker is a school-going child, his or her work hours should be so arranged as not to interfere with his/her school-attendance.[31]

Moreover, the Labour Act 2006 inadequately prohibits the employment of any child below the age of 14,[32] distinguishing this category from the children aged between 14 and 17 years of age, called 'adolescents' in section 2(8) of the Act. According to this Act of 2006, the adolescent is allowed to work subject to compliance with certain prescribed conditions,[33] even though the work may involve 'dangerous machines'. For example, section 40 of the Act provides that no adolescent shall be engaged at a machine without having been instructed as to the dangers arising from the operation of the machine or without being properly trained in handling the machine. In a similar vein, while allowing an adolescent to work in any 'factory or mine', the Act seeks to protect the child worker in such establishments by regulating the working hour for him/her.[34]

Appreciably however, the Labour Act 2006 has to some extent incorporated the hazardous work phenomenon by prohibiting the employment of the adolescent (a child of 14 to 17 years age) in works

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31 The Compulsory Primary Education Act 1990 makes education compulsory for children aged 6-10, which conceivably has a positive contribution towards eliminating the child labour or the WFCL.

32 The Labour Act 2006, s. 34(1) and s. 2(63) respectively.

33 See *ibid.*, ss. 40-43.

34 *Ibid.*, s. 41. The maximum working hour for an adolescent in a factory/mine is 5 hours a day and 30 hours a week, while in case of any other establishment this is 7 hours a day and 42 hours a week. See *ibid.*, s. 41, subsections (1) and (2) respectively.

involving operating machines,[35] and in underground or underwater works.[36] Moreover, the government is empowered to prescribe a list of 'dangerous works' and to prohibit the engagement of adolescents in them.[37] Another important provision of the Labour Act 2006 is its section 112 that has prohibited the employment of any person below the age of 21 as a driver and any person below the age of 18 in a capacity other than that of a driver in the road transport sector. Undeniably, in Bangladesh, work in the transport sector entails a considerable amount of high risk to one's life and health, and hence employment of children in the transport sector would form a WFCL. Form this perspective, section 112 of the Labour Act is a welcome step towards controlling the WFCL.

Importantly, the Children Act 1974 which, along with the Children Rules 1976, form the national charter for children,[38] prescribes the age of 16 as the age of childhood, and criminalises in section 44 the exploitation of children by the employer and other illegal and immoral activities involving children. The Act thus implicitly prohibits children under the age of 16 to take up work that may be injurious to their overall development.[39]

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35 *Ibid.*, s. 39. Section 39 provides that no adolescent shall be allowed in any establishment to clean, lubricate, or adjust any part of machinery while that part is in motion, or to work between moving parts of any machine or between a fixed and a moving part of an operating machine.

36 Section 42 of the Labour Act 2006 also prohibits work under the surface or beneath the waters by children aged 14 to 17 years. Similarly, the Mines Act 1923 (Act No. 4 of 1923) prohibits work in mines by children below the age of 18 [s. 26 (A)], a bar that can, however, be overcome if a doctor certifies a child to be able to work.

37 *Ibid.*, section 40(3).

38 See also the Bangladesh Shishu Academy Ordinance 1976. For a critique of the Act of 1976 see Malik, Shahdeen. *The Children Act, 1974: A Critical Commentary*. Dhaka: Save the Children UK, 2004.

39 Haider, Mostafa. 2008. "Recognising Complexity, Embracing Diversity: Working Children in Bangladesh", *South Asia Research*, vol. 28(1): 49–72, at p. 56. The Children Act 1974, sections 34-43, prohibits several versions of child-exploitation through engaging them in begging, or exposing them to drugs, brothels, sodomy, and seduction. See further sections 35, 41, and 42 of the Labour Act 2006, which criminalise the engagement of children in begging or prostitution.

Despite the existence of a plethora of laws[40] and international instruments creating obligations vis-à-vis child labour for Bangladesh, child labour continues to exist here for several cross-cutting factors such as economic, cultural, and political. It is obvious that 'the law' in Bangladesh has been tolerating child labour and probably some worst forms of child labour, which according to one researcher is arguably not a 'breach' of international law as is traditionally understood, but rather reflection of social and local construct of global standards.[41] For example, the law of prohibited labour for children below 12 is often violated in order to meet, among others things, the survival need of the child. The observation as to legal tolerance is also true of the fact that domestic child labour is not legally regulated in Bangladesh. Once this problem of legal tolerance or non-regulation is acknowledged,[42] the next area of focus should be the gradual elimination of the WFCL and the protection of fundamental rights of working children, especially of those who are in WFCL, including the so-called 'hard-to-reach' children.[43]

4. WFCL in Bangladesh: Doubting the Uniformising effort in Understanding the WFCL

There is doubtless a sizable number of children engaged in WFCL in Bangladesh, working both in formal economy (such as in industries) and informal economy (e.g., domestic workers).[44] Why are children found in work or WFCL? Many would suggest that poverty is the premier factor

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40 In addition to statutes discussed above, a number of other laws sporadically and indirectly address the issue of worst forms of child labour. Amongst these laws are: The Suppression of Violence against Women and Children Act 2000; The Narcotics Control Act 1990; and The Suppression of Immoral Traffic Act 1933. The Act of 2000, for example, criminalises abduction of and trafficking in children, while the Act of 1933 provides for punishments for the offence of exposing children to prostitution. These laws thus supplement the objective of outlawing WFCL.

