ISSN 1813-5099

UNIVERSITY OF DHAKA

DHAKA UNIVERSITY LAW JOURNAL

Volume 19 Number 2 December 2008

Mohammad Shahabuddin
Ethnic 'Otherness' in International Law: An Alternative History of International Law from Pre-Modernity to the Nineteenth Century

Mohammad Nazmuzzaman Bhuian & Muhammad Mahbubur Rahman
Post-Cold War UN Peacekeeping: A Review of Legal Aspects

Dr. S. M. Hassan Talukder
Administrative Tribunals in Bangladesh: An Appraisal on Establishment and Procedure

Nakib M. Nasrullah
Current Trends in CSR Practices in the Business of Private Enterprises: Comparative Experiences of Bangladesh and Vietnam

Md. Khurshid Alam
Ship-owner's Undertaking to Proceed without Deviation: A Critical Analysis

Arif Jamil & Md. Shamsuddin Masum
Towards a Legal Regime for the Rights of Persons with Disabilities in Bangladesh

Raushan Ara
Non-Registration of Compulsory Registrable Documents: An Overview of its Legality and Effect

Mohammad Abdur Razzak
Formation of a Contract and its Technicalities: Bangladesh Perspectives

Mohammad Azharul Islam
Examining the Relevance and Validity of Sharecropping under Islamic Land Law

The Dhaka Univeristy Studies Part-F

THE DHAKA UNIVERSITY STUDIES
PART-F
VOLUME 19 NUMBER 2
DECEMBER 2008

THE DHAKA UNIVERSITY STUDIES PART-F

Volume 19	Number 2	December 2008

Submission

Dhaka University Law Journal is interested in original contributions on contemporary or jurisprudentially important legal issues from scholars and professionals. This is a peer-reviewed journal, and papers and critical essays are published only after the author(s) has/have resubmitted the paper in compliance with reviewers' suggestions and recommendations, if there be any.

Two copies of manuscripts should be sent to the correspondence address, and a copy must also be submitted by email attachment to: <lawfac@bangla.net>. A covering-letter giving a short biographical note on the author(s) along with a declaration as to the originality of the work and the non-submission thereof to anywhere else must accompany the manuscripts.

Standard articles written on one side of good quality A4-sized papers, double spaced with wide margins, should be of 8,000-10,000 words including footnotes. The contributions must be in journal style outlined below.

References, footnotes and layout

The text must contain appropriate headings, subheadings and authoritative footnotes. The footnotes should be numbered consecutively and typed single spaced at the bottom of each relevant page. Citations conform generally to a Uniform System of Citation. Thus the style should be as follows:

Journal article: Single author

Baxi, Upendra. 1969. "Directive Principles and Sociology of Indian Law", Vol. 1, No. 3 *Journal of the Indian Law Institute*, pp. 245-72, at p. 70. [Here, the relevant reference is to p. 70 of the work which appears on pp. 245-72 of the journal].

Journal article: Multiple authors

Yoo, John C. and Saikrishna B. Prakash. 2003. "The Origins of Judicial Review", Vol. 70 *University of Chicago Law Review*, pp. 887-982, at pp. 889-90.

Book: Single author

Baxi, Upendra. 1985. *Courage, Craft and Contention: The Indian Supreme Court in the Eighties.* Bombay: N. M. Tripathi, at p. 101.

De Cruz, Peter. 2006. *Comparative Law in a Changing World.* 3rd edn. London and Sydney: Cavendish, chapter 6. [Here, a broad reference is made to chapter 6 of the book].

Book: Multiple authors

Menski, Werner, Ahmed R. Alam and Mehreen K. Raza. 2000. *Public Interest Litigation in Pakistan.* London and Karachi: Platinium and Pakistan Law House, at p. 102.

Book: Edited

Alauddin, M. and S. Hasan (eds.). 1999. *Development, Governance and the Environment in South Asia: A Focus on Bangladesh.* London: Macmillan.

Chapter in a book

Baxi, Upendra. 1987a. "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India", in Tiruchelvam, N. and R. Coomaraswamy (eds.): *The Role of the Judiciary in Plural Societies.* London: Francis Printer, pp. 32-59, at pp. 33-4. [Here, 1987a denotes the author's first work in the same year of 1987].

Book: Corporate author / institute

REDRESS. 2004. *Torture in Bangladesh: 1971-2004.* London: REDRESS.

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).

Website references

Alam, M Shah. 2006. 'Reviewing Our Legal Education', available at: <http://www.thedailystar.net/law/2006/12/01/index.htm>, last accessed on 12 June 2007.

Cases

A (FC) v Secretary of State for the Home Department [2004] UKHL 56.

A. D. M., Jabalpur v Shivakant Shukla AIR 1976 SC 11207.

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].

Abbreviations should be written out in full when they appear first in the text or form the first word in a sentence. Leave out full stops in abbreviations made up of capitals as, for example, SEC, HCD, and JATI.

For the immediate past citation but with reference to a different page, *ibid.*, at p. 34 / *Ibid.,* at p. 34 should be used. For the same, immediate past reference, *Id./id.* should be used. For cross references use, for example: See above/below note 5, at p. 35; See further Baxi (1987a), above note 37; For details, see section/part 3/III below.

Published by the Registrar, University of Dhaka, and printed by
Trayee, (A House of Quality Printing), 15, Nilkhet, Babupura, Dhaka-1205.
Phone: +880-02-9660745.

Subscriptions

The Faculty of Law publishes *Dhaka University Law Journal* (The Dhaka University Studies Part F) twice a year. The subscription rates for individuals for a single issue are Taka 75 (domestic) and $15 (international). Institutional subscriptions for a single issue are Taka 100 (domestic) and $20 (international). Postal costs will be charged separately.

Manuscripts and editorial correspondence should be addressed to:

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

DHAKA UNIVERSITY LAW JOURNAL

Volume 19 Number 2 December 2008

Contents

Ethnic 'Otherness' in International Law: An Alternative History of International Law from Pre-Modernity to the Nineteenth Century 1
Mohammad Shahabuddin

Post-Cold War UN Peacekeeping: A Review of Legal Aspects 35
Mohammad Nazmuzzaman Bhuian & Muhammad Mahbubur Rahman

Administrative Tribunals in Bangladesh: An Appraisal on Establishment and Procedure 65
Dr. S. M. Hassan Talukder

Current Trends in CSR Practices in the Business of Private Enterprises: Comparative Experiences of Bangladesh and Vietnam 83
Nakib M. Nasrullah

Ship-owner's Undertaking to Proceed without Deviation: A Critical Analysis 105
Md. Khurshid Alam

Towards a Legal Regime for the Rights of Persons with Disabilities in Bangladesh 119
Arif Jamil & Md. Shamsuddin Masum

Non-Registration of Compulsory Registrable Documents: An Overview of its Legality and Effect 145
Raushan Ara

Formation of a Contract and its Technicalities: Bangladesh Perspectives 159
Mohammad Abdur Razzak

Examining the Relevance and Validity of Sharecropping under Islamic Land Law 183
Mohammad Azharul Islam

CONTRIBUTORS

Mohammad Shahabuddin
Assistant Professor, Department of Law, Eastern University

Mohammad Nazmuzzaman Bhuian
Assistant Professor, Department of Law, University of Dhaka
&
Muhammad Mahbubur Rahman
Lecturer, Department of Law, University of Dhaka

Dr. S. M. Hassan Talukder
Assistant Professor, Department of Law, University of Dhaka

Nakib M. Nasrullah
Assistant Professor, Department of Law, University of Dhaka

Md. Khurshid Alam
Associate Professor, Department of Law, University of Dhaka

Arif Jamil
Lecturer, Department of Law, University of Dhaka
&
Md. Shamsuddin Masum
Senior Judicial Magistrate, Sylhet.

Raushan Ara
Lecturer, Department of Law, University of Dhaka

Mohammad Abdur Razzak
Assistant Professor, School of Business, East West University.

Mohammad Azharul Islam
Lecturer, Department of Law, University of Dhaka

The Dhaka University Studies, Part-F Vol. XIX (2) : 1-34, December 2008

ETHNIC 'OTHERNESS' IN INTERNATIONAL LAW: AN ALTERNATIVE HISTORY OF INTERNATIONAL LAW FROM PRE-MODERNITY TO THE NINETEENTH CENTURY

Mohammad Shahabuddin*

1. Introduction

The key argument of this article is that international law has always been applied as a 'language' to deal with the ethnic 'other' defined by the dominant cultural group of each epoch. At the same time, while defining the pejorative 'other' along ethnic lines, international law has conceived the very notion 'ethnicity', understood here as socio-historically constructed primordial ties, in terms of primitiveness that is associated with the non-dominant cultures alone.

As the etymology of the term 'ethnicity' demonstrates, its Greek root *ethno* happened to be used to refer to the 'other', the non-Greek, in a derogatory sense.[1] In later uses, in New Testament Greek, *ethnos* appeared as a religious indicator to refer to non-Christian and non-Jewish. At that stage, the derived adjective *ethnikos* was very nearly synonymous with *barbaros* – those who spoke unintelligible languages, and wanted for civilization, who were beyond the bounds of meaning, order and decency.[2] For throughout the Middle Ages it was the Church Latin that dominated literacy in Europe, the term *gentile* – a grouping for religious 'otherness' – succeeded *ethnos*.[3] In public Roman law, *jus gentium* represented a body of rules for Romans in maintaining relations with foreigners, while *jus civile* governed interactions between citizens. The term 'law of nations,' the synonym for the present day phrase 'international law,' is the literal translation of the Latin term *jus gentium* into English.[4]

---

* Assistant Professor, Department of Law, Eastern University

1 For an account of such derogatory reference to the 'other', see Elizabeth Tonkin, Maryon McDonald, and Malcolm Chapman, *History and Ethnicity* (London: Routledge, 1989), 12–20.

2 Ibid., 13.

3 Ibid.

4 Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan,1947), 19.

In this article, we explore how this 'otherness' in 'ethnicity' has been incorporated in the understanding of international law as well as its response to various non-dominant cultural groups throughout the history. However, dealing with history in relation to international law and its ethnic 'other' is complicated for a number of methodological issues: when did international law first come into being; should the pre-nineteenth century inter-State practices be considered as international law; how to deal with the Eurocentrism in the standard narrative of the history of international law; and so on. Nevertheless, as we shall see shortly, irrespective of the debate about the origin of international law, the phenomenon of identifying the ethnic 'other' in derogatory terms was well-exhibited even in the ancient international law – a fact that substantiates our proposition.

The following sections are designed to address these methodological issues first, and then, demonstrate how the ethnic notion was consistently incorporated and used in international law in different phases of its development. To this end, in this article we focused on three broadly drawn phases. First, we presented a brief account of ethnic phenomenon in the pre-modern international law in section 3, which is followed by a critical examination of the naturalist writings of Francisco de Vitoria and Hugo Grotius, the founding fathers of modern international law, to demonstrate how a universal claim of natural law doctrines justified the early colonial missions in the sixteenth and the seventeenth centuries. However, with the emergence of sovereignty as a dominant political philosophy in the nineteenth century Europe, natural law experienced a gradual decline and legal positivism took its place, although it remained difficult to draw any such line of distinction. While the naturalists endeavoured to bring the 'savages' and the 'barbarians' within the ambit of international law to legitimize European colonialism, the acclaimed Jurists of the nineteenth century – Henry Wheaton, James Lorimer, William E. Hall, Thomas Lawrence, and John Westlake – adopted the reverse technique of excluding the non-European 'barbarians' from the sphere of international law to pursue the same objective. The 'standard of civilization' constructed along ethno-

cultural lines then served as an efficient device to exclude the 'other'. Section 5 tried to grasp this phenomenon of ethnic otherness in the writings of the nineteenth century positivists.

As each section of this article demonstrates, the notion of ethnic 'otherness' is an omnipresent phenomenon in international law, though in different epochs, it was expressed through different legal techniques and vocabularies. Although the present article sketches this trend in international law up to the nineteenth century, the continuity of the process of identifying and dealing with 'the other' along ethno-cultural lines remains relevant even in the post-colonial international law in the forms of mandate system, minority protection, war on terror, human rights, development, good governance, to take few examples. While such a study is nothing short of essential for a holistic understanding of the dynamics of 'ethnicity' in international law, it is beyond the scope of the present work, and we leave it for future research.

2. Dealing with History in Relation to International Law and its Ethnic 'Other'

The task of dealing with history in the context of international law is a complicated one for a number of reasons. First, although the relationship between international law and history may be understood in terms of "history of international law" (a narrative of its origins, development, progress or renewal), "history in international law" (the role that the historical events or persona play in discussions and arguments about law), or "international law in history" (the way international law and its proponents involved in creating history), Craven notes, it turns out that practically it is difficult to maintain such categorization of this relationship, for "each type of engagement with history and international law will interweave various different types of historical narrative".[5] However, this categorisation remains useful to point "to the typically multi-layered nature of international lawyers' engagement with the past".[6]

---

5 Matt Craven, "Introduction: International Law and Its Histories," in *Time, History and International Law*, ed. Matthew Craven, M. Fitzmaurice, and Maria Vogiatzi (Leiden; Boston: Martinus Nijhoff, 2007), 7.

6 Ibid., 8.

Second, while dealing with the history of international law, Onuma observes, international lawyers inevitably had to face the question of the definition of international law, which they answered "according to their methods, approaches to international law, sense for 'others', and other factors".[7] Oppenheim, for example, claims that "[I]nternational law as a law between Sovereign and equal states based on the common consent of these States is a product of modern Christian civilization".[8] Tracing the necessity of international law in the face of the eruption of independent states in Europe, Oppenheim saw the emergence of this discipline in the seventeenth century; thus, he had no hesitation to enthusiastically recognize the Dutch diplomat Hugo Grotius as the "Father of Law of Nations," for the "system of Grotius supplied a legal basis to most of those international relations which were at the time considered as wanting such basis".[9] This claim is not beyond controversy, however. Some influential publicists after the end of the nineteenth century, such as James Brown Scott, argued that those of the late Spanish school such as Francisco de Vitoria were the true founders of international law, while there were others who emphasize the importance of Vattel, pointing out modern, liberal features in his writing.[10] Onuma thus concludes: "In any event, the very question whether Grotius, Vitoria, or Vittel should be regarded as the father of international law assumes that international law was born in modern Europe, and is confined within the perspective of Eurocentric modernity."[11]

Now, problem remains with this Eurocentric assumption. Nussbaum maintains that the phenomena of international law are conspicuous even in a treaty of approximately 3100 BC, which was concluded between Eannatum, the victorious ruler of the Mesopotamian city-state of Lagash, and the men

---

7 Yasuaki Onuma, "When Was the Law of International Society Born? : An Inquiry of the History of International Law from an Intercivilizational Perspective," *Journal of the History of International Law* 2(2000): 3.

8 Lassa Oppenheim, *International Law* (London: Longmans, Green and Co., 1905), 44.

9 Ibid., 58.

10 Onuma, "When Was the Law of International Society Born?" 5.

11 Ibid.

of Umma, another Mesopotamian city-state.[12] A good number of treaties were also concluded by Egyptian and Hittite rulers around 2000 BC covering a wide range of issues, such as peace, alliances, boundary lines, establishment of vassal states, and so on.[13] Similarly, in ancient China and India, there were traces of norms dealing with foreigners in matters of war and peace. Thus, the proposition that international law is the creation of the seventeenth century European jurists is confusing. As Butkevych stresses,

> the Eurocentric approach in describing the history of international law led to the negation of international law of earlier epochs and nations, which virtually excluded from research whole layers of international legal developments of ancient States of the Middle East, India, China, etc.[14]

On the other hand, to what extent these ancient instances of the treaty regulation of inter-'state' relations are comparable with modern international law, and, therefore, be called 'international law', leads to the third complicacy involved in the study of the relationship between history and international law. Assuming that international law requires a universal application, Onuma claims that before the emergence of any universal international system until the nineteenth century, many independent human groups whose members shared the egocentric world image, e.g. the Islamocentric *Siyar*, the Sinocentric tribute system, or Eurocentric law of nations, coexisted in various regions of the globe.[15] Given that these systems were applied in only a limited area of the earth and lasted for a limited period of time, Onuma refuses to call them universal systems; instead, claims that it is only around the end of the nineteenth century that the European international law actually became valid as universal law of the world in the geographical sense.[16]

---

12 Nussbaum, *A Concise History of the Law of Nations*, 8.

13 Ibid.

14 Olga V. Butkevych, "History of Ancient International Law: Challenges and Prospects," *Journal of the History of International Law* 5(2003): 217.

15 Onuma, "When Was the Law of International Society Born?" 8.

16 Ibid., 7.

Drawing upon an inter-civilizational approach, Onuma then holds the view that even the very terms used to express these co-existing regional units, are related to the prevalent notions through which dominant actors in a certain region at a particular time see and understand the world or the cosmos, and to the criteria through which they distinguish the self-group from the other-group.[17] This claim is substantiated by the fact that the term 'international' used in such analytical notions as 'international orders,' 'international systems' or 'international societies' is identical to the coexistence of sovereign nation States in modern Europe, whereas it appears inconsistent if applied to other regional civilizations "whose prevalent notions on cosmology and for distinguishing the self and the other are different from those in modern Europe".[18] Arguing that from the tenth century onward, the fundamental framework of distinguishing the 'self' and the 'other' was not one's belonging to a political or national community, but one's belonging to a religious community, Onuma thus concludes that "the notion *international* is not appropriate either as a notion to express the relations between the Muslim dynasties or as a notion to express the relations between the Muslim dynasties or groups and non-Muslim dynasties or groups."[19]

The same analogy is applied in the field of international relations by Stephen Ryan, who relies on the claim of established schools of anthropology that the conventional concept of the nation-state fits only one-quarter of the members of the global state system, and takes the view that for the rest of the world, the term 'nation-state' is a misnomer.[20] Thus, in the present day use of the terms – the United *Nations,* inter*national* law, the *national* interest, among others – actually refers to States, not nations. "This hijacking of the term 'nation' by States has meant that true nations have to be described as something else; usually as sub-nations or as tribes."[21] In this sense, 'international law' as a term remains a misnomer in its present day use, but certainly demonstrates its European origin.

---

17 Ibid., 9.
18 Ibid.
19 Ibid., 10.
20 Stephen Ryan, *Ethnic Conflict and International Relations* (London: Dartmouth Publishing Company, 1995), 3.
21 Ibid.

While discussing history and international law, we, therefore, encounter a number of issues: the ways of approaching history in relation to international law, the problem of deciding when international law did start from, and as a corollary, the difficulty of deciding when international law did gain universality. However, so far as our focus on tracing the ethnic otherness embedded in international law is concerned, in this article we took the approach of dealing with both the history of international law, i.e. the narrative of different phases of its development as well as the history in international law, especially, the roles that individuals played in shaping up this discipline. Apropos the specific period of the 'creation' of international law, the purpose of the present work would be best served by avoiding this debate altogether. Instead, we argue that the phenomenon of 'ethnic differentiation' has always been there in the relationship between and among socio-political units since the antiquity, no matter we term the then mechanisms to regulate such relations 'international law' or not.

3. Ethnic 'Otherness' in the Pre-Modern International Law

When the King of Hitties – Suppiluliuma – conquered the country of Izuva in 1350 BC, he explained the conquest by the fact that the latter had belonged to the Hitties' kingdom age-long, as he was seeking to *liberate* people that were Izuva's subjects. [22] For this reason, Suppiluliuma did not 'conquer,' but 'liberated' the countries that used to be under the jurisdiction of Izuva. In his words: "the countries I had occupied I liberated, and their people remained in their places; the people I had made free returned to their folk."[23] On this point, it is, therefore, argued that

> a precursor of the institute of aggression manifest itself, which is justified by the purpose of liberation of foreign population and which will be shaped in the Middle Ages doctrine to be named later a humanitarian intervention. Justification of crusades by 'liberation' of local people from government that is not submitted to 'liberator' is by no means less typical of international military relations in the 20th and 21st centuries.[24]

---

22 Butkevych, "History of Ancient International Law," 205.

23 James B. Pritchard, ed., *Ancient Near Eastern Texts Relating to the Old Testament*, 2nd ed. (Princeton, NJ: Princeton University Press, 1955), 318.

24 Butkevych, "History of Ancient International Law," 206.

In international relations, ancient Greece used to consider the non-Greeks as 'barbarians' and hold the view that these barbarians are the born enemies designated by nature to serve the Geeks as slaves, whereas one Greek State held a strong feeling of 'all-Greek kinship' for the other – a feeling that they belonged to the same racial, cultural, lingual and religious community – despite their political segregation and discord.[25] In the case of warfare, Socrates famously proposed to limit the concept of war to fights with the barbarians, while he called fights among Greeks 'disease and discord'.[26]

Although Nussbaum holds the view that unlike the Greeks, the Romans did not discriminate extensively against barbarians or against others racially foreign, in his writing it is quite evident how the Romans too used their municipal legal techniques for expanding their empire.[27] Unilateralism is another characteristic of ancient Roman relations with others. In the era of Kings, which ended in 509 BC, it was the *fetiales* – a special group of priests – to decide whether a foreign nation had violated its duties towards the Romans; in the days of the Republic, the *fetiales*'s role changed into certifying to the senate the existence of 'just' cause of war.[28] To the field of international legal terminology, ancient Roman legal traditions made substantive contributions to provide with a 'European origin'. As Nussbaum shows, up to the nineteenth century, the writers on international law in variably adopted Roman legal learning not only as an incomparable tool of juristic precision, but also as an assimilative vocabulary for all over the Western Europe.[29] For example, Roman rules on private ownership (*dominium*) were relied on for tenets on territorial sovereignty, rules on private contracts were adduced for treaties, rules on *mandatum* for the functions of diplomatic agents, and so on.[30] Even the very phrase 'Law of Nations' is a literal translation from *jus gentium*.

---

25 Nussbaum, *A Concise History of the Law of Nations*, 11.
26 Ibid., 15.
27 Ibid., 17.
28 Ibid., 16–17.
29 Ibid., 18.
30 Ibid.

Following the fall of Roman Empire, Christianity dominated Europe in the Middle Ages wherein popes claimed and sometimes enforced an ultimate supremacy over emperors. Equipped with formidable spiritual and worldly powers, e.g. the authority to excommunicate, the pope became in the latter part of the Middle Ages the foremost representative of unitary rule in Western civilization.[31] Pope Innocent IV (1243 – 1254), for example, even put forward the claim that his power extended over infidels too, and if the infidels did not obey the pope's licit commands, "they ought to be compelled by the secular arm and war may be declared upon them by the pope and not by anyone else".[32] Moreover, Pope Innocent IV continues, "if [the] infidels prohibit preachers [of Christianity] from preaching, they sin and so they out to be punished".[33] In the conflict with the Saracens, the role of the Church was most prominent as the recognized political leaders of Christendom in the Middle Ages. The Popes prohibited the selling to the Saracens of arms, ships, lumber for ship construction, and other goods useful in warfare as well as the conclusion of treaties with non-Christian rulers.[34]

However, in the Eastern Europe, the highest authority was with the Byzantine emperor, who considered himself as the true successor of the Roman emperors and as called upon to rule over the world as well as the sovereign master of the Orthodox Church. From this sway over the Church, Nussbaum argues, the Byzantine emperor derived the claim of to be the protector of Christians, particularly the Orthodox, even outside the empire, which exemplifies another Christian 'universalist' ideology and consequently, presumptuous and interventionist policies.[35] Another difference between the East and the West appeared regarding the conception of just war in the Middle Ages. In the Western Europe, the Roman doctrine

---

31 Ibid., 23.

32 Pope Innocent IV, "Document 40: Commentaria Doctissima in Quinque Libros Decretalium," cited in Brett Bowden, "The Colonial Origin of International Law. European Expansion and the Classical Standard of Civilization," *Journal of the History of International Law* 7 (2005): 5.

33 Ibid., 4.

34 Nussbaum, *A Concise History of the Law of Nations*, 26–27.

35 Ibid., 27.

of just war was revived in Christian spirit. However, this doctrine served as an ideology to justify certain kinds of wars, rather than as a rule to prohibit or restrict wars. Moreover, the restrictive function of the just war doctrine was applicable only among the Christians.

> 'Pagans', who were regarded to be, or sometimes actually, hostile to the Christians were viewed as an agent of evil. To convert them to Christianity even by force was believed by many Europeans as sacred mission Christians.[36]

In the East, on the other hand, the Orthodox Church has never received the just-war doctrine. "The emperor of Byzantium considered himself God's vicegerent; to be brought under his domination, albeit by force of arms, was rather considered a blessing to the vanquished."[37] Thus, in both the eastern and western Europe, just war doctrine had no meaning for the non-Christian world.

The conception of natural law, like the just-war doctrine, was also adopted and remodelled in the Christian spirit during the Middle Ages. In the matter of law of war too, the necessity of protection of Christians played a key role. In this process, religious differentiation was also demonstrated. Although savagery in warfare during and after the battle persisted to a great extent during the Middle Ages, some progress was achieved during the later Middle Ages when the killing or enslavement of Christian prisoners of war was gradually abandoned. However, protection was not extended to non-Christian prisoners of war; centuries later such prisoners still found as slaves in Italy and elsewhere.[38]

In the interaction between Christian Europe and Muslim Orient, the latter too relied on religious norms in its inter-state relations. Thus, though citizens and diplomats of Italian city states were granted concessions by the Oriental ruler in the familiar form of franchises or diplomas, the Moslem rulers were

---

36 Onuma, "When Was the Law of International Society Born?" 24.
37 Nussbaum, *A Concise History of the Law of Nations*, 44.
38 Ibid., 35.

little interested in obtaining for their subjects reciprocal treatment in the respective European countries, for the Mohammedan law forbade the believers to sojourn for any length of time in the lands of the infidels.[39] Similarly, the non-Muslim settlers in Muslim states were allowed to preserve their own law given that "the Moslem law as set forth in the Koran was exclusively designed for the Moslem, who consequently did not care to regulate relations among infidels".[40] However, as Onuma shows, *Sharia* deals with non-Muslims as well under the dichotomy of 'believers' and 'unbelievers'. Thus, in the eighth century, the Abbasid dynasty expanded its territory "with a high profile based on the egocentric sense of superiority" to bring the 'unbelievers' within the influence of Islam.[41]

In Nussbaum's account of the works of the jurists of this period too, we trace a notion of 'international law for Christians'. For example, Bartolus (1314–1357), distinguished jurist of the Middle Ages and a Professor in Perugia, strongly objected on legal grounds to the servitude of Christian prisoners of war, thereby aiding the efforts of the Church.[42] French lawyer Pierre Dubois (1250–1321) in a pamphlet *On the Recovery of the Holy Land* (1306) postulated, as a prerequisite of a new crusade, the establishment of universal peace throughout Christendom. This goal he proposed to attain by a general council of all prelates and secular Christian princes, to be convoked and presided over by the pope.[43] Independently of Dubois, in later centuries others conceived the notion of, and proposed in actual politics, a federation or coalition of Christian states designated to fight against the Turks.[44]

While until the late eighteenth century European colonizing mission was legalized by identifying the non-Europeans as uncivilized barbarians, and then, by bringing these barbarians within the ambit of law of nature by founding fathers of international law such as Vitoria and Grotius, and later

---

[39] Ibid., 38.
[40] Ibid., 39.
[41] Onuma, "When Was the Law of International Society Born?" 20.
[42] Nussbaum, *A Concise History of the Law of Nations*, 46.
[43] Ibid., 49.
[44] Ibid., 50.

by their followers, in two other parts of the world, two different systems – Sinocentric tribute system and Islamocentric *Siyar* system – similarly claimed ethnic superiority by depicting the *other* as barbarian. In Onuma's description, the fundamental philosophy underlying the tribute system under the Chinese empire was the rule by virtue, i.e. the emperor should embody the virtue and spread it throughout under Heaven. Under this belief system, also the rulers beyond the immediate influence of Chinese civilization, i.e. non-East Asians, must obey the Emperor, who is the only supreme authority under Heaven. As a general rule, even those uncivilized people were expected to understand the virtue of the emperor, and send a tributary mission to the 'emperor' in order to share in his virtuous rule.[45] Similarly, in Onuma's description of the Islamocentric *Siyar*[46] system, it appears that until the seventeenth century, a sense of superiority guided Muslim rulers' relationship with non-Muslims. Based on the dichotomy of 'believers' and 'unbelievers', thus, the world was divided into "*dar al-Islam* (abode of Islam), the territory under Muslim rule and *dar al-harb* (abode of war), the territory under the rule of unbelievers". Under this system, the very essence of Islamic rule was believed to bring the non-Muslim within the purview of Islamic rule. The powerful Ottoman Empire imposed its rule of world ordering on the non-Muslim neighbours including the European nations by adopting a unilateral diplomacy by applying the rules of *Syar*, which were based on the egocentric and universalistic Islamic image of world order. However, with the decline of the relative strength, the Ottoman Empire had to have recourse to European principle of 'sovereign equality' vis-à-vis the European powers, which the latter very often refused to accept; consequently, from the seventeenth century on, Muslim rulers had to sign a number of unequal treaties that determined their relationship with the European powers.[47]

---

[45] Onuma, "When Was the Law of International Society Born?" 12–18.

[46] Based on Islamic scholarship, Onuma defines *Siyar* as the "norms that regulates the relationship of the Muslims with the non-Muslims".

[47] See generally Onuma, "When Was the Law of International Society Born?" 18–22.

Thus, irrespective of the origin of international law or to put more correctly, the debate about the origin of international law, it is evident that the notion of international law has always been used to identify the inferior *other* along ethno-cultural lines and consequently, regulate the relationship with *them* in the international sphere. The trend has been the same in every epoch of history and in every region where the dominant cultural group desired to define its relationship with the assumed culturally substandard *others* around it. Difference lies, however, in the language that each group used in this process. As the preceding discussion demonstrates, different regimes in different parts used different languages to accomplish the same imperial mission. However, at the dawn of the nineteenth century, this diversity ceased to exist; instead, now it is the dominant language of the European civilization that the imperial mission speaks.

The international law that we experience today verily has its root in the European international law of the sixteenth century and onward. Among different regional systems of international law in the antiquity and the Middle Ages, which were limited in their application, European international law emerged dominant in subsequent phases of its development as a universal norm of inter-State relations. In the following sections, we demonstrate how innovative European legal techniques such as natural law and legal positivism were applied to justify and legalize colonialism on the basis of ethnic 'otherness'.

4. Ethicising Colonialism and the Role of the Natural Law Jurists

Colonialism and international law went on hand in hand. On the one hand, international law justified colonialism, and on the other, as Anghie argues, international law was constituted in the process of colonial confrontation.[48] This two-way relationship between international law and colonialism got legal expressions first by natural law jurist Francisco de Vitoria in the

---

[48] See generally, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

sixteenth century. In the following century, Hugo Grotius clearly exhibited the influence of Vitoria's doctrines on his writing. This section provides with a critical perspective of their works in relation to ethicising the colonial projects.

4.1. Vitoria and the Colonization of the Amerindians

In 1494, Spain and Portugal signed the Treaty of Tordesillas under which these two Catholic European powers decided to regulate the distribution of the newly discovered or to be discovered countries without papal assistance or interference. The Treaty of Saragossa, concluded in 1529 between Charles V of Spain and John III of Portugal elaborated the provision restricting papal dispensation. With these treaties, the practice of papal grants vanished; instead, sovereignty over newly discovered territory was acquired by a symbolic act performed in the territory, e.g. the erection of a cross or of a monument bearing the arms of the conquering sovereign.[49] In such a context, Francisco de Vitoria – a professor of theology at the University of Salamanca – gave his famous lectures on "The Indians Recently Discovered" and on "The Law of War Made by the Spaniards on the Barbarians" in 1532. For centuries, these lectures had repercussions in the development of as well as discourse on international law. Vitoria doctrines, on the one hand, brought Spanish colonization of Amerindians under legal regulations, and on the other hand, justified the very act of colonization using the same legal language. Vitoria's legal language, like the practices in the ancient international and the Middle Ages, incorporated the same cultural differentiation to justify Spain's hegemonic rule over the Indians.

In the first place, Vitoria demonstrates humanitarianism by claiming that the Indian aborigines (called as barbarians) were true owners in both private and public law before the arrival of the Spaniards, and their ownership cannot be lost by reason of unbelief. He further asserts that titles based on universal imperial jurisdiction, papal grant, discovery, moral sin on the part of these Barbarians, and other titles claimed by many in those days could not justify

[49] Onuma, "When Was the Law of International Society Born?" 53–54.

denying the ownership of the Indians over their property. Vitoria refuses to preclude Indians from being true owners on the pretext of unsoundness of mind; moreover, he reminds the Spaniards that among their peasants many are not better than beasts.[50] Nevertheless, beneath this humanitarian gesture, Vitoria justifies the expropriation of resources by the fellow Spaniards using legal techniques.

Refuting the claims of unlawful titles by European scholars over Indian territory, Vitoria then presents a series of 'lawful titles' to establish Spanish dominance. First, he claims that under the law of nations (*jus gentium*), which either is natural law or is derived from natural law, the Spaniards have a right to travel into the lands in question and to sojourn there, provided they do no harm to the natives, and the natives may not prevent them. Therefore, to keep the Spaniards away from Indian territory would amount to an act of war.[51]

Moreover, Vitoria argues that by natural law running water and the sea are common to all, so are rivers and harbours, and by the law of nations ships from all parts may be moored there; and on the same principle they are public things. Therefore, it is not lawful to keep any one from them. "Hence it follows that the aborigines would be doing a wrong to the Spaniards, if they were to keep them from their territories."[52] Given that freedom of navigation is actually meant for smooth functioning of trade, Vitoria ensures the right to trade for the Spaniards by claiming that they must not be prevented from participation in opportunities considered by the natives themselves as common to citizens and guests alike, so long as they do no harm to their country. As a matter of fact, here Vitoria assumes "a kind of one-sided national-treatment prerogative with no treaty required".[53] Thus, neither may the native princes hinder their subjects from carrying on trade

---

50 See generally, Franciscus de Vitoria, *De Indis Reflectio Prior*, trans. J. P. Bate (Washington, DC: Carnegie Institution of Washington, 1917)., sec. II.

51 Ibid., sec. III, 151.

52 Ibid., 152.

53 Nussbaum, *A Concise History of the Law of Nations*, 62.

with Spanish, nor may the princes of Spain prevent commerce with the Natives.[54] Here, the expression of reciprocity is nothing short of legal camouflage. Onuma rightly comments:

> It should be noted that Vitoria made these arguments when the Spaniards were already in America but no Americans were in Europe, and when the Spaniards were in the process of conquering the Amerindians. In such an asymmetrical context, Vitoria's egalitarian theory and the Spanish military supremacy and ruthlessness, i.e., the critical elements of modern European civilization, realized and legitimized European domination over the non-Europeans.[55]

From these rights advocated by Vitoria follow the remedy for the Spaniards in case of violation of their lawful entitlements by the Indians. Thus, Vitoria prescribes: If the Indian natives wish to prevent the Spaniards from enjoying any of their above-mentioned rights under the law of nations, the Spaniards ought in the first place to use reason and persuasion to show that they do not come to the hurt of the natives, but wish to sojourn as peaceful guests and to travel without doing the natives any harm. But if, after this recourse to reason, the barbarians decline to agree and propose to use force, the Spaniards can defend themselves and do all that consists with their own safety, it being lawful to repel force by force. Even they should go to war, if it be necessary and lawful, in order to preserve their right.[56] Thus, Vitoria arrives at "the theory of a violated 'freedom' of the invaders".[57]

Alongside natural law, Virotia's claim of lawful titles for Spaniards rests on their sacred duty to propagate Christianity. Thus, holding the view that the Spaniards are the ambassadors of Christian people, he asserts that they have a right as well as obligation to preach and declare the Gospel in barbarian lands, for the Indians are all not only in sin, but outside the pale of salvation.[58] And like in other cases, if the Indians prevent the Spaniards from freely preaching the Gospel, the Spaniards ultimately acquires the right to

---

54 Vitoria, *De Indis Reflectio Prior*, 152.
55 Onuma, "When Was the Law of International Society Born?" 25.
56 Vitoria, *De Indis Reflectio Prior*, 154.
57 Nussbaum, *A Concise History of the Law of Nations*, 62.
58 Vitoria, *De Indis Reflectio Prior*, 156.

make war and seize lands and territory of the natives and set up new lords there and put down the old lords until they succeed in obtaining facilities and safety for preaching the Gospel.[59] Thus, "Vitoria injects the religious element in the objective aspect of the just-war conception, inasmuch as he considers interference with the preaching of the gospel as a just cause of war".[60] It is also worth noting that here Vitoria simply echoes the pronouncement of Pope Innocent IV made three centuries earlier in the context of preaching Christianity among the infidels. In other words, Vitoria maintains the century old practice of justifying Christian dominance over non-Christians using the natural law language.

The most explicit expression of ethnic differentiation in Vitoria's work appears in the eighth lawful title he prescribed, of which he is doubtful but which he does not entirely condemn. Claiming that the aborigines are little short of unintelligent, he finds them unfit to found or administer a lawful State up to the standard required by human and civil claims. 'Proofs' are abundant in his support: they have neither proper laws nor magistrates; they are not capable of controlling their family affairs; they are without any literature or arts, not only the liberal arts, but the mechanical arts also; they have no careful agriculture and no artisans; and they lack many other conveniences, necessaries, of human life.[61]

> It might, therefore, be maintained that in their own interests the sovereigns of Spain might undertake the administration of their country, providing them with prefects and governors for their towns, and might even give them new lords, so long as this was clearly for their benefit. If they were all wanting in intelligence, there is no doubt that this would not only be a permissible, but also a highly proper, course to take; nay our sovereigns would be bound to take it, just as if the natives were infants. The same principle seems to apply here to them as to people of defective intelligence; and indeed they are no whit or little better than such so far as self-government is concerned, or even than the wild beasts, for their food is no more pleasant and hardly better than of beasts. Therefore their governance should in the same way be entrusted with to people of intelligence.[62]

---

59 Ibid., 157–158.
60 Nussbaum, *A Concise History of the Law of Nations*, 61.
61 Vitoria, *De Indis Reflectio Prior*, 161.
62 Ibid.

And most interestingly, for Vitoria such act of taking responsibility of the 'people of defective intelligence' by the 'people of intelligence' surely might be founded on the precept of charity.[63] His phrase – "*they* be *our* neighbours and *we* being bound to look after *their* welfare" – unequivocally presents a cultural dichotomy, wherein Vitoria as a representative of the 'intelligent' *us* is advocating a better future for the barbarian *other* by legitimizing Spanish rule over *them*. Remember, Hitties King Suppiluliuma used the similar rhetoric to justify his acts of invasion in 1350 BC.

Regarding the law of war, Vitoria again maintains differential treatment. Thus, in a war with pagans in which the indiscriminate spoliation of all enemy-subjects alike and the seizure of all their goods are justifiable, Vitoria argues, it is indubitably lawful to carry off both the children and the women of the Saracens into captivity and slavery, for the animosity is perpetual and that the pagans can never make amends for the wrongs and damages they have wrought. But on the other hand, he claims that by the law of nations, it is a received rule of Christendom that Christians do not become slaves in right of war; thus, similar enslaving is not lawful in a war between Christians.[64]

Another Catholic theologian of the sixteenth century – Francisco Suarez – further elaborated the doctrine of just war along the lines laid down by Thomas Aquinas and Vitoria. And Suarez too propagated different rule of war to be applied for non-Christians. Thus, for infidels Suarez suggests compulsion, i.e., armed intervention, in case they interfere with the free preaching of the Gospel; he further suggests that Christian princes, at the expense of the infidels, may establish fortifications in the infidels' country in order to secure ingress and egress of the missionaries.[65] Similarly, Alberico Gentili, despite his Protestant faith, looks upon the Saracens as potential enemies and allows treaties with infidels only on terms which would render them tributary to the Christian power, or else in commercial matters.[66]

---

63 Ibid.

64 Franciscus de Vitoria, *De Indis Et De Ivre Belli Reflectiones*, trans. J. P. Bate (Washington, DC.: Carnegie Institution of Washington, 1917), 181.

65 Nussbaum, *A Concise History of the Law of Nations*, 70.

66 Ibid., 79.

Thus, Vitoria's doctrinal position on Spaniard-Indian relations had profound influence on successive scholars of international law. Most importantly, in Vitoria's writing, as Anghie observes, "particular cultural practices of the Spanish assume the guise of universality as a result of appearing to derive from the sphere of natural law".[67] These 'universal norms', constructed by the sophisticated use of natural law techniques, are then put as a 'standard' on the basis of which peoples outside Europe would be assigned with an inferior image of 'barbarian' or 'uncivilized' in the future development of international law in succeeding centuries. To that we turn now.

4.2. Grotius and the Dutch Interest in the East Indies

In a letter dated the 28th of November 1606 to Don Martin Alphonse de Castro, the Councillor and Viceroy for the East Indies, the King of Spain – Philip III declaring prohibited all commerce of foreigners in India itself and in all other regions across the sea commanded the Viceroy to take all necessary measures to enforce such prohibition with the full power of his authority and without any exception. In another letter to the same recipient on the 27th of January 1607, the King clearly stated that the Dutch were the enemies of Spain who had received a welcome reception from the natives in the Eastern regions to the apparent dissatisfaction of the King. Under this circumstance, he expressed confidence that the Viceroy would punish both the Dutch and the natives so thoroughly that neither the one nor the other would ever dare such practices in future. Couple of years later, in 1609, Dutch scholar and diplomat Hugo Grotius published his famous writing *Mare Liberum* (The Freedom o the Seas). *Mare liberum* is actually the Chapter XII of the study – *De Jure Praedae* (On the law of Prize and Booty) – prepared by Grotius in 1604 and 1605 upon the request of Dutch East India Company upon the seizure of Portuguese-flagged vessel *Sta. Catarina* by the Dutch.[68] For centuries, *Mare Liberum* has been reverentially referred to as a milestone in the development of international law for expanding its horizon.

---

[67] Antony Anghie, "Francisco De Vitoria and the Colonial Origins of International Law," *Social and Legal Studies* 5, no. 3 (1996): 326.

[68] Nussbaum, *A Concise History of the Law of Nations*, 97.

In *Mare Liberum*, to refute the claim of Portugal, which at that time was a Spanish dominium, Grotius relied on the inviolable maxim of the law of nations – every nation is free to travel to every other nation, and to trade with it – which has its root in the law of nature. This is a right, Grotius claims, which according to the Law of Human Society ought in all justice to have been allowed. Thus, those "who deny this law, destroy this most praiseworthy bond of human fellowship, remove the opportunities for doing mutual service, in a word do violence to nature herself".[69] Grotius has numerous convincing evidence in his support: the Israelites *justly* smote with the edge of the sword the Amorites because they had denied the Israelites an innocent passage through their territory; when the Christians made crusades against the Saracens, no other pretext was so plausible as that they were denied by the infidels free access to the Holy Land; so on. Then he concludes that "the Portuguese, even if they had been sovereigns in those parts to which the Dutch make voyages, would nevertheless be doing them an injury if they should forbid them access to those places and from trading there".[70] However, subsequently Grotius proves that the Portuguese have no right to sovereignty by title of discovery or by virtue of title based on the papal donation or by title of war over the East Indies to which the Dutch make voyage. Consequently, neither the Indian Ocean nor the right of navigation thereon can be claimed by the Portuguese on the similar grounds.

In molding his argument, Grotius exhibits profound influence of Vitoria's views in relation to the colonization of the American Indians. For example, Grotius relies on Vitoria's claim that the Spaniards have no more legal right over the East Indians because of their religion, than the East Indians would have had over the Spaniards if they had happened to be the first foreigners to come to Spain.[71] In another place, he endorses Vitoria's opinion that Christians, whether of the laity or of the clergy, cannot deprive infidels of their civil power and sovereignty merely on the ground that they are infidels,

---

[69] Hugo Grotius, *Mare Liberum*, trans. Ralph Van Deman Magoffin (New York: Oxford University Press, 1916), 53.

[70] Ibid., 54.

[71] Ibid., 56.

unless some other wrong has been done by him.[72] This qualifying phrase demands a critical examination.

As we have discussed in the preceding section, having claimed that moral sin is not a valid excuse for evicting Amerindians from their property, Vitoria then justified Spanish domination in that region by having recourse to the right to free navigation and the right to trade guaranteed under natural law. For Vitoria, violation of these rights is a valid reason for declaring war against the barbarians. In a similar vein, Grotius too, first asserts that though some of the Indians of the East were idolators and some Mohammedans, and therefore sunk in grievous sin, had none the less perfect public and private ownership of their goods and possessions, from which they could not be dispossessed without just cause. And then, Grotius finds a 'just cause' in the fact that the right to free navigation and to trade has been refused to the Dutch, which ultimately legitimizes war against the Portuguese. Thus, following the legacy of past naturalists, Grotius argues:

> If many writers, Augustine himself among them, believed it was right to take up arms because innocent passage was refused across foreign territory, how much more justly will arms be taken up against those from whom the demand is made of the common and innocent use of the sea, which by the law of nature is common to all? If those nations which interdicted others from trade on their own soil are justly attacked, what of those nations which separate by force and interrupt the mutual intercourse of peoples over whom they have no rights at all?[73]

While Vitoria made his legal argument against the Indian natives, Grotius here finds the Portuguese the subject of his verdict. And in this feud between two great European powers, the East Indians remain silent bystanders. Grotius' otherwise sophisticated articulation of the doctrines of natural law does not accommodate the East Indians in this process, whose fate would be re-written in the following centuries by the European powers. Like Vitoria, Grotius also uses the same legal language, i.e. natural law as well as divine

---

[72] Ibid.
[73] Ibid., 85.

mandate to serve the national interest when he says: "there need not be the slightest fear that God will prosper the efforts of those who violate that most stable law of nature which He himself has instituted, or that even men will allow those to go unpunished who for the sake alone of private gain oppose a common benefit of the human race".[74] For Grotius here, common benefit equates European, and more specifically, Dutch interests. Moreover, his claim of universality of natural law unequivocally emanates from the assumed superiority of Christianity as a universal faith. Thus, he convinces his Christian European audiences that *their* God endorses such a war. Although, Goritus is generally believed to have secularized natural law, given the anti-Islamic political spirit among Christian Rulers in Europe of his time, he endeavoured to justify Christian powers' alliance with non-Christians with reference to Biblical history, the church fathers and the medieval doctors.[75]

Grotius is widely celebrated for his humanist attitude towards the non-European rulers; he was the one to recognize the full sovereignty of the individual Asian monarchs. For example, Wheaton noting that Grotius makes no distinction between different types of nations – civilized or uncivilized – appreciates Grotius's cosmopolitism.[76] However, as Borschberg argues, Grotius as well as the Dutch East India Company had ulterior motive behind such recognition of full sovereignty for East Indian rulers back in the seventeenth century. It was the blue print of securing for themselves "'a legal monopoly' directed not against Spain and Portugal alone, but against other European traders as well, especially the English".[77] Thus, Grotius played the role of a legal agent to facilitate colonization of the East Indies by the Dutch.

---

[74] Ibid., 86.

[75] Peter Borschberg, "Hugo Grotius, East India Trade and the King of Johor," *Journal of Southeast Asian Studies* 30, no. 2 (1999): 233.

[76] Henry Wheaton, *Elements of International Law*, 8th ed. (Boston: Little, Brown, and Company, 1866), 10.

[77] Borschberg, "Hugo Grotius, East India Trade and the King of Johor," 243.

In the face of continuous war with the Portuguese, declining profit from the Dutch East India trade, and increased competition from the English two conferences were convened in 1613 and 1615 to settle on-going disputes between the Dutch and the British – two great naval powers – over the colonial enterprise in Asia.[78] Grotius was deputized to the conferences. To pursue the English delegation with the Dutch proposal of merging the English and Dutch East India Company to maintain an armed presence in the East, Grotius in his opening speech states: "neither peace among the peoples without arms, nor arms without funds, and no funds without tributes".[79] Here, Grotius quite unambiguously expresses his loyalty to the Company. However, the English were not sufficiently persuaded.

During this time, Grotius demonstrated a changed attitude towards the Asian peoples. Just six year after the publication of the Freedom of the Sea, the same enlightened jurist and the 'father of international law' – Hugo Grotius – now declares, in the words of Borschberg, that

> if the Asian peoples are reluctant to fulfil their contracts of trade with the Dutch, this does not at all show that the contracts are invalid as the English delegates argued, but simply that the Asians are *perfidious*. It is thus legitimate for the Dutch to compel the Asians to honour their contracts and to prevent them from trading with the English or any other party, Asian or European.[80]

This reflects Grotius' consciousness of political realities. As Pound claims, Grotius' jurisprudence "grew out of and grew up with the political facts of the time and its fundamental conception was an accurate reflection of an existing political system which was developing as the law was doing and at the same time".[81]

---

78 Ibid., 226.

79 See ibid., 229.

80 Ibid., 247.

81 Roscoe Pound, "Philosophical Theory and International Law," *Biblioteca Visseriana Dissertationum Ius Internationale Illustratium* 1 (1923): 71–90, quoted in Anghie, *Imperialism, Sovereignty and the Making of International Law*, 129.

Thus, Grotius followed Vitoria in using the natural law vocabulary to legitimize the national interests of his country. Therefore, beneath the claim of sovereign equality remains the motive of establishing trade monopoly. The rhetoric of the universality of 'law of nature' disguises its sense of Christianity as a superior value. And the whole notion of 'law of nature' is structured, defined, and propagated to provide the European colonial powers with a legal mechanism to advance imperialism to the non-European world.

This trend of ethnic differentiation within natural law doctrine is also found in the writings of the eighteenth-century German professor Christian Wolff. In his work *Jus Gentium* published in 1749 he presents the dichotomy of 'barbarous' and 'cultured and civilized' nations on the basis of their reliance on law, again understood in a European sense. Given the little care for intellectual virtues and neglect for perfecting of the intellect, Wolff asserts, the barbarous nations follow the leadership of their natural inclinations and aversions in determining their actions, whereas cultured and civilized nations "cultivates intellectual virtues," "desires to perfect the intellect," "develop the mind by training," and possess "civilized usages or usages which conform to the standard of reason and politeness".[82] Thus, it sounds logical that the civilized should take the responsibility of training the barbarians so that they can join the civilized world. Despite his acknowledgement that by nature all nations are equal, he is, nonetheless, of the opinion that "what has been approved by the more civilized nations is the law of nations".[83]

However, from the nineteenth century onward, the same task of European imperialism was carried out with another dominant legal vocabulary – positivism, but using the same technique of constructing the backward and the uncivilized *other*. The following section briefly sketches the intellectual contributions of the nineteenth century jurists to this project.

5. Ethnicity in Legal Positivism, and the Standard of Civilization

Writings of Vitoria and Grotius remained salient for the understanding of international law and its relationship with the barbarian world until the late

---

[82] Christian Wolff, *Jus Gentium Methods Scientifica Pertractatum*, (NY: Oceania Publications for Carnegie Institution, 1964 [1749]), 33, cited in Bowden, "The Colonial Origin of International Law," 14.

[83] Wolff, 15–17, cited in ibid., 14.

eighteenth century, from when the supremacy of natural law gradually faded into insignificance with the rise of sovereignty as a political doctrine. In the nineteenth century, legal positivism emerged as dominant legal language for dealing with colonialism through the writings of jurists such as Henry Wheaton, James Lorimer, William E. Hall, John Westlake, and Thomas Lawrence. The following is a brief sketch of how colonialism is expressed as well as justified as a phenomenon of ethno-cultural hierarchy in the authoritative writings of the positivists.

While the naturalists used a universal language of law of nature to bring the non-Europeans within the ambit of international law, the nineteenth century jurists used the technique of excluding them from the international society in determining the relationship of international law with the non-European world. To this end, they generally relied on the cultural notion of civilization, which without being properly defined remained a standard for acquiring the membership of international society. The foundational assumption of this system was that the Europeans are the civilized nations and the 'other' rests outside the pale of civilization; therefore, for becoming the member of international society, the latter needs to attain some degree of civilization. Designing the criterion for membership in this way, various human groups are actually assigned with different positions in the civilizational progress, wherein European civilization is portrayed as the finishing point of this race towards civilization. In the writing of Scottish jurist James Lorimer, such categorization is clear: "As a political phenomenon, humanity, in its present condition, divides itself into three concentric zones or spheres – that of civilized humanity, that of barbarous humanity, and that of savage humanity."[84] The relevance of ethnicity in such categorization is evident from his appreciation of the emergence of a new field of study – ethnology – in the very opening statement of his work: "No modern contribution to science seems destined to influence international politics and jurisprudence to so great an extent as that which is known as ethnology, or the science of races."[85]

---

[84] James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (Edin.: Blackwood, 1883), 101.

[85] Ibid., 93.

The influence of ethnology on international law got best expression in the evolutionary framework that "suggested that non-European communities were not only different but inferior in the sense of being more primitive".[86] The evolutionary theories offered, as Burrow notes, a way of reformulating the essential unity of mankind by arguing that the differences represented different stages in the process of progress.[87] Thus, in this theory of progress, "the 'otherness' of the non-Europeans could be seen as backwardness, a lagging behind in the chain of evolution".[88] Koskenniemi argues that such a framework was necessary to justify not only the colonizing mission, but also the injustices involved in it.[89]

Having identified the uncivilized 'other', the nineteenth century jurists then devised a system of international law that sounded more like a system of the European, by the European and for the European. And the uncivilized other automatically fell outside this system. Lawrence, thus, defines international law "as the rules which determine the conduct of the general body of civilized states in their dealings with one another".[90] For him, "civilization not only provides men with many interests in common; but it also tends to remove man's suspicion of his brother man", among countless others, and thereby, civilization tends "to knit states together in a social bond somewhat analogous to the bond between the individual man and his fellows".[91] Similarly, according to Hall, "[I]nternational law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement."[92] Here, a civilized state is comparable to a civilized citizen of a civilized European State who is guided by the conscience in abiding by laws. This conscience is an indication of civilization which the non-Europeans essentially lack. For Wheaton too, "[I]nternational law, as

---

86 Koskenniemi, *The Gentle Civilizer of Nations*, 75.

87 J. W. Burrow, *Evolution and Society. A Study of Victorian Social Theory* (Cambridge: Cambridge University Press, 1966), 98–99, cited in ibid., 74.

88 Henry Sidgwick, *Philosophy. Its Scope and Relations. An Introductory Course Lectures* (London: Macmillan, reprinted by Theommes, 1998 [1902]), 174–211, cited in Koskenniemi, *The Gentle Civilizer of Nations*, 74.

89 Koskenniemi, *The Gentle Civilizer of Nations*, 74.

90 Lawrence, *The Principles of International Law*, 1.

91 Ibid., 3.

92 William E. Hall, *A Treatise on International Law*, 8th ed. (Oxford: Clarendon Press, 1924), 1.

understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent."[93] He finds the supremacy of international law of Christian civilized nations in the fact that the Mohammedan and Pagan nations of Asia and Africa in their interaction with the Europeans renounce their peculiar international usages and adopt those of Christendom.[94] In the same vein, Henri Bonfils and Paul Fauchille explain in their text book that the foundation of international law resides "in the undeniable and necessary fact of the existence of a durable and legally recognized community among States that have attained or exceeded a certain level of civilization".[95] For Westlake, "the general rules of international law apply in their fullness only to sovereign States like France or the United Kingdom"[96] and sovereignty is an attribute of European civilization alone. This is how the nineteenth century jurists perceived international law as a European regime and automatically exclude the non-European world from its sphere.

Thus, the whole concept of international law is ethnicized by the creation of the dichotomy of civilized Europe and uncivilized non-Europe. The uncivilized non-Europe conceived as an ethnic other is outside the realm of international law, for such rules are meant for regulating the mutual interaction among the civilized European nations. As Anghie notes:

> [o]nly the practice of European states was decisive and could create international law. Only European law counted as law. Non-European states were excluded from the realm of law, now identified as being the exclusive preserve of European states, as a result of which the former were deprived of membership and the ability to assert any rights cognizable as legal.[97]

On the other hand, in their interaction with the non-European uncivilized, the Europeans are put in a superior position to decide the rules of the game. The nineteenth century positivists paid a great service to this effect by defining and qualifying the concepts of State and sovereignty that proved crucial in securing a dominant position for the Europeans in such interactions. They explained law, society, State and sovereignty in a way that

---

[93] Wheaton, *Elements of International Law*, 20.

[94] Ibid., 18.

[95] Bonfils-Fauchille, *Manuel*, 5, cited in Koskenniemi, *The Gentle Civilizer of Nations*, 73.

[96] John Westlake, *Chapters on the Principles of International Law* (Cambridge: The University Press, 1894), 86.

[97] Anghie, *Imperialism, Sovereignty and the Making of International Law*, 54.

excluded the non-European others from international society, but at the same time, applied the same positivist international law with a view to justifying the colonization of the uncivilized.

Hegel, for example, having claimed that international law springs from the relations between autonomous States, asserts that it is essential that the authority of a State should receive its full and final legitimation through its recognition by other States. And then he finds it questionable how far a nomadic people or "any people on a low level of civilization" can be regarded as a State.[98] Along the line of Hegelian thoughts, Lawrence notes that only sovereign States are the subjects of international law, but qualifies the notion of sovereignty with the view that before a sovereign State can become a subject of international law it must possess a certain degree of civilization despite the fact that this degree is never ascertained.[99] Therefore, he concludes that

> [A] body politic completely supreme over all its members, and subject to no external authority, *must have reached a certain degree of civilization*, have ceased to be nomadic and become owner of a fixed territory, have provided for the continuity of its existence, and have attained a certain size and importance, before it can be regarded as one of those Sovereign States which are Subjects of International Law.[100] (Emphasis added)

However, Lawrence assures that there are nations who will never be able to exhibit this mark of civilization: "It would, for instance, be absurd to expect the king of Dahomey to establish a Prize Court, or to require the dwarfs of the central African forest to receive a permanent diplomatic mission".[101] Thus, on the one hand, Lawrence sets the requirement for being the subject of international law in conformity with the European standard of civilization, and on the other hand, by putting this standard along civilizational line, predicts permanent exclusion of some ethnic groups from the realm of international law.

Wheaton, in the same vein, emphasizes the recognition by the civilized nations as a mode of acquiring sovereignty for the uncivilized ones. For him, the terms State and sovereign are synonyms, but the nature of sovereignty – internal or external – determines the fate of the State in international

---

98 Georg E. F. Hegel, *Philosophy of Rights*, trans. T. M. Knox (Oxford: Clarendon Press, 1942), 212–213.

99 Lawrence, *The Principles of International Law*, 58.

100 Ibid., 60.

101 Ibid., 58.

relations. While the internal sovereignty of a State may be acquired by the fact of mere existence, the external sovereignty of any State requires recognition by other States in order to render it perfect and complete.[102] In his words,

> if [a new State] desires to enter into that great society of nations, all the members of which recognize rights to which they are mutually entitled, and duties which they may be called upon reciprocally to fulfill, such recognition becomes essentially necessary to the complete participation of the new State in all the advantages of this society.[103]

Thus, unless such recognition is granted, uncivilized remains uncivilized and does not exist in the international plane, though it may well exist as a sovereign so far as its internal affairs are concerned. Classifying sovereignty as internal and external, therefore, Wheaton reinforces the image of a world composed of a family of civilized nations as well as a group of states who lack necessary external sovereignty to be a part of the civilized family. In this ambivalence of positivist legal doctrine, the latter exist as a State in relation to their internal affairs, but at the same time, they cease to exist in relation to international law.

And so far as the right of recognizing the new State as a member of international society is concerned, it lies without the least fear of contradiction with the civilized world. Lawrence provides with the rationale behind such privilege for the civilized nations when he asserts that operating areas of the law of nations and civilization are supposed to coincide.[104] Presenting his claim that international law is what the civilized nations practice among themselves in this way, he then asserts that for a new State to be admitted to this common sphere of international law as well as civilization is to obtain a kind of "international testimonial of good conduct and respectability," which the European nations developed over centuries.[105]

> Modern [I]nternational [L]aw grew up among them. There never was a time when they were outside its pale. Their influence helped to mould it. Many of them existed before the great majority of its rules came into being. There was no need for them to be formally received among its subjects.[106]

---

102 Wheaton, *Elements of International Law*, 28.
103 Ibid., 28.
104 Lawrence, *The Principles of International Law*, 59.
105 Ibid., 59.
106 Ibid., 84.

But whenever other nations desire to join this European group, they must have the approval from the latter. Therefore, it is fully justified that the European nations possess the right to decide on the membership of the civilized family of nations.

Again, the treatment of new States desiring access to this society is not supposed to be uniform; instead, cases should be determined on the basis of ethnic character of the nations seeking admission. In other words, civilized Europe is entrusted with not only the monopolized right to recognize the uncivilized 'other'; in this process it is also allowed to classify the 'other' on the basis of the position of the aspirant in the scale of civilization, which is again defined along ethnic lines. Thus, Lorimer holds the view that as of right, civilized nations may grant three stages of recognition: first, plenary political recognition for the 'civilized humanity', i.e. all the existing States of Europe with their colonial dependencies, *in so far as these are peopled by persons of European birth or descent* and to the States of America, second, partial political recognition for the 'barbarous humanity' comprising Turkey, China, Japan, and Siam, and finally, natural or mere human recognition for the 'savage humanity' covering rest of the mankind.[107] On the other hand, Lawrence differentiates between the admission of States hitherto barbarous (e.g., Turkey, Japan, and Persia) and the admission of States formed by civilized men in hitherto uncivilized States (e.g., the Transvaal, the Congo Free State, and Liberia). For the first category of States, it is required that the State to be admitted shall be to some extent civilized after the European model. Since the exact amount of civilization required cannot be defined beforehand, Lawrence prescribes that each case must be judged on its own merits by the powers who deal with it.[108] Although Lawrence does not provide any specific mechanism for the admission of the States in the second category, it seems obvious from this categorization that these States have already attained certain degree of civilization. More specifically, these hitherto uncivilized States have transformed themselves with the help of the civilized men who have taken the responsibility of civilizing the uncivilized out of philanthropic zeal. Thus, Lawrence appreciates the philanthropic venture of the International Association of the Congo under the direction of the King Leopold II of Belgium, "who for some years provided from his private resources the funds necessary to carry on its operations. These were directed towards the formation of civilized settlements in the vast area of the

---

[107] Lorimer, *The Institutes of the Law of Nations*, 101–102.

[108] Lawrence, *The Principles of International Law*, 85.

Congo basin, for the purpose of combating the slave-trade and opening up the country to legitimate and peaceful commerce."[109] However, the later history of Congo as a matter of fact stands in sharp contradiction with King Leopold's projected benevolence.

Hall too understands civilization in ethnic terms. His claim that international law is a product of special civilization of modern Europe, and therefore, only such states can be presumed to be subject to it as are 'inheritors' of that civilization assumes an ethnic underpinning of European civilization. Thus, the non-European world automatically falls outside the sphere of civilization first, and then, as a consequence, of international law. To be a part of international law then, Hall argues, they must progress with the acquiescence of the Europeans.[110] Accordingly, his conclusion follows like this:

> If by its origin a new state inherits European civilization, the presumption is so high that it intends to conform to law that the first act purporting to be a state act which is done by it, unaccompanied by warning of intention not to conform, must be taken as indicating an intention to conform, and brings it consequently within the sphere of law. If on the other hand it falls by its origin into the class of states outside European civilization, it can of course only leave them by a formal act of the kind already mentioned.[111]

Here, presumption follows the ethnic 'origin' of a nation, and admission to international legal system is determined on that basis. Thus, a State outside the pale of European civilization to be a member of this system must act to exhibit to the satisfaction of the elite members of the civilized international society that it has attained certain degree of civilization in line with the European civilization. And given that there is no such defined standard of civilization, their admission remains at the mercy of the civilized European nations. Koskenniemi presents this paradox in the most lucid manner:

> [i]f there is was no external standard for civilization, then everything depended on what Europeans approved. What Europeans approves, again, depended on the degree to which aspirant communities were ready to play by European rules. But the more eagerly the non-Europeans wished to prove that they played by European rules, the more suspect they became: had not Bluntschli argued that only 'non-Aryans' bowed down in front of their masters? In order to attain equality, the non-European community must accept Europe as its master – but to accept a master was proof that one was not equal.[112]

---

[109] Ibid., 86.
[110] Hall, *A Treatise on International Law*, 47.
[111] Ibid., 48.
[112] Koskenniemi, *The Gentle Civilizer of Nations*, 135–136.

Within this positivist dichotomy of civilized and uncivilized, colonization is justified as a mission to civilize the uncivilized. And it is also legitimate since there is no 'government' – understood as an attribute of civilization – in the native lands to prevent colonization. Thus, Westlake concludes that "the inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied," for they cannot be kept out in the absence of any government.[113] But at the same, since international law is perceived as a set of rules applicable among European nations, the native communities – the uncivilized and hence colonized – has no claim under international law; instead, the interrelations of the colonizers are regulated by this set of civilized norms. And the fate of the colonized is left with the conscience of the colonizers who are civilizers as well.[114] The nineteenth century positivists thus created a legal regime of right without duty for the Europeans in their relationship with the colonized. As Hall uphold, under international law the colonizers are duty-bound towards other colonizers only. Westlake expresses this role of international law most explicitly: "[i]nternational law has to treat such natives as uncivilized. It regulates, for the mutual benefit of civilized states, the claims which they make to sovereignty over the region, and leaves the treatment of the natives to the conscience of state to which the sovereignty is awarded."[115] German jurist Heimburger maintains in 1888 that the State's quest for territory is a justified "expression of its life-energy" under international law, and is "protected as long as it does not conflict with the legal spheres of the other European States".[116] The use of the term 'legal sphere' categorically underscores the legal character of colonial missions. In this lawful process of colonization, the colonized remains outside the discourse. They are assigned the role of an unlucky consumer in a highly monopolised market where they are left with no other option other than consuming the commodity of 'civilization' manufactured in the West; this situation is in fact analogous to the very structure of the colonial economy. And international law is there only to regulate as well as to legitimize the scramble of the colonizers to set up their own domain of monopoly in the vast uncivilized world around them.[117]

---

113 Westlake, *Chapters on the Principles of International Law*, 142–143.

114 Koskenniemi, *The Gentle Civilizer of Nations*, 108.

115 Westlake, *Chapters on the Principles of International Law*, 142.

116 Cited in Koskenniemi, *The Gentle Civilizer of Nations*, 109.

117 The role of the colonized as passive bystanders is well substantiated in the Berlin West African Conference of 1884 and 1885. Without the consent or participation of the African people, dominant European powers of that time demarcated the whole of

The nineteenth century as a particular period in history contains more than what we have sketched so far in relation to the creation and domination of ethnic other in the forms of colonization. However, the thrust of the preceding discussion was to demonstrate how the nineteenth century positivists carried out the mission of furthering European dominance over the rest of the world using legal positivism. The nineteenth century legal scholarship had its own characteristics as the natural law scholarship had in the preceding centuries; yet, its contributions had perhaps constituted the most significant epoch in the history of international law by providing with juristic basis for concepts such as State, sovereignty, and civilization in relation to international law and its other. Nevertheless, despite its unique approach to international law, the nineteenth century legal positivism is not much different from earlier efforts to legitimize colonizing mission by identifying the backward and uncivilized ethnic other. The nineteenth century jurist Wheaton, who also followed this trail, appreciated their contribution as the foremost source of international law: "they are generally impartial in their judgment. They are witnesses of the sentiments arid usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles."[118] For Wheaton, thus, the 'impartiality' of European international law jurists appeared as a philanthropic connotation. In this way, international law was guided by the ethnic 'otherness' embedded in it on the one hand, but on the other hand, applied various innovative techniques to camouflage this biasness as a philanthropic venture of civilizing the uncivilized 'other'.

6. Concluding Remarks

Although in each phase of its development, different legal principles dominated the plane of international law, the notions of the 'self' and its 'other' always remained the core of this discipline. In other words, the history of international law all through history is marked by the phenomenon of creating and dominating the ethnic 'other' by the dominant cultural group of each epoch, European domination being the obvious characteristic of international law in the modern history. Different legal techniques and vocabularies have been employed to accomplish this task, but the

---

Africa into colonies or spheres of influence in such a way that they came under two or three European powers.

[118] Wheaton, *Elements of International Law*, 20.

phenomenon remained unchanged. While the sixteenth and seventeenth century jurists, such as Vitoria and Grotius, used the vocabulary of natural law to legitimize European control over the 'barbarians' and also to legalize colonization of vast territories outside Europe, the nineteenth century jurists such as Wheaton, Lawrence, Westlake, Lorimer, and Hall, applied the language of legal positivism to keep the 'barbarians' outside the domain of European international law. But at the same time, the positivists advanced European imperialism by using the 'standard of civilization', again determined along ethnic lines.

The foregoing discussion, in one way, sketches the meaning of 'ethnicity' in international law by exploring their historical relationship. Throughout history, human groups have been reduced to barbarians or savages for not being 'Greek', 'Roman', 'Muslim', 'Christian', 'Chinese', 'European', 'civilized', and so on. As a discipline, international law has always been used in dealing with these barbarians and savages. Unlike many other disciplines, even the very creation and development of international law relied on ethnic otherness at different points of time. However, in the international law of modern time, this continuous process of defining and dealing with the ethnic 'other' reinforces the supremacy of the 'West' constructed as a civilized cultural group, and consequently, the need for transplanting its cultural attributes to the non-Western world. In this sense, the relationship between 'ethnicity' and international law is to be understood in historical continuity; it should be conceived as an incessant 'process' that goes much beyond the nineteenth century international jurisprudence. While the present article grasps a segment of this process, much is left to be explored in the future.

The Dhaka University Studies, Part-F Vol. XIX (2) : 35-64 , December 2008

POST-COLD WAR UN PEACEKEEPING: A REVIEW OF LEGAL ASPECTS

Mohammad Nazmuzzaman Bhuian*
Muhammad Mahbubur Rahman**

1. Introduction

UN Peacekeeping has become an increasingly prominent tool used by the international community to promote conflict management and resolution.[1] Its importance and relevance as a pragmatic tool to deal with conflicts worldwide cannot be over-emphasized as the United Nations is under constant pressure to respond to conflicts across the globe. Changing responses of the United Nations to address these constant pressures are, day by day, adding new dimensions to the concept of peacekeeping. In many cases, particularly after the end of Cold War, two fundamentally different concepts - peacekeeping and peace enforcing - are being blended in field operations. Consequently, many legal issues are entering the forefront of public debate.

In the context of such background, the overall objective of the present paper is to identify the legal aspects concerning UN peacekeeping, to assess the prevailing interpretations and doctrines supporting or rebutting the hypotheses associated with these legal aspects, and to look at the post-Cold War developments of peacekeeping and also to examine the legal issues arising out of such developments.

2. The Term 'Peacekeeping' in the UN Context: Misnomer or Open to Frequent Re-definition?

"Peacekeeping" is a broad, generic, and often imprecise term to describe many activities that the United Nations and other international organizations

---

* Assistant Professor, Department of Law, University of Dhaka.

** Lecturer, Department of Law, University of Dhaka.

1 Greig, J. M. and Diehl, P. F. "The Peacekeeping - Peacemaking Dilemma" *International Studies Quarterly*, Vol. 49, No. 4, 2005, p. 621.

undertake to promote, maintain, enforce, or enhance the possibilities for peace. The word 'peacekeeping' is neither defined in the 111-article-long Charter of the United Nations,[2] nor in any other international legal instrument. The existing literature also does not agree on a standard definition. Consequently, the concept of peacekeeping is open to a variety of definitions, and it has been used in several ways by scholars writing on the subject.[3] The reason for this conceptual uncertainty is also due to the fact that this single concept is used to describe an evolving phenomenon with changing variables, actors and objectives.[4]

Former Secretary-General of the United Nations Dag Hammarskjold, who is also known as the father of UN peacekeeping, referred to peacekeeping as "Chapter 6 and a half" operations, meaning "more than 'good offices' but less than 'enforcement'".[5] Doyle elaborates on Hammarksjold's meaning best when he defines a peacekeeping operation as

> military and civilian deployments for the sake of establishing a 'United Nations presence in the field, hitherto with the consent of all parties concerned,' as a confidence-building measure to monitor a truce between the parties while diplomats strive to negotiate a comprehensive peace or officials attempt to implement an agreed peace.[6]

However, this definition is not a workable solution because peacekeeping today includes not only keeping peace.[7] This covers a diverse range of interventions: from traditional peacekeeping, to peace enforcement,

---

2 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force on Oct. 24, 1945.

3 Higgins, R. *United Nations Peacekeeping: Documents and Commentary*, Vol. IV, Oxford: Oxford University Press, 1981, p. viii.

4 See, Durch, W. J. and Berkman, T. C. "Restoring and Maintaining Peace: What We Know So Far", in Durch, W. (ed.), *Twenty-First-Century Peace Operations*, Washington: United States Institute of Peace, 2006, p. 5.

5 Mockaitis, T. R. *Peace Operations and Intrastate Conflict: The Sword or the Olive Branch?*, Westport: Praeger Publishers, 1999, p. 3.

6 Doyle, M. W. "Introduction: Discovering the Limits and Potential of Peacekeeping", in Otunnu, O. A. and Doyle, M. W. (eds.), *Peacemaking and Peacekeeping for the New Century*, New York: Rowman & Littlefield Publishers, 1998, p. 3.

7 Mohamed, S. "From Keeping Peace to Building Peace: A Proposal for A Revitalized United Nations Trusteeship Council", *Columbia Law Review*, Vol. 105, No. 3. 2005, p.810.

peacemaking, peace-building, conflict prevention, humanitarian operations, etc.[8] As such, the real difficulty in providing a comprehensive functional definition of peacekeeping is that, as peacekeeping takes on more and more functions, the definitions get longer, more general and less precise.[9] Resultantly, at no time since its inception has the nature or the concept of peacekeeping been as open to redefinition as it is at this juncture.[10] The only way, then, to define peacekeeping as it has been practiced is to take a cross-section of characteristics of the operations pursued to date. From this perspective, peacekeeping appears as the use of multinational military personnel, armed or unarmed, under international command and with the consent of the parties, to help control and resolve conflict between hostile states and between hostile communities within a state.[11]

In this context, the United Nations view also deserves consideration. According to the United Nations, peacekeeping is a technique that expands the possibilities for both the prevention of conflict and the making of peace and requires the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well .[12] According to the *General Guidelines for Peacekeeping Operations* issued by the UN Department of Peacekeeping Operations (DPKO), peacekeeping refers to

> United Nations presence in the field (normally involving military and civilian personnel), with the consent of the conflicting parties, to implement or monitor

---

8 Flint, E. "Civil Affairs: Soldiers Building Bridges", in Gordon, D. S. and Toase, F. H. (eds.), *Aspects of Peacekeeping*, London: Frank Cass Publishers., 2001, p. 231.

9 Fetherston, A.B., *Towards a Theory of United Nations Peacekeeping*, Hampshire: Macmillan Press Ltd., 1994, p.128.

10 Annan, K. A., "UN Peacekeeping Operations and Cooperation with NATO", *NATO Review* (Web Edition), Vol. 47., No. 5, 1993, p. 3-7, available at: http://www.nato.int/docu/review/1993/9305-1.htm (last accessed on October 3, 2008).

11 *Id.*

12 United Nations, "An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping: Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992", No. A/47/277-S/24111, 1992, para. 20, available at: http://www.un.org/Docs/SG/agpeace.html (last accessed on October 27, 2008).

> the implementation of arrangements relating to the control of conflicts (cease-fires, separation of forces, etc.) and their resolution (partial or comprehensive settlements) or to ensure the safe delivery of humanitarian relief.[13]

Thus it appears that the word 'peacekeeping' as it is used these days by the United Nations is terminologically a misnomer since peacekeepers might be asked to operate in situations where there is no peace to keep.[14] At the same time, even if terminological aspect is left aside giving primacy to the practical meaning, the problem of definition remains complex due to frequent change of the fundamental nature, extent and characteristics of so-called peacekeeping operations.[15] However, this does not adversely affect the present study. For the purpose of this study, the definition offered by the UN Department of Peacekeeping Operations (DPKO) as mentioned above will serve as the working definition.

3. Legal Basis of UN Peacekeeping

The innovation of peacekeeping is not necessarily a recent phenomenon. Although peacekeeping has become widely known as one of the most significant contributions of the United Nations aimed at maintenance of international peace and security, the UN Charter does not mention it, nor did the United Nations founders anticipate it,[16] and, as a matter of fact, its origins lay in a much longer tradition, nurtured over time by many imaginative policy makers, scholars and peace movement organizations,

with roots in the experiments with multinational auspices for international forces during the League of Nations.[17]

---

13 United Nations Department of Peacekeeping Operations, *General Guidelines for Peacekeeping Operations,* New York: United Nations, 1995, pp. 5-6.

14 Slim, H., "Military Humanitarianism and the New Peacekeeping: An Agenda for Peace?", *Journal of Humanitarian Assistance*, 1995, available at: http://jha.ac/1995/09/22/military-humanitarianism-and-the-new-peacekeeping-an-agenda-for-peace/ (last accessed on August 22, 2008).

15 For a brief account of such changes, see, section 6.

16 Johansen, R. C., "Enhancing United Nations Peace-keeping", in Alger, C. F. (ed.), *The Future of the United Nations System: Potential for the Twenty-first Century*, New York: United Nations University Press, 1998, pp. 90-91.

17 For discussion on pre-UN efforts to plan and deploy international military forces for monitoring purposes, see, James, A., *Peacekeeping in International Politics*, New York: St. Martin's Press, 1990; Walters, F. P. *A History of the League of Nations*, Vol. II, London: Oxford University Press, 1952, pp. 538-540.

Although the UN Charter does not explicitly authorize peacekeeping, the United Nations has grounded its peacekeeping missions in chapters VI and VII — and in the space in between the provisions of these chapters.[18] Since it emerged within the framework of chapter VI of the UN Charter dealing with pacific settlement and chapter VII dealing with enforcement, the legal foundation of UN peacekeeping is often justified by claiming that it is within the purview of chapter six and a half.[19]

Article 24(1) of the UN Charter provides that in order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security. However, the responsibility conferred herein on the Security Council is "primary", not exclusive.[20] The General Assembly is also authorized to be concerned with international peace and security.[21] This is because Article 14 of the UN Charter empowers the General Assembly to recommend "measures for the peaceful adjustment of any situation".[22]

---

18 Mohamed, *supra note* 7, p.820.

19 For an elaborate discussion of the legal foundations of UN peacekeeping, see, Chopra, J., "The Space of Peace-Maintenance", *Political Geography*, Vol. 15, No. 3-4, 1996, pp.335-341; Doyle, M. W., "War Making and Peace Making: The United Nations' Post-Cold War Record", in Crocker, C. A., Hampson, F. O., and Alall, P. (eds.), *Turbulent Peace: The Challenges of Managing International Conflict*, Washington: United States Institute of Peace Press, 2001, p. 555; Stopford, M., "Peace-Keeping or Peace- Enforcement: Stark Choices for Grey Areas", *University of Detroit Mercy Law Review*, Vol. 73, No. 3, 1996, pp. 499-502; Wedgwood, R., "United Nations Peacekeeping Operations and the Use of Force", *Washington University Journal of Law and Policy*, Vol. 5, 2001, pp. 69-70.

20 International Court of Justice, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports, 1962, p.163.

21 *Id.*

22 Article 14 of the UN Charter reads: "Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations."

Herein the word "measures" implies some kind of actions.[23] The only limitation in this regard is that the General Assembly should avoid such recommendations while the Security Council is dealing with the same matter unless the Council requests to do so.[24]

Chapter VI of the UN Charter provides the procedure for peaceful settlement of disputes. In case of any dispute or any situation which is likely to endanger the maintenance of international peace and security,[25] the Security Council is authorized to recommend appropriate procedures or methods for adjustment of the dispute or situation.[26] However, the measures under Chapter VI are non-military. Such measures may include the establishment of a peacekeeping force having no mandate to use military force except with a situation of self-defence. Moreover, consent of the host state is a precondition for establishing a peacekeeping force under this chapter.

On the other hand, Chapter VII empowers the Security Council to initiate a collective military action in an appropriate case. In Article 39 of the UN Charter, the Security Council has been given the power to make determination of the existence of the threat to peace, breach of peace or act of aggression.[27] In fact, the Charter has centralized and institutionalized the process of determination of the crisis and for launching of the collective action.[28] It has thus improved upon the Covenant of the League of Nations under which the League was not competent to decide whether or not a state had resorted to war in violation of the Covenant, but was left on each

---

23 International Court of Justice, *supra note* 20, p.163.

24 See, Article 12(1) of the UN Charter that reads: "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests".

25 See, the UN Charter, Articles 33 and 34.

26 See, the UN Charter, Articles 36 and 37.

27 Article 39 of the UN Charter reads: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security".

28 Khare, S. C., *Use of Force Under United Nations Charter*, New Delhi: Metropolitan Book Co. (Pvt.) Ltd., 1985, p.140.

member itself to decide.[29] The most coercive action specified in this chapter is enshrined in Article 42 of the Charter. This Article authorizes the Security Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security". The Security Council is yet to resort to these coercive measures, i.e., actions by military forces foreseen in Article 42.[30] In the situation between Iraq and Kuwait, the Council chose to authorize member states to take measures on its behalf.

4. Basic Principles of UN Peacekeeping

Ever since the United Nations effectively invented armed peacekeeping in 1956, blue helmets have relied on a trinity of principles as their conceptual body armour. The consent of the parties, the neutrality/impartiality of the peacekeepers, and the minimum or non-use of force were meant to keep them above the conflicts that they were despatched to ameliorate or end.[31] It is sometimes asserted that UN peacekeeping survived and developed because it adhered to these three basic principles with extra-ordinary flexibility.[32] However, these principles are interrelated and mutually reinforcing.[33]

Traditional peacekeeping forces have been described as "consent forces",[34] i.e., the consent of the parties to the deployment of the force and to the

---

29 Stone, J. *Legal Control of International Conflict: A Treatise on the Dynamics of Disputes and War-Law* , New York: Rinehart and Company Inc. Publishers, 1954, p. 179.

30 United Nations, *supra note* 12.

31 Donald, D., "Neutrality, Impartiality and UN Peacekeeping at the Beginning of the 21st Century", *International Peacekeeping*, Vol. 9, No. 4, 2002, p. 21.

32 Higgins, R. "A General Assessment of United Nations Peace-keeping", in Cassese A. (ed.), *United Nations Peace-keeping: Legal Essays*, Alphen aan den Rijn : Sijthoff & Noordhoff, 1978, p. 1.

33 Department of Peacekeeping Operations and Department of Field Support, *United Nations Peacekeeping Operations: Principles and Guidelines*, New York: United Nations, 2008, p. 31.

34 Siekmann, R., *National Contingents in United Nations Peace-keeping Forces*, Dordrecht: M. Nijhoff, 1991, p. 6.

renewal of its mandate has been considered essential for their operation.[35] In fact, consent of the host state has been the heart of the peacekeeping capacity that has devolved on the General Assembly acting through its "Uniting for Peace" procedure and it has been a primary element in the legal and political foundation of peacekeeping forces authorized on the basis of Security Council resolutions.[36] Although a textual reading of the Charter leads to the view that the consent of the "host state" is not necessarily needed if there is a threat to the peace, breach of the peace, or act of aggression, practice has led towards the other direction.[37] In the resolution establishing the United Nations Force in Cyprus (UNFICYP), it was expressly provided that the host state was to have a voice in the composition of the Force.[38] When the host state withdrew its consent to UN Emergency Force (UNEF), the UN Secretary General U. Thant observed:

> . . . it . . . has seemed fully clear to me that since United Arab Republic consent was withdrawn, it was incumbent on the Secretary General to give orders for the withdrawal of the Force. The consent of the host country is a basic principle which has applied to all United Nations peace-keeping operations.[39]

However, no consent would be necessary if the Security Council should order a peacekeeping force established by the Council itself or by the General Assembly to enter the territory of a particular state in order to maintain or restore peace. Nevertheless, after the Congo operation of the early 1960s, it was concluded in the UN Secretariat that the organization is structurally ill-suited for forcible peacekeeping.[40]

---

35 Talmon, S., "Impediments to Peacekeeping: The Case of Cyprus", Langholtz, H., Kondoch, B., Wells, A. (eds.), *International Peacekeeping: The Yearbook of International Peace Operations*, Vol. 8, Leiden: Martinus Nijhoff Publishers, 2004, p. 37.

36 Garvey, J. I., "United Nations Peacekeeping and Host State Consent", *The American Journal of International Law*, Vol. 64, No. 2, 1970, p.241.

37 Higgins, *supra note* 32, p.5.

38 *Id.*

39 United Nations Emergency Force, *Special Report by the Secretary General*, U. N. Doc. A/6669, May 18, 1967, p. 9.

40 See, Bowman, E. H. and Fanning, J. E., "The Logistic Problems of a UN Military Force", *International Organization*, Vol. 17, No. 2, 1963, pp.355-376.

UN peacekeeping is also based on the principle that an impartial presence on the ground can ease tensions between hostile parties and create space for political negotiations.[41] This impartiality, however, should not be confused with neutrality or inactivity. In fact, UN peacekeepers should be impartial in dealings with the parties to the conflict, but not neutral in the execution of their mandate.[42]

Another traditional but basic principle of peacekeeping is the minimum or non-use of force. However, former UN Secretary General Kofi Annan recommends that the United Nations should abandon outdated concepts of neutral peacekeeping and replace them with a more muscular form of peace operation if it is to avoid the kind of fiascos in previous missions.[43] Mandates of peacekeeping operations are now usually broad enough to allow troops to physically protect civilians under imminent threat of violence.[44] This use of force under imminent threat of violence may be a viable option only if supported by the other two basic principles.

5. Peacekeeping During the Cold War: A Historical Background from Legal Viewpoints

During the early years of Cold War, veto power was a matter of regular recourse by the permanent members of the Security Council. Consequently, with the failure of the Security Council to act, the General Assembly, the second most important organ of the United Nations, came into prominence

---

41 Department of Peacekeeping Operations, *Handbook on United Nations Multidimensional Peacekeeping Operations*, New York: United Nations, 2003, p. 1.

42 Department of Peacekeeping Operations and Department of Field Support, *supra note* 33, p.33.

43 Ramo, J. C., "The Five Virtues of Kofi Annan", *Time Magazine*, September 4, 2000, p. 50.

44 See, The mandates of the United Nations Mission in Sierra Leone (UNAMSIL) (SC Res.1270 (1999)), the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) (SC Res. 1417 (2002)), the United Nations Mission in Liberia (UNMIL) (SC Res. 1509 (2003)), the United Nations Operation in Côte d'Ivoire (UNOCI) (SC Res. 1528 (2004)) and the United Nations Operation in Burundi (ONUB) (SC Res. 1545 (2004)) in the 'Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict', 28 May 2004, UN doc. S/2002/431, p. 8.

for the maintenance of international peace and security.[45] This development was gradual and reached its climax with the adoption of the 'Uniting for Peace' resolution of November 3, 1950.[46] This resulted into establishment of UN Truce Supervision Organisation (UNTSO) authorized to oversee the armistice between Israel and the Arab States. This can be considered the starting point for UN peacekeeping.[47] The plan of this resolution was first outlined by the US Secretary of State, Dean Acheson, before the General Assembly on September 20, 1950 for strengthening the collective security system to enable the United Nations to maintain international peace and security.[48] This development in the organizational field of United Nations made by this resolution was appreciated by a number of jurists and large majority of states.[49] However, a number of other jurists regarded it as a design to meet the breakdown of the collective security system of Chapter VII under strain of hostile alignments within the United Nations.[50] The

---

45 Khare, *supra note* 28, pp. 181-182.

46 U.N. General Assembly Resolution No. 377 (V) A (1950), UN Doc. A/1775.

47 However, the first full-fledged peacekeeping force to be actually deployed under the UN flag was the UN Emergency Force (UNEF I), was established in 1956 with contributions from ten nations to supervise the retreat of foreign troops from the Suez Canal area.

48 See, Franck, T. M., "Who Killed Art. 2(4)? or: Changing Norms Governing the Use of Force by States?", *The American Journal of International Law*, Vol. 64, No. 4, 1970, pp. 809-837.

49 See generally, Cohen, B. V., *The United Nations: Constitutional Development, Growth and Possibilities*, Cambridge: Harvard University Press, 1961, p. 18 (Cohen regards it as a great constitutional landmark in the development of the Charter); Eichelberger, C. M., *UN: The First Ten Years*, New York: Harper and Brothers, 1955, p. 2 (Eichelberger considers it as an adjustment in the organization to the new power situation by shifting the centre of gravity from Security Council to the General Assembly where veto power does not prevail); Goodrich, L. M. and Simons, A. P., *The United Nations and the Maintenance of International Peace and Security*, Washington: Brookings Institution, 1955, p. 345 (the authors view it as an attempt by the General Assembly to exercise its residuary responsibility).

50 See, Stone, *supra note* 29, pp.271-276; Eagleton, C., "The United Nations: Aims and Structure", *The Yale Law Journal*, Vol. 55, No. 5, 1946, p. 974; Wright, Q., "Accomplishments and Expectations of the World Organization", *The Yale Law Journal*, Vol. 55, No. 5, 1946, p. 870; Kirk, G., "The Enforcement of Security", *The Yale Law Journal*, Vol. 55, No. 5., 1946, p. 1081; Borchard, E. "The Impracticability of 'Enforcing' Peace", *The Yale Law Journal*, Vol. 55, No. 5., 1946, p. 966.

legality of "Uniting for Peace" resolution remains challenged by strict Charter constructionists even to this day.[51]

The practice of peacekeeping evolved dramatically since 1956 when, during the Suez Crisis, Canada's Foreign Minister Lester B. Pearson proposed that third-party UN peacekeeping troops be used to allow France and Britain to resolve the crisis through negotiations rather than through a military confrontation.[52] Although originally a Canadian idea, the UN's Swedish Secretary-General, Dag Hammarskjöld, began the process of institutionalizing peacekeeping as an extension of UN diplomacy.[53]

During the first 40 years of the United Nations, *ad hoc* and informal arrangements were sufficient to manage the peacekeeping operations, which were generally limited in scope.[54] Therefore, traditional peacekeeping, which constituted the majority of UN operations during the Cold War,[55] entails the deployment of peacekeepers and observers assigned with responsibilities such as supervising buffer zones, monitoring ceasefires and supporting disarmament plans.[56] Missions were limited to interdiction between conflict parties and did not generally allow for assertive missions.[57]

---

51 Smith, E. M., "Collective Security, Peacekeeping and Ad Hoc Multilateralism", in Ku, C. and Jacobson, H. K. (eds.), *Democratic Accountability and the Use of Force in International Law*, Cambridge: Cambridge University Press, 2003, p. 89.

52 Schnabel, A., "A Future for Peacekeeping?", *Peace Review*, Vol. 9, No. 4, 1997, p. 563.

53 Pugh, M., "Peacekeeping and Critical Theory", *International Peacekeeping*, Vol. 11, No. 1, 2004, p. 42.

54 New Zealand Ministry of Foreign Affairs and Trade, *United Nations Handbook*, Wellington: Ministry of Foreign Affairs and Trade, 1995, p. 26.

55 The UN mission in the Congo from 1960 to 1964 is the exception. See for details, Mortimer, E., "Under What Circumstances Should the UN Intervene Militarily in a 'Domestic' Crisis?", in Otunnu, O. A., & Doyle, M. W., (ed.), *Peacemaking and Peacekeeping for the New Century*, 1998, Lanham: Rowman & Littlefield, pp. 127-128.

56 See, Doyle, *supra note* 19, pp. 532-533; Goulding, M., "The Evolution of United Nations Peacekeeping", *International Affairs*, Vol. 69, No. 3, 1993, p. 457; Doyle, M. W. & Sambanis, N., "International Peacebuilding: A Theoretical and Quantitative Analysis", *American Political Science Review*, Vol. 94, No. 4, 2000, p. 781.

57 See, Goulding, *Ibid*, pp.451-464.

Administrative functions were generally limited to management of the mission itself, rather than management of the territory.[58] Quite simply, traditional peacekeeping consisted of keeping the peace. Consent of the parties, neutrality of the peacekeepers and minimal use of force only for purposes of self-defense were adhered to as the key principles of this type of intervention.[59] The UN missions in Cyprus, the Golan Heights and Kashmir are representative of traditional peacekeeping operations undertaken by the United Nations.[60] Peacekeeping in this sense was seen as a deterrent, applied to "placate and refrigerate the conflict environment to allow formal negotiations to take place".[61]

In short, it can be concluded that during the Cold War, most peacekeeping operations involved a simple interposition of soldiers between the armed forces of warring states, to monitor the observance of a ceasefire, pending the negotiation of a peace agreement. In many cases, this had the unintended effect of reducing pressure on the parties to make the necessary compromises, with the result that the peacekeepers were left in place much longer than originally envisaged.[62] Moreover, during this period, peacekeeping was largely confined to the Middle East and regional conflicts associated with de-colonization. It is only by 1960, that with the establishment by the Security Council of the United Nations Operation in the Congo (ONUC), another dimension - going beyond serving as a neutral buffer between states and becoming involved in intra-state conflicts - was added to UN operations.[63]

---

58 See, Chopra, J., "UN Civil Governance-in-Trust", in Weiss, T. G. (ed.), *The United Nations and Civil Wars*, Boulder: Lynne Rienner Publishers, 1995, p. 79.

59 Goulding, *supra note* 56, pp.453-455.

60 For history and analysis of UN peacekeeping during the Cold War, see, Goulding, *supra note* 56, pp.452-453.

61 Richmond, O. P., *Maintaining Order, Making Peace*, Hampshire: Palgrave, 2002, p. 44.

62 The exceptions that prove this rule were the highly complex operation in the Congo in the early 1960s and, to a lesser extent, the deployment in southern Lebanon from 1978 onwards.

63 Smith, *supra note* 51, p. 89.

6. Legal Aspects of Post-Cold War UN Peacekeeping Operations

Today the international security environment is far more complex than it was in the Cold War era of bipolarity. The diminished threat of a world war has been replaced by the reality of intra-state conflicts that undermine stability and security at the domestic and regional level.[64] While addressing this changed scenario, peacekeeping activities of the United Nations are demonstrating new dimensions. In fact, the recent UN "peacekeeping" operations differ in matters of environment, principle and practice from their Cold War predecessors.[65] Especially, in the early 1990s, with the end of the Cold War, the UN agenda for peace and security rapidly expanded.[66] Consequently, the extent to which the Security Council adopted decisions under Chapter VII since 1990 has been wholly unprecedented.[67] Indeed, the phrase "threats to peace" came to mean severe domestic violations of human rights, civil wars, humanitarian emergencies, and almost whatever a Security Council majority (absent a Permanent Member veto) said it was.[68] Therefore, whereas between 1947 and 1987, a span of 40 years, the United Nations undertook thirteen 'peacekeeping' missions of varying scope, duration, and degree of success,[69] between 1988 and 2007, a span of only

---

64 Islam, S. M. T., "Role of United Nations Peacekeeping in International Security: A Critical Analysis", *Asian Affairs*, Vol. 26, No. 3, 2004, p. 29.

65 Slim, *supra note* 14.

66 Doyle, M. W., "The New Interventionism", *Metaphilosophy*, Vol. 32, No. 1/2, 2001, p. 221.

67 Malone, D. M., "The Security Council in the Post-Cold War Era: A Study in the Creative Interpretation of the UN Charter", *New York University Journal of International Law and Politics*, Vol. 35, No. 2, 2003, p. 492.

68 For a discussion of the traditional Cold War interpretations of the phrase, see, Goodrich, L. M., Hambro, E., and Simons, A. P., *Charter of the United Nations: Commentary and Documents*, New York: Columbia University Press, 1969, pp. 293-300.

69 The thirteen missions between 1947 and 1990 include (in chronological order): United Nations Truce Supervision Organization (UNTSO), 1948-present; United Nations Military Observer Group in India and Pakistan (UNMOGIP), 1949-present; First United Nations Emergency Force (UNEF I), 1956-1967; United Nations Observation Group in Lebanon (UNOGIL), 1958-1958; United Nations Operation in the Congo (ONUC), 1960-1964; United Nations Security Force in West New Guinea (UNSF), 1962-1963; United Nations Yemen Observation Mission (UNYOM), 1963-1964;

nineteen years, the United Nations undertook fifty missions with increasingly ambitious mandates.[70] At first, this activism was greeted with

---

United Nations Peacekeeping Force in Cyprus (UNFICYP), 1964-present; Mission of the Representative of the SG in the Dominican Republic (DOMREP), 1965-1966; United Nations India-Pakistan Observation Mission (UNIPOM), 1965-1966; Second United Nations Emergency Force (UNEF II), 1973-1979; United Nations Disengagement Force (UNDOF), 1974-present; United Nations Interim Force in Lebanon (UNIFIL), 1978-present. See, www.un.org/Depts/dpko/list/list.pdf (last accessed on October 25, 2008).