41 See Haider (2008), above note 39.

42 A particular limitation of local official laws in Bangladesh is that they address industrial employments only, leaving an array of informal-sector works out of the protection net. Another creeping problem affecting the child's rights is that, whatever laws are in place, they suffer from a chronic problem of non-implementation or mal-administration.

43 See the Labour Act 2006, and the Factories Rules 1979 for some protective measures.

44 About 71.55% of working children aged 5-14 are employed as unpaid family workers (62.4% in the case of boys and 80.7% in the case of girls).

behind child labour in Bangladesh, and that it is for the poverty-child labour link that child labour/hazardous labour may not be eliminated altogether from Bangladesh.[45] Recent empirical research, however, claims that the relationship between poverty and child labour is weaker than is often believed.[46] As Khair tells us, other social and cultural factors such as immediate monetary gains accruing from work rather than from attending schools, or migration and surging of population may also account for this scenario.[47] Betcherman *et al* report that apart from the poverty factor, children may prefer work because of a combination of the following factors: (i) *incentives* favouring work, (ii) *constraints* compelling children to work, and/or (iii) the fact that decisions are not made in the child's best interest (*agency* problem).[48] In their words:

> It is true that the incidence of child labor is associated with poverty, [...]. Other forces clearly come into play. For example, children may work because the economic returns to working may be greater than returns they would be able to accrue in low-quality, inaccessible schools. Or families in vulnerable situations may put children to work because they need the immediate benefits of their labor due to lack of access to credit instruments or social safety nets. These situations require multi-sectoral approaches that can involve, at a minimum, education, social protection, and health interventions, as well as enforcing compulsory education and child labor regulations.[49]

Whatever the reasons behind children's engagement in labour, the reality remains that Bangladeshi children are undertaking multifaceted worst forms of child labour, which are damaging for their development as these works often produce injurious physical and mental health consequences,[50]

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45 See World Bank. 2000. *Breaking the Cycle: Working Children in Bangladesh.* Dhaka: The World Bank, at p. 10. See further Banu *et al* (1998), above note 9.

46 See further Betcherman, Gordon, Jean Fares, Amy Luinstra, and Robert Prouty. 2004. *Child Labor, Education, and Children's Rights.* Washington, D.C.: World Bank, Social Protection Unit.

47 Khair, Sumaiya. 2005. *Child Labour in Bangladesh: A Forward Looking Policy Study.* Geneva: International Programme on the Elimination of Child Labour, ILO.

48 It may be noted that while participation by working children in family decision-making may help reduce child labour, this may also rationalise the toleration of the practice.

49 As in note 46 above, at pp. 3-4.

50 Alam, Md. Zahangir, Saulat H. Zaman and Mohammed M. Mulla. 2006. "Work and life of children engaged in the worst forms of labour" (in Bangla), *Dhaka Bishwabidyaloy Patrika*, vol. 83-84: 129-56.

as well as economic consequences. But it is hard to sort out works which are to be treated as constituting WFCL according to national and international legal standards. One study by ILO-IPEC, UNICEF, and BSAF[51] identified 27 forms of works as hazardous or WFCL, which include work in transport industries and automobile workshops, and working as 'helpers' of buses, trucks or other modes of transports.[52] The list is by no means exhaustive, and it may be the case that even a form of apparently harmless work may indeed be the 'worst form' of labour for a particular category of children in a given scenario.

Although the ILO Convention No. 182 broadly allows individual states to legislate on kinds of WFCL, there is a need for a wider margin of appreciation to be kept for developing nations in outlawing WFCL. Also, the dominant literature and global prescriptions by international organisations tend to define 'labour' or 'work' with reference to economic activity, thereby precluding a number of other forms of work from the protection scenario. These may be voluntary work or self-employment needed for sheer survival of the 'self' minus the intent for profit. In a tradition-bound society like Bangladesh, children sometimes work to contribute to their familial survival or to contribute to their parents' household works out of a sense of 'duty'. When seen legalistically, works of this sort may, too, be called hazardous or WFCL. They, however, are tolerated in society and have become a long standing reality.

It seems, therefore, that the existing global legal regime and policy suggestions concerning the WFCL are biased towards developed countries, as they often tend not to be society-specific but rather to be generally prescriptive, which may be deficient in performance in a culturally different society. This is evident in, for example, the treatment of 'education' as a highly potent preventive instrument against WFCL without focusing enough on other strategies that may create an internal environment denouncing child labour. The limitation of generalised global legal strategies may be further illustrated by a reference to the fact that the widely-employed anti-child labour strategy of education has not actually worked in Bangladesh, as the existing girl child labour in

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[51] IPEC and BSAF respectively stand for International Labour Office's International Programme on the Elimination of Child Labour, and Bangladesh Shishu Adhikar Forum.

[52] *See* Bangladesh Bureau of Statistics 2006. *Baseline Survey For Determining Hazardous Child Labour Sectors in Bangladesh 2005*. Dhaka: BBS.