70 The fifty missions between 1990 and 2007 include (in chronological order): United Nations Good Offices Mission in Afghanistan and Pakistan (UNGOMAP), 1988-1990; United Nations Iran-Iraq Military Observer Group (UNIIMOG), 1988-1991; United Nations Angola Verification Mission (UNAVEM), 1989-1991; United Nations Transition Assistance Group (UNTAG), 1989-1990; United Nations Observer Group in Central America (ONUCA), 1989-1992; United Nations Iraq-Kuwait Observation Mission (UNIKOM), 1991-2003; United Nations Mission for the Referendum in Western Sahara (MINURSO), 1991-present; United Nations Angola Verification Mission II (UNAVEM II), 1991-1995; United Nations Observer Mission in El Salvador (ONUSAL), 1991-1995; United Nations Advance Mission in Cambodia (UNAMIC), 1991-1992; United Nations Protection Force (UNPROFOR), 1992-1995; United Nations Transitional Authority in Cambodia (UNTAC), 1992-1993; United Nations Operation in Somalia I (UNOSOM I), 1992-1993; United Nations Operation in Mozambique (ONUMOZ), 1992-1994; United Nations Operation in Somalia II (UNOSOM II), 1993-1995; United Nations Observer Mission Uganda-Rwanda (UNOMUR), 1993-1994; United Nations Observer Mission in Georgia (UNOMIG), 1993-present; United Nations Observer Mission in Liberia (UNOMIL), 1993-1997; United Nations Mission in Haiti September (UNMIH), 1993-1996; United Nations Assistance Mission for Rwanda (UNAMIR), 1993-1996; United Nations Aouzou Strip Observer Group (UNASOG), 1994-1994; United Nations Mission of Observers in Tajikistan (UNMOT), 1994-2000; United Nations Angola Verification Mission III

(UNAVEM III), 1995-1997; United Nations Confidence Restoration Operation in Croatia (UNCRO), 1995-1996; United Nations Preventive Deployment Force (UNPREDEP), 1995-1999; United Nations Mission in Bosnia and Herzegovina (UNMIBH), 1995-2002; United Nations transitional Administration for Eastern Slavonia,Baranja and Western Sirmium (UNTAES), 1996-1998; United Nations Mission of Observers in Prevlaka (UNMOP), 1996-2002; United Nations Support Mission in Haiti (UNSMIH), 1996-1997; United Nations Verification Mission in Guatemala (MINUGUA), 1997-1997; United Nations Observer Mission in Angola (MONUA), 1997-1999; United Nations Transition Mission in Haiti (UNTMIH), 1997-1997; UN Civilian Police Mission in Haiti (MINOPUH), 1997-2000; UN Civilian Police Support Group (UNCPSG), 1998-1998; United Nations Mission in the Central

great enthusiasm - the United Nations could finally perform its mission as the guardian of peace throughout the world. Very soon, however, objections were raised, especially by the "third world," against the perceived excess in the use of power and authority. Another important legal issue arising out of post-Cold War UN peacekeeping developments is the legitimacy of subcontracting, i.e., delegating UN peacekeeping mandates to single states, group of states and regional and sub-regional organizations. Moreover, since UN peacekeeping forces these days have extended mandate that authorize them to use military force not only for the purpose of self defence but also for the defence of their mandate,[71] the aspect of mandate-execution calls for examination of other legal issues such as applicability of international humanitarian law (IHL) to UN peacekeeping forces and the legal status of such forces in terms of their immunities and privileges. In what follows, an attempt is made to appraise, under different heads, all these legal aspects concerning post-Cold War UN peacekeeping operations.

6.1 Extended Mandate

In the recent years, the concept of peacekeeping has been stretched beyond recognition.[72] Interventions during the Cold War period are now described

---

African Republic (MINURCA), 1998-2000; United Nations Observer Mission in Sierra Leone (UNOMSIL), 1998-1999; UN Interim Administration Mission in Kosovo (UNMIK), 1999-present; United Nations Mission in Sierra Leone (UNAMSIL), 1999-2005; United Nations Transitional Administration in East Timor (UNTAET), 1999-2002; UN Organization Mission in the Democratic Republic of the Congo (MONUC), 1999-present; United Nations Mission in Ethiopia and Eritrea (UNMEE), 2000-2008; United Nations Mission of Support in East Timor (UNMISET), 2002-2005; United Nations Mission in Liberia (UNMIL), 2003-present; United Nations Operation in Côte d'Ivoire (UNOCI), 2004-present; United Nations Stabilization Mission in Haiti (MINUSTAH), 2004-present; United Nations Operation in Burundi (ONUB), 2004-2006; United Nations Mission in the Sudan (UNMIS), 2005-present; United Nations Integrated Mission in Timor-Leste (UNMIT), 2006-present; African Union/United Nations Hybrid operation in Darfur (UNAMID), 2007-present; United Nations Mission in the Central African Republic and Chad (MINURCAT), 2007-present. See, www.un.org/Depts/dpko/list/list.pdf (last accessed on October 25, 2008).

71 See for details, Cox, K. E., "Beyond Self-Defence: United Nations Peacekeeping Operations & the Use of Force", *Denver Journal of International Law and Policy*, Vol. 27, 1998-1999, pp.239-273.

72 Schnabel, *supra note* 52, p. 569.

retrospectively, somewhat romantically perhaps, as 'traditional', 'classic', 'relatively straightforward' or 'generally benign'.[73] In fact, mandates of Cold War peacekeeping and post-Cold War peacekeeping, if compared against each other, demonstrate striking differences. Although the United Nations had confronted the challenge of a failed state in the Congo operation of the early 1960s,[74] intra-state conflicts did not emerge as the primary focus of the Security Council until the late 1980s.[75] Within these complex environments the emphasis shifted from a monitoring or observation role to attempts to actively resolve and settle conflicts.[76] As a result of this shift, the Security Council expanded the concept of peacekeeping from its classical origins into a new framework of complex operations. Prior to 1990, the United Nations had authorized two enforcement missions, one against North Korea in 1950 and the other against Congo in 1960 (ONUC).[77] But, after 1990, it has approved a number of major operations with similar characteristics, in Kuwait, Somalia, the former Yugoslavia, Kosovo, East Timor, Albania,[78] the Central African Republic and Sierra Leone. However, some of these are UN

---

73 Wilkinson, P., "Sharpening the Weapons of Peace: Peace Support Operations and Complex Emergencies", in Woodhouse, T. and Ramsbotham, O. (eds.), *Peacekeeping and Conflict Resolution*, London: Frank Cass Publishers, 2000, pp. 63 – 64.

74 See, Chopra, *supra note* 58, pp. 77–78.

75 See, "Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations", U.N. Doc. No. A/50/60–S/1995/1, 1995, p. 11 (providing statistics on peacekeeping operations), available at: http://www.un.org/Docs/SG/agsupp.html (last accessed on November 11, 2009).

76 Williams, M. C., *Civil-Military Relations and Peacekeeping*, Oxford: Oxford University Press, 1998, p. 1.

77 ONUC amounted to at least *de facto* enforcement action. See, White, N. D., "The UN Charter and Peacekeeping Forces: Constitutional Issues", in Pugh, M., (ed.), *The UN, Peace and Force*, London: Frank Cass Publishers, 1997, p. 53.

78 In case of Albania, traditional peacekeeping and peace enforcement were combined in one mandate. See Kritsiotis, D., "Security Council Resolution 1101 (1997) and the Multinational Protection Force of Operation Alba in Albania", *Leiden Journal of International* Law, Vol. 12, No. 3, 1999, pp. 511-47.

mandated forces, while others are merely authorized "coalitions of the willing".[79]

To portray the evolution of UN peacekeeping in terms of its mandate, contemporary literatures frequently resort to the concept of "generations of UN peacekeeping operations",[80] wherein most of the post-Cold War operations fall under the category of "new generation peacekeeping".[81] The most striking features of these "new generation" peacekeeping operations are not so much the large numbers of military personnel involved - several earlier peacekeeping operations, for example, in Sinai, the Congo, and Cyprus had featured large deployments of Blue Helmets - as the important role and substantive diversity of their civilian and police components.[82] Civilian functions discharged by peacekeeping operations or otherwise mandated by the Council included civil administration (most notably in Namibia, Cambodia, the former Yugoslavia, East Timor, and Kosovo); humanitarian assistance (a major feature of the current UN mission in Afghanistan deployed alongside a coalition peacekeeping operation, the International Security Assistance Force (ISAF)); human rights monitoring and training; police and judicial support, training, and reform; and even a degree of leadership on economic revival and development.[83] While military personnel remain vital to most operations, civilians have taken on a growing number of responsibilities, which include: (a) helping former opponents

---

79 See generally, Simma, B., "NATO, the UN and the Use of Force: Legal Aspects", *European Journal of International Law*, Vol. 10, No. 1, 1999, pp. 1-22; Cassesse, A., "Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?", *European Journal of International Law*, Vol. 10, No. 1, 1999, pp. 23-30; and also, Guicherd, C., "International Law and the War in Kosovo", *Survival*, Vol. 41, No. 2, 1999, pp. 19-34.

80 See generally, Otunnu, O. A. and Doyle, M. W. (eds.), *Peacemaking and Peacekeeping for the New Century*, Maryland: Rowman & Littlefield, 1998; Goulding, *supra note* 56, pp.451-464.

81 However, this conceptualization is overlapping and no distinct timeframes can be given for it. It is based on the analysis of how UN peacekeeping responded to emerging conflicts and the roles and responsibilities that ensued.

82 See, Williams, *supra note* 76.

83 See generally, Ratner, S. R., *The New UN Peacekeeping: Building Peace in Lands of Conflict After the Cold War*, New York: Palgrave MacMillan, 1995.

implement complex peace agreements by liaising with a range of political and civil society actors; (b) supporting the delivery of humanitarian assistance; (c) assisting with the disarmament, demobilization and reintegration (DDR) of former combatants; (d) supervising and conducting elections; (e) strengthening the rule of law, including assistance with judicial reform and training of civilian police; (f) promoting respect for human rights and investigating alleged violations; (g) assisting with post-conflict recovery and rehabilitation; and (h) setting up a transitional administration of a territory as it moves towards independence.[84] Depending on their mandate, such multidimensional peacekeeping operations (also referred to as peace operations) may be required to: (a) assist in implementing a comprehensive peace agreement; (b) monitor a ceasefire or cessation of hostilities to allow space for political negotiations and a peaceful settlement of disputes; (c) provide a secure environment encouraging a return to normal civilian life; (d) prevent the outbreak or spillover of conflict across borders; (e) lead states or territories through a transition to stable government based on democratic principles, good governance and economic development; and (f) administer a territory for a transitional period, thereby carrying out all the functions that are normally the responsibility of a government.[85]

It is sometimes argued that there are now more intra-state than inter-state conflicts, justifying peacekeeping with extended mandate. As former UN Secretary General Boutros Boutros Ghali observes, peacekeeping is "the invention of the United Nations" and accordingly, the UN has transformed its 'invention' over time to suit the exigencies of the crisis at hand.[86] However, both the assumption as to the exigencies of the crisis and the transformed prescription thereto are questionable. There are some jurists who regard the peacekeeping missions' extended mandate as contrary to the spirit and mandate of the UN Charter. One argument is that interpretation of what developments may constitute "threats to the peace", interpretation of the terms of Chapter VII of the Charter and also practice under that chapter,

---

84 Department of Peacekeeping Operations, *supra note* 41, p. 2.

85 *Ibid*, pp.1-2.

86 See, United Nations, *supra note* 12.

all have evolved significantly in the post-Cold War era without Charter amendment or a clear break with earlier interpretations.[87] Besides, according to the view of Fleitz, traditional peacekeeping is the only legitimate form of peacekeeping and various 'improved' models of traditional peacekeeping such as multidimensional, second generation, aggravated and muscular peacekeeping, are nonviable experiments without any clear doctrinal or theoretical foundation.[88] There is also an ongoing debate as to whether humanitarian intervention is an essential element of peacekeeping process. Many scholars regard humanitarian efforts of peacekeeping missions as free-standing initiatives, structurally independent of peacekeeping activities.[89] This is because to equate humanitarian situations with threats to international peace and security is a dubious proposition. The experience of Somalia was not very happy either for the people of that country or for the UN and as such the doctrine of humanitarian intervention needs to be treated with caution. There are other scholars, however, who consider humanitarian intervention as an essential element of peacekeeping process.[90] A third approach, reflecting doubts about the desirability of integration and the possibility of insulation, holds that humanitarian action in complex emergencies should be institutionally independent of the United Nations altogether. A host of humanitarian organizations — first and foremost the International Committee of the Red Cross (ICRC) but also some non-governmental organizations — emphasize their structural independence.[91]

---

87 Malone, *supra note* 67, p. 487.

88 See, Fleitz, F. H., *Peacekeeping Fiascoes of the 1990s: Causes, Solutions and U.S. Interests*, Westport: Praeger Publishers, 2002, pp. 3-5.

89 See, Minear, L. and Weiss, T.G., *Humanitarian Politics*, New York: Foreign Policy Association, 1995; Minear, L., "The Evolving Humanitarian Enterprise," in Weiss, T.G. (ed.), *The United Nations and Civil Wars*, Boulder: Lynne Rienner, 1995, pp. 89-106.

90 See, Ajello, A. R., "The Coordination of Humanitarian Assistance in Mozambique in the Context of ONUMOZ," in Whitman, J. and Pocock, D. (eds.), *After Rwanda: The Coordination of United Nations Humanitarian Assistance*, London: MacMillan Press, 1996, pp.199-200.

91 Minear, L. "Humanitarian Action and Peacekeeping Operations", *Journal of Humanitarian Assistance*, 1997, available at: http://jha.ac/1997/02/26/humanitarian-action-and-peacekeeping-operations/ (last accessed on October 23, 2008).

6.2 Subcontracting

After the end of the Cold War as the United Nations was placed center stage in efforts to resolve outstanding conflicts, the fading of ideological divisions and superpower spheres of influence enabled the members of the Security Council to act collectively and disinterestedly on many issues.[92] But the multiplication of peacekeeping missions resulting from such activism was not always accompanied by coherent policy or integrated military and political responses.[93] Consequently, a good number of missions encountered problems and received serious criticisms from the observers. Ultimately, the institution of UN peacekeeping started to face a new challenge - the "crisis of expectations" in the Cold War era aggravated to a "crisis of confidence-cum-credibility" and member states began to limit their military, political and financial exposure.[94] Especially, in the aftermath of the operations in Somalia,[95] it was generally acknowledged that United Nations did not itself have the institutional or logistic capacity to conduct peace enforcement operations.[96] The solution to this problem, in the eyes of many, was that such operations should be subcontracted.[97] However, there are several examples prior to Somalia missions that are equivalent to subcontracting. In 1990, the Security Council authorised a multinational coalition to use all necessary means to enforce peace in the Gulf region.[98] The UN peacekeeping mission in Liberia (UNOMIL) set up in 1993 is also sometimes regarded as a form of subcontracting as it worked in coalition

---

92 Griffin, M., "Blue Helmet Blues: Assessing the Trend Towards 'Subcontracting' UN Peace Operations", *Security Dialogue,* Vol. 30, No. 1, 1999, pp. 43-44.

93 Schnabel, A. and Thakur, R., "Cascading Generations of Peacekeeping: Accross the Mogadishu Line to Kosovo and Timor", in Schnabel, A. and Thakur, R. (eds.), *United Nations Peacekeeping Operation: Ad Hoc Missions, Permanent Engagement,* New York: United Nations University Press, 2001, p. 3.

94 *Ibid*, pp. 3-4.

95 United Nations Operation in Somalia I (UNOSOM I), 1992-1993 and United Nations Operation in Somalia II (UNOSOM II), 1993-1995.

96 Griffin, *supra note* 92, p. 45.

97 *Id.*

98 Chawla, S., "Trends in United Nations Peacekeeping", *Strategic Analysis*, Vol. 24, No. 10, 2001, p. 1902.

with Economic Community of West African States (ECOWAS), a sub-regional organization. After the Somalia missions, modifying the Gulf War precedent somewhat, UN-authorized military action by the USA in Haiti, France in Rwanda, Russia in Georgia and NATO in Bosnia.[99] Thus, this practice of devolving control to other actors began to gain currency.[100]

Experts are not unanimous on the legal justification of such subcontracting of peacekeeping. Some jurists view this practice of delegating enforcement operations to groups of member states is a recipe for marginalization of the United Nations.[101] The marginalists believe that delegation will result in the neglect of Third World conflicts, great power abuse and a return to a world divided by spheres of influence, all of which will undermine United Nations legitimacy.[102] From marginalists perspective, NATO's decision to use force in the Kosovo conflict without a UN mandate is the final nail in the United Nations' coffin, representing the culmination of a trend, that has been visible for a while.[103] They also argue that subcontracting raises concerns about bias and selectivity.[104] Since the major powers are interested to take military actions only when and where their national interests are involved,[105] delegation of UN authority to them or to any so-called 'coalition of the willing' dominated by them, as has happened so far and most likely to happen in the days to come, belittles the fact that the United Nations is the political embodiment of the international community and the custodian of the international interest. Moreover, the United Nations has not adequate legal

---

99 Schnabel and Thakur, *supra note* 93, p. 13.

100 Griffin, *supra note* 92, p. 46.

101 Jacobsen, P. V., "Overload, Not Marginalization, Threatens UN Peacekeeping", *Security Dialogue,* Vol. 31, No. 2, 2000, pp. 168. Also see, Schachter, O., "United Nations Law in the Gulf Conflict", *American Journal of International Law*, Vol. 85, No. 3, 1991, pp. 452-473.

102 *Id.*

103 *Id.*

104 Karns, M. P. and Mingst, K. A., "Peacekeeping and the Chaging Role of the United Nations: Four Dilemmas", in Schnabel, A. and Thakur, R. (eds.), *United Nations Peacekeeping Operation: Ad Hoc Missions, Permanent Engagement,* New York: United Nations University Press, 2001, p. 216.

105 Schnabel and Thakur, *supra note* 93, p. 13.

framework to ensure that subcontracted operations are conducted with appropriate accountability or oversight and has, so far, shown little inclination to meet this challenge.[106] This also goes against the legitimacy of unguided subcontracting.

On the other hand, subcontracting has been heralded in some quarters as a necessary and innovative solution to the operational crisis of the United Nations.[107] They argue that although collective action would usually take the form of global action authorized under Article 42 of the UN Charter, it could also be implemented by regional arrangements and agencies authorized under Article 53.[108] Subcontracting is also thought to represent a promising trend insofar as it might help relieve some of the financial burden of the United Nations and promote wider participation in the maintenance of international peace and security.[109] There is also a growing feeling that regional and sub-regional organizations should play a lead role in peacemaking, peacekeeping and peace-building in their own areas since they know their region better than the United Nations.[110]

6.3 Relevance of IHL in UN Peacekeeping

One of the main aims of UN peacekeeping is to ensure respect for IHL.[111] But, are the peacekeepers bound by the standards of humanitarian laws? In

---

106 Griffin, *supra note* 92, p. 48.

107 *Ibid*, p. 47.

108 Franck, T. M. and Patel, F., "Agora: The Gulf Crisis In International and Foreign Relations Law: UN Police Action in Lieu of War: the Old Order Changeth", *American Journal of International Law*, vol. 85, 1991, p.63. Article 53 states: "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state".

109 Griffin, *supra note* 92, p. 47.

110 *Id.*

111 International humanitarian law denotes the whole body of law applicable during armed conflict, often referred to as the law of armed conflict (*jus in bello*). See,

the early days of UN peacekeeping operations, there was some doubt about the applicability of IHL to UN forces.[112] Even if force is used as part of a peacekeeping force's mandate, IHL – as a law whose "thrust is at regulating the warrior, not the peacekeepers"[113] - was always a slightly odd way of dealing with peace operations.[114] This was due to various factors. Notwithstanding its international legal personality,[115] the UN is not in itself a state and thus, it does not possess the juridical or administrative powers to discharge many of the obligations laid down in the Conventions.[116] It also lacks the legal and other structures for dealing with violations of IHL. Nor does it possess the competence to recognize that an armed conflict invoking

---

Greenwood, C., "Historical Development and Legal Basis", in Fleck, D. (ed.), *Handbook of Humanitarian Law in Armed Conflicts*, Oxford: Oxford University Press, 1995, pp. 8-12.

112 In a report entitled "Should the Laws of War Apply to United Nations Enforcement Action?" presented to the American Society of International Law in 1952 by the Committee on the Study of the Legal Problems of the United Nations, its Chairman (Clyde Eagleton), stated that: "[a] war is fought by a State for its own national interest; United Nations enforcement action is on behalf of order and peace among nations . . . War as between States of equal legal status has in the past been regarded as honourable; the use of force against the United Nations is now to be regarded as an offence against all Members." The Eagleton committee concluded in its report that due to the different nature of the use of force by the United Nations to restrain aggression from war-making by a State, the United Nations should not feel bound by all the laws of war, but should select such of the laws of war as may seem to fit its purposes. See for details, Eagleton, C. *et al.*, "Should the Laws of War Apply to United Nations Enforcement Action", *American Society of International Law: Proceedings of the Annual Meeting*, 1952, p. 220.

113 Weiner R. O. and Aolain, F. N., "Beyond the Laws of War: Peacekeeping in Search of a Legal Framework", *Columbia Human Rights Law Review*, Vol. 27, No. 2, 1996, p. 307.

114 Megret, F. and Hoffmann, F., "The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities", *Human Rights Quarterly*, Vol. 25, No. 2, 2003, p. 331.

115 See, International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *ICJ Report*, 1949, pp.174-220.

116 Murphy, R., "International Humanitarian Law and Peace Support Operations: Bridging the Gap", *The Journal of Conflict Studies*, Vol. 23, No. 1, 2003, p. 13.

the application of the Geneva Conventions exists.[117] Moreover, one of the difficulties of applying the laws of armed conflict in peacekeeping operations is that many peacekeeping situations are below the necessary threshold level of violence.

However, since after the UN peacekeeping mission's engagement in Congo, many international organizations and jurists have been offering interpretations in support of applicability of IHL to the peacekeeping operations.[118] There is an argument to the effect that there are situations where the United Nations would be responsible under customary international law for acts of persons or armed forces acting under its control.[119] In the *WHO Agreement Case,* the International Court of Justice specifically referred to the existence of obligations at customary international law for international organizations.[120] As such, it is now generally accepted that IHL binds United Nations forces, whether performing duties of a peacekeeping or peace-enforcement nature,[121] and the conduct of hostilities by UN forces cannot be free from humanitarian

---

117 Turley, S. L., "Keeping the Peace: Do the Laws of War Apply?", *Texas Law Review*, Vol. 73, No. 1, 1994, p. 158.

118 See generally, Tittemore, B. D., "Belligerents in Blue Helmets: Applying International Humanitarian Law to the United Nations Peace Operations", *Stanford Journal of International Law*, Vol. 33, No. 1, 1997, pp. 61-118; Murphy, *supra note* 116, pp.12-59; Shraga, D., "UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations Related Damage", *The American Journal of International Law*, Vol. 94, No. 2, 2000, pp. 406-412; Weiner and Aolain, *supra note* 113, pp. 312-320; Kelly, M. J., *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework*, Hague: Kluwer Law International, 1999; Megret, and Hoffmann, supra note 114, pp.314-342.

119 See, Amerasinghe, C. F., *Principles of the Institutional Law of International Organization*, Cambridge: Cambridge University Press, 1996, pp. 240-241.

120 See, International Court of Justice, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, *ICJ Reports*, 1980, p. 73.

121 Greenwood, C., "Scope of Application of Humanitarian Law", in Fleck, D. (ed.), *Handbook of Humanitarian Law in Armed Conflicts*, Oxford: Oxford University Press, 1995, p. 46.

constraint or application of humanitarian law considerations.[122] On the same reasoning, IHL is of direct relevance to states contributing contingents to peace support operations even if they are not formally parties to the corresponding international treaties.[123] However, UN Model Agreement with troop contributing states now includes an express provision to the effect that the peacekeepers shall be bound by IHL.[124]

Nevertheless, the attitude of various national courts accelerated concerns among international lawyers. The Canadian Courts Martial Appeals Court held in *R. v Brocklebank*[125] that Private Brocklebank, who was arrested for aiding and abetting the torture of a Somali teenager, had no legal obligation to ensure the safety of a prisoner – because neither the Geneva Conventions[126] nor the Additional Protocols[127] applied to peacekeeping

---

122 It is widely accepted that the laws of war remain directly relevant to such forces. See, Roberts, A., and Guelff, R. (eds.), *Documents on the Laws of War,* Oxford: Oxford University Press, 2000, p. 721.

123 See, Murphy, R., "International Humanitarian Law Training for Multinational Peace Support Operations: Lessons from Experience", *International Review of the Red Cross*, No.840, 2000, pp. 953-968.

124 The relevant clause reads: "[The UN peacekeeping operation] shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel. The international conventions referred to above include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of armed conflict. [The Participating State] shall therefore ensure that the members of its national contingent serving . . . be fully acquainted with the principles and spirit of the conventions".

125 *R. v Brocklebank* CMAC-383, 2 April 1996.

126 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 3; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85; Geneva Convention (III) relative to the Treatment of Prisoners of War, 75 UNTS 135; Geneva Convention (IV) Relative to the Protection of Civilians in Time of War, 75 UNTS 287 (all adopted 12 August 1949, entered into force 21 October 1950).

127 Protocol I Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), 1977, 1125 UNTS 3; Protocol II Additional to the Geneva Conventions of 1949, and Relating to the

operations. Hence IHL did not apply to Canadian Forces in Somalia. A Belgian Military Court investigating violations of IHL also came to a similar conclusion.[128]

In an attempt to clarify the doubt, the UN Secretariat, in 1999, in collaboration with the International Committee of the Red Cross (ICRC), finalized principles and rules on the observance of IHL by peacekeepers. Accordingly, on 6 August 1999, a bulletin[129] was promulgated by the Secretary General of the United Nations.[130] In particular, the IHL obligations outlined in this bulletin include the standards on protection of civilian population,[131] means and methods of combat,[132] treatment of civilians and persons *hors de combat*,[133] treatment of detained persons,[134] and protection of the wounded, the sick, and medical and relief personnel.[135] However, this bulletin does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or their status as non-combatants, as long as they are entitled to the protection given to civilians under the international law of

---

Protection of Victims of Non-International Armed Conflict(Protocol II), 1977, 1125 UNTS 609.

128 See, Judgment of the Belgian Military Court regarding violations of IHL committed in Somalia and Rwanda, No. 54 A. R. 1997, 20 November 1997; Comment by M. Cogen in 'Correspondents' Reports: A Guide to State Practice Concerning International Humanitarian Law', *Yearbook of International Humanitarian Law*, Vol. 1, 1998, pp. 415–416.

129 Secretariat of the United Nations, "Observance by United Nations Forces of International Humanitarian Law", *International Review of the Red Cross*, No.836, 1999, pp. 812-817.

130 For more details, see, Zwanenburg, M., "The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: Some Preliminary Observations", *International Peacekeeping*, Vol. 5, No. 4-5, 1999, pp. 133-39.

131 See, section 5.

132 See, section 6.

133 See, section 7.

134 See, section 8.

135 See, section 9.

armed conflict.[136] This bulletin probably settled most immediate worries,[137] but it does not cover all situations.[138] For example, where national contingents come together to form "coalitions of the willing", but do not become organs of the UN, or fall under its command and control, then the UN cannot be held responsible for their acts.[139] In such cases, the acts of military forces remain the responsibility of the states concerned.[140]

Thus it appears that the issue of applicability of IHL to UN peacekeeping forces, that remained a grey area in the Cold War era, has gained some sort of legal clarification in the recent years. However, limited attention has been paid to develop mechanism to oversee adherence of IHL norms by the members of subcontracted peacekeeping forces.[141]

6.4 Legal Status of UN Peacekeepers

Under existing law, a UN peacekeeping operation is considered a subsidiary organ of the United Nations, established pursuant to a resolution of the Security Council or General Assembly.[142] As such, it enjoys the status, privileges, and immunities of the Organization provided for in Article 105 of the UN Charter,[143] and the UN Convention on the Privileges and Immunities

---

136 See, section 1.2.

137 Shraga, *supra note* 118, p.406.

138 See, Wills, S., "Military Interventions on Behalf of Vulnerable Populations: The Legal Responsibilities of States and International Organizations Engaged in Peace Support Operations", *Journal of Conflict & Security Law*, Vol. 9, No. 3, 2004, p. 402.

139 See, Seyersted, S., "United Nations Forces: Some Legal Problems", *British Yearbook of International Law*, Vol. 37, 1961, pp. 362 and 421.

140 Murphy, *supra note* 116, p.20.

141 Zwanenburg, M, "Double Standards in Peacekeeping? Subcontracting Peacekeeping and International Humanitarian Law", Leiden Journal of International Law, Vol. 12, No. 4, 1999, p. 753.

142 Murphy, *supra note* 116, p.15.

143 Article 105 of the UN Charter provides: "(1) The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes. (2) Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization. (3) The General Assembly may make

of the UN of 13 February 1946.[144] Other than these, the legal framework for UN forces is usually made up, *inter alia*, of: (a) the resolution of the Security Council or the General Assembly establishing and mandating the forces, (b) the Convention on the Safety of United Nations and Associated Personnel 1994,[145] (c) the Status of Force Agreement (SOFA) or the Status of Mission Agreement (SOMA) concluded between the UN and the host state,[146] (d) the agreement by exchange of letters between each of the participating states and the UN, (e) the regulations for the force issued by the Secretary-General. As mentioned above, the promulgation of the bulletin in 1999 by the Secretary-General outlining the IHL obligations of the UN

---

recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose".

144 Adopted by the General Assembly on 13 February 1946, entered into force on 17 September 1946, See for text, United Nations, *Treaty Series* , Vol. 1, p. 15 and Vol. 90, p. 327.

145 49 U.N. GAOR Supp. (No. 49) at 299, U.N. Doc. A/49/49 (1994), entered into force on 15 January 1999. In essence, it covers two types of personnel who carry out activities in support of the fulfillment of the mandate of a UN operation. In the first category are those directly engaged as part of a UN mandated operation whether in a military, police, or civilian capacity. The second category covers "associated personnel," i.e., persons assigned by the Secretary-General or an intergovernmental organization with the agreement of a competent organ of the UN. For example, NATO forces asked to assist UNPROFOR in Bosnia-Herzegovina, and US assistance under UNITAF in Somalia would fall within this element of the definition. For more details see, Bloom, E. T., "Protecting Peacekeepers: The Convention on the Safety of UN and Associated Personnel," *The American Journal of International Law*, Vol. 89, No. 3, 1995, pp. 623-624; C. Greenwood, "Protection of Peacekeepers: The Legal Regime", *Duke Journal of Comparative and International Law*, Vol. 7, No. 1, 1996, pp. 185-208; Bourloyannis-Vrailas, M. C., "The Convention on the Safety of UN and Associated Personnel", *International Comparative Law Quarterly*, Vol. 44, No. 3, 1995, pp. 560-90; Kirsch, P., "The Convention on the Safety of UN and Associated Personnel", *International Peacekeeping*, Vol. 2, No. 5, 1995, pp. 102-106.

146 In practice, however, it is not always easy for the UN to conclude SOFA or SOMA, e.g., none was concluded in Somalia, and it took nearly 20 years to conclude a SOFA in respect of UNIFIL. See generally, Fleck, D., and Saalfeld, M., "Combining Efforts to Improve the Legal Status of UN Peacekeeping Forces and Their Effective Protection", *International Peacekeeping*, Vol. 1, No. 3, 1994, pp. 82-84.

peacekeeping forces[147] does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel.[148] Moreover, the Rome Statute[149] gives the International Criminal Court (ICC) jurisdiction over serious violations of the laws and customs applicable in international armed conflict included under Article 8(b) (iii), namely, 'intentionally directing attacks against personnel, installations, materials, units or vehicles involved in humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations', as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.[150] In case of violations of IHL, members of the military personnel of a UN force are subject to prosecution in their national courts.[151] These provisions of the Rome Statute have significantly strengthened as well as clarified the position of international law regarding the legal status of UN peacekeepers.

7. Conclusion

The foregoing discussions reveal that after the Cold War, international law has developed to a positive direction in clarifying two important issues – applicability of IHL to UN peacekeeping forces and legal status thereof. But, the legitimacy of extended mandate and subcontracting is yet to be satisfactorily established. Those advocating for legitimacy basically point to the notion of changed circumstances as the basis of justification. But, the existence of such circumstances that necessitated the merger of peacekeeping and peace enforcement, two radically different and apparently incompatible propositions, remains difficult to identify. Here lies the crux of the problem of extended mandate. If the international community could maintain the wall between peacekeeping and peace enforcement

147 Secretariat of the United Nations, *supra note* 129, pp. 812-817.

148 See section 6.3 above.

149 Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force July 1, 2002.

150 See for details, Robinson, D. and Hebel, H. V., "War Crimes in Internal Conflicts: Article 8 of the ICC Statute", *Yearbook of International Humanitarian Law*, Vol. 2, Dordrecht, Kluwer Publication, 1999, pp. 193-209.

151 See, Secretariat of the United Nations, *supra note* 129, section 4.

abandoning the idea of so-called generations of peacekeeping – the United Nations could more legitimately respond to any given situation using either of these two instruments, who are different in their approaches and mandates. On the other hand, subcontracting cannot be defended only by resorting to Article 53 of the UN Charter or to some questionable UN precedents, because the real concern is not as much on the authority of UN to subcontract as on the modalities of subcontracting. The United Nations is yet to develop any standards on "when to subcontract?", "who can be subcontracted?" and "how to ensure accountability of subcontracted forces?". It is, therefore, high time to develop these standards so that the substantial stakeholders feel confident that subcontracting is no more open to manipulation or reflective of the national interests of powerful states.

In fact, peacekeeping is a 50-year-old enterprise that has evolved rapidly in the past decade.[152] Especially, after the end of Cold War, acceleration of change is remarkable. Therefore, the world community has valid reasons to be concerned about the different aspects of peacekeeping, particularly, the legal one. Keeping the apparent positive achievement of UN peacekeeping in mind, any redefinition or creative interpretation of existing laws and standards must be viewed with utmost caution.

---

152 United Nations, *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects and Report of the Panel on United Nations Peace Operations*, (popularly known as "Brahimi Report", named after the Chairman of the Committee which produced the report), UN Doc. A/55/305-S/2000/809, 21 August 2000, para. 12.

The Dhaka University Studies, Part-F Vol. XIX (2) : 65-82 , December 2008

ADMINISTRATIVE TRIBUNALS IN BANGLADESH: AN APPRAISAL ON ESTABLISHMENT AND PROCEDURE

Dr. S. M. Hassan Talukder*

1. Introduction

During long past time, disputes arising out of the administrative actions both in the public and private sectors had been subjects 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 natures. 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.

Eight years later of the enactment and enforcement of the Constitution, the Parliament of Bangladesh, in fulfillment of the constitutional mandate, enacted the Administrative Tribunals Act, 1980 (Act No. VII of 1981), empowering the Government to establish by notification in the Official Gazette one or more Administrative Tribunals[1] to deal with matters and disputes especially pertaining to service matters of civil servants.

Accordingly, in exercise of the powers conferred by Section 3(1) of the Administrative Tribunals Act, 1980, the Government, by a notification[2] established an Administrative Tribunal at Dhaka on 01 February, 1982, for the whole of Bangladesh. Thus, an Administrative Tribunal was established for the first time in the history of Bangladesh to resolve disputes concerning the terms and conditions of the service of civil servants. In fact, the Tribunal was given herculean task of resolving disputes relating to service matters of civil servants throughout the country.

---

* Assistant Professor, Department of Law, University of Dhaka.

1 See sub-section (1) of sec. 3 of the Administrative Tribunals Act, 1980, which runs thus "The Government may, by notification in the official Gazette, establish one or more Administrative Tribunals for the purpose of this Act".

2 Notification No. S.R.O. 58-L/82-JIV/1T-1/81, dated 01 February, 1982.

Ten years after the establishment of the first Tribunal, it was ultimately realised in 1992 that the single Tribunal was unable to deal with the increasing number of cases expeditiously and, as such, on 30 May, 1992, the second Administrative Tribunal was established at Bogra.[3] The Government took more than nine years to set up further Tribunals to ensure speedy justice. On 22 October, 2001, the Government of Bangladesh established 05 more Administrative Tribunals in the country.[4] Thus, the total number of Administrative Tribunals stands at 07.

Since Administrative Tribunal in Bangladesh is a newly born institution and no in depth study on this institution has yet been made, an attempt is, as such, taken hereunder to appraise the provisions[5] concerning the-

(a) composition of Administrative Tribunals;

(b) qualifications of the Members of Administrative Tribunals;

(c) terms and conditions of the office of the Members of Administrative Tribunals; and

(d) procedure of Administrative Tribunals in Bangladesh.

2. Composition of Administrative Tribunals

Provisions concerning the composition of Administrative Tribunals in Bangladesh have been laid down in Section 3(3) of the Administrative Tribunals Act, 1980. Making Administrative Tribunal a single member tribunal, this Section runs thus:

> An Administrative Tribunal shall consist of one member who shall be appointed by the Government from among persons who are or have been District Judges.

Thus unlike the Administrative Tribunal (statutorily called Service Tribunal) of Pakistan, which is consisted of a Chairman and such member or members not exceeding three as the President may from time to time appoint,[6] and the

---

3 Notification No. S.R.O. 119-L/92/249-JIV/5C-5/89, dated 30 May, 1992.

4 Notification S.R.O. No. 288-Law/2001, dated 22 October, 2001.

5 Provisions are contained in the Administrative Tribunals Act, 1980 and the Administrative Tribunals Rules, 1982.

6 As regards composition of Administrative Tribunal in Pakistan, sec. 3 (3) of the Service Tribunals Act, 1973, provides – "A Tribunal shall consist of- (a) a Chairman, being a person who is, or has been, or is qualified to be, judge of a High Court; and (b) such

Administrative Tribunal of India, which is consisted of a Chairman and such number of Vice-Chairman and Judicial and Administrative Members as the Government may deem fit,[7] the Administrative Tribunal in Bangladesh is a single member tribunal.

Furthermore, unlike the Service Tribunal of Pakistan or the Administrative Tribunal of India, the Administrative Tribunal in Bangladesh has no Benches to perform its functions in an effective and fair manner. With regard to the working of Service Tribunal by Benches in Pakistan, initially there was no provision in the Service Tribunals Act, 1973. In 1978, a new Section, 3A, was added to the Act to ensure fair, smooth and effective functioning of the Service Tribunal by Benches consisting of not less than two members.[8] Like the Service Tribunal of Pakistan, the Administrative Tribunal of India has also Benches consisting of one Judicial Member and one Administrative Member[9] to dispose of cases in an efficient manner.

3. Qualifications of the Members of Administrative Tribunals

As regards basic qualifications of the members of the Administrative Tribunals in Bangladesh, sub-section (3) of Section 3 of the Administrative Tribunals Act, 1980, provides that the Government can appoint as the member of the Administrative Tribunal only a person who is or has been a District Judge.

Thus, the Administrative Tribunal is composed of a District Judge who is the head of the Judiciary at the district level having, indeed, at least 15 years

---

member or members not exceeding three, each of whom is a person who possesses such qualifications as may be prescribed by rules, as the President may from time to time appoint".

7 Concerning composition of Administrative Tribunal in India, sec. 5 (1) of the Administrative Tribunals Act, 1985, provides that "Each Tribunal shall consist of a Chairman and such number of Vice-Chairman and Judicial and Administrative Members as the appropriate Government may deem fit and, · · · ·".

8 Sec. 3A was inserted in the Service Tribunals Act, 1973, by the Service Tribunals (Amendment) Ordinance, 1978. It provides that "The powers and functions of a Tribunal may be exercised or performed by Benches consisting of not less than two members of the Tribunal, including the Chairman, constituted by the Chairman".

9 Sec. 5(2) of the Administrative Tribunals Act, 1985, provides that "Subject to the other provisions of this Act, a Bench shall consist of one Judicial Member and one Administrative Member".

experience in the judicial service[10] and, as such, is expected to resolve relevant disputes in a satisfactory manner. But, it is noticeable that whereas the Administrative Tribunal of Bangladesh is composed of a District Judge alone, the Chairman of the Service Tribunal of Pakistan is to be appointed from among the persons who are or have been judges of High Courts or are qualified to be judges of High Courts although the qualifications of other members (not exceeding three) have not been determined by the relevant Act.[11] Like Pakistan, the Chairman of the Administrative Tribunal of India is required for being appointed from among the persons who is, or has been, a judge of a High Court. But in case of Indian Administrative Tribunal, the Vice-Chairman[12] of the Tribunal, who has held that office for at least two years, can also be appointed as the Chairman of the Tribunal. Unlike Pakistan, in India the Judicial Member of the Administrative Tribunal is required to be a person who is, or has been, or is qualified to be, a judge of a High Court; or has been a member of the Indian Legal Service and has held a post in Grade I of that Service for at least three years.[13] The Administrative

---

10 In judicial sphere, a District Judge in Bangladesh belongs to a cadre service known as Judicial Service. At the very beginning, he starts his service carrier as an Assistant Judge. Normally, a few years later, he is promoted to service as Senior Assistant Judge. From the post of Senior Assistant Judge, promotion lies to the post of Joint District Judge. Thereafter, from the post of Joint District Judge, promotion lies to the post of Additional District Judge. A District Judge is appointed from the Additional District Judges. See the Civil Courts Act, 1887.

11 Unlike the Chairman, for the members of the Service Tribunal of Pakistan there exist no prescribed basic qualifications in the Service Tribunals Act, 1973. This issue has been left in the hands of the President. See sec. 3 (3) of the Service Tribunals Act, 1973.

12 Regarding qualifications for appointment as Vice-Chairman, sec. 6(2) of the Administrative Tribunals Act, 1985, provides that a person shall not be qualified for appointment as the Vice-Chairman unless he - (a) is, or has been, or is qualified to be a judge of a High Court; or (b) has, for at least two years, held the post of a Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of a Secretary to the Government of India; or (bb) has, for at least five years, held the post of an Additional Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of an Additional Secretary to the Government of India; or (c) has, for a period of not less than three years, held office as a Judicial Member or an Administrative Member.

13 See sec. 6 (3), the Administrative Tribunals Act, 1985.

Member of the Tribunal is to be a person who has, for at least two years, held the post of an Additional Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of an Additional Secretary to the Government of India; or has, for at least three years, held the post of a Joint Secretary to the Government of India.[14]

Although, unlike India and Pakistan, there is no provision in Bangladesh to appoint a person who is, or has been, a judge of the High Court Division of the Supreme Court as the member of the Administrative Tribunal. Only a District Judge can be appointed as the member of the Administrative Tribunal who is, indeed, qualified to be a judge of the Bangladesh Supreme Court[15] comprising the High Court Division and the Appellate Division. But, it should be stressed here that if the Vice- Chairman of the Administrative Tribunal in India is appointed as its Chairman then, like a judge of the High Court, also a carrier civil servant in the rank of Secretary or Additional Secretary becomes eligible to be appointed as the Chairman of the Administrative Tribunal in India. So is the case in Pakistan where a civil servant having no academic legal qualification can be appointed as a judge of the High Court[16] and, as such, shall be eligible to be the Chairman of the Service Tribunal. In Bangladesh, only a judicial officer having legal qualification can only be appointed to the single member Administrative Tribunal.

4. Terms and Conditions of Office of the Members of Administrative Tribunals

The provisions concerning the terms and conditions of office of the member of Administrative Tribunal in Bangladesh have been laid down in Section 3

---

14 See sec. 6 (3A), the Administrative Tribunals Act, 1985.

15 As per Art. 95 (2) (b) of the Bangladesh Constitution, a person shall be qualified for appointment as a judge of the Bangladesh Supreme Court if he/she has, for not less than 10 years, held judicial office in the territory of Bangladesh.

16 Art. 193 (2) (b) of the Pakistan Constitution (1973) has provided for not less than 10 years' period for civil servants for being eligible for consideration for appointment as a Judge of the High Court and out of the above 10 years, it has been provided that for a period of not less than three years, he must have served as or exercised the functions of a District Judge in Pakistan. 1998 SCMR 2190 = PLJ 1999 SC 2425.

(4) of the Administrative Tribunals Act, 1980, which provides that a member of an Administrative Tribunal shall hold office on such terms and conditions as the Government may determine.

Thus, the Government has been empowered to determine the terms and conditions of the member of the Administrative Tribunal who happens to be a District judge. This provision is contrary to personal independence of the judges, which means that judges are not dependent on Governments in any way that might influence them in coming to decisions in individual cases.[17] However, the Government of Bangladesh, in pursuance of the provisions of Section 3(4) of the Administrative Tribunals Act, 1980, has not yet formulated and adopted any separate Rules concerning the terms and conditions of the members of Administrative Tribunals and, as such, they are being regulated by the Government Rules, framed under Article 133[18] of the 1972-Constitution, applicable to persons in the service of the Republic (the service of the Republic has been defined in Article 152 (1) of the 1972-Constitution to mean any service, post or office whether in a civil or military capacity, in respect of the Government of Bangladesh, and any other service declared by law to be a service of the Republic). In this regard, the observations made by Justice Mustafa Kamal (CJ) in Secretary, Ministry of Finance Vs. Masdar Hossain[19] are worthy of note :

---

17 See Griffith, J.A.G. : *The Politics of the Judiciary,* (1977) 29. Quoted in Bari, M. Ershadul: *Importance of an Independent Judiciary in a Democratic State,* published in the Dhaka University Studies part-F (a yearly journal of the Faculty of Law) IV No.1, (June 1993) 2.

18 Art. 133 provides that "Subject to the provisions of this Constitution Parliament may by law regulate the appointment and conditions of service of persons in the service of the Republic: Provided that it shall be competent for the President to make rules regulating the appointment and the conditions of service of such persons until provision in that behalf is made by or under any law, and rules so made shall have effect subject to the provisions of any such law."

19 52 DLR (2000) AD 86.

> Judicial service is recognized and treated separately in Articles 115[20], 116 and 116A (Part VI) of the Constitution and cannot be part of the civil, administrative or executive service of the country. The definition of the 'service of the Republic' in Article 152 (1) of the Constitution is broad and includes defence and judicial services, but that does not mean that judicial service or defence service is a part of the civil or administrative service. Article 133 (Part IX) cannot be invoked for the judicial officers, as there are separate provisions for them in Articles 115 and 116 (Part VI) of the Constitution. Judicial officers are not persons in the service of the Republic for the purpose of Article 133 and hence the Rules regarding their appointment and conditions of service cannot be framed under Article 133 (Part IX). · · · · As the defence service is under Part IV, so is judicial service under Part VI. In such a situation, the defence service has been correctly organised by separate Acts and Rules and in a similar way the judicial service shall have to be organised in accordance with the provisions of Part VI and the enactment and rules made thereunder.

It is noticeable that for the members of the judicial service and magistrates exercising judicial functions, the Non-party Care-taker Government has adopted appropriate Rules[21] in 2007 in accordance with the guidelines given by the Appellate Division of the Bangladesh Supreme Court in the aforesaid case.

Like the Chairman and members[22] of the Service Tribunal of Pakistan, the members of the Administrative Tribunals in Bangladesh hold office on such terms and conditions as the Government may determine and the law does not provide for any security of tenure of the members. In France, the members of *Conseil d' Etat* and in Germany, professional judges are appointed for life and cannot be arbitrarily removed. These two are the most important factors

---

20 Art. 115 says 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 rules made by him in that behalf."

21 These are the Bangladesh Judicial Service Commission Rules, 2007; the Bangladesh Judicial Service (Pay Commission) Rules, 2007; the Bangladesh Judicial Service (Constitution of Service, Appointment to Service, Suspension, Dismissal and Removal) Rules, 2007; and the Bangladesh Judicial Service (Posting, Promotion, Grant of Leave, Control, Discipline and Other Conditions of Service) Rules, 2007.

22 See sec. 3 (4) of the Service Tribunals Act, 1973. This section provides that "The Chairman and members of a Tribunal shall be appointed by the President on such terms and conditions as he may determine."

that have made French and German Administrative courts judicial bodies of repute, which inspire confidence.[23] In order to make members of the Administrative Tribunals feel secure enough to dispense justice freely, it is essential that they should have a term of office fixed for a number of years or until a certain date of retirement. In the circumstances, the security of tenure of the members of Administrative Tribunals in Bangladesh appears to be unsatisfactory and contrary to their personal independence.[24]

5. Procedure of Administrative Tribunals

Since tribunals are not courts of law and, as such, court procedure does not apply to them. They are not bound to follow the procedure laid down for civil courts unless so provided in the enabling Act. They have their own procedures for performing their functions. Accordingly, the procedure to be followed by the Administrative Tribunal in Bangladesh to resolve disputes pertaining to service matters of civil servants has been laid down in the Administrative Tribunals Act, 1980, and the Administrative Tribunals Rules, 1982.

5.1 Eligibility for Application

In Bangladesh, the right to move an Administrative Tribunal is only available to those persons[25] who are employed in the service of the Republic or of any statutory public authority.[26] But, before one can approach the

---

23 Rashid, Pirzada Mamoon : *Manual of Administrative Laws,* (1998) 53-54.

24 In respect of personal independence of the judges, the International Bar Association says that it means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control. See Halim, Md. Abdul: *Constitution, Constitutional Law and Politics: Bangladesh Perspective,* (1998) 300.

25 As per sec. 4 (3) of the Administrative Tribunal Act, 1980, "person in the service of the Republic or of any statutory public authority" includes a person who is or has retired or is dismissed, removed or discharged from such service, but does not include a person in the defence services of Bangladesh or of the Bangladesh Rifles.

26 As per sec. 2 (aa) of the Administrative Tribunals Act, 1980, "statutory public authority" means an authority, corporation or body specified in the Schedule to the Administrative Tribunal Act, 1980. And the bodies specified in the Schedule to the Administrative Tribunal Act, 1980, are- Sonali Bank, Agrani Bank, Janata Bank, Bangladesh Bank, Bangladesh Shilpa Rin Sangstha, Bangladesh Shilpa Bank, Bangladesh House Building Finance Corporation,

Administrative Tribunal for redress of his grievance, he should fulfill the following criteria:

a) He should have availed all the remedies available to him under service laws.[27]

b) He should have a *locus standi* in the subject matter.[28]

Thus, it is evident that an Administrative Tribunal shall not ordinarily admit an application unless the person approaching it has exhausted all other remedies available to him under the relevant service laws. An employee who suffers by any order of any administrative authority can invoke the jurisdiction of Administrative Tribunal provided he has exhausted all the forums available to him under the service rules as to redress of grievances. Only an employee can make application to the Administrative Tribunal for redress of his grievances under the provisions of Administrative Tribunals Act and Rules. Such a precondition of exhausting all available departmental remedies also exists in Pakistan and India. But the period allowing the higher departmental authority to make decision on the departmental appeals or revisions is two months in Bangladesh whereas it is three months (ninety days)[29] in Pakistan and six months[30] in India.

In France, there is no requirement to invoke a departmental remedy before invoking jurisdiction of administrative courts. In Germany, the requirement of invoking departmental remedies are taken seriously, and a very large number of cases are decided at the stage without ever having to go before

---

Bangladesh Krishi Bank, Investment Corporation of Bangladesh and Grameen Bank.

27 According to sec. 4 (2) of the Administrative Tribunals Act, 1980, no application in respect of an order, decision or action which can be set aside, varied or modified by a higher administrative authority under any law for the time being in force relating to the terms and conditions of the service of the Republic or of any statutory public authority, or the discipline of that service, can be made to the Administrative Tribunal until such higher authority has taken a decision on the matter.

28 According to sec. 4 (2) of the Administrative Tribunals Act, 1980, a person in the service of the Republic or of any statutory public authority may make an application to an Administrative Tribunal under sub-section (1), if he is aggrieved by any order or decision in respect of the terms and conditions of his service including pension rights or by any action taken in relation to him as a person in the service of the Republic or of any statutory public authority.

29 See sec. 4 (1) of the Service Tribunals Act, 1973.

30 See sec. 20 (2) of the Administrative Tribunals Act, 1985.

administrative courts. Some departments have tried departmental boards for decision in departmental matters. Such boards have members who have legal or judicial training, and they have successfully functioned as quasi-judicial bodies at times acting independently of the departmental executive.[31]

Although there is a tendency in recent years to broaden the scope of the expression *'locus standi'* in so far as the writ petitions filed in the public interest, the Administrative Tribunal under Administrative Tribunals Act, 1980, cannot entertain cases filed in the interest of the public[32] as they are created for the specific purposes of service matters. In this connection, in Kazi Shamsunnahar & others Vs. Commandant PRF, Khulna and others,[33] it was held that –

> A person, who is or was in the service of the Republic or of any statutory public authority specified in the Schedule of our Act, has been retired, dismissed, removed or discharged from service, may make an application before the Administrative Tribunal for necessary relief but no person other than the person in the service of the Republic or of any statutory public authority can prefer such an application.

5.2 Filing of Application

Regarding filing of application before Administrative Tribunal in Bangladesh, rule 3 (1) of the Administrative Tribunals Rules, 1982, provides that an application to the Administrative Tribunal shall be made in writing and may be made by the applicant in person, or by a person authorised by him in that behalf, or by a registered post. Thus, like India, where an application can be filed to the Administrative Tribunal either by the applicant in person or by a duly authorised legal practitioner,[34] and Pakistan, where a memorandum can be filed either by the appellant personally or

---

31 Rashid, Pirzada Mamoon : *Manual of Administrative Laws,* (1998) 56.

32 The rule governing the writs of Habeas Corpus and Quo Warranto is that any person can apply for such writ. On the other hand, the rule governing the writs of Mandamus, Certiorari and Prohibition is that it is only the person whose rights have been infringed can apply for such writ. But this rule based on the traditional concept of *Locus Standi,* as evolved from the Anglo-Saxon Jurisprudence is vitiated in the cases of Public Interest Litigation. In legal sphere, the theory of Public Interest Litigation recognises maintainability of legal actions by a third party (not personally aggrieved) in unique situations.

33 (1997) 2 BLC 569.

34 See Rule 4(1), the Central Administrative Tribunal (Procedure) Rules, 1985.

through his advocate,[35] in Bangladesh a person in the service of the Republic or of any statutory public authority is entitled to make an application to the Administrative Tribunal in person or through a lawyer.

With regard to admission of application, rule 3 (6) of the Administrative Tribunals Rules, 1982, provides that the Administrative Tribunal shall admit the application if it is made in proper manner laid down in sub-rules (1), (2), (3), (4) and (5) of rule 3[36] and is not barred by the Administrative Tribunals Act, 1980. In Ali Emdad Vs. Labour Director and others,[37] it was held that an application not following the sub-rules (1), (2), (3), (4) and (5) of rule 3 of the Administrative Tribunal Rules, 1982, can be rejected by Tribunal, but before rejecting it, the Tribunal may give an opportunity for making the application according to those rules. Thus the Administrative Tribunal in Bangladesh can give a chance to those who failed to apply strictly in compliance with the provisions of the relevant rules.

5.3 Subsequent Amendment of the Application

The Section 7B,[38] which has been added to the Administrative Tribunals Act, 1980 by the Administrative Tribunals (Amendment) Act, 1997, has removed the impediment on the way of subsequent amendment of the application. Prior to the amendment, there was no scope to amend the application despite any fatal defect disclosed later on. Section 7B provides for larger scope to amend the application at any stage of the proceedings and even at the stage before the Appellate Division of the Supreme Court.

5.4 Disposal of Application

Where the application is admitted and a date for hearing of the application is fixed, if none of the parties appears and it is found that the notices to appear have been served upon the parties to the dispute, Tribunal may make an order dismissing the application.[39] Where on the day so fixed the applicant appears and the opposite party does not appear, Tribunal may, if it is found

---

35 See Rule 5(1), the Service Tribunals (Procedure) Rules, 1974.

36 Sub-rules (1), (2), (3), (4) and (5) of rule 3 of the Administrative Tribunal Rules, 1982, mainly deal with the filing of application and contents thereof.

37 18 (1998) BLD (AD) 137.

38 Sec. 7B provides that the Tribunal may, at any stage of the proceedings, allow the applicant to alter or amend his application in such manner and on such terms as it thinks fit.

39 Rule 6 (4), the Administrative Tribunals Rules, 1982.

that the notice to appear has been served, hear the application *ex parte*.[40] Where on the day so fixed, the opposite party appears and the applicant does not appear, the Tribunal may make an order dismissing the application: provided that where the opposite party admits the claim of the applicant or from the materials on record it is found that the relief claimed by the applicant should be allowed, the Tribunal shall make an order granting the relief to such extent as it deems fit.[41] These provisions, which are similar to the provisions of Rules 15 & 16[42] of the Central Administrative Tribunal (Procedure) Rules, 1985, and Rule 19[43] of the Service Tribunals (Procedure) Rules, 1974, of India and Pakistan respectively, are identical with those of Order IX of the Code of Civil Procedure, 1908 laid down for civil courts.

Any party to the dispute aggrieved by an order made under rules 6 (4), 6 (5) and 6 (6) of the Administrative Tribunals Rules, 1982, may apply to the Tribunal for an order to set aside the dismissal or the order made *ex parte* which are similar to the provisions of rule 13 of Order IX of the Civil Procedure Code. If the Tribunal is satisfied that there was sufficient cause for the non-appearance of the party, the Tribunal shall make an order setting aside the dismissal or the order made *ex parte* on such conditions as it deems fit.[44] The Tribunal may, if it deems fit in any case, postpone the hearing of an application to a future day to be fixed by it.[45] The Tribunal shall, after the application has been heard, give its decision in writing with reasons therefor, at once or on some future day of which notice shall be given to the parties, and make an order accordingly.[46] The decision or order once given or made shall not afterwards be altered or modified, save for the purpose of correcting a clerical or arithmetical mistake or any error arising from any accidental slip or omission[47] which is in line with the provisions of Section 152/153 of the Civil Procedure Code.

---

40 Rule 6 (5), the Administrative Tribunals Rules, 1982.

41 Rule 6 (6), ibid.

42 Rules 15 & 16 are concerned with procedure required for disposal of application by Administrative Tribunal.

43 Rule 19 is concerned with procedure required for disposal of appeal by Service Tribunal.

44 Rule 6 (7), the Administrative Tribunals Rules, 1982.

45 Rule 6 (8), ibid.

46 Rule 6 (9), the Administrative Tribunals Rules, 1982.

47 Rule 6(10), ibid.

It is noticeable that under the existing laws, Administrative Tribunal in Bangladesh has no power to grant interim relief in respect of a case pending before it for final adjudication.[48] Neither does the Administrative Tribunals Rules, framed in 1982 pursuant to Section 12 of the Administrative Tribunals Act, 1980, for carrying out the procedural aspect of the Act confer on the Administrative Tribunal any such power.[49]

5.5 Execution of Decree

According to rule 7 of the Administrative Tribunals Rules, 1982, the Administrative Tribunal shall, for the purpose of execution of its decisions and orders, follow, as far as practicable, the provisions[50] of the Code of Civil Procedure, 1908. In Munshi Mozammel Hossain Vs. Post Master, Faridpur,[51] it was held that Administrative Tribunal can execute, functioning as an executing court, its own decisions or orders and also the decisions and orders of the Administrative Appellate Tribunal following the provisions of Civil Procedure Code relating to execution of a decree.

5.6 Inspection of any Record or Document

According to rule 8 (1), any party to a dispute may, with the permission of the Tribunal, inspect any record or document in the custody of the Tribunal, other than a record or document with respect to which privilege may be claimed on behalf of the State. An inspection under rule 8(1) shall be in the presence of such officer of the Tribunal as it may specify.[52] This is a healthy provision for ensuring proper representation by any party to a dispute.

5.7 Power of the Administrative Tribunal for the Purpose of Hearing of an Application

Under Section 7(1)[53] of the Administrative Tribunals Act, 1980, an Administrative Tribunal, while hearing an application, is given the power of

---

48 Kamrul Hasan Vs. Bangladesh and others, 49 (1997) DLR (AD) 44.

49 See Chowdhury, Khaled Hamid : Jurisdictional Issues under the Administrative Tribunals Act, 1980, 50 DLR Vol. L, 1998.

50 The provisions relating to the execution of a decree as contained in the Code of Civil Procedure, 1908, are mainly from sec. 34 to sec. 74 (Part II).

51 43 (1991) DLR 415.

52 Rule 8 (2), the Administrative Tribunals Rules, 1982.

53 Sec. 7 (1) provides that " For the purposes of hearing an application or appeal, as the case may be, a Tribunal shall have all the powers of civil court, while trying a suit under the Code of Civil Procedure, 1908 (V of 1908), in respect of

a Civil Court in trying a suit under the Code of Civil Procedure, 1908, in respect of summoning and enforcing attendance of any person and examining him on oath, discovery and production of any document, requiring evidence on affidavit, requisitioning any public record or a copy thereof from any office, issuing Commission for examination of witnesses or documents and such other matters as may be prescribed.[54]

Section 7 (8) provides that "where, in respect of any matter, no procedure has been prescribed by this Act or by rules made thereunder, a Tribunal shall follow such procedure in respect thereof as may be laid down by the Administrative Appellate Tribunal." Thus the Administrative Tribunal has not been given the power to determine its procedure in the absence of specific provisions in the Act or in the rules made thereunder. But the procedure to be laid down by the Appellate Tribunal must be in conformity with the principles of natural justice.[55] As in Abdul Latif Mirza Vs. Government of Bangladesh,[56] the Appellate Division of the Bangladesh Supreme Court clearly observed that the principles of natural justice are part of the law of the country. Moreover, the Appellate Division in Mujibur

---

the following matters, namely:- (a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of any document; (c) requiring evidence on affidavit; (d) requisitioning any public record or a copy thereof from any office; (e) issuing commissions for the examination of witnesses or documents; (f) such other matters as may be prescribed".

54 Here the term "prescribed" means prescribed by the Administrative Tribunals Act, 1980, or prescribed by the rules framed thereunder.

55 Natural Justice is a concept of common law and it is the common law world counterpart of the American 'procedural due process'. The concept of Natural Justice is generally expressed in two fundamental principles. These are: a) Nemo judex in cause sua, i.e., nobody shall be judge in his own cause; and b) Audi Alterm Partem, i.e., party shall not be condemned without giving an opportunity of hearing. Soon after, a third rule was envisaged, and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably (A.K.Kripak Vs. Union of India, AIR 1970 SC 150). In legal sphere, apart from these fundamental principles of Natural Justice, there are also some ancillary rules following from these principles. These are: Right to Notice; right to present case and evidence; no evidence should be taken at the back of other party; report of the enquiry to be shown to the other party; reasoned decisions; institutional decision or one who decides must hear; rule against dictation or decision must be actually his who decides.

56 (1982)34 DLR (AD) 173.

Rahman Vs. Bangladesh[57] held that although an Administrative Tribunal cannot strike down any bar or rule on the ground of its constitutionality, it could strike down an order for violation of the principles of natural justice.

5.8 Right of the Legal Representatives of the Deceased Applicant to Continue the Proceeding

The Administrative Tribunals Act, 1980, did not provide for the right of legal representatives of the deceased applicant to continue the proceedings in order to obtain the pensionary benefit. About seventeen years later, in 1997, the Administrative Tribunals (Amendment) Act, 1997[58] added Section 7A to the Act to rectify the situation. As Section 7A provides –

> Death of the applicant.- (1) Where a person is dismissed or removed from service and an application is made under section 4 against such removal or dismissal and that person dies during the pendency of the case, the right to sue of that applicant shall survive if his service had been pensionable under any law for the time being in force.
>
> (2) Where the right to sue survives under sub-section (1), such legal representative of the deceased applicant who would have been entitled to the pensionary benefit at the event of the death or retirement of the deceased applicant may be substituted, upon an application, made to the Tribunal or, as the case may be, to the Appellate Division, within sixty days from the date of the death of the applicant.
>
> (3) The legal representative of the deceased as referred to in sub-section (2) shall be entitled to the pensionary benefit, which would have been payable to that deceased if he had not been removed or dismissed:
>
> Provided that, such pensionary benefit shall not be payable unless the Tribunal or, as the case may be, the Appellate Division, declares the order of the dismissal or removal, as the case may be, as illegal or void:
>
> Provided further that, for the purpose of this section, the applicant shall be deemed to have died or retired, as the case may be, on the day on which he was removed or dismissed.

Thus, by virtue of the newly inserted Section 7A, one of the most efficacious Sections of the Act to serve humanitarian cause, the right to sue survives regarding pensionary right of the legal representatives of the deceased applicant and are now entitled to continue the proceedings, and in the event

---

57 44 DLR (1992) (AD) 111.

58 Act No. 24 of 1997.

the order of dismissal or removal is declared illegal, they will be entitled to pensionary benefits of the applicant as if he retired or died while in service.

6. Conclusions

Does the Present Composition of Administrative Tribunal Ensure Fair Justice?

Unlike the Service Tribunal in Pakistan or the Administrative Tribunal in India, the Administrative Tribunal in Bangladesh is a single member Tribunal and, as such, has no scope to discharge its functions in Benches. As it is a single member Tribunal, it cannot always be expected to ensure fair justice, expeditious and effective disposal of cases. Accordingly, it may be recommended that Section 3 of the Administrative Tribunals Act, 1980, should be amended suitably in order to enable all Administrative Tribunals in Bangladesh to work in Benches.

Are the Method of Appointment and Term of Office of Members Conducive to Ensure Independence in Performing Their Functions?

Indeed, the Government of Bangladesh legally enjoys uncontrolled powers in the appointment of the members of Administrative Tribunals, as there is no provision for taking into account the qualities of a District Judge who should be appointed as a Member of the Tribunal. Since almost in all cases, the Government is a party, it may be suggested to introduce an appropriate amendment in Section 3 of the Administrative Tribunals Act, 1980, so that the most efficient, learned and impartial District Judges could be appointed to ensure fair justice.

Like the members of the Service Tribunal in Pakistan, the members of the Administrative Tribunals in Bangladesh have no terms of office fixed for a number of years or until a certain date of retirement. They are appointed by the Government and hold office on such terms and conditions as the Government may determine. Thus unlike India, where the members of the Administrative Tribunal hold office for a period of 5 years or unless attain the age of 62 years, the members of the Administrative Tribunals in Bangladesh have not been provided with the security of tenure. Consequently, they have to depend on the whims of the executive for their

term of office, which is contrary to the personal independence of the members of the Administrative Tribunals.

Therefore, in order to make the members of the Administrative Tribunals feel secure enough to dispense justice freely and fearlessly, it may be recommended that Section 3 of the Administrative Tribunals Act should be amended so that they hold office for a period of at least five years or until attain the age of retirement.

Is the Procedure of Administrative Tribunal Fair?

In dealing with an application, the Administrative Tribunal in Bangladesh does not exactly follow the same procedure as the Civil Courts follow in a trial of suit. As most of the disputes concerning service matters of civil servants are based on official record, the Administrative Tribunal is not generally required to take evidence of witness by following a lengthy process of trial. Thus, the procedure of Administrative Tribunal in Bangladesh has been made simple.

Furthermore, by adding Sections 7A and 7B by the Àdministrative Tribunals (Amendment) Act, 1997, important changes have been made in the Administrative Tribunals Act, 1980. Section 7A enables the legal representatives of the deceased servant to have pensionary benefit, which was not available under the original law. By abolishing the provision to the effect that no application to alter or amend his application despite revelation of any serious fault at a later time, Section 7B empowers the applicant to amend his/her application at any stage of the proceedings and even at the stage before the Appellate Division of the Supreme Court. An aggrieved employee has been given the opportunity to appear before an Administrative Tribunal in person or engage lawyer to represent him. The provision to appear before the Tribunal in person by the employee reduces the cost of litigation although representation by lawyer ensures proper and meaningful defence.

While agreeing with the broad proposition that interim order should not be issued in each and every matter thereby restraining the hands of the

executive, we cannot but disagree that such order should never be issued or there would be no occasion at all to issue an interim order. Sometimes, the power to grant interim order or injunction is very essential for effective dispensation of justice. But under the existing laws, the Administrative Tribunal in Bangladesh has no power to grant stay or injunction as an ad-interim measure in the absence of which in many cases the aim of seeking relief becomes frustrated thereby reducing the jurisdiction of the Administrative Tribunals nugatory. As the alternative remedy is not efficacious, in many cases, the person aggrieved seeking immediate relief takes the disputes into the writ jurisdiction of the High Court Division of the Bangladesh Supreme Court. In the circumstances, the Administrative Tribunal in Bangladesh should have powers to grant stay and interim order or injunction.

The Dhaka University Studies, Part-F Vol. XX (2) : 83-104 , December 2008

CURRENT TRENDS IN CSR PRACTICES IN THE BUSINESS OF PRIVATE ENTERPRISES: COMPARATIVE EXPERIENCES OF BANGLADESH AND VIETNAM

Nakib M. Nasrullah*

1 Introduction

Corporate Social Responsibility (CSR) as a current business phenomenon is growing in practice in the business of developing countries like developed economies, particularly after the phase-out of Multi-Fibre Arrangement. Bangladesh, among other Asian countries like India, China, Thailand, Vietnam, Malaysia and Singapore is responding to the CSR issues to ensure its access into the global market under the pressure of supply chain counterpart companies. The countries of South and Southeast Asia are in competition to retain their position in global market as they have the same types of goods to earn the foreign currency like garments and leather. This competition has offered a scope of development of multi-factorial approach and initiatives leading to the growth and promotion of CSR in Business. This article is an attempt to compare the position of Bangladesh in the promotion and practice of CSR with one of Asian countries, Vietnam. The end in view is to identify the comparable rank/posture of Bangladesh and any lesson to be learnt from the Vietnam experience in promoting and integrating CSR in the private enterprises of Bangladesh.

Vietnam is selected for comparison with Bangladesh as both are developing countries[1] and of similar character in business and economy. Firstly, both countries possess a private sector-led, liberal and market-oriented economy. As far as the historical background of privatisation is concerned, the move for privatisation in the economy of Bangladesh began after it assumed a short-lived nationalisation character in the early 1970s. Policy developments and reforms for privatisation began to occur in Bangladesh from 1975.[2]

---

* Assistant Professor, Department of Law, University of Dhaka

1 For information see, the World Bank, 2008 List of Developing Countries< www. aoac.org/meetings1/122nd_annual_mtg/list_developing_countries.pdf> 13 November 2008.

Afterwards, the dominance of the private sector was established in 1990s.[3] This dominance is credited with the adoption of several policies and laws such as *the Foreign Private Investment Act 1980*, *New Industrial Policy 1982*, *Revised Industrial Policy 1986*, and *Industrial Policy 1991*.[4] In Bangladesh currently 77 per cent of the investment in the national economy comes from the private sector which contributes significantly to the GDP (23 per cent) growth of Bangladesh.[5]

On the other hand, the new economic trend in Vietnam is focused on broadening the scope of private sector development and increasing the inflows of foreign direct investment (FDI). The economic reforms (*Doi Moi*) included the recognition of the private sector in the 1992 Constitution. In order to increase Vietnam's private sector and make the country attractive and fit for foreign investment, two new laws were enacted in 2005.[6] This reform has impacted on the increase of FDI inflow and increase in the number of registered SMEs. As a result the private enterprises are supplying 56.3 per cent of the economy's employment, and holding a large share of the 1.2 million new entrants to the labour market annually, making such enterprises increasingly vital to the economy.[7]

---

2 MU Ahmed, *Privatization in Bangladesh* (1999) International Labour Office <www.ilo.mirror.cornell.edu/public/English/region/asro/Bangkok/paper/privatize/chap/pdf.> 6 June 2008

3 Ibid.

4 Ibid; See also Shahzad Uddin 'Privatization in Bangladesh: The Emergence of Family Capitalism' (2005) 36: 1 *Development and Change* 157, 159.

5 ILO, 'Social Compliance and Decent Work: The Bangladesh Perspective' (Papers and Proceedings of the Tripartite Meeting on Social Compliance in the RMG Sector, Bangladesh 2007).

6 The enacted laws were the Unified Enterprise Law and the Common Investment Law. The Unified Enterprise Law merges the Enterprise Law, the State-Owned Enterprise Law, and the Law on Cooperatives, providing a mechanism to protect the rights of citizens to establish and operate private businesses. It also establishes the right of investors to be protected from undue interference from government or other officials, if the business operates legally. The Common Investment Law aims at levelling the playing field between foreign and domestic, and private and state-owned enterprises. See, Tamara bakafi, *Viet Nam: Lessons in Building Linkage for Competitive and Responsible Entrepreneurship* (2006) UNIDO and Kennedy School of Government, Harvard University <http://www.unido.org > 13 September 2008.

7 Ibid.

Secondly, in these two countries the apparel sector is the dominant manufacturing entity for its major contribution to export growth and economic empowerment. The garment products of Bangladesh account for about 76 per cent of its total export earnings and at the same time, it is the most labour intensive manufacturing sector.[8] In Vietnam there are three main exporters; crude oil, textiles and garments, and leather and footwear.[9] A study in 1998 shows that garment industry in Vietnam generates about 20 per cent of total merchandise exports and 41 per cent of manufactured exports.[10] It employs half a million of workers (80 per cent of which are female), or about 22.7 per cent of the countries manufacturing workforce. [11] Export increased from US$ 850m to US$ 2,750m.between 1995 and 2002.[12] In addition, the Vietnam is one of the ten countries in Asia whose apparel products are in stiff competition after MFA phase out.[13]

In view of these similarities in economy the comparison between Bangladesh and Vietnam in terms of social responsible entrepreneurship may be plausible. The comparison is based on some basic lenses of CSR promotion and practice. They are as follows:

1. the main drivers of CSR;
2. the performance of labour and environment related CSR standards or compliance with relevant Codes of Conduct (COCs);
3. the role of business associations in promoting CSR at the enterprises level;
4. the government or public sector's role in strengthening CSR practices; and
5. the development of institutional and partnership activism.

---

8 ILO, above n 5; see also Asian Tiger Capital Partners, *Bangladesh Growth, Investment, Opportunity*, (2008) <www.at-capital.com > 13 November 2008.

9 Ibid.

10 See Khalid Nadvi et al, Challenges to Vietnamese Firms in the World Garment and Textile Value Chain, and the Implications for Alleviating Poverty (this paper has been prepared as part of the project 'Globalisation, Production and Poverty', 2003) UK Department for International Development <http://www.gapresearch.org/production/globprov.html > 15 September 2008.

11 Ibid.

12 Nigel Twose and Tara Rao, *Strengthening Developing Country Governments 'Engagement with Corporate Social Responsibility: Conclusions and Recommendations from Technical Assistance in* Vietnam (Final Report 2004).

13 International Labour Organisation (Sectoral Activities Programme), *Promoting Fair Globalisation in Textiles and Clothing in a post-MFA Environment* (Report for discussion at the Tripartite Meeting on Promoting Fair Globalisation in Textiles and Clothing in a Post-MFA Environment, Geneva 2005) <http://www.ilo.org/wcmsp5/groups/public/...ed-dialogue/....sector/documen> 18 September 2008.

2 The Main Driving Forces of CSR in Bangladesh and Vietnam

A study in Bangladesh identifies three major factors contributing to the adoption of CSR and bringing about a change in practice. One is the increasing scrutiny of local practices of subsidiaries of MNCs, as the continuing incidents of pollution and exploitation, and the increasing local appreciation and understanding of international standards of CSR, lead to a case for wider integration of CSR application.[14] The second factor is the increased social awareness of western consumers about high profile issues such as child labour in the garment sector and quality control of shrimp products which prompts companies to concentrate on CSR practices.[15] And the third factor is that in Bangladesh, as elsewhere in the world, privatisation and market liberalisation policies have emerged as imperatives for business to take up wider social responsibilities and would play a complementary role to the state.[16] In addition, the huge number of NGOs holding companies accountable for their activities; continuing incidents relating to the wasteful use of scarce resources and pollution caused by industries; local and global pressure; and support from business associations also act as driving forces for the promotion of CSR practices in the corporations of Bangladesh.

A recent empirical study on CSR, in describing the driving factors, categories the practices of CSR into two: CSR as a short–term business demand or traditional practice of philanthropy, and CSR as a business case. The study reveals that the dominant driving forces for traditional CSR practices are moral obligations, religious beliefs and practices, and social obligations. For CSR as a business case, the driving factors are professional practice, maintenance of national and international standard codes, and the influence of business counterparts.[17]

---

14 Ritu Kumer, et al. 'Understanding and Encouraging Corporate Responsibility in South Asia Update 3 Bangladesh' (Working Paper No.3, Teri Europe, New Academy of Business Centre for Policy Dialogue, 2004) 5 <www.teriin.org/teri-eu/index.htm> <www.new-academy.ac.uk> <www.cpd-bangladesh.org> 15 September 2008.

15 Ibid.

16 Ibid.

17 Mahila Shajahan and Muhammad Ryhan Sharif (eds.), *Missing Links: Corporate Social Responsibility and Basic Education in Bangladesh* (2006) 47

In Vietnam, the driving forces for the adoption of CSR are largely similar to those in Bangladesh. In determining the driving factors a study on Vietnam[18] reveals that many groups are found who are interested in CSR and push its implementation from different perspectives. These include the external consumer's perspective, importing countries' perspective, and exporting countries' perspective. The consumers always demand from their investors in developing countries the assurance of good CSR performance behind the goods they buy. The importing countries (generally known the developed ones) consider different CSR conditions for the control of their imported products which have direct impact on their employment and compete with domestic manufacturers' products. The conditions are placed by consumers, trade unions, domestic enterprises, human rights and non-governmental organisations, certifying companies and governments. As such, exporting countries/ producing countries (generally known as developing ones) always adhere to CSR by fulfilling the requirements of their international counterparts with the expectation of further contracts and expansion of their market. This CSR is prompted by business associations, export enterprises, trade unions, certifying and supervising organisations, and governments. In the context of Vietnam three main drivers are identified for CSR practices; response to the demands of buyers and customers, self-awareness of enterprises, and supports from other stakeholders.[19] However, aside from CSR as a corporate practice, philanthropy has long been a practice in business in Vietnam.[20]

3. The Performance of Labour and Environment-Related CSR Standards and Compliance with Codes of Conduct

In the implementation of labour and environment related CSR, the export-oriented private manufacturers in developing countries are mostly found to be compliant with the codes of conduct (CoCs) of the multinational buyer companies. The exporting companies are also seen to follow other multi-stakeholder certificating codes such as SA 8000, ISO 14000 and 14001,

---

18 Ministry of Labour, Invalids and Social Affairs and Institute of Labour Science and Social Affairs, *Study on Corporate Social Responsibility: Labour-Related Practice* (final report, Hanoi February 2004) <http://siteresources.worldbank.org/INTPSD/Resources/Vietnam/Vietnam_ILSSA.pdf> 18 September 2008 ; See also Nguyen Huu Dzung, *Labour– Focused Corporate Social Responsibility*: *Case Study in Textile and Footwear Enterprises* (summarised draft report , 2003).

19 Ibid.

20 Ibid.

WRAP, FLA, ETI, and Fair Wear Foundation (FWF) to obtain certificates. In the case of compliance with the buyers' codes the respective buyers and their hired third party conduct all checking, monitoring and supervision at their own cost. Therefore, the buyers' codes are popularly accepted by the producing companies and they enjoy the advantage of not being required to obtain a certificate. Moreover, the CoCs are mostly conformable to national labour laws. As for buyers' CoCs the World Bank reports that there have been more than 1,000 worldwide while there have been more or less 10 multi-stakeholder codes.[21]

In Vietnam, recently, the associations and export enterprises have rapidly responded to the CoCs of buyers in the performance of labour and workplace related CSR. Currently the leading players in CoCs implementation are textile and footwear enterprises, particularly in exporting goods to the US and EU market.[22] In Vietnam, there is a comprehensive labour code providing the foundation for CSR implementation which covers many social issues as developed by the intergovernmental instruments.[23] With the formulation of the labour code, guideline documents, and amending regulation in conformity with globalisation and integration processes, the Government has in fact set up basic conditions to enable enterprises to take initiative in fulfilling CoCs requirements.[24] Enterprises with good performance of Vietnamese law do not suffer any difficulty in following CoCs imposed by buyers. Most of the CoCs provide similar provisions relating to labour and environmental issues to the national laws, sometimes even providing more.[25] In respect of environmental protection the companies also go by CoCs and simultaneously the Vietnamese companies follow the new *Environment Protection Law of 2005* and the *Vietnam Agenda 21*.[26]

---

21 Ibid.

22 Ibid.

23 Ibid.

24 Ibid.

25 Ibid.

26 The 2005 Environmental Protection Law is a comprehensive one that provides for the protection of the environment, measures and resources for the environmental protection, rights and obligations of the organisations and individuals for the protection and state management of environmental protection. The law applies to all organisations, individuals, households, local resident communities, and foreign organisations operating in Vietnam; see the National Assembly Office <www.vietnam.net > 13 November 2008.

In Bangladesh the same scenario appears in the export-oriented enterprises, more particularly in the dominant Ready Made Garment (RMG) sector, with some exceptions. The RMG enterprises follow the CoCs of buyer companies when they usually get into contract with their international counterpart retailers based in the US and EU. The contracting companies currently maintain their own labour and environmental policies in line with the buyers' requirements.[27] The companies also follow WRAP, SA 8000, and ISO 14000 certification principles.[28] There is a recent development that garment enterprises located in the Dhaka EPZ have introduced their own code of conduct in respect of labour rights and workers' welfare related to CSR practice.[29]

It is noteworthy that there has long been a demand for a uniform code of conduct from the RMG companies due to complexities arising in compliance with different CoCs that vary in contents and procedures in many cases. It is indeed an issue when a company is engaged in contract with more than one buyer at the same time. To address this demand the apex organisation of the garment owners, BGMEA has already drafted a code of conduct, but it is yet to be in force as it is awaiting final approval from the Ministry of Labour and Industry of Bangladesh. Meanwhile there is also strong proposal and pressure from MFA Forum on the RMG sector to follow the uniform Jo-in–Code which is practiced in Turkey.[30]

However it is pertinent to say that the Labour Act adopted in 2006 in Bangladesh is a landmark attempt to incorporate almost all relevant principles of labour rights and work place conditions recognised by the ILO Declarations and Conventions. The compliance with the provisions of this national law by all kinds of enterprises whether export oriented or not, may fulfil the requirements of the labour-focused CSR aspects. Similarly, compliance with *Environmental Conservation Act 1995* and *Environmental Conservation Rules 1997* may fulfil to an extent the environmental CSR issues.[31]

---

27 Ritu Kumer, et al, *Understanding and Encouraging Corporate Responsibility in South Asia Update 3 Bangladesh* (2003) Teri Europe <www.teriin.org/teri-eu/index.htm> 13 November 2008.

28 Ibid.

29 ILO, above n 5.

30 Bekafi, above n 6, 16.

31 *The Environmental Conservation Act 1995* provides for an environmental clearance certificate for industry as a condition for launching operation. The Environment Conservation Rules state the purpose of the certificate and categorises the industries

4. The Role of Business Associations in Promoting CSR at Enterprises Level

Business associations may play a vital role in promoting CSR practices in the enterprises. As they are generally formed with the owners of the enterprises, their awareness of the need for CSR and thus involvement in the adoption and implementation through different ways may result in the creation of uniform model and guidelines and enable all to participate in the process irrespective of their size and business extent. Moreover, as an apex body, their monitoring, supervision, partnership, and advocacy may act as a pressure as well as an encouragement for shaping the structure of CSR as a long term business agenda.

The Vietnamese apex business organisations such as the Vietnam Chamber of Commerce and Industry (VCCI), Vietnam Leather and Footwear Association and Vietnam Textile and Garment Association (VITAS) are showing their strong commitment to the promotion of CSR in the enterprises.[32] VCCI, as a representative of employers is assigned by the government to provide a series of supporting services to businesses in the field of sustainable development through much emphasis on the application of CSR.[33] It plays an important role for raising awareness of CSR on a wider scale. In partnership with the German development organisation GTZ, it established a roundtable series to address CSR issues relevant to businesses in Vietnam.[34] The roundtable meetings aimed to raise awareness of CSR, encourage the adoption of CSR in Vietnamese businesses, strengthen communication among firms engaged in these issues, and address particular CSR issues.[35] The topics of the meetings included benefits and challenges in implementing social standards such as CSR capacity building through workers' participation, audit quality control, provision of assistance to SMEs

---

into three, in consideration of their site and environmental impact and prescribes procedures for control and mitigation of environmental pollution.

32 Dao Quang Vinh, *Labour Market and Employment Conditions in Vietnam* (2007) Institute of Labour Sciences and Social Affaires, Vietnam < http://gw.kli.re-kr/emate-gw/seminar.nsf...>13 November 2008.

33 CSR Vietnam Forum, *Corporate Social Responsibility Award 2006 - Footwear and Garment Industries in Vietnam* (2007) <http://www.vietnaumforumcsr.net/default.aspx?portalid=5&tabid=306.

34 Bekafi, above n 6.

35 Ibid.

for implementation of social standards at a low cost, and developing the method of raising public awareness and sustaining social dialogue.[36] It also undertakes collaborative initiatives for organising seminars, workshops and other programmes to enhance the competitiveness of the enterprises through the application of CSR.[37] In addition, it provides support for the Vietnam Business Link Initiative (VBLI) which works to improve working conditions for all people in the footwear industries in Vietnam.[38]

Furthermore, in order to promote CSR and honour those enterprises which have been implementing it well, VCCI organises CSR award for the footwear and garments enterprises. In 2005 and 2006 it organised the honour award in collaboration with the Ministry of Industries, Ministry of Labour and Social Affaires (MOLISA), Vietnam General Federation of Labour (VGFL), Vietnam Leather and Footwear Association (LEFASO), Vietnam Textile and Apparel Association (VITAS), and Vietnam Action Aid.[39] Likewise in 2007, the same award programme was organised by this organisation. The honour award was aimed at creating a positive image of enterprises' integration process as well as enabling the enterprises to cooperate with the regional firms and forums in implementing CSR for sustainable integration.[40]

In Bangladesh, the Bangladesh Federation of Chamber of Commerce and Industry (FBCCI) plays no official role in CSR promotion and its stated objectives do not include activities for that end.[41]However, the Dhaka Chamber of Commerce and Industry (DCCI) has recently undertaken an initiative for the promotion of CSR and formed the Corporate Social Responsibility Standing Committee (2008). The mission of the committee includes creating awareness about CSR through meetings, seminars, roundtable discussions, press conferences and preparing schemes and

---

36 Ibid.
37 Ibid.
38 Ibid.
39 Dao Quang Vinh, above n 32.
40 Ibid.
41 This information is obtained by the 2007 Annual Report of the Federation (personally collected and also by face to face conversation with secretary of the Federation Mr. Amzad Ali Chawdhury, Dhaka Office).

activities.[42] It has a plan to establish a CSR centre and the preliminary work has already been done. This organisation in the implementation of its objectives is at a preparatory stage.[43]

In Bangladesh among the apex business organisations the activities of BGMEA and BKMEA may be considered to be unique and remarkable in accelerating the practice of CSR, particularly in labour and workplace related issues. Both the BGMEA and BKMEA have developed their own official mechanisms to enhance CSR practice at the enterprise level.[44] At the same time, they have also run some welfare activities for their workers as well as for the larger community in the areas of health care, poverty alleviation, capacity building for employment, and other philanthropic activities during emergency situations such as natural calamities, economic inflation and rising prices of commodities.[45] BGMEA's collaborative programmes with the ILO and UNICEF for child labour elimination and their immediate rehabilitation, the ILO and BGMEA partnership programme for improvement of working conditions, and the social compliance cell of BGMEA are the ground-breaking initiatives for the augmentation of labour related CSR activities.[46] In addition, drafting a code of conduct by BGMEA as a business organisation is the first of this kind in the developing country context.[47]

Similarly, BKMEA as the apex organisation of knitwear manufacturers and exporters has some permanent initiatives as pre-requisites for membership of the organisation with a goal to ensuring a better employment situation in the member units.[48] It also organises regular monitoring and inspection activities, training and awareness building programmes for the management,

---

42 Dhaka Chamber of Commerce and Industry, Resolution of the Meeting, 28 January 2008 (personally collected).

43 Ibid.

44 See Bangladesh Garment Manufacturers & Exporter Association (BGMEA), *Study on the Knit Garment Sub-Sector of Bangladesh* (2005) <www.bangladeshgarments.info> 11 November 2005.

45 Ibid.

46 Ibid.

47 Ibid.

48 Bangladesh Knitwear Manufacturers & Exporters Association (BKMEA), Corporate Social Responsibility to the Workers in the Knitwear (2007) <www.redbarnet.dk/admin/Public/DWSDownload.aspx> 13 November 2008; see also BKMEA, Social Compliance Activities of the Knitwear Sector (2006) <www.bkmea.org> 13 November 2008.

workers and other stakeholders to ensure safe and sound working place in line with the sprit of international standards.[49] In addition, they also participate from the organisational level in different welfare activities for knitwear workers at times, and also in the national development agenda.[50]

5. The Role of the Government and Public Sector as Navigator of CSR Practices

The government or public sector's roles for the promotion of CSR may be executed generally in four ways as identified by the World Bank's study.[51]These four ways are mandating, facilitating, partnering and endorsing. It is difficult to evaluate governmental activities for the promotion of CSR through the application of the said parameters in the context of developing countries, as the current notion of CSR is almost everywhere a new approach to business and its practice is at nascent stage. Nevertheless, an attempt is made for an overview of the government or public sector activities in Vietnam and Bangladesh.

In Vietnam, according to a country perspective analysis in the APEC region in terms of role-play for CSR, the enterprises and government are identified as the two main players.[52] Enterprises are always concerned about the determination of the success of the implementation of CSR. The government along side the legal development for the control of multi-sectoral market-based economy contributes in promulgating policies, supervising the enforcement of regulations, and providing information on CSR issues.[53] The Government of Vietnam now takes up CSR relevant issues as a public policy area.

As part of a public policy area, the existing focus in relation to CSR is on awareness- raising by creating forums for dialogue and exchanges, and partnering with national business associations as well as with international

---

49 Ibid.

50 Ibid.

51 Tom Fox, Halina Ward and Bruch Howard, *Public Sector Roles in Strengthening Corporate Social Responsibility: A Baseline Study* (October 2002) World Bank <www.worldbank.org> 22 July 2008.

52 Asia Pacific Economic Cooperation (APEC), *Corporate Social Responsibility in the APEC Region: Current Status and Implication* (Human Resource Development Working Group, Capacity Building Network, December 2005) <www.apec.org > 1September 2008.

53 Ibid.

donor agencies.[54] Other indicators are increasing legislative activities in the areas of labour law, corporate governance and environment protection, and creating voluntary frameworks.[55]Although there is no explicitly designed CSR policy and strategy, the formulation of Vietnam Agenda 21 is treated as an attempt to address CSR as a sustainable strategy.

Therefore, the public policy actors in Vietnam are the Vietnam Agenda 21 office, particularly for environmental protection, and the Ministry for Labour, War Invalids and Social Affaires (MOLISA) for labour and workplace related issues. Agenda 21 is intended to strengthen enforcement measures against companies that pollute by the establishment of Environmental Police and special fees levied on the emission of polluted aste water.[56] In other ways, the government calls on companies to protect the environment and promote safety and health in the workplace.[57]

The Ministry of Labour, Invalids and Social Affaires is involved in different multi-stakeholder partnership programmes, conducting research and study programmes on labour–related CSR practices, organising conferences, workshops, roundtables and awards.[58] In cooperation with Action Aid Vietnam it awards for excellence in CSR performance in the garments and footwear sectors.[59]

In the national policy framework, besides policies of economic development, social and environmental protections are targeted to be mainstreamed into government legislations. The Vietnam Government stimulates and creates an enabling environment for enterprises to engage in the performance of CSR in all levels of operation. MOLISA in collaboration with Ministry of Industries (MoI) offers annual rewards for those enterprises that have best practice of CSR.[60] Since 2005 this incentivising award programme has been

---

54 GTZ and Bertelsmann Stiftung, *The CSR Navigator: Public Policies in Africa, the Americas, Asia and Europe* (2007) <www.bertelsmann-stiftung.de> or <www.gtz.de> 25 September 2008.

55 Ibid.

56 Ibid.

57 Shizuo Fukada, *Corporate Social Responsibility in Vietnam: Current Practices, Outlook, and Challenges for Japanese Corporations* (2007<http:// www.keindanren. org.jp /cbcc / english/report/2007> 15 September 2008.

58 Ibid.

59 Ibid.

60 Vinh, above n. 32.

in operation in order to promote, honour, and praise the CSR practices of the enterprises.[61]

The Institute for Labour Sciences and Social Affaires in Vietnam receives funds from the World Bank to provide technical assistance to enable the government in the process of defining and strengthening its roles in promoting and supporting labour- related CSR.[62] This technical assistance is an effective way to enable the government sector to play a wider role in strengthening CSR in Vietnam.

The Labour Code of the Vietnam Socialist Republic was amended twice from 1994 to 2006 with an aim to promptly modify the policies and regulations pertaining to labour and industrial relations in the market economy, so as to be more compatible with international practices.[63] This improvement in the legislation contributed to the generation of enabling conditions for enterprises to perform CSR in a meaningful way. The Labour Code has become more refined and is an important piece of legislation to protect employees in labour relations; in engaging labour contracts, in wage negotiation and settlement of labour disputes and regulations on fundamental labour rights. It includes workers benefits such as social insurance covering health and other fringe benefits given on the basis of a person's skill and efficiencies.[64] In addition a plethora of labour market programmes are covered, such as providing an unemployment allowance, providing credit for job generation, employment consultation and job matching services and vocational training.[65]

In the light of the above discussion, it seems to be clear that the public sector's role in Vietnam is manifested in introducing the Vietnam Agenda 21, Reservoir Code, different partnering activities, a high level of communication regarding CSR and increasing the level of stakeholder integration. Compared to developing countries perspective it is advancing regularly to a mature level.

In Bangladesh, the public sector's role in promoting labour-focused CSR is very limited. The Ministry of Commerce has recently undertaken some steps by establishing a Social Compliance Forum (SCF) to monitor and

61 Ibid.
62 Ibid.
63 Ibid.
64 Ibid.
65 Ibid.

review the social compliance status in the RMG sector.[66] This is otherwise recognised as the National Compliance Forum. This forum is characterised by multi-stakeholder participation comprising of business associations, buyers, and international development agencies. SCF works through two issue-based task forces and one monitoring cell.[67] The taskforces are taskforce on occupational safety and taskforce on labour welfare. The task force on occupational safety is assigned for reviewing and monitoring the status of occupational safety in the factories and also formulating short term or long term action plans. The occupational safety activity includes fire safety, building safety, environment safety and security. The taskforce on labour welfare includes labour- focused CSR issues, particularly employment conditions and core labour rights. One of the major achievements of the social compliance forum is that it coordinated in 2006 the signing of Memorandum of Understanding (MoU) between the employees, employers of the RMG sector and the government.[68]

Apart from the role of the Ministry of Commerce, the Ministry of Labour and Employment has formed a crises management committee in order to tackle any untoward situation arising out of non-compliance at the factory level.[69] The main functions of this committee are taking appropriate steps to mitigate the emergent unpleasant situations, undertaking steps to implement different provisions of the tripartite MoU of 2006, and inspecting factories other than garments to ensure compliance. Both the committee and forums under these two ministries are not directly engaged in CSR policy-making activities; nevertheless they are playing a facilitating role for ensuring better labour and work place situations.

In respect of legislative development, there is no commanding legislation for CSR application by the enterprises, but the Labour Act 2006 and the Workers Welfare Foundation Act may be considered to be enabling regulations for CSR promotion and practice by the enterprises, although it is not explicitly legislated for CSR.

6. The Development of Institutional and Partnership Activism

CSR networking, research, campaign, and advocacy are instrumental in the enhancement of CSR integration into businesses and help awaken the

66 See ILO, above n 5.
67 Ibid.
68 Ibid.
69 Ibid.

concern of different stakeholders for the need of its practices at all levels of enterprises. Other than business owner organisations and the public sector institutions, in developed and developing countries there has been a growing trend of institutional development at the national or regional level to this end. These institutions operate their activities either independently or in partnership with business organisations, governments, international development agencies and trade unions. Their activities are intended to widen the scope of CSR activities, ultimately resulting in contributing to the national policy development of CSR, increase of the public sector involvement, development of implementation mechanism in the enterprises, and the creation of overall uniformity of the practices. The development of this type of institution in a country shows its progression and increasingly better status in the recognition of CSR.

From the developing countries' perspective, the institutional development for the promotion of CSR activities in Vietnam is comparatively remarkable and their activities in many cases are at a mature level. In this respect, institutes worth mentioning for their country-wide activities are Vietnam Business Link Initiative (VBLI) and Vietnam Business Council (VBC). VBLI is a tri-sector partnership between 26 local and international organisations and companies established in 1999 to address working conditions in the Vietnam footwear industries.[70] VBC is a consultative and deliberative forum that comprises of representatives from businesses, government and civil society to coordinate community-corporate collaboration for social development.[71]

The main objective of VBLI is to improve the working conditions for all people engaged in the footwear factories in Vietnam. To obtain its goal successfully the VBLI has divided its works into two strategic phases: Phase 1 from 1999-2005 and Phase 2 from 2005-2008.[72] Phase 1 activities were focused on raising awareness of and fostering expertise in, occupational health and safety issues in the footwear industry. These activities were carried out through six key items; training workshops, research, pilot

---

70 Bekefi, above n 6.
The 26 entities participating in the VBLI represent government agencies, international associations, research and consultation agencies, sportswear and other private companies, and international organisations and NGOs.

71 Joaquin L. Gonzales, *Corporation –Community Collaboration for Social Development: An Overview of Trends, Challenges, and Lessons from Asia* (2005) Inter-American Development Bank <www.iadb.org/pub > 13 November 2008.

72 Bekafi, above n 6.

programmes commitment to good practice, affecting national policy and strengthening a management support system.[73] Phase 2 activities include increasing the scale and impact of improved health and safety standards developed in Phase 1; supporting the institutionalisation of health and safety standards through government, industry bodies, trade unions, and educational institutions; transferring the VBLI learning and process to garment industries; and repositioning VBLI as a facilitator for health and safety promotion in industries rather than a deliverer of training and other services.[74] It is noteworthy that the VBLI works with national firms, many of which are in multi-national supply chains, encountering both issues of occupational health and safety and proliferation of the codes of conduct to which they must adhere.