Bangladesh's ready-made garment industries shows.[53] On this, the following comment made in a World Bank study is self-explanatory:

> Child labor, particularly as it relates to education, received attention in Bangladesh following the introduction of the Harkin Bill in the U.S. Senate in 1993. The Harkin Bill put an immediate ban on imported goods fabricated or manufactured by children. In Bangladesh the Harkin Bill had an immediate and visible impact on the ready-made garment sector, which accounted for less than 1 percent of child labor. All garment factories laid off their child workers. The bill assumed that the children would now attend school; instead, almost all children sought alternative employment as vendors, beggars, or child prostitutes. In fact, not a single child entered school voluntarily.[54]

It is however encouraging that, in recent times the international community is increasingly listening to the call for diverse but sustainable actions. The international community and civil society have perceptively shifted from concentrating on 'hazardous' to concentrating on 'the worst forms' of labour, which is perhaps a recognition (although it is never appreciated) of the fact that the idea of 'childhood' and outlawing-efforts concerning child labour are bound to be diverse and society-specific, rather than uniform. This 'shift' is evident in the division between child work and child labour, by which needs-based 'child work' is being tolerated now-a-days.

5. The Role of the Government and Civil Society in Eliminating the WFCL

This section focuses on the role of national actors in fighting WFCL, but recognises the exceedingly important role of international actors as a source of inspiration and pressure for the national-level actors. The key global actors are: the ILO; UNICEF, UNESCO, World Health Organization, World Bank, donor countries, international NGOs, consumer movements, human rights movements, the media, the research community, working children and youth movements. The actors at the national level are the government and its various departments, NGOs

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[53] One may recall here the U.S. Harkin Bill's ambitious goal of eradicating child labour from the Bangladeshi garments industry through introducing the education incentive. On the situation of working girl children in the garment industry see, Khair, Sumaiya. 1995. *Changing Responses to Child Labour: The Case of Female Children in the Bangladesh Garments Industry*. London: University of East London (unpublished PhD thesis).

[54] World Bank (2000), above note 45, at p. 14. This is not to claim that 'education' as a tool for fighting child labour is without any success. See above note 31.

and INGOs working in Bangladesh, civil society actors including researchers, academicians, employers, and parents and children concerned. These stakeholders are all indeed duty-bearers, each of them having to bear responsibility under the law and the Constitution towards children in WFCL.[55] As seen, the government in Bangladesh has further obligations in the concerned area under international laws and commitments,[56] arising particularly from the Constitution of the ILO and its several 'Conventions' and 'Policies/Recommendations'.[57]

It follows that the Bangladeshi State has some national and international obligations towards minimising and eliminating the WFCL, in the discharge of which the civil society can play a participatory role. The role of the civil society, of which NGOs are a strong component, in catalyzing or producing social changes is well known.[58] The goal of NGOs working on child rights and/or labour is, in effect, to increase public participation and protect the public interest. As a result, state responsibility and the strength of civil society are positively co-related, one influencing the other. However, as societies and their needs are diverse, the roles of government and civil society actors in a given society are bound to be different. However, since there may be a role for the international civil society to engage in some common and global issues such as the elimination of the worst forms of child labour, there is the need for an effective collaboration between local civil society and international civic actors.[59]

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55 See Art. 21 of the Constitution which imposes a duty upon public officials as well as ordinary citizens to abide by the law and Constitution. It is to be noted that the term 'Constitution' includes the foundational values of a particular nation.

56 For example, under *Rawalpindi Resolution* (October 1996), Bangladesh pledged to eliminate hazardous child-labour by 2000, and all forms of child labour by the year 2010.

57 Bangladesh attained ILO membership on 22 June 1972.

58 On the concept and the role of civil society see generally Siddiqui, Zillur R. 2001. *Quest for a Civil Society*. Dhaka: Sucheepatra; Shahabuddin, Mohammad. 2002. "Revisiting the Concept of Civil Society: A Theoretical Approach", *Bangladesh Journal of Law*, vol. 6 (1 & 2): 109-26.

59 On this notion see further Samad, Muhammad. 2007. "Child Workers in Hazardous Occupations in Bangladesh: GO-NGO Interventions", *Social Science Review (The Dhaka University Studies, Part D)*, vol. 24(2): 133-42. This work merely gives an account of initiatives towards eliminating hazardous child labour undertaken by the government agencies and NGOs, but does not analyse their impacts.

It can be mentioned here that child labour is commonly understood from four perspectives, legal, social, economic and human rights perspectives, which in turn are key to the understanding of the role of the government and civil society actors. The governments often tend to treat the issue of WFCL mostly from purely legal perspective, but sometimes in combination with 'human rights' and 'economic' perspectives. The social perspective, advocated mainly by NGOs, constructs child labour from the point of view that child labour and the resultant exploitation is a consequence of social exclusion of the child. In this approach economic perspective is often under-focused, and this may conveniently ignore the child as a social actor,[60] thereby sidetracking the agency of the child and its right to participate. It can be thus argued that, in order to attain the goal of eradicating the WFCL, the concerned actors need to combine all the relevant perspectives from which child labour can be viewed and tackled.