The VBLI is a success story in terms of promotional activities for occupational health and safety issues in the footwear industries as the maximum number of companies, their managers, and beneficiaries are convinced and responding in terms of CSR performance.[75] Similarly, it has helped raise awareness among industry leaders on occupational health and safety (OHS) issues and at the same time its' programme has made a positive impact on OHS management.[76]

The second famous institute in Vietnam is VBC which is committed to addressing issues related to the development of economic and social business policies or laws. It seeks corporation and community collaboration for social development, which is a means of widening the application of CSR for the community at large.[77] It also seeks to improve the process for obtaining input from both government and business in the reform process. This Council was created under the leadership of four key organisations: The Vietnam Chamber of Commerce and Industries (VCCI), the Prime Minister Research Commission, the Central Institute of Economic Management, and the Association of Small Enterprises in Hanoi.[78]

---

73 Ibid.

74 Ibid.

75 Ibid.

76 Ibid.

77 Gonzales, above n 71.

78 VCCI is a national organisation which assembles and represents business enterprises and associations from all economic sectors across Viet Nam. Prime Minister's Research Commission is the think tank of the Prime Minister on economic, social and administrative reforms, which provides advice and proposals to the Prime Minister and leaders of the Vietnamese Government. The Central Institute of Economic

In addition to the development of internal institutions, the famous intergovernmental and multilateral development agencies are running their own programmes for CSR in partnership. The leading organisations are UNIDO, ILO, GTZ, WB and DFID.

In Bangladesh there are some institutes established in recent years at the national level that are engaged in different awareness raising, advocacy, research and supporting programmes for the promotion and future structuring of CSR. The institutes are the Bangladesh Centre for Advanced Studies, Bangladesh Enterprise Institute, Bangladesh Partnership Forum, and the National Forum on Compliance.

The Bangladesh Centre for Advanced Studies along with their other programmes conducts monitoring services in the garment and textile industries for the improvement of social and environmental compliance status under its social and environmental compliance projects. The social compliance project is a collaborative one with German NGO 3p and BGMEA.

The Centre for CSR is a recent innovation of the Bangladesh Enterprises Institute with an objective to facilitate, expand, and encourage CSR practices in the private sector. The main focus of this centre is awareness raising and structural development of future CSR in Bangladesh.

The Bangladesh Partnership Forum is also a recently launched forum by business leaders and other key players as a part of global partnering programme of IBLF. It is formed with an expressed interest in building inter-organisational partnerships by connecting the corporate sector with the public and non-governmental sector to build mutually beneficial, social, economic, and environmental development programmes.

Apart from this institutional development at the local level of Bangladesh, the partnership activism provided by international development agencies, NGOs or public sector is vibrant, particularly in the areas of labour and product quality. In this respect, the noteworthy names are the ILO, GTZ, SEDF and KATALYST.

Management is the research institute which helps the Vietnamese government work out economic laws and policies.

The following table shows the summary of comparison of CSR practices between Bangladesh and Vietnam.

Lenses of Comparison	Bangladesh	Vietnam	Remarks
1. The main driving forces of CSR	• Increasing scrutiny of local practices of subsidiaries of MNCs. • Increased social awareness of external consumers about labour and quality control of the product. • Emergence of privatization and market liberalization as imperatives for business to take up social responsibility	• Responses to the demands of external buyers and consumers • Increasing self-awareness of the enterprises as to the fulfillment of the requirements of their international counterpart • Supports from other stakeholders such as business associations, trade unions, certifying and supervising organizations and governments	Largely similar, the support from the stakeholders is more available in Vietnam

2. Performance of labour and environment related CSR and compliance with codes of conduct	• The trend of compliance with buyers' and certifying agencies' codes of conduct in relation to labour and environment issues is mainly available in the RMG enterprises among the export enterprises. • The BGMEA has drafted a code of conduct for the RMG enterprises, which are yet to be in force.	• The trend of responses to buyers' codes in the performance of labour and workplace related CSR has grown rapidly among the business associations and export enterprises, The leading players are textile and footwear. • There is comprehensive labour code in Vietnam providing the foundation of CSR. • In respect of environmental management and protection, companies in Vietnam simultaneously with external codes follow Vietnam Agenda 21.	The trend of compliance with buyers' and certifying agencies' codes is wider in the business practice than that of Bangladesh
3. The role of Business Associations in promoting CSR at enterprises level	• In Vietnam the apex business organization VCCI is engaged in providing support services for promotion of CSR at the enterprises level. • Two major owners associations LEFSO and VITAS are actively committed to the promotion of CSR in their enterprises in partnership with public sector.	• In Bangladesh, only the business associations of the RMG sector BGMEA and BKMEA are playing roles in the improvement of labour and workplace conditions at the enterprises level. • The apex employers' organization FBCCI has no role for the promotion of CSR.	The supporting services from the business associations in Vietnam are stronger than that of Bangladesh.

4. The role of public sector as a navigator of CSR	• The Government of Vietnam takes up CSR relevant issues as public policy area. • The Government has adopted Vietnam Agenda 21 providing guideline for companies for environmental control. • The Ministry of Labour, Invalids and Science Affaires are involved in different multi-stakeholder partnership programmes, conducting research and study programmes on labour-related CSR practices.	• In Bangladesh, the CSR is not yet recognized as a public policy agenda. • The Ministry of Commerce has established Social Compliance Forum to monitor and review the social compliance status of the RMG sector. • There are some legal development such as the Labour Act 2006 and Workers Welfare Foundation Act, 2006.	The Government role for CSR is very limited in Bangladesh.
5. The development of institutional and partnership activism	In Vietnam, there are two institutes, namely, VBLI and VBC which have country-wide activities for CSR through partnership programmes over the years.	Bangladesh Enterprise Institute, Bangladesh Partnership Forum, and Bangladesh Centre Advanced Studies established in recent years are engaged in supporting programmes of CSR.	Institutional development and partnership activities in Vietnam in many cases are at mature level.

7. Conclusion

The above discussion shows that there are some similar and dissimilar features in these two countries compared in regard to the promotion and development of CSR as a business agenda.

The similar aspect in developing country context is that the adoption and integration of CSR into the mainstream of business is essentially promoted to satisfy the requirements of international counterpart buyer companies. These requirements generally concern the labour rights, workplace conditions and environmental issues. Both in Bangladesh and Vietnam the need for access into the international market and survival there (ie, the 'market driven force') is the main driving force for the application of labour-related CSR standards. The labour-related CSR practices here appear to be not value driven or self-initiated, but imposed and externally driven.

In both the countries compliance with buyers' codes of conduct and other certification standards influences the national labour laws, which are evidenced with their amendments incorporating more recognised international labour standards as well as the adoption of labour welfare related laws. They are, for instance, the labour code of Vietnam (as amended up to 2006), *the Labour Act 2006* of Bangladesh and the *Workers Welfare Foundation Act 2006*. The compliance with the buyers' codes also influences the adoption of codes of conduct such as BGMEA's code of conduct which is unique one in the Asian region.

In respect of business association's initiatives for CSR promotion, the Vietnamese business organisations are engaged in carrying out activities in wider scale. Particularly VCCI's role can be said to be comprehensive as it works in all kinds of enterprises with the support of the Vietnamese government. This kind of comprehensive role from the apex level business organisation is absent in Bangladesh. In Bangladesh BGMEA and BKMEA's for the promotion of labour and environment related CSR is confined only to the RMG sector. A distinctive feature of BGMEA and BKMEA is their direct involvement in social and community development activities such as poverty alleviation, manpower development, and charitable donations during natural disaster.

As regards government or public sector intervention in CSR Vietnam is far ahead of Bangladesh. CSR in Vietnam is considered as an area of public policy. CSR activities are regulated and supervised by the government, although government legislations and regulations on CSR issues remain

insufficient and weak. The regulatory instruments such as Labour Code and Vietnam Agenda 21 provide a strong foundation for promotion of labour and environment related CSR. In addition, MOLISA as a government organ plays a partnering role for the enforcement of labour regulation, conducting research and providing information on CSR.

CSR issue is not yet undertaken in Bangladesh as a matter of public policy. The government's organisational support for CSR activities is almost limited to the RMG sector as it is the biggest export sector in Bangladesh. The public-private partnership and facilitating activities have not yet developed in true for wide scale promotion of CSR.

As for institutional development for CSR networking, research, campaigning, and advocacy in these two countries there has been recent progress such as in Vietnam with the VBLI and VBC and in Bangladesh with Bangladesh Enterprise Institute CSR Centre, Bangladesh Centre for Advanced Studies, and Bangladesh Partnership Forum. All these organisations also carry out their activities more or less in partnership with different development multilateral agencies or organisations, international companies and NGOs. The Vietnamese institutes are at an advanced stage as they have been working for about ten years and gained a good maturity level in comparison with Bangladesh, where the local institutes in Bangladesh are more recent initiatives and less experienced.

Against the backdrop of above discussion it may be concluded that Vietnam is comparatively more advanced than Bangladesh in the promotion of CSR. Bangladesh can draw up considerably from the experience of Vietnam particularly in public sector interventions and development of institutional partnership in regard to labour, environment and community development issues.

The Dhaka University Studies, Part-F Vol. XIX (2) : 105-118 , December 2008

SHIP-OWNER'S UNDERTAKING TO PROCEED WITHOUT DEVIATION: A CRITICAL ANALYSIS

Md. Khurshid Alam*

I. Introduction

Charter-parties, bills of lading and marine insurances provide certain undertakings which are implied but very important and form the basis of the contractual relationship between the concerned parties. Some of these are so vital that without them the contract of affreightment would not properly function. One of such undertakings on the part of the ship-owner is that the ship shall proceed on the contract route without deviation. Naturally, if the ship is to reach destination on time, she must not deviate. The Courts have given effect to this very reasonable proposition in a number of judicial decisions, which have established the doctrine of deviation, under which the master is held strictly liable, as a general rule, to follow the proper route.

The present article shall examine the principles relating to the ship-owner's undertaking to proceed without deviation under charter-party, bill of lading and marine insurance. The discussion includes the very nature and scope of this undertaking along with an analysis of the cases of justifiable deviations. Finally the effects of unjustifiable deviations have been scrutinized. The discussion shows that the standard of 'no deviation' has evolved and developed over time, but the basic principles behind the practical application of the law remain the same.

II. Meaning of Deviation

In general, deviation means departure from the prescribed or ordinary route, which the ship should follow in fulfilment of the contract of carriage. In the absence of express stipulations to the contrary, the ship shall proceed on her contract voyage without making any unjustifiable deviation from her usual, reasonable or proper route and without unreasonable delay.[1] Where the route of adventure is laid down in express terms in the contract of carriage, then that is the proper route. On the other hand, where the route is not prescribed and the contract simply stipulates the port of loading and the port of discharge, the proper route between these two *termini* is that which is

---

* Associate Professor, Department of Law, University of Dhaka

1 Davis v. Garrett (1830) 6 Bing. 716.

nautically usual[2] or ordinary trade route. 'If no evidence be given, that route is presumed to be the direct geographical route, but ... evidence may always be given to show what the usual route is ... In some cases there may be more than one usual route.'[3]

In *Reardon Smith Lines Ltd. v. Black Sea and Baltic General Insurance Co. Ltd.*[4] a vessel bound from Poti (in the Black Sea) to Sparrow's Point (in the USA) stopped for bunkering at Constanza, which was not on her direct geographic route. She was stranded at Constanza, and the cargo-owner sustained loss due to the delay. There was evidence that about 25% vessels proceeding from Black Sea ports to Bosphoras bunker at Constanza. It was held by the House of Lords that no deviation has occurred, since the ship was on a customary route.

Again, in *Al-Sayer Navigation Co. v. Delta Int. Traders*[5] the respondent, a Bangladeshi firm, imported salt from North Yemen. The salt was shipped from Hodeidah port of North Yemen, and the bill of lading was issued on 31st December 1977. Normally, a voyage from the Hodeidah port to the Chalna port of Bangladesh takes 3-4 weeks, and the expected date of arrival was 27th January 1978. The ship, instead of proceeding towards Chalna port, travelled in the opposite direction to a port of Dar-es-Salam. Such travelling was inconsistent with the contract of carriage. The ship reached Chalna port on 1st April 1978. The respondent, amongst others, claimed that there was undue delay and deviation. The Appellate Division of the Supreme Court of Bangladesh held that the proceeding of the ship in the opposite direction towards Dar-es-Salam was in violation of the bill of lading and was an unauthorised deviation. The carrier must be held responsible for such deviation, as it was one of the causes of undue delay in arrival of the ship at the port of Chalna.

III. No Deviation, whether a Condition or A Warranty

a. Charter-parties and Bills of Lading

The undertaking of no deviation is a 'condition,' and not a 'warranty.' It can be broken by trivial unjustifiable deviation, as well as, by unjustifiable deviation which may inevitably result in a total loss of the

2 Evans v. Cunard S.S. Co. (1902), 18 T.L.R. 374.

3 Reardon Smith Lines Ltd. v. Black Sea and Baltic General Insurance Co. Ltd., The Indian City (1939) AC 562, 584.

4 Ibid.

5 Appellate Division (Civil) 34 DLR 1982, 110.

vessel. Breach of this undertaking relieves the charterer or shipper of further performance of his part of the contract, if he so elects.

Fletcher Moulton, L.J. laid down[6] '...a deviation is such a serious matter, and changes the character of the contemplated voyage so essentially, that a ship-owner who has been guilty of a deviation cannot be considered as having performed his part of the bill of lading contract, but something fundamentally different. He therefore cannot claim the benefit of stipulations in his favour contained in the bill of lading.'

Similarly, Lord Atkin observed[7] that 'I venture to think the true view is that the departure from the voyage contracted to be made is a ... breach of such a serious character that, however slight the deviation, the other party to the contract is entitled to treat it as going to the root of the contract, and to declare himself as no longer bound by any of the contract terms.'

b. Marine Insurances

In marine insurance, deviation is treated as a 'warranty', and not as a 'condition.' Hence insurance cover does not cease on deviation. Clause 8.3 of the standard Institute Cargo Clauses A, B and C provides that 'This insurance shall remain in force ... during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transshipment and during any variation of adventure arising from the exercise of a liberty granted to carriers under the contract of carriage.'[8] It is obvious that Clause 8.3 covers deviation and other situations. For example where during repairs, the cargoes are warehoused, the insurance cover continues. When the events listed in Clause 8.3 occurs, the insured is not required to give notice to the insurer or to pay any extra premium.

IV. Justifiable Deviations

Apart from any express terms of the contract, in certain cases, deviations are justified and, therefore, the ship-owner will incur no liability. Such deviation, however, must not defeat the main object of the contract of carriage.

---

6 Joseph Thorley, Ltd. V. Orchis S.S. Co. (1907) 1 K.B., 660.

7 Hain SS Co. Ltd. v. Tate and Lyle Ltd. (1936) 2 All ER 597 HL 601.

8 © Copyright: 11/08 - Lloyd's Market Association (LMA) and International Underwriting Association of London (IUA). CL382 01/01/2009. Please visit www.lmalloyds.com.

The justifiable deviations are as follows:

a. Deviation in Saving Human Life or Property at Sea

1. Charter-parties

Previously, deviation to save human life at sea was justified, but not to save property, unless there was an express stipulation in the carter-party to that effect. Thus in *Scaramanga v. Stamp*[9] a ship deviated from her course to assist another in danger. But instead of saving the crew only, she attempted to earn salvage by towing the distressed ship into port. In doing so, she went ashore and was lost with her cargo. It was held that the deviation was unjustifiable and the ship-owner was liable for the loss of the cargo.

The law relating to deviation was succinctly stated in this case: '... deviation for the purpose of communicating with a ship in distress is allowable, in as much as the state of the vessel in distress may involve danger to life. On the other hand, deviation for the sole purpose of saving property is not thus privileged, but entails all the usual consequences of deviation. If, therefore, the lives of the persons on board a disabled ship can be saved without saving the ship, as by taking them off, deviation for the purpose of saving them will carry with it all the consequences of an unauthorised deviation. But where the preservation of life can only be effected through the concurrent saving of property, and the *bona fide* purpose of saving life forms part of the motive which leads to the deviation, the privilege will not be lost by reason of the purpose of saving property having formed a second motive for deviating.'

Now, the BIMCO General Time Charter-party (Code name Gentime) contains express provision justifying deviation in saving life or property or both at sea. Clause 9(b) of the Gentime provides that 'In the event of the Vessel deviating ... for reasons other than to save life or property the Vessel shall be off-hire from the commencement of such deviation ...'[10]

---

9 (1880) 5 CPD 295.

10 Gentime is published by the Baltic & International Maritime Council (BIMCO), Copenhagen and issued in September 1999. Please visit www.infomarine.gr/bulletins/chartering_forms/gentime.pdf .

2. Bills of Lading

Article IV, Rule 4 of the Schedule to the Carriage of Goods by Sea Act[11], which applies only to bills of lading, provides that 'Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement ... of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.'

Lord Atkin laid down[12] that to be reasonable, a deviation need not only be made in the joint interests of the ship and the cargo, or to avoid an imminent peril. 'A deviation may, and often will, be caused by fortuitous circumstances never contemplated by the original parties to the contract; and may be reasonable though it is made solely in the interests of the ship or solely in the interests of the cargo or indeed in the direct interest of neither: as for instance where the presence of a passenger or of a member of the ship's crew was urgently required after the voyage had begun on a matter of national importance; or where some person on board was a fugitive from justice, and there were urgent reasons for his immediate appearance. The true test seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interest of all parties concerned, but without obligation to consider the interests of any one as conclusive.'

Whether a deviation is reasonable or not is a question of fact in each particular case. In *Stag Line Ltd. v. Foscola, Mango & Co. Ltd.*[13] mangoes were shipped from Swansea to Constantinople. The ship deviated from her contractual route and went to St. Ives for the purpose of dropping two engineers, who had been testing her fuel-saving apparatus. Before the vessel regained the contract route, she struck a rock and wrecked. It was held by the House of Lords that the deviation was unreasonable, since the dropping of two engineers do not fall within purposes connected with the contractual voyage.

Again, a deviation is reasonable where it is made in order to comply with any orders given by the government of the nation under whose flag she sails.[14]

---

11 1925 : Act XXVI.

12 Stag Line Ltd. v. Foscola, Mango & Co. Ltd. (1932) A.C. 328.

13 (1932) A.C. 328.

14 Luigi Monta of Genoa v. Cechofracht Co. Ltd. (1956) 2 QB 552.

b. Deviation Necessary for Safety of Adventure

Deviation is justified when it is necessary for the prosecution of the voyage, or for the safety of the adventure, because one of the main duties of the master is bring the voyage to a successful conclusion by protecting the ship and the cargoes from undue risks. Thus where the ship sustained damage and repairs became indispensable, and the ship was taken to the nearest port for effecting such repairs,[15] or where the master made a deviation on receiving reliable information that by pursuing the contract route the ship or cargo will run into imminent danger by ice-burgs, heavy fog, hurricanes, pirates or hostile capture,[16] there it was held that the deviation was justifiable. Again, deviation is justified, though caused by the initial unseaworthiness of the ship, where it would be dangerous to keep her at sea without effecting necessary repairs. Thus in *Kish v. Taylor, Sons & Co.*[17] a ship became unseaworthy due to overloading. During the voyage this unseaworthiness obliged her to deviate from her normal route and to proceed to a port for repairs. It was held that the deviation was justifiable. The fact that it was caused by initial breach of contract did not make an otherwise reasonable deviation unreasonable.

Lord Atkinson laid down[18] '...must the master of every ship be left in this dilemma, that whenever, by his own culpable act, or a breach of contract by his owner, he finds his ship in a perilous position, he must continue on his voyage at all hazards, or only seek safety under the penalty of forfeiting the contract of affreightment? Nothing could, it would appear to me, tend more to increase the dangers to which life and property are exposed at sea than to hold that the law of England obliged the master of a merchant ship to choose between such alternatives.'

c. Liberty to Deviate Clause

Deviation is justified when it is covered by the liberty clause contained either in the charter party, bill of lading or marine insurance[19]. The liberty clauses must be construed in such a way so that they do not defeat the

---

15 James Phelps & Co. v. Hill (1891) 1 QB 605.

16 The Teutonia (1872) LR 4 PC. 171.

17 (1912) AC 604.

18 Ibid.

19 Clause 8.3 of the standard Institute Cargo Clauses A, B and C provides that 'This insurance shall remain in force ... during any variation of adventure arising from the exercise of a liberty granted to carriers under the contract of carriage.' For source, see footnote 8.

object of the contract of carriage. If the terms of contract give the carrier 'liberty to call at any port,' off the ordinary route, it must be construed as meaning the right to call at any port substantially in the course of the voyage. Vague general terms, however, do not justify such deviation. In *Leduc v. Ward*[20] the bill of lading for goods shipped from Fiume to Dunkirk gave 'liberty to call at any port in any order ...' On ship-owner's private business the ship deviated from her course some 1200 miles and went towards Glasgo. She was lost in a storm in the Clyde. It was held that the liberty clause merely gave a right to call at any port in the course of the voyage. Glasgo was not in the course of the voyage. Proceeding towards Glasgo was an unjustifiable deviation and the ship-owner was, therefore, liable.

Again, in *Stag Line Ltd. v. Foscola, Mango & Co. Ltd.*[21] it was held by the House of Lords that where the bill of lading gave 'liberty to call at any port in any order for bunkering or other purposes ...,' the word 'other purposes' should be construed as meaning to call at any port for some purpose having relation to the contract voyage.

The deviation clause most commonly met with, viz. 'with liberty to call at any port or ports in any order,' gives comparatively little latitude, for it has been construed to mean only any ports which are normally passed in the ordinary course of the voyage. More than that, the clause has proved a broken reed to the ship-owners.[22] That is why a very comprehensive deviation clause is recommended for more protection of the ship-owner. In *Connolly Shaw Ltd. Nordenfjeldske S. S. Co.*[23] the bill of lading for lemon shipped from Palermo to London gave 'liberty, either before or after proceeding towards the port of delivery of the said goods, to proceed to or return to and stay at any ports or places whatsoever (although in a contrary direction to or out of or beyond the route of the said port of delivery) once or oftener in any order backwards or forwards for loading or discharging cargo passengers coals or stores or for any purpose whatsoever ... and also such ports places and sailing shall be deemed

20 (1888) 20 QBD 475.
21 (1932) A.C. 328.
22 Chorley & Giles' Shipping Law, 7th Edition, 211.
23 (1934) 50 TLR 418.

included within the intended voyage of the said goods.' Before proceeding to London the ship deviated to Hull. In spite of the delay, the lemons arrived in London in good condition, but in the interval the price of lemons had fallen. The endorsee of the bill of lading sued the ship-owner for the damages they had sustained due to the dropping of price which occurred during the delay. It was held that the endorsee was not entitled to damages, since the deviation to Hull was covered by the liberty clause.

V. Effects of Unjustifiable Deviation

a. As Regards Contract of Carriage

An unjustifiable deviation relieves the charterer or shipper of further performance of his part of the contract, if he so elects. Unjustifiable deviation does not of itself abrogate the contract of carriage. It is open to the party not in default either to treat the contract as repudiated or to waive the breach and treat it as subsisting.

Lord Atkin observed[24] that 'I venture to think the true view is that the departure from the voyage contracted to be made is a breach by the ship-owner of his contract, a breach of such a serious character that, however slight the deviation, the other party to the contract is entitled to treat it as going to the root of the contract, and to declare himself as no longer bound by any of the contract terms ... If this view be correct, then the breach by deviation does not automatically cancel the express contract, otherwise the ship-owner by his own wrong can get rid of his own contract.'

Where the contract of carriage is for more than one voyage, and the ship deviated on her first voyage, the charterer or shipped is justified in refusing to load on the second voyage. Thus in *Compagnie Primera v. Compania Arrendataria*[25], where a voyage charter-party contained the clause that it should remain in force for 'two consecutive voyages at the same rate of freight and upon the same terms and conditions' and the vessel made deviation on the first voyage, it was held by the Court of Appeal that since the charter party was not indivisible, a deviation on the first voyage relieved the charterers of further performance of their part of

24 Hain SS Co. Ltd. v. Tate and Lyle Ltd. (1936) 2 All ER 597 HL 601.

25 (1940) K.B. 362.

the contract on the second voyage, if they have chosen to treat the contract as repudiated.

The charterer or shipper may, however, waive the unjustifiable deviation and treat the contract as subsisting. In that case his acts must clearly show that he intended to treat the contract as still binding.[26] 'A waiver to be operative so that a party's claim is estopped must be unequivocal, definite, clear, cognate and complete.'[27]

It was held by the House of Lords[28] 'For this purpose the case is like any other breach of a fundamental condition, which constitutes the repudiation of a contract by one party; the other party may elect to treat the repudiation as being final, but to treat the contract as subsisting...'

Where the charter or shipper waives the deviation and treat the contract as subsisting, he will be entitled to damages for loss actually caused by the deviation.[29]

b. As Regards Freight

Where the charterer or shipper rescinds the contract of carriage, the ship-owner is not entitled to any freight. However, where the contract is repudiated, but even then the goods reach their destination safely, the ship-owner is entitled to a reasonable sum as freight on the basis of *quantum meruit*, as he has essentially performed his obligation to carry.[30] On the other hand, the charter or shipper must pay full freight, where in spite of unjustifiable deviation the contract subsists, or where the unjustifiable deviation is waived.

c. As Regards General Average

The ship-owner cannot claim general average contribution from the charterer or shipper where unjustifiable deviation was the cause of the common danger. Again, where initial unseaworthiness forced the ship to deviate, the ship-owner cannot recover general average contributions in respect of expenses at the port of refuge.[31]

---

26 Ibid.
27 McCormick v. National Motor Insurance (1934) 40 Com. Cas. 76, 93.
28 White & Carter v. McGregor (1962) A.C. 413 (H.L.).
29 Hain S.S. Co. v. Tate & Lyle. Ltd. (1936) 2 All ER 597, 601 HL.
30 Ibid.
31 Schloss v. Heriot (1863) 14 CBNS 59.

d. As Regards Limitation of Liability

Where unjustifiable deviation has occurred, the ship-owner can neither rely on any clause in the charter-party or in the bill of lading entitling him to limit his liability,[32] nor claim demurrage.[33]

e. As Regards Carrier's Immunities

Where there has been an unjustifiable deviation, the ship-owner cannot rely on immunity clauses, or exception clauses or any clause exempting his liability. Unjustifiable deviation is regarded as a fundamental breach and the carrier is deprived of the protection of the exclusion clauses on the principle that some breaches of contract are so contrary to the basic requirements of a particular contract that the benefit of any clause is lost to the party in breach. Thus in *Joseph Thorley, Ltd. v. Orchis S.S. Co.*[34] the bill of lading exempted the ship-owner from liability for loss arising from negligence of stevedores, appointed by them. Later the ship deviated from the proper route. The ship-owner was held to be debarred from relying on the exemption clauses.

The carrier's immunities are as follows:

1. Charter-parties

The ship-owner is responsible for any loss or damage to the goods which he is carrying, unless it is covered by the exception clauses contained in the charter-party. If the charter-party is silent on this matter, then the court will presume the following exceptions:

(a) act of God;

(b) act of foreign enemies;

(c) act of war;

(d) inherent vice in the goods themselves; and

(e) the negligence of the owner of goods;

---

32 Cunard SS Co. Ltd. v. Buerger (1927) AC 1 HL.

33 United States Shipping Board v. Bungey Born Ltda Sociadad (1925) 134 LT 303.

34 (1907) 1 K.B., 660.

2. Bills of Lading

The Carriage of Goods by Sea Act[35] sets out a list of 'excepted perils.' But the ship-owner cannot rely on them if he has committed unjustifiable deviation and such deviation is the cause the damage.

Article IV, Rule 2 of the Schedule to the Act[36] provides that 'Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from --

(a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship:
(b) fire, unless caused by the actual fault or privity of the carrier:
(c) perils, dangers and accidents of the sea or other navigable waters:
(d) act of God:
(e) act of war:
(f) act of public enemies:
(g) arrest or restraint of princes, rulers or people, or seizure under legal process:
(h) quarantine restriction:
(i) act or omission of the shipper or owner of the goods, his agent or representative:
(j) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general:
(k) riots and civil commotions:
(l) saving or attempting to save life or property at sea:
(m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods:
(n) insufficiency of packing:
(o) insufficiency or inadequacy of marks:
(p) latent defects not discoverable by due diligence:
(q) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.'

35 1925 : Act XXVI.
36 1925 : Act XXVI.

3. Marine Insurances

Various losses for which the insurer is not liable to indemnify the assured are as follows:[37]

(a) losses not proximately caused by the perils insured against;
(b) losses caused by the wilful misconduct of the assured;
(c) losses caused by delay;
(d) losses caused by ordinary wear and tear;
(e) losses caused by inherent vice;
(f) other losses e.g. those caused by vermin.

VI. Findings:

a. No deviation, Whether a Condition or a Warranty

In charter-party and bill of lading, the undertaking of no deviation is a 'condition,' and not a 'warranty.' While in marine insurance, no deviation is treated as a 'warranty', and not as a 'condition.'

b. Justifiable Deviation

1. Deviation in saving human life and property at sea is always justified;
2. Deviation for the prosecution of the voyage or for the safety of the adventure is permissible, on the ground that the master is bound to bring the voyage to a successful conclusion;
3. Deviation is justified when it is done in exercise of the liberty clause. Such deviation, however, must not defeat the main object of the contract of carriage.

c. Effects of Unjustifiable Deviation:

1. An unjustifiable deviation relieves the charterer or shipper of further performance of his part of the contract, if he so elects. The charterer or shipper may, however, waive the unjustifiable deviation and treat the contract as subsisting.
2. Where the charterer or shipper rescinds the contract of carriage, but even then the goods reach their destination safely, the ship-owner is entitled to a reasonable sum as freight on the basis of *quantum meruit.* On the other hand, the charter or shipper must pay full freight, where in spite of unjustifiable deviation the contract subsists, or where the unjustifiable deviation is waived.

---

37 Ivamy, E. R. Hardy, *General Principles of Insurance Law*, 6th Edn. (1993), 285.

3. The ship-owner cannot claim general average contribution from the charterer or shipper where unjustifiable deviation was the cause of the common danger.

4. Where unjustifiable deviation has occurred, the ship-owner can neither rely on any clause in the charter party or bill of lading entitling him to limit his liability, nor claim demurrage.

5. Where there has been an unjustifiable deviation, the ship-owner cannot rely on immunity clauses, or exception clauses or any clause exempting his liability. The carrier's immunities applicable to bills of lading are laid down in express terms in the Carriage of Goods by Sea Act[38], while immunities applicable to charter-parties and marine insurances are regulated by contracts and judicial decisions.

VII. Conclusions

The undertaking to proceed without deviation lies in the very heart of the contractual relationship between the concerned parties. Our findings show that the principles of deviation have gradually evolved over time to include a number of cases where deviation is justified. Similarly, the effects of unjustifiable deviations have also gradually developed through a series of case laws. The basic principles however have not changed.

The statutory law in Bangladesh covers only a few of the relevant aspects of this issue, the rest is dependent on judicial interpretations. In order to further develop the law, there is no alternative but to conduct in-depth research on these issues from the perspective of Bangladeshi jurisdiction. The laws all over the world on this issue have uniformity for very understandable reasons. But its application from one jurisdiction to another varies greatly depending on the efficiency of the particular legal system. Further studies on these aspects are urgently needed with special focus on the enforcement mechanism offered by our legal system.

---

38 1925 : XXVI.

Bibliography

1. Payne & Ivamy: Carriage of Goods by Sea, Butterworths, 13th Edition, London, 1989.
2. Carver: Carriage by Sea, Stevens & Sons, 13th Edition, Vol. 2, London, 1992.
3. Chorley & Giles: Shipping Law, Pitman, 8th Edition, London, 1987.
4. Roy Goode: Commercial Law, Butterworths, 3rd Edition, London, 2004.
5. Charlesworth: Business Law, Sweet & Maxwell, 16th Edition, London, 1991.
6. Avtar Singh: Principles of Mercantile Law, Eastern Book Co., 7th Edition, Lucknow, 2000

The Dhaka University Studies, Part-F Vol. XIX (2) : 119-144 , December 2008

TOWARDS A LEGAL REGIME FOR THE RIGHTS OF PERSONS WITH DISABILITIES IN BANGLADESH

Arif Jamil*
Md. Shamsuddin Masum*

1. Introduction

Equality of every citizen in all spheres of life is a well recognized fundamental right. The persons who are differently able commonly known as persons with disability deserves equal right and treatment that a normal person without disability enjoys. More than the physical sufferings persons with disability may suffer social inequality and stigma which may make their life difficult and therefore, disability is not a fact of sufferings rather an issue of social inequality. According to the latest survey of World Health Organisation (WHO) about forty five million people of the world are persons with disability. Most of them dwell in the developing countries. According to WHO estimate, 10% of any given population constitutes persons with disabilities. The number is increasing at a high rate day-by-day. Diseases, malnutrition, accidents and some other reasons arising in the womb, during birth and after birth are the main reasons of disability.[1] In Bangladesh 14 million people are persons with different forms of disability, among them 28% are physically impaired, 32% are visually impaired, 22% with hearing and speech disability, 7% are intellectually disable and 11% have one or more than one disability.[2]

Although disability is as old as the human race, the issue of disability and the experiences of persons with disabilities have received little attention in general academic arena. These issues have often been ignored, and only in the disciplines of medicine and psychology, has disability been given an important place. Persons with disabilities remain at the margins of society as one of the impoverished groups. The overall low levels of development and inadequate health and social welfare services have all contributed to the

---

* Lecturer, Department of Law, University of Dhaka.
** Senior Judicial Magistrate, Sylhet.

1 Dewan, Dr. Sojol , 'Manus Manuser Jonno' in Mohiuddin Ahmed (ed.) *We shall overcome*, CDL, Dhaka, 2007, p. 42.

2 Khan, A.H.M Noman 'Totto Praptir Odhikar: Protibondi Manusher Obosta o Koroniyo' in *Protibhas*, Dhaka, 2008, Vol.1, p. 1.

persistence of poor quality of life among the disabled people in developing countries, particularly in Bangladesh. It is generally agreed that more information on the extent of the impact of disabilities is required to formulate future policies aiming at improving the quality of life of disabled people. [3]

The disability rights debate is not just about the enjoyment of specific rights. Rather, it is about ensuring equal and effective enjoyment of all human rights, without discrimination by persons with disabilities. The non-discrimination principle helps make human rights relevant in the specific context of disability, just as it does in the contexts of women and children. Non-discrimination and the equal effective enjoyment of all human rights by people with disabilities are, therefore, the dominant theme of the long-overdue reform in the way disability and persons with disabilities are viewed throughout the world. This article aims to promote the rights of persons with disability and help them to be recognized as differently able persons capable to contribute in the achievements of their family, society and country.

The article has tried to explore the national and international laws and policies regarding the rights of persons with disability. The objective of the present exercise is to examine the laws, policies and practices in protecting the rights of persons with disabilities, the efficacy of the present system, and finally to achieve a near ideal legal framework for the persons with disabilities. The article has five sections. Section 1 gives a brief introduction to the interface. Section 2 examines the definition of the concepts of disability and persons with disabilities in the light of legislations of different countries and from the existing literature and also shows how the issue of disability has become a human rights issue. International laws that specifically target the rights of the persons with disabilities have been discussed in section 3. Section 4 deals with the progress of disability movement in Bangladesh by State and Non State actors and tries to identify the shortfalls in securing the rights of persons with disabilities in Bangladesh. Whether there is any need of learning from the international legal instruments and practices, in particular, from the Biwako Millennium

---

3 Hosain, GMM, '*Disability problem in a rural area of Bangladesh*' Bangladesh, 1995, pp 21, 24-31.

Framework and the United Nation Convention on the Rights of Persons with Disability 2006 and the necessity of adopting in our national laws has also been discussed in this section. Lastly, section 5 outlines the findings and recommendations for enhancing the effectiveness of the present system, both in policy and practice.

Different books, articles, journals, websites and newspapers have been consulted for the completion of this article. Many activists of disability movement and different stakeholders have also been interviewed. Authors' personal experiences in dealing with this issue have also been used for the achievement of this article.

2. Conceptualizing Disability and Persons with Disabilities

The term disability has been defined, in most cases, from a clinical perspective and so the persons with disabilities are treated as an infirm person, and this expression itself is very much unethical. In fact, it is the success of the worldwide disability movement to turn the definition into rights based approach, which argues that disability is rather an issue of social inequality that illustrates the unequal power-relations between the disabled and the non-disabled of the community and it is about a relationship of the disabled people and the environment, which is already designed by the non-disabled people to hinder the participation of disabled persons in the society on an equal basis with others.[4]

The most commonly cited definition given by the World Health Organisation (WHO) in 1976, which draws a three-fold distinction between impairment, disability and handicap as 'An *impairment* is any loss or abnormality of psychological, physiological or anatomical structure or function; a *disability* is any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being; a *handicap* is a disadvantage for a given individual, resulting from an impairment or a disability, that prevents the fulfillment of a role that is considered normal (depending on age, sex and social and cultural factors) for that individual'.[5]

According to the disability rights movement, WHO has confused between the terms 'disability' and 'impairment'. They maintain that impairment refers

---

4 See Article 1 to the United Nations Convention on the Rights of Persons with Disabilities 2006.

5 Deborah, Kaplan, 'The definition of Disability', The Center for an Accessible Society. [See http//.www. Accessiblesociety.org accessed on May 19, 2009].

to physical or cognitive limitations that an individual may have, such as the inability to walk or speak. In contrast, disability refers to socially imposed restrictions, that is, the system of social constraints that are imposed on those with impairments by the discriminatory practices of society.

However, disability is a condition or function judged to be significantly impaired in comparison with the usual standard of an individual or their group. The term is often used to refer to individual functioning, including physical impairment, sensory impairment, cognitive impairment, intellectual impairment or mental health issue.[6]

The Americans with Disabilities Act of 1990 (ADA) defines in an inclusive way that tends to capture both the largest and broadest estimate of people with disabilities. It describes the disability as a condition which limits a person's ability to function in major life activities – including communication, walking, and self-care such as feeding and dressing oneself and which is likely to continue indefinitely, resulting in the need for supportive services.[7] Again the Disability Discrimination Act (DDA) 1995 of UK says that a disabled person is someone who has a physical or mental impairment that has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities.[8] Under these definitions two types of disability has been addressed. Within the words physical disability, it has covered other forms of disability i.e. hearing impairment, speech impairment or visual impairment. The definition also concentrated on the consequences of impairments. The impairment must not be of temporary or of insignificant nature, but that disability should have a substantial and long-term adverse effect and that will create a barrier on his or her normal life.

Bangladesh Disability Welfare Act 2001[9] gave a vast definition and categorised the different types of disability. Unlike the DDA of the UK, it has specified the causes of physical disability, which may be as a result of disease, accident, improper or maltreatment. Following the medical definition, the Act specifically enumerated the elements of hearing, speech, visual impairment or mental disability, which is, of course, comprehensive. Again like the DDA it has admitted that a disabled person will be unable to lead a 'normal life'. Besides the definition of specific kinds, the Act includes any other type of impairment to be defined and declared by the National

6 [See http:en.wikipedia.org.wiki,accessed on May 20,2008].
7 Title I of the ADA 1990.
8 Section 1 of the Disability Discrimination Act 1995.
9 Section 3 of Bangladesh Disability Welfare Act 2001.

Coordination Committee (NCC) to be within the purview of disability. But it has to be mentioned that Bangladesh Disability Welfare Act 2001 gave a clinical definition of disability and persons with disabilities. The definition ignored the right of the persons with disability to sustain as a normal citizen of the state. A bench of *Justices S B Sinha and H S Bedi* of the Indian Supreme Court has ruled that there cannot be caste-based reservations in special benefits provided to physically challenged persons. The Court observed "A disabled is a disabled. The question of making any further reservation on the basis of caste, creed or religion ordinarily may not arise. They constitute as a special class."[10]

The definition[11] given by the 1975 UN Declaration on the Rights of Disabled Persons[12] was backdated whereas the UN Convention on the Rights of Persons with Disabilities (CRPD) 2006 gave a liberal definition based on the human rights approach. The Convention defines persons with disabilities which include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.[13]

In fact most of the above stated definitions are given from medical perspective. The definitions carry the message that the persons with disabilities are infirm or patients. As they are physically 'impaired', they are the subjects of medical treatment. Addressing the issues of persons with disabilities from a clinical perspective is a global phenomenon, which has been rejected by the disability rights movement and they suggest perceiving them from a social and human rights perspective.

2.1 Disability as a Human Rights Issue

Previously, persons with disabilities were viewed as 'objects' of protection, treatment and assistance rather than subjects of rights. Persons with disabilities were excluded from mainstream society and provided with special schools, sheltered workshops, and separate housing and

---

10 Deccan Herald , New Delhi, September 3, 2007.

11 Article 1 of the UN Declaration on the Rights of Disabled Persons 1975. Under this article the term "disabled person" means any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities.

12 UN General Assembly resolution 3447 (XXX) of 9 December 1975.

13 Art. 1 of the CRPD.

transportation on the assumption that they were incapable of coping with either society at large or all or most major life activities. They were also denied equal access to those basic rights and fundamental freedoms like health care, employment, education, vote, and participation in cultural activities. In the last two decades, the approach towards persons with disabilities has changed and they have started to be viewed as holders of rights. The shift to a rights-based approach has been authoritatively endorsed by the United Nations and is reflected in several developments which have taken place at the international and national level since the proclamation by the General Assembly in the year 1981 as the 'International Year of the Disabled' under the slogan 'Full Participation and Equality'.[14]

3. International Laws Specifically Targeting the Rights of Persons with Disability

The effort to establish, maintain and secure the right of persons with disability is a continuing process the objective of which is to protect their inherent rights. This chapter will try to identify different international binding and non binding instruments which specifically deal with the protection of the rights of persons with disability. Bangladesh follows the norms and principles of some of these instruments in the national implementation process.

The United Nations is contributing by enacting necessary laws, principles, declarations and organising different programs for the protection of the rights of persons with disability. In addition to the above mentioned conventions, the General Assembly has adopted several non-binding resolutions and declarations specifically related to the issue of disability which have greatly contributed to increasing attention or awareness to the human rights dimension of disability issues. These instruments include: the Principles for the protection of persons with mental illness and the improvement of mental health care, often referred to as 'MI Principles',[15] the World Program of Action concerning Disabled Persons (WPA),[16] and the

---

14 General Assembly resolution 36/77 of 8 December 1981[See http://www2.ohchr.org/english/issues/disability/intro.htm#un, accessed on May 1, 2010].

15 General Assembly resolution 46/119 of 17 December 1991.

16 General Assembly resolution 37/52 of 3 December 1982.

Standard Rules on the Equalization of Opportunities for Persons with Disabilities.[17]

In 1971, for the first time, the Declaration on the Rights of Mentally Retarded Persons[18] on the part of the UN was adopted to protect the rights of persons with intellectual disability. This instrument was adopted, inter alia, for assisting the intellectually challenged persons to develop them in various fields of activities and for promoting their integration as far as possible in normal social life.[19] In 1975 the United Nations adopted the Declaration on the Rights of Disabled Persons.[20] This instrument for the first time enumerated some legal arguments in favour of the disabled persons to protect their rights. The rights set forth in the Declaration shall be granted to all disabled persons without any exception whatsoever and without distinction or discrimination on the basis of race, colour, sex, language, religion, political or other opinions, national or social origin, state of wealth, birth or any other situation applying either to the disabled person himself or herself or to his or her family.[21]

In 1991 the UN adopted Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.[22] For the best available mental health care, for the protection of right from economic, sexual and other forms of exploitation, physical or other abuse and degrading treatment and for ensuring their treatment with humanity and respect for the inherent dignity of the human person, the Principles enumerated some important provisions.

The UN adopted Standard Rules on the Equalization of Opportunities for Persons with Disabilities in 1995. The aim of these Rules were that girls, boys, men and women with disabilities, as members of their societies, may exercise the same rights and obligations as others. The documents also require States to remove obstacles to equal participation.[23]

---

17 General Assembly resolution 48/96 of 20 December 1993.

18 General Assembly resolution 2856 (XXVI) of 20 December 1971.

19 See Preamble to the Declaration on the Rights of Mentally Retarded Persons 1971.

20 General Assembly resolution 3447 (XXX) of 9 December 1975.

21 Article 2 of the Declaration.

22 General Assembly resolution 46/19 of 17 December 1991.

23 [See http://www2.ohchr.org/english/issues/disability/intro.htm#un, accessed on May 1, 2010].

3.1 The Biwako Millennium Framework (BMF)

For the purpose of promoting an inclusive, barrier free and rights based society for people with disabilities in the Asian and Pacific region the Economic and Social Commission for Asia and the Pacific (ESCAP) adopted Resolution 58/4 in the city of Otsu, Japan in May 2002. The Biwako Millennium Framework is policy guidelines and not a legal document and effective until 2012.

The BMF clearly states its primary vision of promoting rights based approach in disability issues from a charity based approach, and it is reflected in the decades defining theme, towards an inclusive, barrier free and rights based society.[24] It also contains strategies to promote rights based approach to disability issues by adopting specific convention and developing domestic rights based legislation.

The BMF emphasised on the promotion of development action for the realisations of rights. It BMF also incorporates two of the Millennium Development Goals (MDGs), universal primary education and eradication of extreme poverty and hunger, as applicable to the disability sector and expresses them as its policy and program targets. This draws attention to the need to include disability concerns in the attainment of the MDGs. In this regard, the BMF establishes itself as a linkage between the global development mandate and the global disability-specific human rights instrument.

The BMF has more detailed description of issues and has recommended more policy and program actions than the Convention. It provides 21 detailed time-bound policy and program targets under the seven priority areas, namely 1) Self-help organizations of persons with disabilities and related family and parent associations; 2)Women with disabilities; 3) Early detection, early intervention and education; 4) Training and employment, including self-employment; 5) Access to built environments and public transport; 6) Access to information and communications, including information, communication and assistive technologies and 7) Poverty alleviation through capacity-building, social security and sustainable livelihood program.

---

24 Biwako Millennium Framework(BMF) for Action towards an Inclusive, Barrier-free and Rights-based Society, United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) Para 9. [See http:www.unescap.org.esid. psis.disability.bmf.bmf.html accessed on May 20, 2009].

For the disability statistics and data collection, the BMF, on the other hand, provides a situation analysis in which the lack of data on disability prevalence, economic, social indicators of people with disabilities, and under-reporting of the prevalence were raised as issues. It encourages Governments to take more action on the data collection, applying the international standard.

3.2 The UN Convention on the Rights of Persons with Disability (CRPD) 2006

On 13th December 2006, in the sixty-first session of the General Assembly of the United Nations, the International Convention on the Rights of Persons with Disability was adopted. The convention is both reactive and proactive. It is comprehensive and encompassing civil, political, social, economic and cultural rights of persons with disabilities which not only prohibits discrimination but also calls for positive action and development activities to realise the rights of persons with disabilities.

One of the salient characteristics of the Convention is the inclusion of the concept that disability results from the interaction between individuals with impairments and attitudinal and environmental barriers. The Preamble and the Article 1 clearly negates the concept of disability as an individual pathology and draws attention to another dimension, in which the onus is on society that includes Governments and other stakeholders to remove barriers for persons with disabilities.

Another distinctive characteristic is the inclusion of a concept of reasonable accommodation. It refers to necessary and appropriate modification and adjustment needed to ensure the enjoyment of all rights by persons with disabilities on equal basis with others. It should be provided in response to individual needs. In implementing this concept, reasonableness of the accommodation will have to be judged in an individual context with the consideration of not imposing too much burden on companies or government institutions. For the disability statistics and data collection, the Convention calls for appropriate data collection and respects the privacy of persons with disabilities.[25] It also calls for dissemination of the statistics and data to be made accessible for persons with different disabilities.

For many resource-deprived countries, the Convention might imply much greater expenditure and use of resources. However, the inclusion of the

---

25 Article 31 of the CRPD.

article on international cooperation[26] responds to those concerns. Though each party fundamentally has to fulfill obligations under the Convention, the importance of partnership with international and regional organisations and civil society in the realisation of the rights of persons with disabilities is given importance in article 32. In operational terms, the article calls for making general development activities more disability inclusive, with emphasis on capacity building, cooperation in research and technology transfer, and economic assistance as appropriate.

The Optional Protocol[27] to the CRPD establishes two procedures aimed at strengthening the implementation and monitoring of the Convention. The first is an individual communications procedure allowing individuals to bring petitions to the Committee claiming breaches of their rights; the second is an inquiry procedure giving the Committee authority to undertake inquiries of grave or systematic violations of the Convention. The Optional Protocol to the Convention recognised the competence of the Committee on the Rights of Persons with Disabilities to receive and consider communications from or on behalf of individuals or groups of individuals. Bangladesh ratified the protocol on May 12, 2008.