6. Conclusions

It appears from the above that the elimination of the WFCL has turned out to be an overly complex task particularly in Bangladesh, calling for no single strategy. There indeed is no right answer to the problem of worst from of child labour. A proven reality, however, is that law has propelled limitations in adequately handling the problem. The present international regime is inadequately society-specific, while the Bangladeshi laws dealing with child labour or WFCL are fraught with lack of enforcement, incoherence, and legal uncertainty as evident, for example, in different legal ages of childhood. Even when it comes to the question of 'law', there is no systematic mechanism for the enforcement of existing legal provisions meant for the 'eradication' of child labour or for the welfare of child workers.

The renewed global vision to eliminate the child labour by 2016, premised on the old goal of 'immediate' elimination of the WFCL, seems ambitious. However, we must not stop our endeavours, legal, social, and developmental, towards reducing the WFCL. For example, despite the limits of law, 'law' can be utilised as a site of contestation to improve the situation through means like public interest litigation. It seems that the zeal and vigour of the world movement against child labour has somewhat dwindled, which is also a case in Bangladesh. While global actors must continue to work in a holistic manner and in recognition of cultural and socio-economic diversities amongst nations, local actors and stakeholders must unite and reenergize themselves.

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[60] See Haider, above note 39, at p. 54

The complexity of the subject disallows any single or right recommendation. One must not, however, overlook the oft-made recommendations for more research work, a vigorous system of registration of birth and of child work, escalating education facilities, strengthening poverty-alleviation programmes, the removal of existing inconsistencies in laws, and the setting up of a central coordinating body for the effective monitoring of all actions in the area of WFCL. Given the extra-complexity of the issue of elimination of WFCL in the Bangladeshi context, the best recommendation would be to ask all concerned, the government and non-government actors, researchers, parents, employers, and the victims (children), to work with a spirit of togetherness and honesty in order to create an environment that will gradually eliminate the WFCL. This approach should essentially be predicated upon social justice, and on social responsibility of everyone with powers and duties. Attention should thus be paid to the wellbeing and development of the children in the worst forms of labour and of their families, pending the natural elimination of the WFCL.

SEPARATION OF JUDICIARY IN BANGLADESH: A BIG LEAP LEADING TO INDEPENDENCE AND ITS POTENTIAL IMPACTS

Farzana Akter*

1. Introduction

The terms separation and independence are not synonymous. This becomes more visible and audible when we would like to talk about the role of a judiciary for ensuring justice and good governance in a democratic country. It has been our long cherished dream to separate our judiciary from the influence and control of the executive organ of the state. It has become a matter of great pride and honour for us that the separation of judiciary is no longer a dream for us but has become a thing of reality and we all hope that this historic evolution would usher in a new era of greater judicial independence. Let us again aspire that this greater independence would enable our lower judiciary to satisfy the justice-seekers.[1]

It is almost trite to mention that no other criminal court of the lower judiciary in Bangladesh enjoys direct connection with the larger portion of our litigants so extensively like the magistrate courts. Nor have magistrates of other countries the many special jurisdictions and extra-judicial functions conferred on the magistrates of Bangladesh by statutory enactment.[2]

As regards criminal cases in Bangladesh, magistrates' courts are the courts of first instance. It would be evident from the number of criminal cases filed in a year in these courts, which is far greater than the number of cases in civil courts. So, these criminal courts should have played a vital

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1 Rahman, Shah Md. Mushfiqur , "Separation of Judiciary and its Potential Impact", *The Daily Star,* 03-11- 2007, p 23.

2 Bhuian, Mohammad Nazmuzzaman, "Separation of Magistracy: A Need for the Independent Judicial System in Bangladesh", *The Dhaka University Studies, Part F, Vol. XVI (1),* June 2005, p 81.

role in shaping the thoroughgoing nature of our legal system. But unfortunately, due to some legal shortcomings, these courts are playing controversial role frustrating the very purpose of the independent judicial system. Public perception of the magistracy is very low and the reasons are plain to see. In order for law enforcement to be fair, the judicial system must be concerned only with the application of law. There is only one way in order to make this happen: assurance of independence from any sort of influence from the administrative branch of the government. Achieving judicial independence is the crucial phase in regaining public confidence in the legal system of Bangladesh. The future independence of the judiciary of Bangladesh depends upon the minimization of the executive interference in the lower judiciary, and more importantly, upon the removal of the executive control over the magistracy.[3]

The separation of the lower judiciary or Magistrate Court has been a matter of great urgency for securing justice to the justice- seekers in our country. We really would like to appreciate this big leap of the separation of judiciary in Bangladesh. The aim of this study is to focus on the possible implications that may result from this separation as the real independence of the judiciary and the proper functioning of an independent and separate magistracy in Bangladesh are likely to be very much influenced by these implications and for this reason, these potential impacts should be dealt with a measure of great caution and concern.