4. Disability Movement in Bangladesh by State and Non State Actors and Need for the Reflection of International Standard in Domestic Legislation

Disability is a social issue and it can affect the lives of people with disabilities in any society. To bring a positive social change, there is need of conscious and organized people with disabilities who will participate spontaneously in the social mobilization work. To ensure their effective participation in the process of social change they need to form their very own organization and strong leadership skills. These organizations should be evolved with social and political commitment. If people with disabilities are stimulated, they can take control of their lives. They could bring change in the society for their inclusion and equal rights. The rights of people with disabilities get established when they are empowered and their participation is ensured.[28]

---

26 Article 32, *Ibid.*

27 The Protocol was adopted in 2007.

28 Hossain, ASM Mosharraf, 'Participation of People with Disabilities Through Self-help Organizations', Action on Disability and Development(ADD) [See http:www.dcdd.n.data.ESCAP.doc accessed on January 19, 2008].

In fact, state has the major role for an effective movement and hence can bring remarkable changes. Bangladesh, despite all the constraints of being a developing country took some initiatives for the protection of the rights of persons with disability. But that is not so significant. Again it must have to be acknowledged that in the disability movement of Bangladesh, the Non Government Organisations have a great contribution. In fact the NGO's are the pathfinder and the government plays the role of coordinator in the movement for the protection of rights of persons with disability.

In this section the Article will focus on the laws and policies and also on the specific sectors where the disability movement is undertaken by the state and non state actors, along with the major shortfalls in the process. The chapter will try to find out if there is any scope of reflecting international standard in domestic policies and practice and how far it is necessary to incorporate the provisions of international legal framework into the domestic one.

4.1 Laws and Policies Relating to the Rights of Persons with Disability

This sub-section has discussed some of the most relevant legislations and policies regarding disability issues. It also attempts to find out the adequacy of existing legal framework by revisiting them and by interviewing different stakeholders.

4.1.1 Constitution of the People's Republic of Bangladesh

The Constitution of the People's Republic of Bangladesh, as a supreme law of land protects the rights of persons with disability. The Constitution says all citizens are equal before law and shall be entitled to equal protection of law.[29] From its literal meaning it can be concluded that this fundamental right may be violated when a person is deprived of his/her legal capacity on account of an actual or perceived disability.

The Constitution states that no citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to any access to any public place of entertainment or resort or admission to any educational institution.[30] This is the fundamental right of every citizen and the state is bound to ensure this right to all citizens. Therefore, when in any public place there is no scope of accessibility in terms of infrastructure of the persons with disability and

29 Art. 27 of the Constitution of Bangladesh.

30 Art. 28(3) of the Constitution of Bangladesh.

there is a bar with respect to admission in the mainstream educational institutions, it would be considered to be the violation of the fundamental rights of the Constitution. Many other provisions are of particular relevance for the persons with disabilities, including, the right to life[31], which may be violated when life-saving treatment is denied on the account of disability; right to freedom from torture and other cruel, inhuman or degrading treatment and punishment[32], which may be violated when the persons with disabilities are placed in an inappropriate environment. However, forced institutionalisation of persons with mental or psychiatric disabilities may constitute arbitrary dètention in breach of the right to liberty and security of a person.

To ensure the employment of disabled persons there is a remarkable judgment of the Indian Supreme Court. A Writ petition was filed against discrimination of visually impaired in competing for the coveted civil services of the country, and for the government to be directed to permit otherwise qualified blind candidates to appear in the selection examination. The Supreme Court not only allowed the petition, but also directed the Government to allow them to write the examination in Braille or with the help of a scribe. [33]

4.1.2 The National Policy for the Persons with Disabilities 1995

This is the first Government initiative by which the fact of disability got the national recognition. It was not adopted taking the clinical view of the fact of disability rather it was placed in the mainstream development agenda. For the purpose of adopting the policy, a National Coordination Committee (NCC) on disability concerns was set up to consolidate the activities of different Government and Non Government Organisations to promote equal access to basic rights and fundamental freedoms. Though the policy was adopted, it was never notified in the government gazette.

4.1.3 Bangladesh Disability Welfare Act 2001

Bangladesh Disability Welfare Act was adopted with the objectives to protect and safeguard the rights and dignity of the persons with disability, ensure their participation in the national and social programs and their general welfare and also for matters connected therewith or incidental thereto.[34] The law lists 10 specific priority areas: (1) Disability prevention,

31 Article 32 Ibid.

32 Article 35(5) Ibid.

33 *National Federation of Blind vs. Union Public Service Commission (1993) 2 SCC 411: AIR 1993 SC 1916.*

34 See Preamble to Bangladesh Disability Welfare Act 2001.

(2) Identification, (3) Curative treatment, (4) Education, (5) Health care, (6) Rehabilitation, (7) Transport and Communication, (8) Culture, (9) Social security and (10) Self help Organisations. Bangladesh Disability Welfare Act has established National Coordination Committee (NCC) and National Executive committee (NEC) at national level and the District Disability Welfare Committee (DDWC) in each district of Bangladesh. The law specifically delegates the functions of these committees.

Though the law was supposed to secure and protect the rights of persons with disabilities, it fails to enumerate specific provisions regarding its enforceability. Again the name of the Act is itself discriminatory for the persons with disability. The word "welfare" seems that the State looks at the persons with disability in the eye of mercy. The Act has not identified any action as offence and has left the jurisdiction of the government to be exercised under the rule making power given in section 21. The law also restrained any legal action on grounds of public interest by inserting section 22.[35]

There is a problem with respect to the hierarchy of appointment between the NCC and the DDWC. In the NCC the member secretary is the Managing Director of National Foundation for Development of the Disabled Persons whereas the Deputy Director of the District Social Services office acts as a member secretary for the DDWC. The Managing Director of National Foundation for Development of the Disabled Persons is not the controlling authority of the Deputy Director of the District Social Services office. So the NCC is not in a position to take any action against the District Committee, if it acts in violation of law or does not comply with the rules and orders.

According to the schedule of the Act, the DDWC should meet at least after every two months. On February 2007, the National Forum of Organizations Working with the Disabled (NFOWD) conducted a country wide survey through its network members to find out the recent activity status of DDWC. The survey shows that 36% of DDWC held meeting within last three months, 28% of DDWC held no meeting within last one year and 4% of

---

35 Section 22 of Bangladesh Disability Welfare Act 2001.
"Freeing from personal liabilities/ Protection against being sued: No suit or prosecution shall lie in any civil or criminal courts against the Government, or any member of the Coordination Committee, or the Executive Committee or the District Committee or any officer, employee or any other person, so authorized or assigned, for his actions in discharging the assigned duties so done in good faith under this Act or at the order of the competent authority to that effect even if such act has either caused; or has reasons to be caused that happen, damages to any one in the process."

DDWC had never arranged any meeting.[36] Rojob Ali[37] told the author that in the district of Sylhet, after the interval of three years, the last meeting was held in November 2008. He being a member of the Committee is to be invited in the meeting. The fact is that the DDWC meets only if he along with the NGO workers takes the initiative.[38] Again, there is an obligation on the part of each DDWC to submit an activity report to the NEC on an annual basis[39] but it does not maintain regularity. Anowara Begum,[40] the Deputy Director of the Department of Social Welfare told[41] that due to some problem, the meeting of the DDWC is not generally held on a regular basis. She also mentioned that they never provided any activity report to the NEC. In this respect she stated that if any report is called for from the centre, then only they comply with such requirements.

4.1.4 National Action Plan on Disability 2006

The National Action Plan was adopted in 2006 following Bangladesh Disability Welfare Act 2001. It covers the areas of national coordination, disability prevention, training, identification and early detection, education and material development, communication, employment and rehabilitation, human resource development, social security and promoting self-help organizations. Though the Plan was adopted with the coordination of different ministries of the Government of Bangladesh, the Ministry of Social Welfare has the foremost duty to implement the actions taken thereof. But, practically it is indeed very difficult for the Ministry of social welfare alone to manage all the issues and concerned affairs.

4.1.5 Disability Welfare Rules 2008

For the implementation of Bangladesh Disability Welfare Act 2001 the Rules have been adopted on February 20, 2008. Under the rules, the DDWC will take all necessary steps for the identification of the persons with disability within its area.[42] It has prescribed the functions of DDWC,[43] inter

---

36 WHOSE VOICE WE COUNT? Contextualizing Biwako Millennium Framework (BMF) In Bangladesh: A Reality Check. An alternative report done by Action Aid Bangladesh and Advancing Public Interest Trust (APIT), P.26.

37 Mr. Rojob Ali, who is a visually impaired person, is the Chief Executive of the Green Disable Foundation based in Sylhet. He is also the divisional representative of NFOWD.

38 Mr. Rojob Ali was interviewed on May 11, 2009.

39 Section 13(c) of Bangladesh Disability Welfare Act 2001.

40 She is the member secretary of the DDWC, Sylhet.

41 Interviewed on May 12, 2009.

42 Rule 3 of Disability Welfare Rules 2008.

alia, to take steps for ensuring the absolute participation of the persons with disability in the national and social activities, to provide stipend, scholarship and fellowship for them, to establish research and training activities, to collect different scholastic elements i.e. brail guide, stylus, perkins brailer, brail printer etc, to provide all legal supports for the protection of the legal right of them, to provide economic and other supports for their self-employment, to take steps to reserve seats for them in public transport, to take initiatives to remove discrimination in the case of employment etc.[44] Disability Welfare Rules 2008 also prescribes that all the public welfare offices must have special means for the accessibility of the persons with disability.[45] For that purpose it has specifically mentioned the places where special efforts and care have to be taken. 5% places of each residential building should be easily accessible for the persons with disability.[46] Again the law has specifically enumerated the provisions regarding the implementation of the accessibility of the persons with disability in different public and private buildings. [47]

The priority areas mentioned in Bangladesh Disability Welfare Act 2001 provided only general guidelines.[48] The notable feature of the Rules of 2008 is that it has concentrated only on the issues of identification and communication of the persons with disability. Regarding the other issues, the law prescribes general guidelines only. The purpose behind the adoption of Rules within the purview of the Act is to enumerate the specific means and ways for assisting the implementation of the targets of the Act. Disability Welfare Rules 2008 does not cover all the issues addressed by the Act of 2001. Again, it has to be admitted that the initiative to ensure the accessibility of the persons with disability in the public offices as required by the Rules[49] can not be implemented in a day. But it can be reasonably expected that the process for the identification of the persons could be initiated with immediate effect. In some areas a certificate is given to the persons with disability by the Department of Social Welfare. In Sylhet, Anowara Begum, the Deputy Director of the Department of Social Welfare told that from 2005 the persons with disability are being provided with a

---

43 Rule 13, Ibid.
44 Rule 15, Ibid.
45 Rule 16, Ibid.
46 Rule 17, Ibid.
47 Rule 17 and 18, Ibid.
48 Schedule of Bangladesh Disability Welfare Act 2001.
49 Rule 16,17,18 of Disability Welfare Rules 2008.

certificate. She considers this initiative as the identification of the persons with disability. Till the date of interview[50] 205 persons were provided with that certificate. With respect to the benefits of this identification, she mentioned that by showing the certificate the persons get disability allowance and loans from the Government. Under the Rules of 2008, the Government has to take initiative for the identification of the persons with disability. The Deputy Director told that the persons have to appear on their own initiative with the medical certificates, nationality certificates and photos. She has identified the lack of manpower as the main problem for the slow functioning of the Department. Under the Rules,[51] the District Committee may delegate the powers and functions of identification upon the chairman, member and secretary of the union parishads, community polices, Commissioners of City Corporations, health workers, NGO representatives working with disabled persons etc. This initiative may reduce the work load of the Department of Social Welfare. More than one year have passed after the Rules were enacted but the District Committee of most of the districts has not taken any initiative for the identification of the persons with disability as prescribed by the Disability Welfare Rules 2008.

4.2 Disability Movement vis-à-vis the Right to Education in Bangladesh

From 1960s the disability movement in Bangladesh was concentrated primarily on the right to education of the children with disability. In those days the Government took the initiative to continue the integrated blind education project. The reason behind was that the blindness was visible and in the matter of intellectuality, these persons were treated as normal persons. After the 1970's, though some private initiatives were taken in the field of disability with respect to hearing and visual intellectuality, initiatives with respect to the education gradually increased.[52]

The Constitution of Bangladesh offers a uniform, mass oriented and universal system of education, extending free and compulsory education to all children. It has been more than a decade since the United Nations declared the "Education for All" in 1990. Bangladesh government also made a declaration on "Education for All" and introduced Compulsory Primary Education through constitutional means. From the country report of

---

50 Interviewed on May 12, 2009.

51 Rule 3 of Disability Welfare Rules 2008.

52 Zaman,Dr. Sultana Sarwarat Ara 'Disability movement in Bangladesh', Supra note 3, pp 15-23.

Bangladesh[53] we find that in every district under the Department of Social Services (DSS), Government of Bangladesh operates 5 special schools for blind children, 7 for deaf children, 1 for intellectually disabled children. The DSS also operates a total of 64 integrated schools (special classes in the mainstream schools) for blind children in 64 districts. The Ministry of Social Welfare established a National Centre for Special Education (NCSE) in Dhaka in the year 1992. But the reality is that around 4% children with disabilities get enrolled in the Government educational institutions.[54]

The University of Dhaka offers a Masters course and graduation on Special Education under the Institute of Education and Research (IER). The courses have 3 disciplines: i) Education of Persons with Visual Impairment; ii) Education of Persons with Hearing & Speech Impairment; and iii) Education of Persons with Intellectual Impairment. Recently a disability officer has been appointed in Teachers and Students Centre (TSC) to look after the affairs of the students with disability. On August 16, 2007 the first ever 'Resource Centre' for visually impaired students was launched at the Central Library of the Dhaka University.[55] 15 post-graduate teachers are trained every year by the Department of Special Education under the Dhaka University. Several other teachers' training programs are also being offered by other private voluntary organizations. The second phase of the national Primary Education Development Program (PEDP-II) has included the issue on inclusive education program. Along with the formal education program, Bangladesh has a very strong and vast non-formal education structure, mostly operated by the NGOs, where the inclusion of learners with disabilities has been initiated.[56]

Bangladesh National Federation of the Deaf (BNFD) runs nine special schools for the sign language users. The Deaf High School is located within the premises of the BNFD in Dhaka and provides residential facilities to the students. The school was approved by the Government in 1990 and follows the mainstream national curriculum. But the completion rate of high school

---

53 COUNTRY REPORT BANGLADESH, The 26th Asia-pacific International Seminar on Education for Individuals with Special Needs, The National Institute of Special Education (NISE),Yokohama City, Japan , December 4 – 7, 2006.

54 Supra note 38, p.12.

55 The Daily Star, August 17, 2007.

56 BANGLADESH & BIWAKO: ACHIEVEMENTS & CHALLENGES, Country report of Bangladesh presented at High Level Inter-Governmental meeting on the mid-point Review of the Asian and Pacific Decade of Disabled Person 2003-2012, 19-21 September 2007, Bangkok, p. 4.

by the deaf students is below 50%, which is indicative of the dismal condition and quality of academic services. Baptist Mission Integrated School (BMIS), situated in Mirpur, Dhaka, is the only school in Bangladesh that provides education and accommodation to visually impaired girls from kindergarten to the secondary level. Now there are 100 visually challenged students studying at different classes in the school.[57] The Society for the Welfare of the Intellectually Disabled (SWID), established in 1985 in Shalgaria, Pabna, has 48 academic branches all over the country where a total of 7516 children and adult with disabilities are provided with life skill training. [58]

The Convention on the Rights of Persons with Disability 2006[59] says that states are to ensure equal access to primary and secondary education, vocational training, adult education and lifelong learning to the persons with disability. Education for the persons with different forms of disability is to employ the appropriate materials, techniques and forms of communication. Pupils with support needs are to receive support measures, and pupils who are blind, deaf and deaf-blind are to receive their education in the most appropriate modes of communication from teachers who are fluent in sign language and braille. The BMF also stresses on education issues and recommended to establish a national action plan. The accomplishments of Bangladesh has been so far-National Action Plan on Disability 2006; Institutional Programs by Department of Social Services for Persons with Disabilities relating to education and training; Poverty Reduction Strategy Paper (PRSP); National Education Policy 2000; Primary Education Development Program (PEDP)-II; Teaching Quality Improvement in Secondary Education Project under the Department of Secondary and Higher Education, Ministry of Education and National Plan of Action (NPA) for Children (2004 – 2009). Education issue of individuals of special needs is, however, included in all the above policies, legislations, plan/projects etc.

Although we have abundant policies and laws, the striking feature of our existing system is that only 8% of the children with disability have received any form of education.[60] Inclusive education is included in National Plan of Action for Education for All but it seems that there is a great need for more operational inclusion strategies. The social attitude i.e. the attitude of

57 [See http://bmsworldmission.org/ accessed on April 15, 2010].

58 Supra note 38, p. 42.

59 Article 24 of CRPD.

60 *Examples of Inclusive Education Bangladesh,* UNICEF Regional Office for South Asia, 2003, p.6.

parents, communities, peers and teachers towards the children with disability must be changed. More children would be able to follow classes in public schools if there are minor adaptations on mobility, daylight, noise levels, seating, toilets etc. Evidence suggests that inclusive education is more cost effective than specialised school.[61]

There exists certain amount of lack of coordination between the Ministry of Education and the Ministry of Social Welfare. A demand was raised for education and inclusion of the Visually Impaired (VI) children in the mainstream education by the Ministry of Social Welfare but Ministry of Education does not pay heed to the need by believing that it was Ministry of Social Welfare's responsibility to render education facilities to the VI children. As a result the teachers in the primary and secondary schools refuse to admit VI children in a plea that they have no resources or training to teach VI children in the mainstream educational institutions.[62]

4.3 Remarkable Changes in the Right to Employment and Rehabilitation of Persons with Disability

Unemployment always can make the life of a person with disability vulnerable, critical and unbearable. Though the Government has adopted some policies regarding the employment of the persons with disability, there is no significant achievement in the private sector. There are many employment sectors where these persons may be appropriately employed and given the opportunity they can prove their potentialities. It can be rightly said that persons with disability are not burden to society; rather they can contribute to the development of it. Again it is the duty of the employing institutions to ensure a decent working environment for the persons with disability.

The BMF set targets for the member states that at least 30 percent of the signatories will have to ratify the International Labour Organization Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983, by 2012. By 2012, at least 30 per cent of all vocational training programs in signatory countries will be inclusive of persons with disabilities and will provide appropriate support and job placement or business

---

61 *Disability in Bangladesh, A Situation Analysis*, The Danish Bilharziasis Laboratory, 2004.
[See http://www.siteresources.worldbank.org/Disability/Resourses accessed on May 21, 2009].

62 Islam, Md. Shafiqul 'Education for Visually Impaired Persons', Supra note 3, p. 280.

development services for them. As a signatory state,[63] Bangladesh has the responsibility to ensure the decent working conditions for the persons with disability as set by the BMF action plan.

In employment, the government has declared a 10% quota for the persons with disabilities in the government sector.[64] Again, under Disability Welfare Rules 2008, the Government will take necessary steps to ensure employment of persons with disability within the quota system in the public, private and autonomous institutions. [65] In reality, due to loopholes in the employment policies and a lack of proper monitoring, the declared quota system for persons with disabilities has not adequately been implemented. For an instance, Bangladesh Public Service Commission (PSC) failed to provide admit cards to the visually challenged candidate for Bangladesh Civil Service (BCS) examination and denied scribe support for a visually challenged candidate for the preliminary test of 28th BCS examination.[66]

The Government has initiated micro-credit provision for persons with disabilities under soft terms and conditions. The Ministry of Social Welfare through Department of Social Services is operating micro-credit program for persons with disabilities while four national banks also initiated special micro-credit program to support self-employment of persons with disabilities. [67]

In Tongi there is a Vocational Training Centre for persons with disability. There persons with hearing and visual impairment are trained with vocational training. There is a 'hearing' centre for the training of persons with visual impairment. The hearing and speech specialist from Sweden, with modern machineries are engaged to train these persons about the art of using the hearing instrument.

Some of the NGOs run many specialised rehabilitation center, often located in urban areas. The Center for the Rehabilitation of the Paralysed, commonly known as CRP is doing a significant job in rehabilitating the disabled persons. The Government has established institutions for the treatment of the children and adult with disability. CRP Savar entertains both in-patients (100 beds) and out-patients. The IMPACT Foundation Bangladesh runs a floating

63 Bangladesh signed the Convention in 1993.

64 Clause 8(f) of the National Policy for the Disabled in 1995.

65 Rule 13(Jha) of Disability Welfare Rules 2008.

66 Deprived visually challenged candidates demand opportunities to PSC in press conference, *Ittefaq*, November 21, 2008.

67 Supra note 58, p.4.

hospital which provides general treatment and rehabilitative surgery to people with disabilities living in remote areas. The *Bangladesh Protibondhi Kollyan Somitee* (BPKS), a non-governmental and self-help organization for persons with disabilities, runs computer training for orthopaedically disabled and one job placement program covering both public and private sector. Based in Dhaka, the BPKS operates in 32 districts of the country. There are many other NGOs which render service for the employment and rehabilitation of the persons with disability.

4.4 Condition in Respect of Early Identification and Intervention Process

The BMF specified that Governments should ensure detection of disabilities at as early age as possible. Again by 2012, all infants and young children from birth to four years old will have access to and receive community based early intervention services which ensure survival with support and training for their families.

Disability Welfare Rules 2008 has specifically enumerated provisions regarding the identification and registration of persons with disability and for that purpose the District Committees will take necessary steps prescribed in the Rules. But the identification activities complying with the Rules of 2008 has not yet started in most of the areas of the country. Rojob Ali[68] stated that in Sylhet division i.e. in the districts of Habiganj, Moulvibazar, Sunamganj and Sylhet no DDWC has taken any initiative for the identification and registration of the persons with disability.

Regarding the early intervention the law seems to have no specific goal. Again, the national health policy appears to have no comprehensive approach to address the issue of disability. The Health, Nutrition and Population Sector Program (HNPSP) run by the Ministry of Health and Family Welfare do not have any substantive strategy or action plan for rehabilitation and early detection.[69]

4.5 Self Help Organizations (SHOs) and Position of Bangladesh

In order to ensure self representation, participation, equality of opportunities and overcome common difficulties there is no alternative to promote Self Help Organisations for the persons with disabilities. According to BMF

---

68 Supra note 40.

69 Supra note 38, p. 47.

Governments, international funding agencies and NGOs should establish policies with the requisite resource allocations to support the development and formation of self help organisations of persons with disabilities in all areas.

Bangladesh Disability Welfare Act 2001 provides[70] state will take steps to organize training programs in sub-district, district and division level for the progress of leadership of the persons with disability. Similar view was also expressed in the National Policy for the Persons with Disabilities 1995.[71] Disability Welfare Rules 2008 is absolutely silent on this issue. Despite the issue been addressed by many policy instruments and active initiatives taken by the NGOs, the Government has not been able to take remarkable initiatives in this respect. The Action on Disability and Development (ADD) and the Action Aid Bangladesh have a significant contribution in organizing the leadership of the persons with disability. In Sylhet, the Disable Citizen Council, a SHO, was formed in July, 2008 under the auspices of Green Disable Foundation. Currently, the organization is running Candle Training and Manufacture Program under which the members are manufacturing different types of candles for commercial purposes. The Council also organizes different workshops to make the persons with disability aware of the laws and policies relating to their right to education, employment, accessibility etc.[72] However, there is no such initiative on the part of the Government.

4.6 Necessity of Access to Friendly Public Transport System by a Person with Disability and Progress Made in this Respect

In order to improve the living standard of the disabled persons, mobility is often a prerequisite. The CRPD and the BMF gave a stress on the assurance of the mobility or transport facilities for the disabled persons. The CRPD says that personal mobility and independence are to be fostered by facilitating affordable personal mobility, training in mobility skills and access to mobility aids, devices, assistive technologies and live assistance.[73] The BMF says that Governments should adopt and enforce accessibility

70 Part 10 of the Act.
71 Section 13 of the Policy.
72 Supra note 40.
73 Article 20 of CRPD.

standards while planning for public facilities, infrastructure and transport, including those in rural contexts. All new and renovated public transport systems, including road, water, light and heavy mass railway and air transport systems should be made fully accessible to persons with disabilities.

Under Bangladesh Disability Welfare Act 2001 the president of the district bus owners organization is the member of the DDWC. The purpose behind this inclusion was to ensure the suitable transport system for the persons with disability. But in most of the cases the president of the district bus owner's organization is not at all informed about his inclusion in the committee. Azizur Rahman Ambia is the President of the District Bus Owners Association of Sylhet and assumed the post from June 27, 1994. He does not know that he is a member of the DDWC of Sylhet.[74] He was never invited to attend any meeting of DDWC.

An executive order from the Prime Minister's office has been issued in March 2002 to ensure transport facility to the persons with disabilities. It prescribes installing separate ticket counters at stations, terminals and ports, reserving specific number of seats in buses, trains, launches and steamers, constructing slope ways/ramps at every government office.[75] In line with the order, some arrangements have been made but too little of it has been found implemented. Consequently, persons with disabilities are debarred from availing themselves of the public services. More importantly, the Ministry of Communication and Bangladesh Road Transport Authority have not adopted any policy in this regard.

4.7 Lack of Initiatives for the Welfare of Women with Disability

One of the priority areas and major concern of the BMF is the women with disability. Again under the UN Convention[76] the state parties are under an obligation to take measures to ensure the full and equal enjoyment by women with disability of all human rights and fundamental freedoms. Bangladesh does not have any legal framework to protect the rights of women with disabilities.

---

74 Interviewed on May 13, 2009.
75 Supra note 40, p.51.
76 Article 6 of the CRPD.

Though Bangladesh has ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), women with disabilities have always been ignored. The Ministry of Women and Children's Affairs also does not address the issues of women with disabilities. There is also no specific anti- discriminatory law that addresses the rights of the women with disabilities. The national women advancement policy of Bangladesh also bypasses the women with disabilities. The mainstream movement for the protection of the rights of women does not raise this issue at national level.

5. Conclusion by Way of Recommendations

The basic human rights of citizens of Bangladesh have been protected by its constitution regardless of gender, class, religion, race etc. It does not discriminate between persons with disabilities and persons without disabilities. The National Policy for Persons with Disabilities, 1995 has actively considered the relevant constitutional provisions dealing with the rights of persons with disabilities. The Government has enacted Bangladesh Disability Welfare Act 2001 to protect and promote the rights of the persons with disabilities following the Disability Policy and the commitments to United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities. Recently the country has adopted the Rules for the implementation of the objectives of the Act.

From 1999, on the first Wednesday of April, the country has been celebrating the "National Disability Day" and October 15 as the "White Cane Day". On the other hand, from 1992, December 3rd is being celebrated as the "International Disability Day". On those days, the print and electronics media of our country publish special features and broadcast special programs, the target of which is to ensure the equality and full participation of persons with disability in all sectors of society. These programs are immensely helpful to aware general people about the rights of persons with disability. As a result of this consciousness, our intellectuals are now thinking, writing, painting and producing different dramas. Even solely based on the life of a disabled girl a full length feature film has been

released in Bangladesh, the message of which was that the disabled persons are not burden of the society.[77]

Again being a ratifying country[78] of the 2006 UN Convention and an active member of formulating the Biwako Millennium Framework, Bangladesh has initiated implementing activities towards addressing the inclusive, barrier free and rights based society for persons with disability. Although the activity as instructed by the Biwako Millennium Framework is still far behind of implementing in full, the efforts to improve the condition of the Government and the NGOs are noticeable. Around 400 NGOs in the country are working with the mission of equalization of rights of persons with disabilities. These combined efforts of the GO-NGO sector have created a movement towards a paradigm shift from charity to equity towards persons with disabilities. However, following recommendations can be suggested to ensure better protection and enjoyment of the rights of persons with disability:

1. A close coordination and joint effort among all the concerned Government Ministries and Departments is needed to prepare an effective and uniformed action plan to ensure the education, rights and opportunity for children with disabilities and individuals with special needs.
2. Private sector should be more equipped and empowered in serving the persons with disability. There are many areas where they may be employed and the private institutions may initiate quota system for this purpose. More holistic approach of the private sector would definitely strengthen the economic security of persons with disabilities.
3. Necessary actions and policies are needed to be adopted particularly, for women and children following the BMF action plan and the CRPD 2006. However, women with disabilities should be included in the mainstream women's right movement with greater cohesion.
4. Bangladesh Government has to increase budgetary allocation for proper implementation of the recently adopted action plan formulated by the inter-ministerial task force.
5. The role of media is pivotal in building a healthy living environment for the persons with disability. Journalists can publish sensible reports on the living conditions and social harassment of the persons with different types of disability that they face in their day to day life. The electronic media may broadcast special reports and special dramas to sensitize the people for the protection and promotion of the rights of persons with disabilities.

---

77 *Bihongo*, a feature film, directed by renownd dramatist Abdulla Al Mamun, was released on August 24, 2001.

78 Bangladesh ratified the Convention on November 30, 2007.

6. Efforts should be taken to design, develop and distribute accessible ICT products, e.g., transcriber, interface, software and assistive technology products as well as accessibility techniques for all categories of disabled people including visually and physically challenged, hearing and speech impaired, intellectually disabled, autistic children and others. The existing National Information and Communication Technology (ICT) policy should be transparent on accessibility to the persons with disabilities.
7. Special, integrated and inclusive education systems are practiced in Bangladesh. So there is a definite need for further comprehensive and intensive research to be conducted on how best the existing system can be improved, or how to optimize the benefits considering the socio economic condition of the country. The teachers of these special schools need to be well trained and their salary and benefits should be increased. There should be an uninterrupted and adequate supply of braille books and equipment and other training materials for the persons with specific disabilities who need them most. A uniform curriculum should be developed by the Government for ensuring a standard education for all.
8. Along with the Ministry of Social Welfare, the other ministries of the Government should also express their commitment in specific areas in the protection of the rights of the persons with disability.
9. Whether the quota system for the employment of persons with disability in the Government sector is being implemented properly, needs to be reviewed by the Government.
10. The Government must do a comprehensive exercise to determine the actual number of the persons with disability. This is important for developing any realistic plan for extending the service to the persons with disabilities and for improving the preventive mechanisms. The identification and registration of the existing persons with disability must be started immediately complying with the provisions of the Rules adopted in 2008. The Rules have to efficiently cover all the priority areas addressed by Bangladesh Disability Welfare Act 2001, the Biwako Millennium Framework and the United Nations Convention on the Rights of Persons with Disability 2006.

The Dhaka University Studies, Part-F Vol. XIX (2) : 145-158 , December 2008

NON-REGISTRATION OF COMPULSORY REGISTRABLE DOCUMENTS: AN OVERVIEW OF ITS LEGALITY AND EFFECT

Raushan Ara*

1. Introduction

The first complete enactment as to registration of documents was passed by Act XVI of 1864, consolidating and amending all the previous laws relating to the registration of assurances. It introduced for the first time a system of compulsory registration in British India as to certain classes of the documents. However, the Indian Registration Act, 1877[1] introduced a provision in order to give priority to registered documents irrespective of the fact that whether they were optionally or compulsorily registerable. But it is none other than the Regiatration Act, 1908 (herein after referred to as the Act) that comes into effect with the scheme of consolidating and gives notoriety to deeds by providing for their public registration. Though this Act does not lay down that, any transaction in order to be valid must be effected by a registered instrument, conversely what it provides is that when there is a written instrument evidencing transaction, it must in certain cases be registered while in other cases, it may at the option of the parties be registered in the manner laid down by the Act. But as the Act affects primarily substantive rights, a document which is registered under the Act, takes effect, as a result of registration, from the date of execution prospectively.[2] However, registration of a document in violation of the Act since nullifies the registration, makes them unacceptable as evidence of any transaction affecting such property or conferring such power and does not nullify the transaction which is the subject of the document; the main objects of law of registration are, to provide a conclusive proof of genuineness of documents; afford security of the title deeds, publicity of transaction in respect of properties; prevent fraud; provide facility for ascertaining whether a property has already been dealt with or not.[3] Therefore, the purpose of this article is to focus on how the non-registration of compulsory registrable documents impinges on the legality of the rights and obligations arising out of a particular property and to outline up to which extent this lends to the inviolability and importance of certain classes of documents.

---

* Lecturer, Department of Law, University of Dhaka

1 Act III of 1877.

2 *Hemanta v Midnapur Zamindari Co.* ILR (1919) 47 Cal 485 at p. 496 (PC).

3 http://www.keralaregistration.gov.in/index.php?option=com_content&task=view&id=12&Itemid=26, last accessed on 30 June 2010.

2. Compulsory Registration

The Registration Act, 1908 is not striking at transactions and therefore, it is not necessary that a transaction affecting immoveable properties should be carried out by a registered document. It only enacts that where a document is employed to effectuate any of the transactions specified in section 17 of the Act, such document must be registered notwithstanding that the transaction is one which the law does not required to be put into writing. Therefore, the necessity of registration arises only in regard to documents set up in section 17. However, documents of which registration is compulsory *inter alia*, include: gift of immoveable property, declaration of heba,[4] non-testamentary instruments creating rights in immoveable property, receipt of consideration, instrument of mortgage, lease, non-testamentary instruments transferring or assigning any decree or order of a court, instrument of partition,[5] instrument of sale,[6] authorities to adopt a son and contract for sale of any immoveable property.[7] But these instruments are subject to certain exceptions[8] where registration will not raise a constructive notice against the purchaser of such property.[9] And non-registration in case of optionally registrable documents[10] won't impair the effectiveness rather the registration of those amounts to the creation of independent evidence of its execution and existence. On the other hand, in deciding whether a document requires to be registered or not, consideration however, should be placed on the document as a whole and it is the immediate intention of the document and not the ultimate result that should be looked at in this type of situations.

---

4 Section 17 (1) Clause (aa) was inserted by the Registration (Amendment) Act, 2004 (Act No. XXV of 2004), section 3.

5 Clause (f) of section 17 was inserted by Act No. XXV of 2004, section 3 (with effect from 1st July, 2005).

6 Clause (g) of section 17 was inserted by Act No. XXV of 2004, section 3 (with effect from 1st July, 2005).

7 Section 17A was inserted after section 17 by Act No. XXV OF 2004, section 4, (with effect from 1st July, 2005). This section says in subsection (1) that notwithstanding anything to the contrary contained in this Act or any other law for the time being in force, a contract for sale of any immoveable property shall be in writing, executed by the parties thereto and registered. Sub-section (2) says "A contract for sale referred to in sub-section (1) shall be presented for registration within thirty days from the date of execution of the contract and the provisions regarding registration of instrument shall apply".

8 For details see section 17(2), the Registration Act, 1908.

9 *Hiralal v Bhagirathi* AIR 1975 Cal 445.

10 Section 18, the Registration Act, 1908.

3. Non-registration: Its Legality and Effects

Providing a method of public registration of documents in order to give information to people about their legal rights and obligations arising or affecting a particular property, is, amongst other things, the very idea of registration that lends inviolability and importance to certain classes of documents.[11] Section 17 of the Act, being a disabling section, must be construed strictly as because unless a document is clearly brought within the purview of section 17, its non registration is no bar to its being admitted in evidence. And if there is any doubt on the subject, the benefit of the doubt must be given to the person who wants the court to receive the document in evidence.

However, section 49 of the Act reveals the effect of non-registration of documents which are required to be registered and it says that no document required to be registered under this Act or under any earlier law providing for or relating to registration of documents shall operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent, to or in immovable property, or confer any power to adopt, unless it has been registered.[12] And a document which does not require to be registered cannot be affected by procedure of inadmissibility. However, apart from cases where a registered instrument is specifically required by the Transfer of Property Act, 1882; there are many transactions relating to immoveable property which can be validly effected orally. In cases of this type, if there is in fact a writing relating to such transaction, it becomes relevant to consider whether, on its true interpretation, the document itself was intended by the parties to be the formal instrument of the transaction, superseding and embodying the oral bargain, and would be compulsorily registrable.[13] Conversely, this Act also provides for the prohibitory and penal sanctions which impose serious disqualifications for non-observance of registration.

3.1 Negation in Affirming Title

It can not be laid down as a general principle that mere registration of an instrument without reference to other circumstances operates to transfer the property or pass title to it[14] where there is neither possession of the property

---

11 *Jogi Das v Fakir Panda* AIR. 1970 Orissa. 22.

12 *Mobinul Haq Siddiqi and another v Mrs. Hajra Farooqi and 3 others* PLD 1986 Kar 358.

13 *Subba Rao v Mahalakshmamma* ILR (1930) 54 Mad 27.

14 *Ibrahim v Sardar Ahmed* (1955) 7 DLR (WPC) 62; *Aminuddin Ahmed v Samaddi Hajari* (1955) 7 DLR 443; *Subrahmanya Sastry v Lakshminarasamma* AIR 1958 AP 22; *Mina Ghosh v Daulatram Arora* AIR 1967 Cal 633.

alleged to have been sold nor any proof of the payment of consideration. Prior to the Transfer of Property (Amendment) Act, 2004, in case of a sale of immovable property of the value of more than taka 99, registration was obligatory and in absence of registration, it could neither extinguish the title of the executant's nor confer that on the vendee; explicitly, vendee could not derive any benefit from the production of such document in support of his claim of ownership on the basis of title.[15] However, it is the said Amendment that makes every instrument of sale of tangible immovable property compulsorily registrable irrespective of the value, and now where compulsory registrable document is not registered, it can be received in evidence; but it, by itself, will not operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent to or in the immovable property. In *Ashutosh v Md. Yusuf Ali*[16] it has been held that an unregistered document agreeing to exchange immoveable property which otherwise requires compulsory registration would not vest any title or affect the same in the said property. As section 17 does not purport to create a new title[17] but only affirms it which was created by the deed, the title is complete when the deed is executed and the effect of registration is only to make it absolute and unquestionable[18] meaning when an unregistered deed is executed, transfer of title remains in abeyance till the deed is registered, and as soon as it is registered, the transfer operates in the words of section 47 of the Act not from the date of the registration but from the date on which it would, if no registration was needed, have taken effect.[19] Therefore, title of a person under a registered document may be said to relate back to the time from which it would have operated if no registration thereof had been required or made.[20]

3.2 Issues Regarding Admissibility

The general rule of compulsorily registrable documents as specified in section 17 of the Act is that non-registration of those documents does not affect transactions but only nullifies the instrument to the extent of its

---

15 *Muhammad Saeed v Mst. Nahid Shagufta & 3 others* PLD 1990 Lah 467 (DB).

16 *Ashutosh Saha and another v Mohammad Yusuf Ali and others* AIR 1987 Pat 102 (FB).

17 *Khan Md. Biswas v Chittaranjan Sen* (1955) 7 DLR 60; *Girindra Chandra Datta Chowdhury v Kumud Behari Roy* (1952) 4 DLR 623.

18 *Chander Singh and others v Jamuna Prasad Singh and others* AIR 1958 Pat 193.

19 *Ata Ullah Malik v The Custodian of Evacuee Property, West Pakistan and Karachi and others* 16 DLR SC 298.

20 Ibid.

admissibility in evidence in a civil proceeding.[21] In other words, where on its proper interpretation, the document is in itself the instrument of the transaction in question, it must be registered although the transaction is one which the law does not require to be effected by a registered instrument, and in the absence of registration, the document cannot be received as evidence of the said transaction. [22]

However, the former effect of non-registration that it could not be received as evidence of any transaction affecting such property is no longer the law of the country[23] as under section 49, the only penalty provided is that no document required to be registered shall operate to create, declare, transfer, limit or extinguish whether in present or in future any right, title or interest to or in any immoveable property. Thus, though an agreement which is not registered in terms of section 17 could not be made a basis for an assertion of title in the suit property, yet it could certainly be admitted in evidence[24] and used for a collateral purpose[25] such as of showing its nature and character as well as position of person holding under the same.[26] Though the character and nature of the possession cannot be separated from the main transaction evidenced by the document, a distinction has, however, to be drawn between the character and nature of the possession and character and nature of the transaction as because the document is admissible to prove the character and nature of the former and it is not admissible to prove the character and nature of the latter. For instance, the fact that whether a lease of immoveable property is made for a certain term express or implied or in

---

21 *Abdullah v Rahmatulla* AIR 1960 Mad 274; *Iswar Dutt v Sunder Singh* AIR 1960 J & K 63; *Katai Mia v Sukhamoyee Chaudhurani* AIR 1959 Assam 60;

22 Vide sec.49 of the Registration Act and sec.91, of the Evidence Act. See, observations in *Maung Tun Pe v Maung Sein Myi* ILR (1929) 7 Rang 414, in so far as they conflict with the above view, must be read with caution. As regards the Mahomedan Law of gifts, the decision in *Nasib Ali v Wajed Ali* (1926) 100 IC 296 (Cal) and *Kulsum Bibi v Shiam Sunder Lal* (1936) 164 IC 515 (All) (where the deed of gift being unregistered, the gift was proved by oral evidence), seem at first sight to be at variance with the rule in the text above.

23 *Sh. Jamilur Rahman v Akbar Hasan* 1985 CLC 922 (Karachi); *Hakim Din v Muhammad Irshad* PLD 1978 Lah 333 (DB); *Abdul Karim v Mirza Basir Ahmad* PLD 1974 SC 61

24 *Muhammad Akram v Syed Imrao Ali Shah* 1988 CLC 2228 (Lahore).

25 *Khalilur Rahman v Province of E Pak* 29 DLR 239; *Shahadat Hossain and others v Md Jabed Ali*, 1984 BLD 215

26 *Khalilur Rahman v Province of E Pak* 29 DLR239; *Dwijendra nath Pathak v Abdullah Al- Mahmud* (1973) 25 DLR 480; *Pak Employees Co-operative Housing Society v Anwar Sultana* (1969) 21 DLR (WP) 345; *Babu Ram Mandol v Revuka Bala Roy Chowdhury* (1960) 12 DLR 517; *Ahmed Shah Khan v Abdul Barkat* (1959) 11 DLR 427; *Khan Md. Biswas v Chittaranjan Sen* (1955) 7 DLR 60.

perpetuity or for a certain consideration is not covered by the term 'collateral purpose' under the concerned section. They are the essential terms of the lease and cannot be proved by a document which is not by the law governing such document admissible in evidence but endorsement, requiring registration and not registered in a lease is admissible for collateral purposes.[27] An unregistered lease thus, does not prove the relationship of landlord and tenant to create rent, the area of the leasehold property, the period of lease and other terms. It only shows the nature of possession and of finding out if parties agreed to refer the dispute to arbitration.[28]

3.3 Consideration of Registered and Unregistered Instruments

In cases where a transaction is ineffective so long as it is not registered, the fact that it has not been registered, would make it inoperative. Therefore, where a transfer of the property to the respondent is exhibited by a registered document which upon its terms is an absolute sale and the appellant seeks to utilize the unregistered one to show that the transaction covered by the registered document though ostensibly a sale, is, in reality a mortgage by conditional sale and it was held that an unregistered document cannot be allowed to affect the terms of a registered one which creates rights in the property of the value of more than Taka 100. Once by a registered deed title has passed to the vendee, the subsequent deed of cancellation by the vendor does not nullify the effect of the already completed deed.[29] And when a document requires registration, but is not registered, the defect of registration may be cured by the conduct of the parties in continuously acting upon it for a long period. Upon these facts the Privy Council held that though the document was not registered, effect should be given to it, as if it was registered.[30]

However, an unregistered document is not rendered the document invalid or the rights there under is not extinguished by a subsequent registered document although, the ownership, it is submitted, will commence only from the date of the second document. Thus, where the appellant claimed that disputed piece of land had been gifted to him with possession but the same had also been sold by registered sale deed, it was held that the registered

---

27 *Khan Muhammad Biswas v Chittaranjan Sen* (1955) 7 DLR (HCD) 60.

28 *Cotton Trading Corporation of Pakistan Ltd. V Sheikh Sultan Trust, Karachi* 1981 CLC 623; *Mahendra Singh v State* AIR 1976 All 59.

29 *Michhu Kumar and others v Raghu Jena and others* AIR 1961 Orissa 19.

30 *Muhammad Khan v Muhammad Zaman Khan* PLD 1956 (WP) Pesh 12.

deed had precedence over the earlier unregistered gift-deed.[31] In cases under section 50 of the Registration Act, 1908 an unregistered mortgage won't invalidate or extinguish the rights of such a mortgagee. Therefore, purchase under a subsequent registered mortgage does not extinguish an earlier unregistered mortgage and the debt could be recovered from the money, if any, after satisfying the registered one. Similarly, a person who claims under a deed which under the law does not require registration and is perfectly valid though unregistered cannot escape the provisions of section 50.[32] Also, where persons in possession claimed title on the basis of unregistered sale deed, it could not be held to transfer title to such persons but could be made use of to examine the nature of transaction it evidences. However, without creating any legal title in the plaintiffs, the unregistered document changed the nature of their possession of the suit land and if they did not acquire the status of lawful owners they, at least, feigned ownership, under the terms of the said document to the knowledge of the defendants since its execution; their possession of the suit land as such, stretched long after the statutory period of 12 years to create title in them.[33]

3.4 Execution Aspects

Generally, a registered document should be presumed to be written on the date it bears and for the purpose of execution, registration of a document raises no presumption in its favor. And person claiming the execution is required to prove it by producing evidence that it was in fact executed.[34]. In all such cases, lapse of time does strengthen the onus cast. However, where a document has been duly executed, in the absence of any circumstances to the contrary, the presumption will be that the parties intended, the title to pass forthwith. On the other hand, in relation to section 47 of the Registration Act, 1908, the provisions herewith operate not only as between the parties to the deed but also affect the rights of third parties.[35] For instance, where there is transferor and the transferee, the registered document takes effect as between them from the date of execution; and if there is a competition between two documents relating to the same property the one executed earlier in point of time will have priority over the other. But as regards a third party, the point of time at which the deed is to be effective is, when it is

---

31 *Jainullah and another v Anu Mia and others* (1963) 15 DLR (HCD) 77; *.Mir Abdul Ali v Md. Rafiqul Islam* 8 BLD (AD) 73 and 149.

32 *Ashraf Ali v Chandrapal Singh and another* AIR 1925 Oudh 506.

33 Chowdhury, Obaidul Huq. 1985. *The Registration Act.* 2nd edn. Malibagh:Dhaka, at p. 141.

34 *Sh. Muhammad Sharif Uppal v Sh. Akbar Hussain and others* PLD 1990 Lah 229.

35 *Sadei Sahu v Chandramani Dei and another* AIR 1948 Pat. 60 (DB)

registered.[36] Also where there being two different *Kabalas* one later than the other in favor of two different persons in respect of the same property, title under the first has priority over title under the second though, the second is registered prior to the first and possession is delivered under it. And where a deed of transfer of immovable properties is executed, but before it can be registered the properties covered by it are attached, the attachment cannot prevail against the deed when it is registered or it cannot prevent the registration thereof and when registered, the deed operates only from the date of its execution.[37]

3.5 Ultra *vires* Transactions

As the law of registration is intended to prevent and not to aid fraud,[38] registration cannot confer validity upon an instrument which is *ultra vires*, illegal or fraudulent. Since a transaction, before it becomes effective, must be a legally proper transaction; so as to be a proper one, registration must be valid according to the law for the time being in force and if it is not, mere registration does not make it effective. For instance, non-compliance with the rules of registration as laid down in the Act makes it invalid whether effected by fraud, negligence or inadvertence.[39] Thus, the Registration Act, 1908 has no application in cases where the registered deed is obtained by fraud and the party holding the same has no claim to priority by virtue of the Act; the object of which is to put an end to fraud. In cases where there is a fraud on the law of registration like relevant property's description was different from that described in the registered document, document is not presented before the Registrar by the executant or the proper person, the registration of those documents will be invalid[40] since the transactions are *ultra vires*, illegal or fraudulent. However, to see whether the registration of a document has the effect of transferring any right of property or not, the

---

36 *Muhammad Meherali Mondal v Muhammad Karam Ali Sarkar* (1965) 17 DLR 365.

37 *Bhagavathula Kemeswara Rao v Doddaku Veera* AIR 1960 Andh Pra 616.

38 *Abdul Motalib v Imam Ali Mollah and ors* (1990) 42 DLR (AD) 123;*Mir Abdul Ali v Md. Rafiqul Islam Khan* (1988) 40 DLR (AD) 75;*Abdur Rahman v Baser Ali and others* (1969) 21 DLR (HCD) 599; *M/S Green & White v Registrar J. S. Companies* (1963) 15 DLR 4924 Bom. 126, 148; *Abdul Motalib v Imam Ali Mollah and others* 10 BLD (AD) 160.

39 *Chindu v Rameshwarnath* AIR 1927 Nag 30 (DB).

40 *Harendra v Hari* ILR (1914) 41 Cal 972*Bishwanath v Chandra* ILR (1921) 48 Cal 509; *Akshayalingam v Ramayya* (1929) 120 IC 876; *Jogine Mohan v Bhoot Nath* ILR (1902) 29 Cal 654.

40 *Mujibannissa v Abdul* ILR (1901) 23 All 233; *Halima v Khairunnisha* ILR (1925) 8 Rang 898: *Dottic v Lochmi* ILR (1931) 10 Pat 481.

court has to see the intention of the parties in each particular case, as mere registration of a document does not necessarily operate to transfer or affect the property dealt with it without regard to the intention of the parties to the document.

3.6 Priority Cases

The dispute as to the precedence of one document over the other in the case of successive transfers of the self-same property in favor of different person has to be determined in accordance with the principles laid down in section 47 of the Act.[41] It gives priority to a registered instrument over an unregistered one on the principle that it is execution and not registration that determines the precedence of one document over another.[42] It follows that if a deed is presented for registration within the time prescribed by the Act, and registered, it is immaterial that another deed executed subsequently has obtained priority of registration. But where the registration of a deed is delayed by the fraud and misrepresentation of the other party, the latter cannot be allowed to benefit from his own fraud. Therefore, where a transfer was made in favor of P after the transfer in favor of D but it was registered earlier than the transfer in favor of P, it was held that though the effect of registration is to confer validity on the document from the date of its execution, D should not be allowed to rely upon his own fraudulent conduct to give his conveyance preference over the sale-deed in P's favor executed later but registered earlier.[43]

However, the principle of priority conferred to one document over another is not in any way affected by decrees being obtained on them.[44] Therefore, where X sold property to A by unregistered deed who leased it to X and obtained the decree for rent on lease, and subsequently, X sold the same property to B by a registered deed, B is entitled to priority and the decree does not have preference over the other. And also where a decree is obtained on an unregistered mortgage and a registered sale-deed is executed pending

---

41 *Mir Abdul Ali v Md Rafiqul Islam* 40 DLR (AD) 75; *Jainullah and another v Anu Mia and others* (1963) 15 DLR (HCD) 77.

42 *Azizuddin Alias Aniuddin v Abu Taleb Sarder* (1983) 35 DLR (HCD) 360; *Ata Ullah v Custodian of Evacuee Property* (1964) 16 DLR (SC) 299; *M/S Green & White v Registrar J.S. Companies* (1963) 15 DLR 492; *Jainullah and another v Anu Mia and others* (1963) 15 DLR (HCD) 77; *Fazar Ali & ors. v Afzal Mia & ors.* (1957) 9 DLR 258.

43 *M.k. Muhammad Batcha Sahib v Arunachalam Chettiar* AIR 1926 Mad. 39.

44 Mahmood, Sh. Shaukat and Shaukat, Sh. Nadeem 1985. *The Registration Act.* 4th edn.. Lahore: Pakistan, at p. 188.

execution of the decree; the sale is governed by the doctrine of *lis pendens* and cannot take precedence over the decree. Similarly, section 50 of the Act reveals that every document of the kinds mentioned in clauses (a), (b), (c) and (d) of section 17(1), and every document registrable under section 18, in so far as such document affects immovable property or acknowledges the receipt or payment of any consideration in respect of any transaction relating to immovable property[45] shall, if duly registered; take effect as regards the property comprised therein, against every unregistered document relating to the same unregistered one be of the same nature as the registered document or not.[46] Proviso of this section explains that the person in possession of the property under an unregistered document prior in date would be entitled to the rights under section 53-A of the Transfer of Property Act, 1882 (IV of 1882) if the conditions of that section are fulfilled and the person in whose favor an unregistered document is executed shall be entitled to enforce the contract under the unregistered document in a suit for specific performance against a person claiming under a subsequent registered document.[47] The explanation to the section has the effect of making even a compulsorily registrable document which is registered under the earlier Acts prevail over an unregistered optionally registrable document executed under the prior Acts. Here consideration should be placed on the point that this principle has no application to cases where under the prior unregistered deed of transfer, there has been a valid and effectuated transfer of property; it refers only to cases where the previous document, though valid, was only optionally registrable, that is to say, if in respect of a document relating to a transaction a person had the option to register the document, and if for some reason the transaction is not completed or does not completely take effect and subsequently another person comes to purchase the same property under a registered document without any knowledge or notice of the previous transaction, then in the conflict between these two provisions of the Act, it was decided that effect shall be given to the latter registered document.[48] Therefore in a competition between a document which is compulsorily registrable and registered and one which is optionally registrable and

---

45 Substituted by Registration (Amendment) Ord., 1962 (45 of 1962), s. 13 (with effect from the 7th June, 1962), for "and clauses (a) and (b) of section 18".

46 Subs. by Registration (Amendment) Ord., 1962 (45 of 1962), s. 13 (with effect from the 7th June, 1962), for the full-stop.

47 Provisions added By Registration (Amendment) Ord., 1962 (45 of 1962), s. 13 (with effect from the 7th June, 1962), for the full-stop.

48 *Kuppuswami Goundan v Chinnaswami Goundan and others* AIR 1928 Mad. 546.

registered, the former will prevail, whether the unregistered document be of the same nature as the registered one or not.

3.7 Issues of Notice and Onus Thereof

As question of notice arises only when there is conflict between registered deed and unregistered one or oral transaction or where transferor is not entitled to dispose of property, the question of priority in operation of document is not affected by want of notice, on the part of the person claiming under the subsequent document of the execution of earlier one.[49] Also, a registered transferee will have no priority over unregistered transfer if he receives notice thereof prior to the registration of the document even though he had no such notice at the time of execution of the document.[50] Therefore, in view of the provisions of the specified Act, the right of pre-emption as to various parties must be determined as on the date of registration and not on the date of execution of the transfer deed on which pre-emption is claimed.[51] But as regards the right of the transferees, where a deed of gift in favor of a vendee is executed before but registered after the date of suit for pre-emption, the deed of gift having become operative prior to the institution of the suit, there is no improvement of status by the vendee after the institution of the suit. And in a pre-emption suit the limitation runs from the date of registration and not from the date of execution of the deed where Article 120 of the Limitation Act is applicable and not section 47 of the Registration Act, 1908.[52] A registered deed though operates as notice in *rem* yet while making statement before Registrar, transferor must produce before him very cogent proof in support of his claim to be owner of property under transfer or sale and must also accept responsibility to meet claim of any body as may assert his ownership to property.[53]

---

49 Mahmood, Sh. Shaukat and Shaukat, Sh. Nadeem 1985. *The Registration Act*. 4th edn.. Lahore: Pakistan, at p. 174.

50 *30 All 238; AIR 1933 Lah. 609; AIR 1929 Lah. 500.*

51 *Abdul Motalib v Imam Ali Mollah and others* 10 BLD (AD) 160; *Ayesha Khatun v Jahanara Begum* 43 DLR (AD) 9; *Abdul Motalib v Imam Ali Mollah and ors* (1990) 42 DLR (AD) 123; *Lebu Mia v Ganesh Chandra Nath and ors* (1982) 34 DLR (AD) 220; *Abdur Rahman @ Abdur Rahman v Maklis Ali and anor* (1979) 31 DLR (AD) 118; *Abdur Rahman v Baser Ali and others* (1969) 21 DLR (HCD) 599; *Azimuddin Bhuiyan v District Registrar, Dacca, Mr. A.B.M.F. Rashid, Sub, Registrar, and others* (1968) 20 DLR (HCD) 355; *Ajimuddin Paramanik & others v Najemuddin Mondal and others* (1965) 17 DLR (HCD) 231; *Muhammad Meherali Mondal v Muhammad Karam Ali Sarkar* (1965) 17 DLR 365;*Noab Mian Bhuiyan v Golam Hosain (minor)* (1961)13 DLR (HCD) 889.

52 *Ragho v Sakharam* AIR 1922 Nag 200.

53 *Jamal Khan and 5 others v Mst. Mubarik Bano and 7 others* PLD 1982 Pesh 16.

3.8 Specific Performance or Recession of Contract

The Registration Act also provides for instituting a suit of specific performance or recession of contract where a contract for sale of immoveable property is executed but not registered prior to coming into force of section 17A[54] and where either of the parties to the contract shall if aggrieved for non-compliance with any of the provisions mentioned in section 17B[55] (1) (a); notwithstanding anything contained to the contrary in any law for the time being in force as to the law of Limitation. However, there is a condition precedent for instituting the specified suit which reveals that it has to be instituted within six months next after the expiry of the period mentioned in section 17B(1)(a).

3.9 Oral Agreement and Possession

It is clear by section 48 of the Act that a registered document shall take effect against an oral agreement or declaration relating to any property only when the said agreement or declaration has not been accompanied or followed by delivery of possession. But an oral agreement or an unregistered written agreement as to sale of immovable property followed by delivery of possession without any registered document with respect thereto, shall affect the validity of the subsequent sale of the same property.[56] Therefore, where a purchaser of immovable property under an unregistered *kabala* has paid the agreed price to the vendor, and is placed in possession, in the absence of circumstances showing that such purchaser was not entitled to sue his

---

54 This is provided in section 17B which was inserted after section 17 by Act No. XXV of 2004, section 4, (with effect from 1st July, 2005).

55 -(1) where a contract for sale of immoveable property is executed but not registered prior to coming into force of section 17A-

(a) the parties to the contract shall, within six months from the date off coming into force of that section, -

(i) present the instrument of sale of immoveable property under the contract for registration, or

(ii) present the contract for sale itself for registration, or

(b) either of the parties, if aggrieved for non-compliance with any of the provisions mentioned in clause (a), shall, notwithstanding anything contained to the contrary in any law for the time being in force as to the law of Limitation, institute a suit for specific performance or recession of the contract within six months next after the expiry of the period mentioned in clause (a),

(2) the provision of sub-section (1) shall not apply to any contract for sale of immoveable property on the basis of which a suit has been instituted in a civil court before coming into force of section 17A.

56 Mahmood, Sh. Shaukat and Shaukat, Sh. Nadeem 1985. *The Registration Act.* 4th edn.. Lahore: Pakistan, at p. 178.

vendor for specific performance, a subsequent purchaser of the property under a registered conveyance cannot succeed in a suit to recover possession of the property from such purchaser. And where a transferee under a verbal contract is already in possession in some other character, the case would be one of "oral agreement accompanied by possession" within the meaning of this section and such transfer would prevail against any subsequent registered transfer.

However, it is already settled that no equitable doctrine could override specific provisions of section 49 of the Act so as to make an unregistered document create title, if the same required registration under section 49.[57] And where, a purchaser was let into possession by vendor under an unregistered document pursuant to an oral agreement to sell under a mistaken belief that the transaction was complete, whereas, in fact it was incomplete, for want of registration of instrument purporting to effect transfer, such purchaser must be regarded to be a purchaser under a contract for sale which was yet to be an equitable owner, yet would have a charge on property for the amount paid by him towards purchase of property in question.[58]

But a subsequent registered document cannot be pleaded in bar of a prior unregistered document or a prior oral agreement to sell if the registered document has been taken with notice of the latter. [59] And the provision as to delivery in section 48 of the Act does not preclude the party to the oral agreement from relying on the doctrine of notice when there has been no delivery of possession.[60] However, the onus of proof that the registered transferee, had notice of the prior oral agreement is on the person claiming under the oral transfer,[61] and if the property to be sold is not in the possession of the vendor, but of another person it is the duty of the purchaser to make enquiries from that person, and he is bound by all the equities which the party in possession is tantamount to notice of the interest or claim in the property of the person in possession and whoever deals with such property is put on enquiry as to the title of the person in possession. And if, therefore, the *factum* of possession is proved, notice to the transferee of the claim or interest of the person in possession must be assumed. That being so, he is put

57 *Habibur Rahman and another v Mst. Wahdania and others* PLD 1984 SC 424.
58 Ibid.
59 *Hemeswar Barua v Poal Chandra Bora and another* AIR 1928 Cal 754.
60 (1907) 17 M.L.J. 319 (DB).
61 *Rasila and another v Haveli Ram and others* AIR 1929 Lah. 500.

on the enquiry as to the claim the property and when no such enquiry is made; there will be a postponement of the claim.[62]

4. Concluding Observations

As the Registration Act, 1908 came into force on the first day of January 1909, provisions of this Act therefore, apply to all documents which are produced in courts in evidence on or after 1 January 1909 provided the document is one which was compulsorily registrable under the Act in force at the time when it was executed. The question of admissibility of a document in evidence is a matter of procedure and so it is governed by the registration law present at the date of the institution of the suit, and not by an Amending Act which may be in force when the suit comes on for hearing. Thus after the Transfer of Property (Amendment) Act, 2004 (Act No. XXVI of 2004) there is no scope for the courts of law to take into consideration any unregistered instrument of sale of tangible immovable property executed thereafter as well as there is no scope to enforce any unregistered contract of sale by a suit for specific performance of contract. That by the said Act of 2004 compulsory provision of registration has been made for every instrument of mortgage where the principal money secured is one hundred taka or upwards with the only exception that where the bank or financial institution wishes to finance to the purchase of a flat or floor space or plot to be constructed or developed, the same may be effected through a mortgage by deposit of title deeds and no immovable property under registered mortgage shall be re-mortgaged or sold without the written consent of the mortgagee and any transfer in violation of this shall be void. It is submitted, however that, where on its true construction, a document is admittedly within the four corners of the provisions of the Act as to compulsory registration, the courts cannot countenance any evasion of the statute, but must give effect to the terms of the Act which are imperative, and no plea of hardship and so forth can be of any avail. Where a document would be invalid because of non-registration if one construction is placed on it, and be valid if another construction is placed on it, then the law should favors the construction which would make it valid. Therefore, the effect of non-registration of documents which are required to be registered is a settled question of law and must be considered carefully when the question of admissibility of evidence arises of such documents.

62 *Balchand Mahton v Bulaki Singh* AIR 1929 Pat. 284.

The Dhaka University Studies, Part-F Vol. XIX (2) : 159-182 , December 2008

FORMATION OF A CONTRACT AND ITS TECHNICALITIES: BANGLADESH PERSPECTIVES

Mohammad Abdur Razzak*

1. Introduction

Foundation of commercial transactions is built on what is, legally speaking, known as "contract". A contract, as commonly understood, is a negotiated settlement which, as well, referred to as "agreement". In the general sense of the terms the expression like "agreement" and "contract" are used interchangeably. However, in legal parlance "agreement" and "contract" are not viewed in the same sense and are having different legal status. As Professor Treitel puts it, formation of a "contract" involves two-stage procedure. In the first place, an "agreement" springs out of a proposal and, in the second place, a "contract" is formed out of an agreement.[1] This prescription, as it argued in this article, is well accommodated in the scheme of the Contract Act, 1872 (in concise "the Contract Act"). Section 2 (h) of the Contract Act states in forth right terms that an agreement enforceable by law is a contract. This definition corroborates the view that "agreement" and "contract" are not taken to signify same legal meaning and to constitute same legal obligations.

The Contract Act, to a large extent, encapsulated principles of English law prevailed during nineteenth century. The English colonial rulers intended to impose English secular principles of mercantile law by way of formulating a set of rules, which, later on, with the assent of her Majesty, was enacted as "Indian Contract Act, 1872" (now known as "Contract Act")having uniform application to all Indians of different denominations. The rules embodied in the Contract Act although, inter alia, construe relevant technical terms and lay down procedure to enter into contracts suffered from some inherent intricacy requiring judicial intervention for precision. As a result, since the time of the enactment the judges have constantly been being called to apply their judicial mind to construe the provisions of the Contract Act and a large

---

* Assistant Professor, School of Business, East West University

1 Treitel G.H.: *The Law of Contract* Eleventh Edition (2003), published by Sweet & Maxwell Limited., 1011 Avenue Road, London NW3 3PF, UK, p. 8. See also *James Finlay PLC Vs. Meshbahuddin Ahmed* 46 DLR (1994) 624, para 17.

proportion of these judicial pronouncements has particular bearing on the procedure to form contracts.

This is particularly important to note here that the Contract Act does not have any discrete part/chapter incorporating rules on the procedure to enter into a contract. The rules are scattered across the enactment under convenient heads. Same conclusion may be drawn regarding judicial observations focusing on the procedure to form contracts inasmuch as these were pronounced in different circumstances, in different point of time and were recorded in different legal journals. It is, therefore, not exaggerating to say that this requires a thorough research to figure out the sequential steps needed to enter into a contract as prescribed by the Contract Act and jurisprudence developed thereunder. This article is a modest attempt for that end.

The article having examined the relevant provisions of the Contract Act and judicial decisions proposes to introduce a framework to form a contract and, in order to appreciate the functional aspect of the proposed framework, has developed some flow charts and diagrams. As the article progresses it realizes that the framework to form a contract as enunciated by the Contract Act in 1872 is still relevant and answers the need of the people; although the substantive provisions building blocks for the framework have, due to rapid change in the trading pattern and socio-economic condition in the twentieth century, become obsolete entailing massive renovation of the Contract Act. In section 1 this article focuses on the provisions of the Contract Act to figure out the procedure to make an agreement and in section 2 this article further undertakes an investigation to trace out the chronological steps required to form a contract out of an agreement.

Section 1: Formation of Agreement

2.1 Agreement in General:

Normally, agreement is reached by process of an offer by one party, termed the 'offeror', accepted by the other, termed the 'offeree'; and, before the offeree can enforce the offeror's promise, the offeree must give the consideration requested in the offer[2]. Section 2 (e) of the Act defines "agreement" stating: "Every promise and every set of promises, forming the consideration for each other, is an agreement." It appears from this definition that an agreement comprises two elements: (1) promise(s) and (2)

---

2 *Halsbury's Laws of England*, contents provided by the Butterworths Direct Online Service, visited on 03/10/2005, Para 603

consideration[3]. Further, a promise stems out of two elements: offer and acceptance[4]. In final analysis this may be said that an agreement is the combination of a number of elements, namely, proposal, acceptance and consideration, bound together in the prescribed manner.

2.2 Procedure to Constitute Agreement

The artificiality of the definition of the term "agreement" provided by the Contract Act as mentioned above would impart legal and real business sense while the procedure of forming an agreement is examined. An agreement comprises a set of human actions technically called "proposal", "acceptance" and "consideration". These actions may be allowed to be arranged in triangular shape so as to culminate into an agreement. This is discussed below:

2.2.1 Proposal

It is universally accepted that to enter into a contract the first and foremost thing is to have a "proposal" or "offer". A "proposal" denotes one's desire to do or omit to do something bound up with an intention to enter into a legal relationship thereby with another. As stated in Halsbury's Laws of England, "An offer is an expression by one person or group of persons, or by agents on his behalf, made to another, of his willingness to be bound to a contract with that other on terms either certain or capable of being rendered certain."[5] The expression "willingness to be bound to a contract" as used in the definition underscores that intention to enter into a legal relationship with another is key for the validity for an offer. This subjective approach of having an intention has impeccably been insulated in section 2 (a) of the Contract Act[6]. According to Contract Act, an offer is having two essential components: It is, in the first place an expression of the offeror's willingness to do or to abstain from doing something. Secondly, it is made with a view to obtaining the assent of the offeree to the proposed act or abstinence. Seemingly the second component of the definition contemplates that an

---

3 It is, however, important that promises and consideration that may culminate into an agreement must have reciprocity.

4 See section 2 (b) of the Contract Act, 1872.

5 *Halsbury's Laws of England* note 2 above, at Para 632. This position of law is also subscribed by Prof. Treitel:Treitel note 1 above, at p. 8. See also 46 DLR (1994).HCD 624, at para 17.

6 This section defines the term "Proposal" in an incoherent but robust language: "When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal "

offerer shall be presumed to have an intention to bind himself legally to the offeree while making the offer. For example, A while in a self-service shop picks an item and places it on the cash counter saying, "I want to buy it", he expresses his intention to be legally bound to pay the shopkeeper stipulated amount when the shopkeeper is agreeable to sale the same to him. This intention on the part of the offerer is determined by what is called "objective test"[7].

However, a proposal as discussed above would not suffice to constitute an agreement. It needs to be accepted by the offeree.

2.2.2 Acceptance

"Acceptance" in terms of law of contract denotes a positive response on the part of the person receiving a proposal, i.e., offeree. But mere mental determination would not be sufficient. It needs some overt act by which an offeree can demonstrate his assent to have a bargain on the terms as stated in the proposal.[8] As Act[9] puts it: "When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted." Section 7 (1) of the Act further tunes this definition stating that an

---

7 "It is a well-established principle of the English law of contract that an offer falls to be interpreted not subjectively by reference to what has actually passed through the mind of the offeror, but objectively, by reference to the interpretation which a reasonable man in the shoes of the offeree would place on the offer."" *Centrovincial Estates plc v Merchant Investors Assurance Company Ltd* [1983] Com LR 158 (CA) as per Slade LJ. See also judgment of Bowen LJ in *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256; Court of Appeal, 1892 Dec. 6,7. For more on the puzzle of subjectivity versus objectivity see Poole Jill : "*Case Book on Contract Law*" Sixth Edition, published by University Press, UK Pp. 17-19. This should be noted here that While addressing the question of intention of the contracting parties, law generally divides the agreements into: (1) commercial agreements and (2) family, domestic or social agreements. In the case of family, domestic or social agreements, the presumption is that there is no intention of the parties to create legal relations; but the presumption is just other way round in the case of commercial agreements: *Halsbury's Laws of England* note 2 above, at Para 719. For family or social arrangements see *Balfour v Balfour* [1919] 2 KB571 [CA); *Jones v Padavatton* [1969] 1 WLR 328 (CA); *Coward v Motor Insurers' Bureau* [1963] 1 QB 259 (CA). For commercial contracts see *Carlill v Smoke Ball Company* [1893] 1 QB 256.

8 This proposition was made by Lord Blackburn in *Brogden V Metropolitan Railway Company* (1877) 2 App Cas 666 (HL): "...But when you come to the general proposition which [the judge at first instance] seems to have laid down, that a simple acceptance in your own mind, without any intimation to the other party, and expressed by a mere private act, such as putting a letter into a drawer, completes a contract, I must say I differ from that ...."

9 See Section 2 (b) of the Contract Act.

acceptance shall be absolute and unqualified.[10] Prof. Treitel while examining the concept of "acceptance" from English law perspective encapsulates the provisions of the Act and observes[11] that an acceptance is "a final and unqualified expression of assent to the terms of an offer."

The term "acceptance" has comprehensively been defined in Halsbury's Laws of England[12]: "An acceptance of an offer is an indication, express or implied, by the offeree made whilst the offer remains open and in the manner requested in that offer of the offeree's willingness to be bound unconditionally to a contract with the offeror on the terms stated in the offer." This definition by employing the word "signify" give emphasis to the fact that to make an acceptance the assent of the offeree needs to be communicated.[13] Whether or not the offeree has communicated his assent to the offeror would be determined, it is suggested,[14] by "objective test".

Therefore, acceptance may safely be termed as final willingness of the offeree which has the effect of converting the proposal into a promise.

This may be noted that "promise" refers to the "proposal" which offeree has already accepted[15]. The offeree is said to have accepted the proposal when he completes the communication of his acceptance[16]. The legal effect of completion of communication of an acceptance is that neither offerer nor the offeree can, afterward, revoke his part of the bargain[17] without incurring legal liability. But the performance of the promise can be enforced when it is proceeded by what is known as "consideration". Hence, it is appropriate here to explain "consideration".

2.2.3 Consideration

Traditionally, English law regards "consideration" as a detriment to the promisee and/or a benefit to the promisor. As Lush J puts it a valuable

---

10 Section 7 (a) of the Contract Act.

11 Treitel note 1 above, pp 16-17.

12 *Halsbury's Laws of England* note 2 above, Para 650.

13 Communication of assent may be made expressly or impliedly: Section 9 of the Contract Act.

14 Treitel note 1 above, pp. 16-17. Further, to be valid, an acceptance is to be communicated in the prescribed manner.[14] "If the offer requests a promise, no contract is formed unless and until that promise is given; and, if the offer requests an act, no contract is formed unless and until that act is performed.": *Halsbury's Laws of England* note 2 above,Para 650.

15 Last sentence of section 2 (b) of the Contract Act.

16 Law prescribes that communication of acceptance is completed as against the offeree once it is brought to the notice of the offeror. Section 4 of the Contract Act.

17 Section 5 of the Contract Act.

consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.[18] Although traditionally, both benefit and detriment are to be present, it is suffice to have detriment to the promisee to support an act as consideration.[19] Again, that benefit or detriment can only amount to consideration sufficient to support a binding promise where it is causally linked to that promise.[20] The definition of consideration as given in the Contract Act[21] is largely based on the traditional approach of English law[22].

This traditional view of benefit and detriment has been criticised[23] on the grounds, in the first place, that out of a contract both the parties are benefited and so it is thought not to be correct to appreciate it from benefit and detriment perspective. Secondly, some time "notion of "benefit and detriment" sounds artificial to support consideration.[24] The consideration may be interpreted to exist making the corresponding promise binding although the promisor gets no benefit[25] and the promisee suffers no detriment[26] in the course of transaction.

On the contrary, Sir Frederick Pollock provided an alternative definition regarding the "consideration" as price for the promise.[27] This definition was adopted by House of Lords. Endorsing this view Lord Dunedin observed, "An act or forbearance of the one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for

---

18 *Curriev Misa* (1875) LR 10 Ex 153, p. 162.

19 Treitel note 1 above, p. 68 *Halsbury's Laws of England* note 2 above, Para 729.

20 *Halsbury's Laws of England* note 2 above, Para 728.

21 According to Section 2 (d) of the Contract Act "When at the desire of the promisor, the promisee or any other has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise ."

22 This statement is supported by the Indian Supreme Court in Chidam-barn lyer v. Renga lyer (1966) A.SC. 193-197.

23 Treitel note 1 above, p. 68.

24 Treitel note 1 above, p. 68.

25 For example, where A guarantees B's bank overdraft and the promisee bank suffers detriment by advancing money to B, then A is bound by his promise, even though he gets no benefit from the advance to B. Thus promise of A is enforceable although he receives no benefit from the transaction.

26 Under an export trading bank pursuant to a letter of credit undertakes to pay the exporter and promise of the exporter to deliver goods can be enforced against it although importer being promisee apparently suffers no detriment.

27 Pollock: *"Principles of Contract"* (13th Ed.), p. 133.

value is enforceable."[28]For example, against the promise of the seller to deliver agreed goods the buyer has deposited a stipulated sum. This act, namely, paying of stipulated amount of money, is the value and inducement for the promise and hence this can be legally enforced.[29]

So far it is emphasized that consideration consists of performance against a promise. But it is well settled that mutual promises can furnish consideration[30] and resulted bargain will impose binding obligations.[31] Only limitation being that these promises cannot be compelled unless the time for performance of promises arrives[32]. Further, consideration must not be confounded with "condition precedent"[33] or "motive"[34].

---

28 In Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd [1915] AC 847, 855.

29 This definition of consideration has been rejected by Prof. Treitel on the ground that the definition being vague is less helpful in determining the existence of consideration in different set of facts. He, however, prefers to follow the traditional definition given by Lush J though being a critic of it.

30 Critical view is that this kind of consideration is not squarely covered by "benefit and detriment" theory as the performance is suspended upto a future point: Treitel note 1 above, p. 70.

31 Thoresen Car Ferries Ltd v Weymouth Portand BE [1977] 2 Lloyd's Rep. 614 at 619.

32 Where a seller having a promise from the buyer to pay the price on a specified future date promises to deliver the goods, these promises having reciprocity provide consideration for each other.

33 Unlike the condition-precedent consideration is a task requested for. Fulfilment of condition precedent creates an entitlement to the benefit of the promise; but consideration affords legal footing to enforce the promise [Holmes, The Common Law: Contract available at www.constitution.org visited on March 20th, 2008; see also Thomas v Thomas (1842) 2 QB. 851]. In Carlill v Carbolic Smoke Ball Co.[33 [1893] 1 Q.B. 256] the plaintiff provided consideration for the defendants' promise by using the smoke-ball; but her catching influenza was only a condition of her entitlement to enforce that promise. For the former task was requested by the defendant and not the latter.

34 As prof. Treitel observes, a motive for making a promise is not necessarily consideration for it in the eye of law; but the consideration for a promise is always a motive for promising. [Holmes, The Common Law: Contract available at www.constitution.org visited on March 20th, 2008; see also Treitel note 1 above, p. 72]. This proposition may be well illustrated by the following example: In Thomas v Thomas (1842) 2 QB. 851. a testator shortly before his death expressed a desire that widow should during her life have the house in which he lived. After his death his executors "in consideration of such desire" promised to convey the house to the widow during her life or for so long as she should continue a widow, "with the condition that she should pay £1 per annum towards the ground rent, and keep the house in repair. In an action by the widow for breach of

It is evident from the foregoing discussion that:

(1) Consideration means any task, e.g., an act or omission or a promise thereof;

(2) These tasks are requested by the promisor and as such consideration is the motive for the promise of the promisor;

(3) These tasks are performed or undertaken as per the desire of the promisor and hence these have reciprocity with the promise of the promisor;

(4) To be consideration tasks are to be valuable, i.e., capable to be measured in terms of money, albeit nominal;[35] and

(5) These tasks are done or undertaken either by the promisee or any third party.

2.3 Agreement: Valid/void/voidable

It is evident from the foregoing discussion that the process of making an agreement commences with a proposal and it becomes a promise if accepted by the offeree and the promise becomes enforceable if and when offeree furnishes consideration.[36] Hence an agreement results from a combination of offer, acceptance and consideration. This process may be illustrated by a formula as shown in the following diagram:

---

this promise, the consideration for it was held to be the widow's promise to pay and repair. Court regarded the desire of the testator as motive, not as consideration. Court observed: a motive for promising does not amount to consideration unless two conditions are satisfied, viz.: (i) that the thing secured in exchange for the promise is of some value in the eye of the law and (ii) that it moves from the promisee. Thus the testator's desire was a motive for the executors' promise, but not part of the consideration for it. The widow's promise to pay and repair was another motive for the executors' promise and did constitute the consideration.

35 Lloyd's Bank v Bundy (1975) Q.B. 326, 336, Per Lord Denning M.R; for more on this point see Pollock and Mulla: "*Indian Contract and Specific Relief Act*", India (1994), eleventh edition, pp. 33-34.

36 This may be brought to the notice of the readers that if the consideration required from the offeree is a promise, the giving of that promise is said to result in a bilateral or synallagmatic contract, under which both sides initially exchange promises; but, if the requested consideration is an act other than a promise, its performance is said to make a unilateral contract, whereupon the offeror becomes bound by his offer. *Halsbury's Laws of England* note 2 above, Para 603.

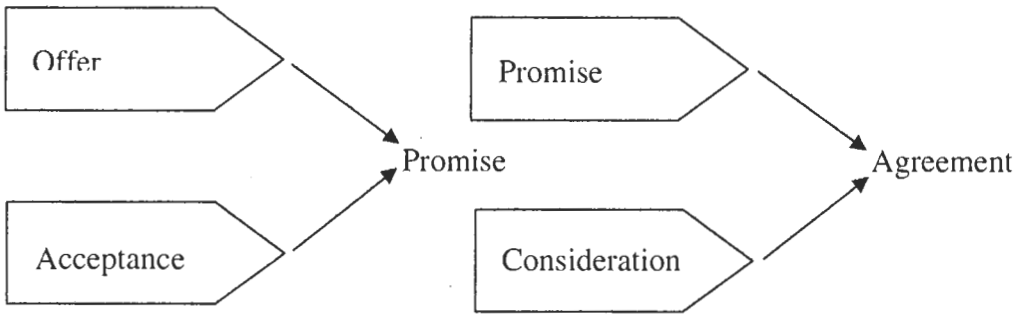

DIAGRAM 1

The Contract Act categorises agreements into (1) valid, (2) void and (3) voidable. Only completely perfect agreements become contracts. A completely valid contract is one that is enforceable by all the parties to it by one of the prescribed remedies.[37] Such contracts must be distinguished from those with varying degrees of imperfection, namely void[38] and voidable[39]. Therefore, obvious conclusion is that an agreement if so facto does not become a contract. It requires some further prerequisites and these are explained in the section 2 below.

Section 2: Formation of Contracts

3.1 Meaning of Contract

Section 2 (h) of the Contract Act defines "contract" as those agreements that are enforceable by law. Criteria for enforceability has been set out in section 10 of the Contract Act and these are two folds: primary and supplementary.

---

37 See section 2 (h) of the Contract Act.

38 The expression "void agreement" is commonly used in a convenient term for an agreement which is not enforced by law. Such agreements are some time treated to be void from the very inception [See *Mohoribibee V Dharmodas Ghosh* (1903) 30 IA 114:30 Ca1539]. The appellation "void" has also been used to describe an initially valid contract which ceases to have effect before its expiry (See section 56 of the Contract Act, 1872).

39 A "voidable contract" is one which is initially valid, but where one or more of the parties have right of election to avoid or to continue and so validate it [Section 2 (i) of the Contract Act]. Unless and until a right of avoidance is exercised, a voidable contract remains valid.

3.2 Primary Prerequisites

There are four primary prerequisites that an agreement ought to satisfy to enjoy enforceability and have the status of a contract, namely, (1) competent parties, (2) free consent of the parties, (3) lawful object and consideration and (4) agreement not being barred by law. It is noteworthy, aforesaid conditions are fundamental for the validity of all agreements. In the following pages these conditions are explained.

3.2.1 Competent parties

It is the first and foremost criteria for the legality of an agreement that the parties thereto are competent to contract. Only three categories of people are declared to be competent to contract. They are the persons who are of the age of majority, of sound mind and not being disqualified from contracting by law[40]. In other words, law declares three classes of persons as incompetent to make contracts; they are persons below the age of majority, i.e. minors,[41] persons with unsound mind,[42] e.g. a lunatic, and persons disqualified from contracting, e.g., bankrupt.[43]

3.2.1.1 Nature and Legal Effect of the Transaction

Perplexity lies in the fact that no where in the Contract Act this has been clarified as to what would be the legal status of the contracts made by such incompetent persons. It was in the root of controversy among the lawyers, jurists, judges. People had to wait for thirty years since the promulgation of the Act in 1872 to have a judicial pronouncement to put at rest this controversy. In 1903 the Privy Council in the landmark decision in Mohoribibee V Dharmodas Ghosh[44] observed that an contract made by a minor with a major person is not only void, but void ab initio. So there can

---

40 Section 11 of the Contract Act.
The age of majority is generally eighteen, except when a guardian of minor's person or property has been appointed by the court, in which case it is twenty-one: Section 3, Majority Act, 1875.

42 Section 12 of the Contract Act defines the expression "person with unsound mind".

43 See section 94 of the Insolvency Act, 1997.

44 (1903) 30 IA 114:30 Ca1539. This principle was further extended to hold that a minor who has made an agreement by misrepresenting his age may afterward disclose his real age. There is no estoppel against him: [*Gadigeppa Bhimappa Mets v Balangowda Bhimangowada*, AIR 1931 Born 561]. On the same principle a minor cannot be held liable for his acts in tort if the liability arises out of a contract.[44] Then this will be an indirect way to enforce an agreement against a minor. However, if the tort is independent of a contract, he cannot escape liability: [*Fawcett v Stnethurst* (1914) 84 LJKB 473:112 LT 309; Hari v Dulu Miya, (1934) 61 Cal 1075].

be no contract by a minor and hence no contractual liability arising out of it[45]. The protection of interest of the minor person was the prime concern of the judiciary while delivering the judgment.[46]

As laid down in Mohoribibee's case a minor shall incur no personal contractual liability and as such he cannot be compelled to shoulder any liability thereunder. Now question arises if a minor gets into a contract committing fraud as to his age, can the benefit which such minor has received be restored to the other party in the event of refusal by such minor person to fulfil his part of the contract? This has been answered in the negative in the Mohoribibee's case on the ground that the major person who enters into the contract having knowledge of the infancy cannot claim refund of the money. What if the other party is having no knowledge about the infancy? Dominant view is that the minor shall restore the benefit to the other party as the contract is being avoided on the ground of infancy[47]. On the contrary, if a minor gets into a contract and supplies full consideration or performs his part of the contract, can the other party being a major person come out of the contract on the strength of the Mohoribibee's case without incurring any liability? The consistent view is that the major person will be precluded from denying performing his part of the contract[48].

---

45 Such a transaction which is void is a nullity (E.G., a vendee purchasing a minor's land sold by an unauthorised person such as his mother is no more than a trespasser in the estate of such minor: PLR (Dac) 627.

46 every man is the best judge of his own interests and it is well reflected on the doctrine of consideration: see Pollock and Mulla note 35 above, Pp. 33-34. But this presumption is suspended in the case of children.

47 But as to the nature of restoration conflicting views are traceable. According to one opinion, the major person can recover the property, if traceable, delivered to the minor person under the contract; but he cannot seek to recover its price or damages, for, if allowed to do so, the court would be enforcing the contract against a minor: [*Ajudhia Prasad v Chandan Lal* AIR 1937 All 610(FB): *Gokeda Latchurao v VBhimayya*, AIR 1956 AP 182]. However, other view does not allow the minor to avail any undue benefit hiding behind his infancy and is, therefore, ready to direct a minor even to pay compensation to the other party when the contract is avoided: [[47] *Khan Gul v Lakha Singh* ILR (1928) 9 Lah 701: AIR 1928 Lah 609]. This latter view is endorsed by the Indian legislature: See section 33 of the Specific Relief Act, 1963 (in force in India).

48 Reason lies in the fact that this would go against the minor person and negate the principle as laid down in Mohoribibee's case [*Atim Ali V Ashraf Ali* 11 DLR 185; *Raghava Chariar v Srini-vasa* (1916) 40 Mad 308: AIR 1917 Mad 630 (FB); *General American Insurance Co Ltd v Madanlal Sonulal*, (1935) 59 Born 656; *Thakur Das v Mt Pulti*, AIR 1924 Lah 611. *Ulfat Rai v Gauri Shanker*, (1911) 33 All 657; *Jaykant v Durgashankar*, AIR 1970 Guj 106]. If the contract is avoided even at the suit of an

It is submitted that provisions of the Contract Act applicable to the contracts made by minors cease to address all aspects comprehensively and so these are required to be reviewed.

3.2.1.2 Exception

The cardinal rule settled in Mohoribibee's case is subject to some exception. Broadly speaking, contracts that are generally beneficial[49] for a minor or for his "basic necessary"[50] or for his full enjoyment of the right to get employment ensured by statute[51] can be enforced by or against the minor.

It is to be noted that above principles stated about the contracts by or on behalf of a minor are applicable with necessary modifications to all contracts where one of the parties is incompetent according to section 11 of the Act to enter into a contract.

3.2.2 Free Consent

It is the second requirement for the validity of an agreement. A true contract requires the agreement of parties freely made with full knowledge and without any feeling of restraint[52]. Hence, section 10 of the Act entails the parties to an agreement to have not only "consent"[53]but also "free consent"[54]

---

innocent third party, the full benefit shall be restored to the minor [*Walidad Khan v Janak Singh* AIR 1935 All 370].

49 pLR (1960) (WP)73;11 DLR 185; 21 DLR (SC) 54; 20 DLR (WP) 101.

50 For example, section 68 of the Contract Act gives validity to a contract by a minor if the same is concluded for the supply of "basic necessary" to such minor person or his dependents. But the liability that arises under section 68 of the Act is not a personal one; it is the estate of a minor person that may be liable to be attached by the Court to provide pecuniary benefit to the other party. What is necessary is a relative fact, to be determined with reference to the fortune and circumstances of the particular person. The station in which he moves in; the difficulties he is exposed to; the benefits he is entitled to etc. are basic factors to be considered. Necessaries must be things which the minor actually needs. Objects of mere luxury cannot be necessaries, nor can objects which, though of real use, are excessively costly. For example, supply of food, cloths etc. may be termed as necessaries. So also a contract for medical or legal services. A contract by a minor widow to pay for her husband's funeral may fall under the same category: see Pollock and Mulla note 35 above, p. 177. As settled in *Nash V Inman* [1908] 2 KB 1. to render an infant's estate liable for necessaries "two conditions must be satisfied, (1) the contract must be for goods reasonably necessary for his support in his station in life, and (2) he must not have already a sufficient supply of these necessaries" and it is immaterial whether this fact is known to the other party or not.

51 See sections 34 and 44 of Bangladesh Labour Act, 2006.

52 Pollock and Mulla note 35 above, p. 158.

53 The term "consent" denotes that two or more persons agree upon the same thing in the same sense while entering into a contract: Section 13 of the Contract Act.

for the legality of the agreement.[55] Broadly speaking, consent of the parties is not deemed to be free if it is tainted by pressure, misleading representation or by factual variance without the knowledge of the parties and, therefore, the resulted agreement may sustain a degree of legal disability. This criteria is shown in the diagram below:

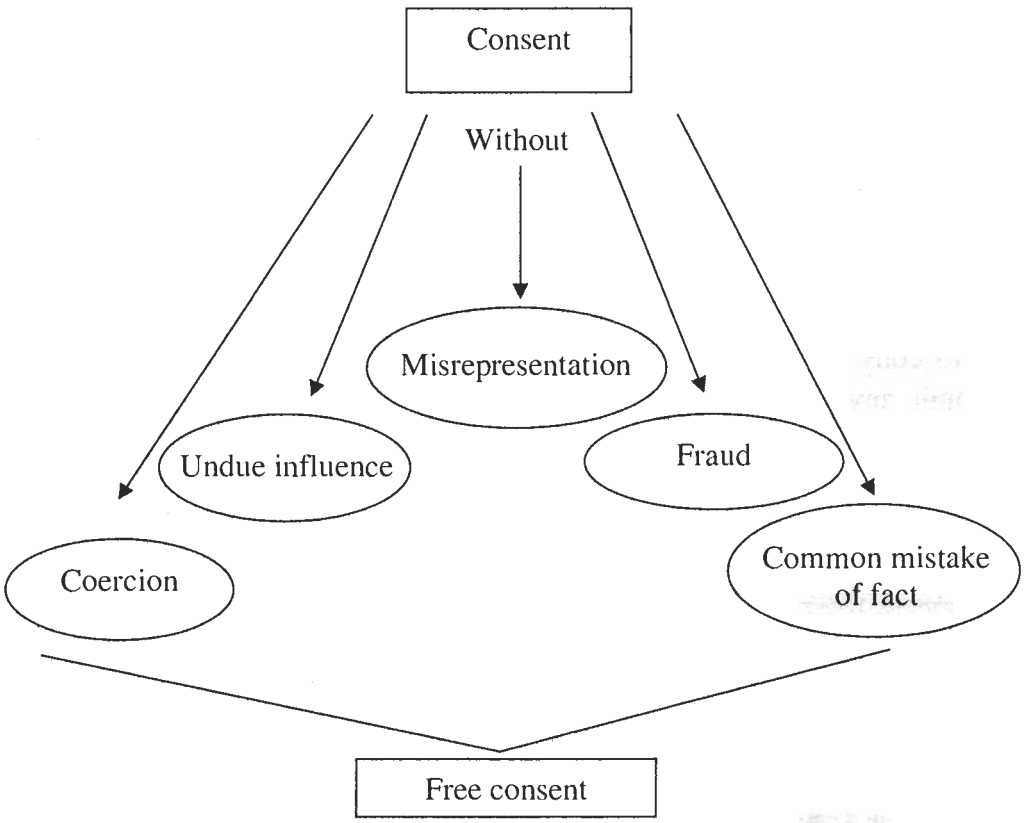

DIAGRAM 2

This criteria demands further clarification.

---

54 Section 14 of the Contract Act defines this expression and states that a consent to an agreement is not free if it is caused by coercion, undue influence, fraud, misrepresentation or mistake.

55 This proposition has been deduced having considered the provisions of sections 10, 13 and 14 of the Contract Act.

3.2.2.1 Consent Obtained Under Pressure

Some time parties to an agreement may be allowed to have the feeling of restraint in one way or other to give assent to such agreement against their will. The resulted agreement will not become a contract; rather it is categorized as a voidable contract which may be set aside at the option of the innocent party either on the plea of "coercion" or "undue influence"[56].

3.2.2.1.1 Coercion

Coercion involves exerting of pressure through the use of force or violence. Motive of the party resorting to use of force or violence is important. As section 15 of the Contract Act puts it, if a person, with an intention to cause another to get into a contract, (1) commits or threatens to commit any offence[57] or (2) unlawfully detain or threatens to detain any property, to the prejudice of that another, the person said to have committed "coercion".[58]

So to constitute coercion there must be the committing or threatening to commit any offence[59] or the unlawful detaining or threat to detain any property[60] to the prejudice of another[61]. Coercion involves actual or imminent use of force but for which the person so coerced gives his consent.

---

56 Sections 19 and 19A of the Contract Act entitle the innocent parties either to rescind the contract or seek compensation. See section 2 (i) of the Contract Act for the meaning of the term "voidable contract". See also section 29 of the Sale of Goods Act, 1930 to appreciate the effect of such contracts in case of sale of goods.

57 Section 15 of the Contract Act refers to the offences as defined by the Penal code, 1860.

58 Section 15 of the Contract Act.

59 Where in a case a bond was executed by a person while under custody by an order of a Court having no jurisdiction, it was held that the bond was not binding inasmuch as the same was executed under duress: [[59] *Banda Ali v. Banspat Singh*, 40 I.C. 352; (1882) 4 All 352. The Allahabad High Court in this case presumed that any confinement by a Court without jurisdiction is an unlawful detention which has fiercely been criticised: see Pollock and Mulla note 35 above, P. 204]. Same rule was applied to set aside a contract wherein a man forced his wife and son to give assent to a contract to transfer a piece of land by threatening to commit suicide: [*Amiraju v. Seshama* (1918) 41 Mad. 33; for English view on duress to person see *Barton v Armstrong* [1976] AC 104 (PC)].

60 Where a land attached by a Court belonged to a third party and such party deposited a sum with protestseeking release of the property, the payment was regarded to have been made under coercion: [[60] 17 CWN 541; 17 CLJ 478 PC].

61 1927 MWN 761.

Simple fear of criminal proceeding[62] or mere suspicion[63] may not be sufficient to avoid the contract on the ground of coercion.

Although traditionally "coercion" covers duress to person as well as property, it is very recent phenomenon that the judiciary has shown its inclination to another form of duress. Courts have accepted that a contract can be set aside where illegitimate commercial pressure is exerted by one party on another and this form is often referred as "economic duress"[64]. This is questionable how far the text of section 15 of the Contract Act (without any further amendment) can accommodate the concept of "economic duress"—a staggering truth for modern intricated trade relationship. However, the concept of "economic duress" has come under severe criticism[65].

3.2.2.1.2 Undue Influence

The concept of "undue influence" was introduced by the Court of Equity[66] to supplement the common law relief of "duress" or "coercion"[67]. This

---

62 *Noor Muhammad vs Abdul Sattar Jan*, PLD 1959 (Kar) 348; 22 A 224; (1900) 22 ,All. 224; (1882) Ptmj. Rec. No. 135.

63 29 B 149.

64 A contract may be avoided on the ground of economic duress if the commercial pressure alleged to constitute such duress that the victim must have entered the contract against his will, must have had no alternative course open to him, and must have been confronted with coercive acts by the party exerting the pressure. In *DSNB Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530, Dyson J formulated the criteria as requiring that the pressure or threat being applied should have the effect of producing a feeling of compulsion or lack of practical choice. For more cases from English law see *Pao On v Lau Yiu* Lon [1980] AC 614 (PC); *North Ocean Shipping Co. Ltd v Hyundai Construction Co. Ltd, The Atlantic Boron* [1979] QB 705; *Occidental Worldwide Investment Corp v Skibs A/S Avanti, The Siboen and the Sibotre* [1976] 1 Lloyd's Rep 293; for Indian approach see 50 M 786; 105 IC 5; 192 7 Mad 852; for American perspective see Williston on Contracts, 3rd ed., vol. 13 (1970), section 1603.

65 Atiyah severely criticised this concept of consent being vitiated by duress and considered that it was likely to lead to irrelevant inquiries into the psychological motivations of the party pleading duress [(1982) 98 LQR 197]; see also Smith (1997) 56 CLJ 343.

66 In about forteenth century the Court of Equity was established in Great Britain to give relief to those who had no remedy under common law: http://en.wikipedia.org/wiki/Equity_(law)#Development_of_equity_in_England visited on 14.01.09.

67 Under common law a contract could not be invalidated if consent to the contract was found to have been obtained against violence or a threat of violence the effect of which was to bring about a coercion of the will.[67] So a contract could not be set aside under common law although consent was obtained by undue pressure unless the element of violence was established. Therefore, Court of Equity, in order to ensure justice, started

equitable relief was replicated in the Contract Act promulgated in 1872 for the Indian Sub-Continent. According to the Contract Act a person is said to have exercised "undue influence" to obtain consent from another if:

(1) He is, because of existing relationship, stands in a dominating position towards another,

(2) Dominating party uses his position to dictate the will of the other and thus induces him to enter into a contract and

(3) The resulted contract is unconscionable which brings unfair advantage to the dominating party.[68]

The presumption of undue influence is applicable between two persons who are having a relationship existing and because of such rapport one person by default gets higher or dominating footing. A person is said to be in the dominating position if he can exercise authority (either real or apparent) over, or having fiduciary relationship with, the other.[69]

Although undue influence usually arises in fiduciary position,[70] but as between the strangers who may have no fiduciary relations, certain forms of coercion, oppression or compulsion may amount to undue influence[71] and it is immaterial whether the undue benefit squeezed out of the contract is had by the dominating party or a third party[72]. Accordingly, agreements executed by a pardanashin lady[73] or a poor and illiterate woman[74] or any

---

to invalidate contracts under the relief of "undue influence" in the cases where one party induced the other to enter into the contract by actual pressure without the presence of any violence or any threat thereof: See Treitel note 1 above pp. 405 and 408.