2. Conceptualization of the terms 'Separation of Judiciary' and 'Independence of Judiciary'

2.1. Separation of the Judiciary

Separation of the judiciary has been argued both as a cause and a guardian of formal judicial independence. The concept of separation of the judiciary from the executive refers to a situation in which the judicial branch of government acts as its own body frees from intervention and influences from the other branches of government particularly the executive. Influence may originate in the structure of the government system where parts or all of the judiciary are integrated into another body (in the case of Bangladesh: the executive). For example, in Bangladesh as per the Constitution the President appoints judicial officers in consultation with the Supreme Court. Besides, other functional aspect of

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3 Ibid.

the judicial system including the administration of justice is in some way, affected by executive orders or actions.[4]

Executive abuse of this constitutional order result in biased appointment of judges, and other officers of the judicial cadre, favoring individuals who support the governing political party. Dr. Kamal Hossain, a respected advocate of the Supreme Court, explains the concept of separation of the judiciary through the idea of double standards. An executive officer follows plans, which are of a vertical nature, with the higher offices guiding the decisions of the lower officers, who look for the best possible ways to further the plans established by those higher in the pecking order. Executive decisions are made in lines of policy; law is not a policy. Judges or magistrates performing judicial functions must examine what evidence is given and find a way to best apply it to the law; there is less room for an individual's perceptions in judicial decisions.[5]

Complete separation is relatively unheard or outside of theory, meaning no judiciary is completely severed from the administrative and legislative bodies because this reduces the potency of checks and balances and creates inefficient communication between organs of the state.[6]

2.2. Independence of Judiciary

Generally judicial independence means the freedom of judges to exercise judicial powers without any interference or influence. The most central and traditional meaning of judicial independence is the collective and individual independence of judges from the political branches of the government, particularly from the executive government.[7] It requires that judges should not be subject to control by the political branches of government and that they should enjoy protection from 'any threats, interference, or manipulation which may either force them to unjustly'

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4 Mollah, Md. Awal Hossain, "Separation of Judiciary and Judicial Independence in Bangladesh" available at-http://www.unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN020065.pdf.< accessed on 26/11/2007>.

5 Dr. Kamal Hossain, the Senior most lawyer of the Supreme Court of Bamgladesh and the Chairman of the Drafting Committee of the Constitution of Bangladesh gave this opinion on 5th March 2004 in an interview by Sierd Hadley.

6 Ibid.

7 Cappelletti, Mauro (1989), "The Judicial Process in Comparative Perspective", *Clarendon Press, Oxford,* 1991, p 69.

favour the government or 'subject themselves to [punishment] for not doing so'.[8] However, the international instruments require that judges should be free to decide cases impartially, 'without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.'[9]

The concept of judicial independence has two opposite connotations; negative and positive. In the negative sense, the concept of judicial independence seeks to avoid any kind of dependence, interference or influence in administering justice. In other words, judicial independence refers to the existence of a judiciary that enjoys freedom from dependence, interference or influence from any sources whether from the executive, the legislature or private individuals. In the positive sense, judicial independence means the freedom of the judges to exercise judicial functions impartially, in accordance with their own understanding of law and fact.[10]

The concept of judicial independence, as recent international efforts demonstrated by different international declarations, principles like Montreal Declaration (1983), UN Basic Principles (1985) and Beijing Statement (1995) to this field suggests, comprises following four meaning of judicial independence:

(i) **Substantive Independence of the Judges:** It is referred to as functional or decisional independence meaning the independence of judges to arrive at their decisions without submitting to any inside or outside pressure;

(ii) **Personal independence:** That means the judges are not dependent on government in any way in which might influence them in reaching at decisions in particular cases;

(iii) **Collective Independence:** That means institutional administrative and financial independence of the judiciary as a

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8 Larkins, M Christopher, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis", (1996) *44 American Journal of Comparative Law* 605, p 608.

9 Montreal Declaration (1983, Article 2.02), UN Basic Principles (1985, Article 2) and Beijing Statement (1995, Article 3a).

10 Karlan , S Pamela (1999), "Two Concepts of Judicial Independence" (1999), *72 Southern California Law Review 535*, pp 536, 558.

whole vis-à-vis other branches of the government namely the executive and the legislative; and

(iv) **Internal Independence:** That means independence of judges from their judicial superiors and colleagues. It refers to, in other words, independence of a judges or a judicial officer from any kind of order, indication or pressure from his judicial superiors and colleagues in deciding cases.[11]

Independence of judiciary depends on some certain conditions like mode of appointment of the judges, security of their tenure in the office and adequate remuneration and privileges. Satisfactory implementation of these conditions enables the judiciary to perform its due role in the society and thus inviting public confidence in it.[12] Independence of the judiciary, if it is properly maintained, it will lend prestige to the office of a judge and will consequently inspire confidence in the general public.

3. Historical Background of the Separation of Judiciary in Bangladesh and the relevant provisions of the Constitution of Bangladesh

The separation of magistracy has been debated almost since the arrival of the British, it is since the emergence of Bangladesh and the formation of its own Constitution that the need for the separation and the independence of the Judiciary as well as magistracy has become crucial. Specially after the 4th Amendment of the Constitution on 25th January of 1975, which introduced the one party political system, the country went through the most significant and radical changes in the Constitution.[13] It is told that the Amendment completely curtailed the independence of the judiciary.[14]

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11 Bari, Dr. M. Ershadul, "Importance of an Independent Judiciary in a Democratic State", *The Dhaka University Studies, Part F, Vol. IV (1),* June 1993, pp 2, 3.

12 Rahman, Dr. Mizanur, "Governance and Judiciary", *Governance: South Asian Perspective*; Hye, Hasnat Abdul (Editor); The University Press Ltd. 2000, p 147.

13 Ahmed, Moudud, *Bangladesh: Era of Sheikh Mujibur Rahman*, Dhaka, 1984, p 233.

14 Halim, Md. Abdul, *Constitution, Constitutional Law and Politics, Bangladesh Perspective,* Dhaka, 2003, p 118.

Regarding the appointment of the judges in the subordinate courts, it was provided in the original Constitution that the District Judges shall be appointed by the President on the recommendation of the Supreme Court and; in the case of other judicial officers including magistrates shall also be appointed by the President after consulting the Public Service Commission and the Supreme Court.[15] As to the security of tenure, it was provided that the control and discipline of the judges and magistrates would vest in the Supreme Court.[16]

These were healthy provisions regarding the lower judiciary as well as magistracy.[17] But the 4th Amendment amended the appointment provision to the effect that appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with the rules made by him in that behalf.[18] The provision regarding control and discipline were amended to the effect that the control (including the power of posting, promotion and grant to leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President. Thus the whole judiciary became subservient to the executive.[19] And after making such provisions, it was inserted in the Constitution that subject to the other provisions, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions.[20] This provision was really illusory. However, the undemocratic provisions regarding the control and discipline introduced by the 4th Amendment were repealed and the healthy provision 'in consultation with the Supreme Court' as was provided by the original Constitution was revived in 1978 by the Second Proclamation.[21]

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15 Article 115(1) of the original Constitution of Bangladesh of 1972 but this Article was amended by the Fourth Amendment Act, 1975(Act II of 1975), s 19.

16 Article 116 of the *Constitution of the People's Republic of Bangladesh* .In this Article the word "President" was substituted for the words "Supreme Court" by the Fourth Amendment Act, 1975(Act II of 1975), s 20.

17 Supra note 2, p 94.

18 Article 115 of *The Constitution of the People's Republic of Bangladesh.*

19 Supra note 2, p 94.

20 Article 116A of *The Constitution of the People's Republic of Bangladesh.*

21 Supra note 2, p 95.

In the years following the 1975 Amendment, a few attempts were taken to improve the independence of Judiciary, which revolved around mainly the higher judiciary only (e.g. the creation of Supreme Judicial Council regarding the removal of Supreme Court Judges in 1977 and the increase in the tenure of the office of the Supreme Court Judges several times) but the issue of the separation of lower judiciary remained unheeded until 1997 when the High Court Division demanded the judiciary to be separated from the executive.[22]

3.1. Masdar Hossain Case, a brief look into the Judgement

The issue of separation of judiciary from the executive came to the fore with the judgement of Masdar Hossain Case (Secretary, Ministry of Finance vs. Masdar Hossain)[23] that started as a mere grievance regarding financial benefits evolved to an issue that touched the core of separation of judiciary. The higher judiciary seized the opportunity to its fullest to come up with two of the most acclaimed milestone judgments in the country's legal history at both tiers of the apex court. Interestingly enough, and much to the satisfaction of the lawyers' community, the highest court did not losen its leash on the implementation of the judgement. Rather, it still holds the full control of the implementation procedure to make sure that everything is on track.[24]

Popularly it is said that Masdar Hossain judgment contains 12-point directives that are vital to separation of judiciary. Indeed, the judgment contains 12 points in its directive part but all of those are not essentially framed in the form of directions that may require the government to undertake some actions of affirmative nature. Rather, most of the points deal with declarations made by the court clarifying its position on different constitutional provisions and these declarations do have the force of law. Directive points of the operative part require the government to frame Rules that are to deal with establishment of a Judicial Service of Bangladesh; to enact law regarding posting, promotion, grant of leave, discipline, pay, allowances, pension and other terms and conditions of service; to establish a separate Judicial Pay Commission by Rules; to make law ensuring security of tenure of judges,

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22 Ibid.

23 *52 DLR (AD)* p 82.

24 Supra note 1.

security of their salary and other benefits and pension and institutional independence from the Parliament.[25]

These directions of the highest court are complied with the enactment of the much-talked-about four Rules.[26] Other points of the judgement are also of vital importance. For example, the very first point declares that the judicial service, though a service of the Republic, is a functionally and structurally distinct and separate service from the civil executive and administrative services of the Republic and any amalgamation or mixing up between these two different genera of services cannot be done on any account nor can they be placed on a par.[27]

It was also clarified that the control of the Judicial Service should be guided by Rules framed according to Article 115 and not Rules under Article 133 or 136 of the Constitution. It was also clarified that the Services Act, 1975 and the Civil Service Recruitment Rules, 1981would not apply with regard to the judges.[28]

After the pronouncement of this landmark decision, it has taken nearly ten years but this has finally been achieved. On 1 November 2007, a non-political government was able to complete what political governments of the past had promised but failed to deliver. It was a question of political will and the past political masters were unfortunately found wanting.[29] Reluctance of successive governments and bureaucratic tangles had been the main hindrances till now to the implementation of such separation. Political governments, due to partisan interests had also procrastinated in the implementation of the required steps. This course of action on their part had been so despite the provisions of Article 112 of the Constitution

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25 Ibid.

26 The Bangladesh Judicial Service Commission Rules, 2007; The Bangladesh Judicial Service (Pay Commission) Rules, 2007; The Bangladesh Judicial Service (formation of the service, appointment in the service and temporary dismissal, dismissal and removal) Rules, 2007; The Bangladesh Judicial Service (determination of posting, promotion, grant of leave, regulation, discipline and other conditions of service) Rules, 2007.

27 Ibid.

28 Zamir, Muhammad, 'Make the Separation of Judiciary work", *The Daily Star, 17-11-2007.*

29 Ibid.

whereby the government is supposed to act in aid of the Supreme Court.[30]

The civil society, media and the political parties of Bangladesh welcomed the development. Haroon Habib, a Dhaka based freedom fighter turned journalist said, "The separation of judiciary was an epoch-making step, and should be considered a major milestone in Bangladesh's judicial history despite the fact that it was done when there is no political government." Appreciations came from its development partners, with countries like the United States, Britain and Germany saying that it was an important step towards strengthening democracy in Bangladesh.[31] Barrister Mainul Hossain, the adviser for Law, Justice and Parliamentary affairs to the caretaker government described, "We (the government) have separated the judiciary from the interference of the executive not as a favour to the judges, but to assign them with the heavy responsibility of upholding justice and contributing to good governance as contemplated by the Constitution."[32]

The government has also brought amendments to the Code of Criminal Procedure, 1898[33] reflecting the basis of the separation of judiciary as contained in Article 22 of our Constitution, which states that the State shall ensure separation of the judiciary from the executive.

4. Possible Implications likely to follow from the Separation

Till recently our judges in the lower courts were appointed by the Public Service Commission under a special category named Bangladesh Civil Service (Judicial). This method of appointment has been declared unconstitutional by the apex court. Additionally it was directed to the government that a separate Judicial Service Commission be formed to carry out the same function. This direction is met by the enactment of

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30 Ibid.

31 Merinews,: "Bangladesh's Big Leap Towards a Stronger Democracy," available at http:www.merinews.com/catFull.jsp? article ID = 127957& cat ID=1& category= World < accessed on 29-11-2007>.

32 Ibid.

33 *The Code of Criminal Procedure(Amendment) Act* , 2007 Ordinance no 2, 2007,Bangladesh Gazette, Extraordinary Issue.

the Bangladesh Judicial Service (formation of the service, appointment in the service and temporary dismissal, dismissal and removal) Rules, 2007.[34]

Another enactment titled the Bangladesh Judicial Service Commission Rules, 2007 provides for the formation of Bangladesh Judicial Service Commission which is responsible for the selection of competent candidates for judicial service to be appointed by the President. In accordance with the judgment most of the members of this Commission are to be drawn from persons holding high judicial offices. Naturally these persons are much less likely to succumb to allurements or threats that might be posed by the government. This, consequently, would help them to dispose of their business relatively independently so as to keep government loyalists away from judicial service to preserve the job's sanctity.[35]

The use of an independent commission in appointing judges is the most acceptable mechanism among the commentators in the contemporary world.[36] The *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region [Beijing Statement] 1995* states:

> In some societies, the appointment of judges, by, with the consent of, or after consultation with a Judicial Service Commission has been seen as a means of ensuring that those chosen as judges are appropriate for the purpose. Where a Judicial Service Commission is adopted, it should include representatives of the higher judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained.[37]

The Commission system is operating well in different countries of the world like Canada, South Africa etc. Such type of commission has been established in Bangladesh and has already started its function in selecting the competent judges for the lower judiciary. This is undoubtedly a landmark step in the history of judiciary in Bangladesh.

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34 Supra note 1.

35 Ibid.

36 Baar, Carl, "Comparative Perspectives on Judicial Selection Processes in Appointing Judges: Philosophy, Politics and Practice",*Ontario Law Commission, Ontario, 1991*, p 153.

37 *Beijing Statement 1995,* Article 15. The Conference of Chief Justices of Asia and the Pacific unanimously adopted the *Beijing Statement* on 19 August 1995.

Another enactment entitled the Bangladesh Judicial Service (Pay Commission) Rules, 2007 has been introduced to ensure that financial aspects of judicial officers are no more intermingled with officers of other categories. By means of this law a separate Pay Commission for the judicial service would be established which will be responsible to maintain that financial independence of judicial officers is well secured. It can be safely predicted that pay scale meant for the judges would be quite different from other government services and the trend would be upwards. Proper implementation of this law will draw the attention of many young but highly talented lawyers who otherwise would have engaged in other professions requiring legal expertise. This eventually would add to the dignity and credibility of the judiciary.[38]

Yet another enactment entitled the Bangladesh Judicial Service (determination of posting, promotion, grant of leave, regulation, discipline and other conditions of service) Rules, 2007 is made to deal with the affairs, named in the law itself, of judicial officers.[39]

4.1. Changes made into The Code of Criminal Procedure (1898)

The implications likely to follow from the separation of lower judiciary are very much related and dependent on the amendments made into the Code of Criminal Procedure, 1898 (CrPC). The Code of Criminal Procedure(1898) as amended in 2007 provides in the amended section 6 that there shall be two classes of Magistrates, namely:-

(a) Judicial Magistrate; and

(b) Executive Magistrate.

The Judicial Magistrates would form an inseparable part of the Bangladesh Judicial Service and shall be appointed from the persons employed in the Bangladesh Judicial Service in accordance with the rules framed by the President under Article 115 or under the proviso to Article 133 of the Constitution.[40] On the other hand, Executive Magistrates might be appointed by the Government from any persons employed in the Bangladesh Civil Service (Administration) and be conferred the

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38 Supra note 1.

39 Ibid.

40 Section 11(1) of The Code of Criminal Procedure,1898 (as amended in 2007).

power of executive magistracy.[41] All persons appointed as Assistant Commissioners, Additional Deputy Commissioners or Upazila Nirbahi Officer in any district or Upazila shall be Executive Magistrates and may exercise the power of Executive Magistrate within their existing respective local areas.[42] This means that these persons are automatically empowered with the authority of Executive Magistrates.

Thus a clear segregation is made between these two categories of magistrates both in terms of their place in government functionaries and their functions. The Code of Criminal Procedure, as amended in 2007 in its Schedules III and IV categorically list and provide the ordinary and additional powers respectively of these two distinct categories of magistrates.

Executive magistrates are vested with some serious powers by the amended Code of Criminal Procedure, carefully calculated to encounter unwarranted situations. These include power to arrest, or to direct the arrest of and to commit to custody, a person committing an offence in presence of the magistrate; power to arrest, or direct the arrest in his presence of a person for whose arrest he can issue warrant; power to direct search of any place for the search of which he can issue search-warrant; power to require security to keep peace and good behaviour; power to command unlawful assembly to disperse and use civil force or require military force to that end; power to issue injunction as immediate measure in case of public nuisance etc.[43] Not only these powers, they are also empowered to try cases under the Mobile Court Ordinance (2007)[44] though this will create a dual justice- system in our country because for the same offence punishment may vary in the hands of Judicial Magistrates and Executive Magistrates. Executive Magistrates are also given authority under 36 sections of the Penal Code (1860), covering from sections 143 to 356.[45]

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41 Section 10(5) of The Code of Criminal Procedure,1898 (as amended in 2007).

42 Section 10(6) of The Code of Criminal Procedure,1898 (as amended in 2007).

43 As mentioned in part V of the Third Schedule of the Code of Criminal Procedure,1898 (as amended in 2007).

44 Ordinance no 31, 2007.

45 Khan, Mizanur Rahman, "Brahmmoman Adalot Odhyadesher Boidhota Nie Proshno" (Questions relating to the Validity of the Mobile Court Ordinance), *The Daily Prothom Alo,* 30-10-2007, p 11.

5. Conclusion

There is no doubt that the separation of the lower judiciary is a momentous step for the whole justice system that has been achieved to advance and ensure greater judicial independence and thereby establish rule of law in the country. The historic beginning of this arduous task has to be accomplished to perfection so that the judiciary must live up to its newly acquired status. However, utmost diligence and caution must be exercised to ensure that the new system delivers in accordance with the hopes of the people. The judiciary must feel independent and separate from the executive branch in all respects and act accordingly. Only then the hope for a truly independent judiciary will be fulfilled.[46] A public authority is duty bound to perform public duty with fairness and also in compliance with practiced standards: any inconsistent decision made unfairly or unjustly will become void and without lawful authority. Such an authority cannot act as it please in its absolute and unfettered discretion and therefore, when an administrative action is found to be unreasonable or lacking in the quality of public interest, it becomes invalid. However, the validity or legality of administrative decisions or actions can be determined only by an independent judiciary which plays a central and significant role in preventing and remedying abuse and misuse of powers as well as in eliminating injustice.[47] We are entering a new era. What we will have is a tentative arrangement that will need the support and cooperation of every branch of government. It is up to us to ensure that this separation does not become a token gesture. This measure contains real promise. It has to be supported not because it has been decided and sanctioned by the highest court but because it contains the possibility of people being able to realize their legal and human rights according to the due process of law.[48]

We must maintain caution about not being too complacent about the latest developments. The concept of separation of judiciary is not synonymous of independence of judiciary, though the former ease the path of the latter. So separation is the means and not the end in itself. Our goal is to attain the removal of every obstacle in the way to have a

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46 Law Chronicles Online, "Separation of the Judiciary-What it means for the people" available at- http//www. H:/separation-of-judiciary-What it means.html <accessed on 29-11-2007>.

47 *Mahmudul Islam vs. Bangladesh*, (2003) 55 DLR pp 172, 188, 189.

48 Supra note 27.

justice-system which is really capable of delivering justice. In this regard we must not forget the control that executive still has over the Supreme Court in the form of appointment and elevation to the Appellate Division from the High Court Division. This is high time to address the issue and thus cure the vices that are creeping into the supreme judiciary. In absence of any option to amend the Constitution in any time soon, this may well be done by a concrete legislation outlining the rules regulating the appointment of justices in the Supreme Court. In essence, there are still rooms for further development as the Appellate Division declared,"... it (Parliament) can amend the Constitution to make the separation more meaningful, pronounced, effective and complete.[49] The establishment of a separate secretariat for the judiciary of our country is very much necessary which will certainly facilitate the many tasks needed to be addressed for making the separation successful.

49 Supra note1.