68 Section 16 (2) (a)-(b). In essence, if a person has some influence over another person and by means of that influence has reduced that will of that person to his subjection whatever may be the nature of the influence: spiritual, moral, social or any other influence and if the transaction is unjust then it is such coercion as is sufficient to constitute undue influence: [Bindu Mukhi V Sm Sarda Sundari 1954 6 DLR 97].

69 Section 16 (2) of the Contract Act.

70 Relationship that subsists between father and child, spiritual leader and his followers, physician and his patient, lawyer and his client etc. are the examples of fiduciary relationship and father, spiritual leader, physician and lawyer are deemed to have occupied the position of confidence and are in the dominating position: Pollock and Mulla note 35 above, Pp. 234-235.

71 *Bindu Mukhi V Sm Sarda Sundari* 1954 6 DLR 97

72 Pollock and Mulla note 35 above, P. 234. This ought to be noted that the wordings of section 16 of the Contract Act are not wide enough to afford relief to the innocent parties and hence responsive judicial interpretation is the last resort for the people with grievance.

73 *M/s Ithad Mills V Commisioner of Income Tax* 1969 21 DLR Karachi 325.

person under a threat of criminal proceeding are fit to attract the presumption of undue influence[75] and as such may be avoided by the party complaining[76]. But the relationship between mother and daughter was held to be not appropriate for the presumption of undue influence.[77]

3.2.2.2 Consent Induced by Misleading Statements:

In the pre-contract stage one party may make representation as to any matter relevant for the transaction inducing the other party to enter into an agreement. This information some time may appear to be misleading or untrue. The representee may, if he enters into an agreement placing reliance on such representation, be allowed[78] to rescind the same or get compensation on the plea of misrepresentation or fraud since the contract thus made is a voidable one.

3.2.2.2.1 Misrepresentation

One party, namely, the representor, may make false statement either innocently or negligently as to any material fact for the purpose of inducing the other party, i.e., representee,[79] to enter into an agreement and the representee gives his assent but for such inducement, the consent of the representee is obtained by what is known as "misrepresentation"[80].Section 18 of the Contract Act[81] while defining "misrepresentation" has been

---

74 *Mohammad Sheikh V Minuddin Sheikh* 1970 22 DLR 677.

75 *Purnendu Kumar Das V Hiran Kumar Das* 1969 21 DLR 918.

76 Section 19A of the Contract Act.

77 *Noah Chand Vs. Mst. Hossain Banu others; Noah Chand Vs, Fulmati Beva others* 6BLD(HCD)I 73; Ref: 33 I.A. 86; A.I.R. 1920(P.C.)65. It is to be noted here that the burden of proof lies in the first instances on the party who raises the plea of undue influence. If that party proves that the other party was not only in a position to dominate his will but that the transaction entered into was unconscionable, the burden of proof that the dominating party did not use his dominating position to obtain an unfair advantage over the other is shifted on to him: See section 16 of the Contract Act; see also *Bindu Mukhi V Sm Sarda Sundari* 1954 6 DLR 97; *Mohan Bashi Saha V United IndustrialBank* 1968 20 DLR 9.

78 See note 56 above.

79 Representees may be of three kinds: (1) Persons to whom the representation is directly made and their principals; (2) persons to whom the representor intended the representation to be passed on and (3) members of a class at which the representation was directed: See Pollock and Mulla above P. 254.

80 This may be the position of modern Common Law: Anson, Law of Contract 22nd Ed., 207sqq.

81 However, the wordings of section 18 of the Contract Act has fiercely been criticised being vague: See Pollock and Mulla note 35 above, Pp. 246, 257.

structured on the said principle of English law[82]. As the Contract Act puts it, following conducts of the representor, namely,

(1) A positive statement, although not true, but the representor believes it to be true, or
(2) any innocent failure or breach of duty which, in the first place, gains any benefit to the representor and, secondly, misleads the representee to his prejudice, or
(3) causing, however innocently, the representee to make a mistake as to the substance of the thing which is the subject of the agreement

constitutes "misrepresentation";[83] provided that any one of these things have been done as an inducement to cause the representee to enter into an agreement.

3.2.2.2.2 Fraud

According to English law a representor is guilty of fraud if he makes an ambiguous statement intending it to bear a meaning which is to his knowledge untrue, and if the statement is reasonably understood in that sense by the representee[84]. The Contract Act attaches same level like the English law while defining "fraud" in relation to contracts. An act is said to be fraudulent if the person alleged to have defrauded has deceptive mind. As section 17 of the Contract Act puts it, following acts, whereby to obtain consent from another to a contract is called "fraud":

(1) Any statement which the maker does not believe to be true,

(2) the active concealment of a fact by one having knowledge or belief of the fact ;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

As emphasised by Section 17 of the Contract Act, acts or omissions referred above shall not be regarded as fraud unless these are accompanied by deceptive mind[85]. However, the legal status of a contract induced by fraud

---

82 Pollock and Mulla note 35 above, P. 247.

83 In case of misrepresentation, a representee has two remedies open to him: (1) to elect to rescind the contract and to demand from the representor a complete restoration if that is possible; or (2) to affirm the contract and sue for damages: See sections 19, 39, 64, 75 etc. of the Contract Act. The representee to get any of the above remedies has to prove: (a) the language relied upon does import or contain a representation of some material facts; (b) the representation is untrue; and (c) the representee in entering into the contract was induced so to do in reliance upon it.

84 Treitel note 1 above, P. 337.

85 The principal difference between fraud and misrepresentation lies in the fact that in the one case the representor does not believe it to be true and in the other he believes it to

will be, like misrepresentation, voidable at the option of the representee[86] with the right of the representor to rely upon rule of caveat emptor[87].

3.2.2.3 Factual Variation Without Knowledge: Mistake

"Mistake" refers to an erroneous understanding of the parties concerned as to any matter essential for the agreement[88]. Mistake that vitiates consent to an agreement has to result from common or bilateral misconstruction of the factual matters.

Consent to an agreement may be affected by common mistake in either of the ways mentioned hereinafter and the agreement thus formed is a nullity being void[89]. In the first place, mistake may altogether defeat mutuality between the parties. It is at the root of every contract that the parties shall agree upon the same thing in the same sense[90] and this is often referred as true consent or consensus ad idem. If, for example, at the time of entering into a contract for sale of a specific ship, parties have got different ships in mind, they cannot be said to have agreed in the same thing in the same sense[91]. In the second place, mistake may not have the effect of defeating the object of the contract; rather it may mislead the parties as to the purpose which they contemplate. For example, parties have got into a contract without having any knowledge that, at the time of the contract, the subject-matter of the contract has been destroyed. Here parties have given consent but for the defective knowledge of the matter and hence consent is not deemed to have been given freely[92].

---

be true though in both cases it is a misstatement of fact which misleads the representee[85]

86 *Karnaphuli Paper Mills Ltd. V Amanullah* 1971 23 DLR 150.

87 See section 22 and exception to section 19 of the Contract Act. Under English law principle of caveat emptor shall not be available as a defence if the consent is obtained by fraud: See Poole note 7 above, P. 508.

88 Certain facts are essential to every agreement. They are: (1) the identity of the parties; (2) the identity and nature of the subject-matter of the contract; and (3) the nature and content of the promise itself: A. Singh: "*Principles of Mercantile Law*" India, (2000) P. 118.

89 See section 20 read with section 13 of the Contract Act.

90 Section 13 of the Contract Act.

91 *Raffles v. Wichelhaus* 2 H. & C. 906; 133 R.R 853. For a good survey on the mistake as envisaged in section 13 of the Contract Act, see Pollock and Mulla note 35 above, Pp. 183-197.

92 See section 20 of the Contract Act. Section 20 will come into operation if (1) both the parties are mistaken, (2) the mistake is as to a matter of fact and (3) the fact about which they are mistaken is essential to the agreement.

Two points need to be clarified: In the first place, above rules shall have no application to unilateral mistake. In case of unilateral mistake, one of the parties being under a mistake gives consent and hence the agreement cannot be avoided[93] on the ground of mistake. Secondly, bilateral mistake as discussed above shall relate to "matter of fact" as oppose to "matter of law". If the bilateral mistake is as to a matter of law in force in Bangladesh, this agreement, however, remains valid. But mistake as to any foreign law shall have same effect as mistake of fact[94].

3.2.3 Lawful Consideration and Object

It is the third mandatory requirement that an agreement shall be made with lawful consideration and the purpose of the agreement shall also be lawful. Seemingly, this requirement rather relates to the applied aspect of consideration. This may be recalled that Act requires the presence of three elements for the formation of an agreement, such as, proposal, acceptance and consideration.[95]However, such agreement shall enjoy the status of a contract only when the considerations supplied by the parties are legal. As section 23 of the Contract Act puts it, if the consideration or object of an agreement is not lawful, the agreement is void. Followings are the situations in which consideration or object is regarded to be unlawful:

(1) it is forbidden by law;
(2) it is of such a nature that, if permitted, it would defeat the provisions of any law;
(3) it is fraudulent;
(5) it involves or implies injury to the person or property of another; or
(6) the Court regards it as immoral, or opposed to public policy.

This may be apposite to mention here that a contract is an arrangement which creates obligations for the parties thereto and these are appropriate to be enforced by legal process.[96] This postulation entails that under a contract, in the first place, no one can enjoy any legal rights against an act done by him in an unlawful manner and, secondly, no one is subjected to undertake any obligation the performance of which will not be legal. Section 23 of the Act is constructed on the principle of public policy to effectuate this legal

---

93 Section 22 states this rule which encapsulates the principle of law of sale of goods, namely, "caveat emptor" (buyer be aware).

94 Section 21 of the Contract Act.

95 See para 2.2 above.

96 *Bangladesh Air Service (Pvt. Ltd. Vs. British Airways PLC* 49 DLR (1997) AD 187, para 27.

prescription[97]. Therefore, an agreement falls under section 23 is regarded as *void ab initio* precluding the parties thereto from claiming any legal remedies thereunder[98].

3.2.4 Agreements not Forbidden by Law

The forth and final mandatory requirement for the validity of an agreement is that agreement is not expressly barred by law. This may be recalled here that section 23 of the Act sets out, on the ground of public policy, some criteria which an agreement must satisfy to become a contract. Bar of section 23 shall have general application to all kinds of agreements. In addition to these generalise prohibition statutes may expressly regard agreement of specific category not to be legal. For example, the Contract Act has declared that certain types of contracts cannot be made lawfully. These are as follows:[99]

(1) Agreements in restraint of marriage,
(2) Agreements in restraint of lawful trade,
(3) Agreements in restraint of legal proceeding,
(4) Agreements having ambiguous meaning,
(5) Agreements by way of wager,
(6) Agreements contingent on impossible events,
(7) Agreements the performance of which has become either impossible or illegal, etc.

Although an agreement satisfies all first three conditions, namely, it is made between the competent parties with their free consent and it is made with lawful consideration and for lawful object, nevertheless the

---

A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement having made for illegal purpose cannot impose any lawful obligation upon the parties and as such law will decline to enforce the respective promises of A and B: [Illustration (h) to section 23 of the Contract Act; see also *Md. Joynal and others Vs. Rustam Ali Mia and others* 4BLD(AD)86; Ref: 21 DLR 918; 5DLR 114 and 338.

98 To bring any contract within the purview of section 23 this has to be shown that the contract is either unlawful or immoral or opposed to public policy: *Mohammad Irfan Sayed Vs. Mrs. Rukshana Matin and others* 16 BLD (AD)223; *Meherunnessa Khatun Vs. Abdul Lattif and another* 6BLD(AD)279 Ref: 31 DLR(AD) 155; 38 DLR(AD) 1; *S.M. Anwar Hossain Vs. Haft Abdul Malek and others* 5BLD(HCD)290 Ref: 17 DLR(SC)369: PLD 1965(S.C.) 425:28 DLR 238; 12 DLR 459; PLR (1960) 2 WP 602; 21 DLR (Peshawar) 313.

99 See Sections 26-30, 36 and 56 of the Contract Act.

agreement shall not become a contract if falls under any of the categories of agreement referred to in the present heading.[100]

3.3 Secondary or Supplementary Conditions

Apart from the four primary conditions as discussed in para 3.2 above, tatutes[101] state some further conditions for agreements to comply with and the provisions of the Contract Act are effective[102] subject to such statutory rules.

As this has been shown in this article that generally the Contract Act provides the procedure for the formation of contracts[103]. No particular form is prescribed by the Contract Act for the contracts to be made. However, this general rule is now subject to a number of exceptions imposed by statutes in force in the country. Following forms are found to have been prescribed by laws to make different types of contracts:

(1) Contract made in writing;
(2) Contract executed with proper stamp duty;
(3) Contract made by registered deed;
(4) Contract made in the presence of witnesses etc.

This is more or less obvious that if the statutory requirement is that the contract should be executed in a particular manner and that requirement is also mandatory, there cannot be the slightest doubt that either the document should be executed in that manner or not at all. If the contract is executed in violation of such requirement it is invalid.[104]

---

100 This should be noted that all of these agreements may not render the transaction illegal. Agreements in restraint of marriage, lawful trade, legal proceedings etc. may not have fatal consequence if the bargain is found to be reasonable. Whether or not any agreement is reasonable would be determined by the court having considered the circumstances.

101 The Negotiable Instruments Act, 1881; the Companies Act, 1994; the Procurement Act, 2006; the Bangladesh Labour Act, 2006; the Stamp Act, 1899;the Registration Act, 1908; the Transfer of Property Act, 1882, amongst other statutes, worth mentioning, that define forms for contracts.

102 As second paragraph of section 10 of the Contract Act puts it, "Nothing herein contained shall affect any law in force in Bangladesh, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."

103 In particular, the elements of a contract and the process for them to be combined so as to culminate into a contract.

104 PLD 1976 Lahore 1192; (1986) BLD 14; PLD 1981 Karachi 170; PLR 1958 Dacca 394; 1984 BLD 157. See also Sections 33 and 35 of the Stamp Act, 1899; section 49 read with section 17A of the Registration Act.

Process of forming a contract[105] is shown in the following diagram:

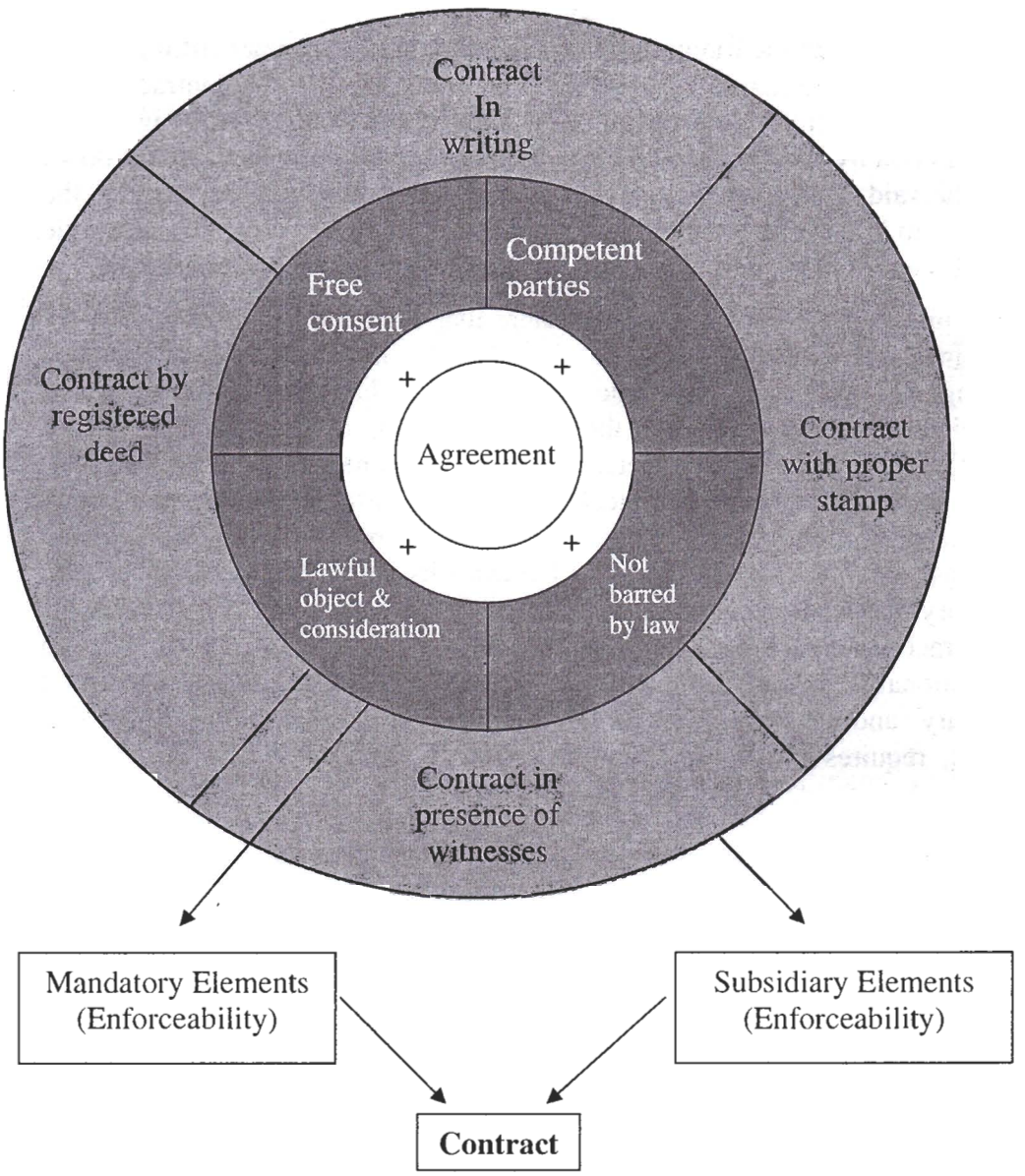

DIAGRAM 3

105 It is submitted that the process of making a contract as described in section 2 above has been endorsed by the High Court Division in James Finlay PLC Vs. Meshbahuddin Ahmed reported in 46 DLR (1994) 624, para 17.

4. Conclusion

It is evident from the foregoing discussion that law of contract enforceable in Bangladesh envisages a structure for entering into a contract. This framework carefully designed by the framers of the Contract Act ought to be understood by all concerned. Fair compliance of the procedure as laid down by the said framework to conclude a contract would certainly expose the parties to less disputes reducing the likelihood of being embroiled in hostile legal proceedings and would result in less disruption in the business.

It is indispensable to be mentioned here that since the promulgation of the Contract Act in 1872 we have witnessed, in the last one and half centuries, change in the socio-economic condition in the Sub-Continent which precipitated drastic change in thoughts and beliefs of people, their mutual relationship, trading pattern etc. making the commercial transactions very intricated. Advancement of technology added a new dimension to such intricated trading process. But it is surprising to note here that the Contract Act as in force in Bangladesh, so far from its commencement in nineteen century, has undergone no basic changes. Hence, prescription given by the Contract Act regarding entering into a contract, as a whole, does not seem to be rational at all and is not suitable for trading in the reality of twenty-first century and hence the Contract Act as mentioned in several places of this work, requires massive and comprehensive overhauling.

The Dhaka University Studies, Part-F Vol. XIX (2) : 183-220 , December 2008

EXAMINING THE RELEVANCE AND VALIDITY OF SHARECROPPING UNDER ISLAMIC LAND LAW

Mohammad Azharul Islam*

1. Introduction

Islam, a complete code of life as perceived and believed by the Muslims, provides detailed guidelines to human being from the very beginning of his life to death. It embraces each and every sphere of one's life namely individual, familial, social, national and international. Though Prophet Muhammad (PBUH) was sent in a desert Islam infallibly depicts a coherent picture which offers the principles and rulings regarding agriculture in a vivid manner. The scheme of Islamic Land Law is so practical in its approach that it supports different forms of cultivation. However, different juristic views exist in this field which necessitates a consolidated picture of agricultural policy based on the true spirit of the Qur'an and Sunnah. Different parts of the current world especially Muslim countries are facing a crucial problem as to their land management. For this, the most serious obstacle, as one eminent author observes, to the realization of *maqasid*[1] is the existing concentration in ownership of means of production in Muslim countries, as it is in all market-economy countries and he continues to say that unless this situation is corrected through the adoption of certain radical measures permissible within the framework of the ***Shariah***[2], it will not be

---

* Lecturer, Department of Law, University of Dhaka.

1 The Arabic word *maqasid* (sing. *Maqsid)* literally implies the higher purposes or objectives or intents. This term is commonly & recurrently used alone to refer to the higher objectives or end goals of Islamic Law in general, that is, *maqasid al-Shariah.* It may also be referred to as the spirit of the law and its guiding principles. The terms *maqasid alShari* (the higher objectives of the Lawgiver), *maqasid al-Shariah* (the higher objectives of Islamic Law), and *al-maqasid al-shariyyah* (legal objectives) are all terms which are used interchangeably. See Author's Preface on the Meaning of Maqasid and the Theory of Higher Objectives, Raysuni, Dr. Ahmad Al, *Imam Al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law,* The International Institute of Islamic Thought, Herndon, 1st edition 2005. Though Abu Ishaq al- Shatibi, the father of the discipline *'Maqasid al Shariah'* didn't define the term in his book *al-Muwafaqat* Ibn Ashur took pain to define the same in his noted book *Maqasid al-Shariah al-Islamiyah* (p. 50) in the following way: "The general objectives of Islamic Law are the meanings and wise-purposes on the part of the Lawgiver which can be discerned in most or all of the situations to which the Law applies such that they can be seen not to apply exclusively to a particular type of ruling. Included here are the occasions for the Law's establishment, its overall aim, and the meanings can be discerned throughout the Law. It otherwise includes objectives which are not observable in all types of rulings, although they are observable in many of them."

2 The very term *'Sharia'* means way, road or path to the watering place. *The Concise Encyclopedia of Islam* (Glasse 1989, p. 361) defines the term *Shariah* as follows:

possible to make the perceptible progress in realising the egalitarian goals of Islam.[3] In order to ensure '*adl*'[4] in all the Muslim countries eradication of poverty through proper land management especially reforming the existing land management in the light of Islamic *Shariah* is one of the most crucial issues faced by the current *ummah.* Considering this issue M. Umer Chapra[5] has rightly observed:

> Given the flagrant inequities that now exist, land reform is not an option which the government may or may not consider seriously. If a meaningful land reform is not implemented, it will come ultimately through a violent revolution. Historical experience shows that when such revolutions take place, all ethical values get trampled. Landlords may in this case lose not only their lands through expropriation but also other belongings and indeed their lives. It would hence be in their own larger, long-term interest to strive voluntarily for just land reform.[6]

In the arena of land reform, terms of tenancy as a factor is worthy of great consideration for the existence of different juristic views regarding its nature. One renowned author has rightly observed:

> While the objectives of establishing justice between the landlord and the tenant remains undisputed by the *fuqaha* of all schools of Muslim jurisprudence, the

---

"Revealed Law, also called al Shariah. The canonical law of Islam as put forth in the Koran and the Sunna and elaborated by the analytical principles of the four orthodox schools (*madhhab*=pl. *madhahib*), the Shafii, Hanbali, Hanafi, and Maliki, together with that of the Shiites and the Jafari. See for details Abdelkader, Deina, *Social Justice in Islam,* The International Institute of Islamic Thought, Herndon, 1st edition 2000, pp. 44-45.

3 Chapra, M. Umer, *'Islam and the Economic Challenge'* The International Institute of Islamic Thought, Herndon and The Islamic Foundation, Nairobi, Kenya and Kano, Nigeria, 1st edition, 1992, p.263. See also Chapra, M. Umer, *Islam and the Economic Development*, The International Institute of Islamic Thought and Islamic Research Institute Islamabad, Translated into Bangla as *Islam O Arthanaitik Unnayan* by Ahmed, Dr. Mahmood, The Bangladesh Institute of Islamic Thought, Dhaka, 1st edition 2000, p.99.

4 The very word *'adl'* is used to place something in its rightful place; it also means according equal treatment to others or reaching a state of equilibrium in transactions with them *(al-taswiyah fil-muamalah). 'Adl'* (also *'adalah)* thus signifies moral rectitude and fairness since it means that things should be where they belong. See Kamali, Mohammad Hashim, *Freedom, Equality and Justice in Islam*, Ilmiah Publishers, Kuala Lumpur, reprint of the revised edition 2002, p.103.

5 Dr. Muhammad Umer Chapra is Economic Advisor to the Saudi Arabian Monetary Agency, Riyadh. He has published widely on Islamic economics and finance. His most outstanding and widely acclaimed work is *Towards a Just Monetary System,* published by the Islamic Foundation in 1985. For his various contributions to Islamic economics and finance he received in 1990 the Islamic Development Bank award in Islamic Economics and the King Faisal International Award in Islamic Studies.

6 See n. 3, *'Islam and the Economic Challenge'* p. 268 and *'Islam and the Economic Development'* p.103.

nature of land tenancy has been one of the most controversial issues in *fiqh* literature.[7]

In this study, we, with a view to building up a strong land management system, will discuss one of the most significant but controversial issue i.e. sharecropping as we feel it very necessary in this complex era of time to reach into a concrete solution regarding the sharecropping and for this reason we have to follow a special methodology. The main objective of this article is to shed light on few issues namely (i) whether sharecropping is allowed under Islamic Land Law or not? (ii) if allowed, which type of sharecropping is permitted? (iii) whether the practice of sharecropping was prohibited by Prophet (PBUH) or not? (iv) if not prohibited by the Prophet (PBUH) which traditions can be cited in favour of the permissibility of the sharecropping? (v) if permissibility of sharecropping is proved from those a*hadith* how those traditions mentioning the prohibition of sharecropping would be interpreted? (vi) how the jurists analyzed the traditions relating to sharecropping? (vii) lastly, on the basis of the above discussion and analysis we would make an attempt to reach a conclusion regarding sharecropping. For this purpose, we have focused on the various provisions of the Holy Qur'an, the Sunnah of the Prophet (PBUH) the practices of His Companions and the juristic principles and last but not least our reasoning.

2. Land Ownership and Land Policy in Islam

The Qur'an does not mention anywhere man's ownership of land as being part of one's wealth. [8] However, the Qur'an does not prohibit individual ownership of land which was subsisting from time immemorial and at the same time it does not promulgate any particular ruling regarding this matter specifically even not with any single implication.[9] Maududi reasserts that Islam didn't modify the existing *urf*[10] regarding ownership i.e. the

---

7 See n.3, *'Islam and the Economic Challenge'* p.266 and *'Islam and the Economic Development'*, p.101.

8 Haq, Irfan Ul, *Economic Doctrines of Islam, A Study in the Doctrines of Islam and Their Implications for Poverty, Employment and Economic Growth,* The International Institute of Islamic Thought, Herndon, 1st edition 1996, p. 162.

9 Maududi, Sayyid Abul A'la, *Mas'alah Milkiyyat-e-Zamin(Rules regarding the Ownership of Land)* translated from Urdu into Bangla as *Bhomer Malikana Bedhan,* by Majumder, A. B. M. A. Khaleque, Adhunik Prokashani, Dhaka, 2nd edition, 1996, p. 19.

10 The very Arabic word *'urf'* has been derived from the root word *'arafa'* which means to know. In literal sense, *'urf'* means 'that which is known'. In its primary sense, it is the

individual ownership was in vogue from time immemorial.[11] Moreover, he based his logic on the principle that tacit approval in favour of a custom establishes its continual validity.[12] It is one of the well established rules of *'usul al-fiqh'*[13] that custom which is not contrary to the principles of *Shariah* is valid and authoritative; it must be observed and upheld by a court of law.[14] Al-Suyuti, the eminent Shafii jurist mentioned a legal maxim in his reputed work *al-Ashbah wa al-Nazair*, in the following way: 'What is proven by *urf* is like that which is proven by a *shari* proof.'[15] The prominent Hanafi jurist al-Sarakhsi also recorded this and subsequently this ruling was adopted in the Ottoman *Majallah*[16] which provides that custom, whether general or specific, is enforceable and constitutes a basis of judicial decisions.[17]

---

known as opposed to the unknown, the familiar and customary as opposed to the unfamiliar and strange. To the majority scholars, usually the words *'urf'* and *'adah'* are synonymous though some draws distinction between them. Dr. Mohammad Hashim Kamali defined 'urf' as 'recurring practices which are acceptable to people of sound nature.' For details see Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, Revised edition, 1991, pp.283-296.

11 See n. 9.

12 Ibid, p.18. Maududi in his another book shows the evidences of recognition of private ownership within the bounds determined by Allah (SWT) and in this respect he cites the following Quranic verses Al-Baqara 2:261,275,279,282,283 An-Nisa 4:2,4,7,20,24,29, Al-Maeda 5:38, Al-Anaam 6:141, Al-Tawba 9:103, Al-Noor 24:27, Ya-Seen 36:71, Adh-Dhariyat 51:19, As-Saff 61:11. For details see, Maududi, Sayyid Abul A'la, *Qur'an Qi Ma'ashi Ta'limat* translated from urdu into Bangla as *Al Quraner Orthonaitic Nitimala(Fundamentals of Economics in the Qura'n)* by Naseem, Abdus Shaheed , Shotabdi Prokashoni, Dhaka, 1st edition, October, 2000, pp. 8-13.

13 *'Usul al-fiqh'* (*'Asl'* is singular whereas *'usul'* is plural; it denotes origin, source, foundations, basis, fundamental, or principle) or the bases or the roots of Islamic law, expound the indications and methods by which the rules of *fiqh* (the detailed Islamic Law) are derived or deduced from their sources. Thus, in this sense *usul* is the methodology and *fiqh* is the product. For details see Hannan, Shah Abdul, *Law, Economics and History*, The Printmaster, Dhaka, 1st edition, June, 2003, p. 10. See also n. 10, p. 1.

14 See n.10, p. 284.

15 Ibid.

16 Al Majallah, the Ottoman Civil Code was prepared between 1868 and 1876. It was prepared on the perspective of the Hanafi School of Jurisprudence but it followed a Napoleonic form. Its full title is *Majallat-I Ahkami Adliye*, the Book of Rules of Justice. It is treated as the first and last Civil Code of the Islamic Legal History. It had been enforced until the destruction of the Ottoman Caliphate. See Sait, Siraj, and Lim, Hilary

Another author expresses the same thing in the following manner:

> Since the Quran is silent on the ownership of land *per se* (as opposed to *amwal*[18] which man owns) it can be argued that the matter has been left to the historical tradition of legality of owning, buying and selling land as well as to the discretion of society and its government. At the time the Prophet came to Madinah, land was held individually as well as communally. For instance, pastures for grazing livestock were generally considered community property.[19]

He goes on saying that as head of the state, the Prophet did not interfere with the existing land holding structure because there was no reason to do so.[20] Nonetheless, he declared goods like inland water resources, forests and soil resources, wildlife, and sub-soil resources like mines minerals and fossil fuels as public property and prescribed rules for their proper administration and management.[21] He also promulgated the principle that the first right of ownership of land was to lie with the Islamic state and then with the individual.[22] For this reason, one author concluded that the Islamic State has overall proprietary rights in land and can grant ownership rights as well as prescribe the highest tenure in the greatest interests of the society.[23] It is evident from the practices of the Prophet (PBUH) and His Rightly Guided Caliphs.[24]

Thus, under Islamic theory, land is seen as a sacred trust for human beings and should be put to continuous productive use.[25] However, excessive exploitation and hoarding of land are prohibited.[26] Islamic property rights are conditional on the requirement that property not be used wastefully or exploitatively, or in a way that will deprive others of their justly acquired property.[27] Islam is against those who accumulate property for the purpose of greed or oppression as well as those who gain through unlawful business

---

Land, Law and Islam Property and Human Rights in the Muslim World, Zed Books Limited, 1st edition, London, 2006, p. 229.

17 See n.10, p.284.

18 This Arabic word implies wealth, property or possession.

19 See n. 8.

20 Ibid.

21 See n. 8, pp.135 & 162.

22 See n. 8.

23 Ibid.

24 Ibid.

25 See n.16, p. 11.

26 Ibid.

27 Ibid.

practices.[28] These Islamic principles contribute to a distinct framework shaping categories of land tenure and usufruct rights that are capable of giving rise to flexible and creative arrangements for access to land.[29]

3. Cultivable Land and its Use

Islamic Law of Land enjoins Muslims to ensure the optimum utilization of land. If the Muslim owns a piece of cultivable land, as Qaradawi puts, he must make use of it by planting crops or trees.[30] Anas bin Malik narrated that Allah's Apostle said, "There is none amongst the Muslims who plants a tree or sows seeds, and then a bird, or a person or an animal eats from it, but is regarded as a charitable gift for him."[31]

It is not consonant with Islam, Qaradawi continues, that such lands not be used for cultivation, as this is tantamount to rejecting the bounty of Allah and wasting wealth, which the Prophet (peace be on him) prohibited.[32] To Qaradawi, there are few approved methods of cultivation of land which are available to its owner under the *Sharia* namely a) cultivating the land himself, b) lending the land to others for cultivation, c)taking a proportion of the crop and d) renting the land for gold or silver.[33] In order to eliminate feudalism and consequently absentee landlordism the Prophet (PBUH) prescribed certain methods of cultivation i.e. to cultivate the land himself; to lend to others for cultivation on the basis of prefixed percentage share of the total produce; or to lend the land free of charge to someone who wants to cultivate it.[34]

---

28 Guner, O. '*Poverty in Traditional Islamic Thought: Is it Virtue or Captivity?'*, Studies in Islam and the Middle East, Vol 2 (1) 2005, p.4

29 See n. 16.

30 Qaradawi, Yusuf al, The Lawful and Prohibited in Islam. Chapter 4: The Halal and the Haram in the Daily Life of the Muslim, Section 2: Business Transactions, The Use of Cultivable Land. Retrieved from http://www.witness-pioneer.org/vil/Books/Q_LP/ch4s2pre.htm# The%20Use% 20of% 20Cultivable%20Land.accessed on April 24, 2010.

31 *Sahih Bukhari,* Vol. 3, Book 39: Agriculture, Hadith no. 513. The English translation of all the ahadith of *Sahih Bukhari* mentioned in this write up are adopted from the *Sahih Bukhari,* English Translation, Khan,M. Muhsin, retrieved from http://www.usc.edu/schools/ college/crcc/ engagement/ resources/texts/ muslim/hadith/bukhari/ accessed on May 20, 2009.

32 See n.30.

33 Ibid.

34 See n. 8, pp. 162-163.

The first and last methods of cultivation find its authority in the tradition narrated by Jabir. He mentioned that the people used to rent their land for cultivation for one-third, one-fourth or half its yield. The Prophet said, "Whoever has land should cultivate it himself or give it to his (Muslim) brother gratis; otherwise keep it uncultivated." Abu Huraira also narrated that Allah's Apostle said, "Whoever has land should cultivate it himself or give it to his (Muslim) brother gratis; otherwise he should keep it uncultivated."[35]

The second method of cultivation is established "firstly by a contract made by the Prophet with the people of Khaibar[36] and secondly by his permitting of temporary share-cropping arrangements that were made between the numerous emigrants and the landed Helpers in Madinah".[37]

Before going into the deep analysis of the above-mentioned issues we would like to clarify the definition of sharecropping.

4. Towards Defining Sharecropping

Before the advent of Islam the people of Arabs used to practise five types of sharecropping.[38] These forms of sharecropping are: a) *al-muhaqalah*[39] (lease of land for food); b) *al-mukhabarah*[40] (lease of land against a certain part of

35 *Sahih Bukhari* Vol. 3, Book: 39 Agriculture, Hadith No: 533.

36 Khaibar (sometimes spelt as Khayber) was a spacious strongly fortified territory, studded with castles and farms, lying at a distance of 60-80 miles north of Madinah. Now a day, it is a village which is known for its uncongenial climate. See Mubarakpuri, Safiur Rahman al, *Ar Raheeq Al-Maktoom* (The Sealed Nectar) translated from Urdu into English by Diab, Issam, Maktaba Dar-us-salam, Saudi Arabia, retrieved from http://www.witness-pioneer.org/vil/Books/SM tsn/ch6s2.html accessed on December 07, 2010.

37 See n. 8, p. 163.

38 Hassan, Abdullah Alwi Haji, *Sales and Contracts in Early Islamic Commercial Law*, Kitab Bhavan , New Delhi, 1st Indian edition 1997, Reprinted 2006, p.98.

39 It was a form of landholding (*metayage)* of the Arabs in pre-Islamic times. In this contract, landless tillers or cultivators (*metayers)* took arable lands from individual landlords, tribes or religious institutions, on the basis of lease against food, grain or corn, in kind or against certain parts of the produce of land. This form of sharecropping was in vogue among the people of the northern and southern parts of the Arabian Peninsula. This contact of tenure was known as *al-qarah* or *al-muzara'ah* among the ancient Iraqis. The Prophet (PBUH) is reported to have prohibited this type of transaction. Adapted with slight modifications from note n. 37, p.99. The same author also mentioned (p. 216) that the term *al-muhaqalah* applies to exchange the grain still in the ear which was prohibited by the Prophet (PBUH), because of *gharar* or deception in it.

40 This term is derived from *Khubrah,* meaning a knowledge of wells or agriculture which implies cultivation. Usually it is used to denote a lease of land for a share of its

its produce); c) *al-muzara'ah* (lease of "white" or bare land for a certain part of its produce; *metayage,* sharecropping); d) *Kira' al-ard*[41] (lease or rent of land, against its produce, a fixed sum of money, or in kind); and e) *Al-musaqat*[42] (lease of a fruit tree, or an orchard for irrigating, fecundating and protecting fruit trees for a certain share of the fruit).[43]

The jurists begin with an analysis of the term *muzara'ah* and discuss whether its grammatical form implies work by both partners, when in practice only one person does the work.[44] Al Kasani, an eminent Islamic scholar has verified the use of the term and quoted a number of other terms that have similar grammatical forms, but involve work from one side. One of the such words is *mu'alajah*(treatment), where it is the physician alone who

---

produce. To Imran Ahsan Khan Nyazee, this is another name for the contract of *musaqah* derived from the transaction with the Jews of Khayber. *Musaqah* has been interpreted by him to mean a contract for the watering of tress between the owner of land and a worker on the condition of sharing the produce. This form of contract was in vogue in pre-islamic Arabia. To support the derivative meaning, Ibn Hazm and al-Zurqani do not agree with other scholars who interpret that the meaning of *al-mukhabarah* originates from Khayber. The Prophet (PBUH) is reported to have banned such practices. See Nyazee, Imran Ahsan, *Islamic Law of Business Organisation Partnerships*, Kitab Bhavan , New Delhi, 1st Indian edition 1999, reprinted 2006, p. 337.

41 The term has been defined by Imam Malik as lease of land against wheat from the produce or others. People of pre-islamic Arabia used to practise such kind of contract. There were several disagreements which arose out of such tenure because it amounted to an agreement which resulted in an unknown share of produce. The Prophet (PBUH) is reported to have prohibited renting out fields, and he prohibited the contract of *kira' al-mazari* or *kira al-ard.* In another tradition, The Prophet (PBUH) is reported to have prohibited such a contract of leasing land against some of its produce but allowed it if it was against gold or silver. Extracted from note 38, pp. 99-100.

42 The very word *al musaqat* is a verbal noun derived from *saqa (s.q.y.),* to water, or irrigate a land. It implies that the essential element of the total process of production was constituted by the method of agriculture irrigation. It is said to form the major part of the investment and expenditure. This form of cultivation is valid, even in the case of rain-water being available, inspite of having no need for artificial irrigation. In this case, other expenses take the place of watering *(saqy).* Iraqis called it *al-muamalah.* This contract concentrates on sharecropping of fruit (fruit *metayage*) only. This type of land tenure was widely practised in the former provinces of the Byzantine and Sassanian Empires. The Prophet (PBUH) entered into the contract of *al-musaqat* at Khayber, with half share of the produce. See n. 38, p.100.

43 Ibid.

44 Al-Kasani, Abu Bakr ibn Mas'ud, *Bada'i al-Sana'i fi Tartib al-Shara'I*, vol. 8, Cairo, 1968, p. 3807; al-Marghinani al-Rushdani Burhan al-Din, Ali ibn Abu Bakr ibn 'Abd al-Jalil al-Farghani, *al-Hidayah Sharh Bidayat al-Mubtadi*, vol. 4, Cairo, 1948, p. 53; al-Zaylai, *tabyin al-Haqaiq,* vol. 5, p. 278, mentioned in n. 40, p. 277.

is doing the work.[45] Some scholars also made recourse to compare the term *muzara'ah* with the term *mukhabarah* with some considering them similar, while others maintained a distinction on the basis of who supplies the seed needed for sowing.[46] Few Jurists advanced their argument by saying that *mukhabarah* was the name of the arrangement undertaken with the people of Khaibar.[47]

In technical sense, it implies a contract for cultivation of land in return for part of the produce in accordance with the conditions stipulated by law.[48] The *Majallah,* in section 1413, defines that *Muzara'ah* is a type of partnership with land contributed by one party and work by another-that is, the land is cultivated and yield is shared by them.[49] *Muzaria,* as an eminent author says, implies a sort of collective farming, i.e. leasing a land to a cultivator on the basis of partnership in the yield.[50]

Thus, sharecropping may be defined as a system of agriculture or agricultural production in which a landowner allows the agricultural labour to utilize the land in return for a share of the produce produced on the land. In *muzara'a* owner of the land provides his land and the agricultural labour (ajir or aamil or tenant or cultivator) worked on it and the agricultural production is divided between them in a pre decided ratio.[51] This partnership agreement may be in different forms, depending upon the terms and conditions set by *Fuqahas*[52].[53] The common point in all of its form is that,

---

45 Ibid.

46 See n. 40, pp. 277-278.

47 Ibn Qudamah, Muwaffaq al-Din Abu Muhammad 'Abd Allah ibn Ahmad ibn Muhammad, *al-Mughni fi Fiqh Imam al-Sunnah Ahmad ibn Hanbal al-Shaybani*, Al-Matba'ah al-Salafiyah wa-Maktubatuha, Cairo, 1962, vol. 5, p. 417. See n. 40, p. 278.

48 Al-Zayla'i, *Tabyin al-Haqaid,* vol. 5, p. 278; Al-Kasani, *Bada'i al-Sana'i*, vol. 8, p. 3807; al-Marghinani, *al-Hidayah*, vol. 4, p. 53; Ibn Qudamah, *al-Mughni*, vol. 5, p. 417. See n. 40, p. 278.

49 *Majallat al-Ahkam al-Adliyah,* § 1431, see n. 40, p.278.

50 Amini, Prof. Maulana Mohd. Taqi, *The Agrarian System of Islam*, Translated by Ali, Syed Ahmad, Idarah-i-Adabiyat-I Delhi, 1st edition, p. 160.

51 Malik, B. Uns, *Al Mudavanant-ul-Kubra,* Khairia, Egypt, 1935, p. 26.

52 The very word *Fuqaha* is the plural form of the word *Faqih*. The person who is well versed in *Fiqh* or Islamic Jurisprudence is termed as *Faqih*. In English, it can be translated as jurist. The *Faqih* or *Mujtahid* must be a Muslim and a competent person of sound mind who has attained a level of intellectual competence which enables him to form an independent judgment or *ijtihad*. The earliest complete account of the qualifications of a *mujtahid* is given in Abul-Husayn al-Basri's *al-Mutamad fi Usulal-Fiqh* which was accepted by al-Shirazi (d. 467/1083), al-Ghazali (d. 505/1111) and al-

landlord must have a share in agricultural production. This share may be different in different types of agreements.[54] It is noteworthy to mention that Malikis do not assign the same connotation to *muzara'ah* as is done by the Hanafis and Hanbalis.[55]

Sharecropping is broadly classified into two categories namely i) Fixed Sharecropping and ii) Variable Sharecropping.[56] In fixed sharecropping, the amount of the crop to be paid to the holder of right on the land is fixed. This is almost like lease. The distinction is one of time and kind. The fixed sharecropping ensures the owner of the land of the loss arising out of the failure of the crop for various reasons like bad weather, ravages of nature, irregularity of plantation, under-cultivation etc.[57] In variable sharecropping, the proprietor does get a fixed proportion rather than a fixed quantum of the crop raised. The earning of the proprietor would vary according to the variation of the yield.[58]

5. Testing the Validity of Sharecropping

In order to determine the validity of sharecropping either fixed or variable or both we have to focus on the Sunnah of the Prophet (PBUH) in the absence of any explicit provision in the Qur'an relating to sharecropping.

5.1 *Ahadith* Prohibiting the Sharecropping

Firstly we will focus on those *ahadith* of which thorough readings reveal the idea that *Shariah* allows a person to own such amount of land which he can

---

Amidi (d. 632/1234). These requirements are: a) He must have a good knowledge of the Arabic language. b) He must be knowledgeable of the Qur'an and the Sunnah and related subjects. c) He must be generally knowledgeable of the *Ijtihad* carried out by previous scholars. d) He must know the *Maqasid* of Shariah. And e) He must be an upright person and capable of distinguishing between a strong and a weak evidence. We think it will be exaggeration to classify jurists here. For details see, n. 10, pp. 374-377. See also, n.13, p. 68.

53 Siddiqi, M.N. *Islam Ka Nazria-e-Milkiat*, Islamic publications Ltd. Lahore, 1968, Vol. 1, pp.185-186.

54 Haque, Zia-Ul *Landlord and Peasant in Early Islam,* Islamic Research Institute, 1977, p.9.

55 Muhammad 'Ulaysh, *Taqrirat ala al-sharh al-Kabir* on the margin of al Dasuqi, *Hashiyah,* vol. 3, p. 372. See n.39, p. 278.

56 Alam, Shamsul *Islamic Thoughts,* Islamic Foundation Bangladesh, Dhaka, 1st edition, August, 1986, p. 834.

57 Ibid.

58 Ibid.

cultivate himself and in order to execute this *Shariah* has prohibited sharecropping.[59]

Maududi asserts that only six companions of the Prophet (PBUH) transmitted the *hadith* relating to the prohibition of sharecropping. They are: (i) Rafi bin Khadij (Allah be pleased with him) (ii) Jabir bin 'Abdullah (Allah be pleased with him) (iii) Abu Huraira (Allah be pleased with him) (iv) Abu Sa'id al-Khudri (Allah be pleased with him) (v) Zayd bin Thabit (Allah be pleased with him) and (vi) Thabit bin. Dahhak (Allah be pleased with him).[60]

Now we shall examine the *ahadith* (plural of *hadith)* transmitted by the above companions in details. Most of the *ahadith* relating to the prohibition of sharecropping has been narrated by him. Among them, we will discuss few *ahadith.*

Firstly, Rafi bin Khadij (Allah be pleased with him) reported that they used to give on rent land during the lifetime of Allah's Messenger (may peace be upon him). They rented it on the share of one-third or one-fourth of the (produce) along with a definite quantity of corn. One day a person from among his uncles came to them and said that Allah's Messenger (May peace be upon him) forbade them this act which was a source of benefit to them, but the obedience to Allah and to His Messenger (may peace be upon him) is more beneficial to them. He forbade them that they should rent land with one-third or one-fourth of (the produce) and the corn of a measure, and he commanded the owner of land that he should cultivate it or let it be cultivated by other (persons) but he showed disapproval of renting it or anything besides it.[61]

The other *hadith* narrated by Rafi bin Khadij in a more explicit manner clarifies the fact of prohibition. He narrated that his uncle Zuhair said that

---

59 See n. 9, p. 45.

60 Ibid.

61 *Sahih Muslim,* vol. 3, Book: 10 The Book of Transactions (Kitab Al- Buyu) , Chapter 18: Renting of Land for Food, Hadith no. 3742. See also Hadith nos. 3743 and 3744. The English translation of all the ahadith of *Sahih Muslim* mentioned in this write up are adopted from the *Sahih Muslim,* English Translation, Siddiqui, Abdul Hamid , retrieved from http:// www.usc.edu/schools/ college/crcc/ engagement/resources/texts/ muslim /hadith/ muslim/ accessed on May 20, 2009. See also *Sunan Ibn-i-Majah,* Imam Abu Abdullah Muhammad B. Yazid Ibn-i-Maja Al-Qazwini, English version by Muhammad Tufail Ansari, Published by Kitab Bhavan, New Delhi, Third Edition: 2005, Vol. III, Book 16: The Book of Mortgages (Security Deposits) (Kitab-ur-ruhun), Chapter No. X: Muzara'a That is Undesirable, Hadith No. 2460, p. 456.

Allah's Apostle forbade them to do a thing which was a source of help to them. He [Rafi] said that Whatever Allah's Apostle said was right. He said that Allah's Apostle sent for him and asked, 'What is he doing with his farms?' He replied that they give their farms on rent on the basis that they get the yield produced at the banks of the water streams (rivers) for the rent, or rent it for some Wasqs[62] of barley and dates. Allah's Apostle said, 'Do not do so, but cultivate (the land) yourselves or let it be cultivated by others gratis, or keep it uncultivated.' He said, 'We hear and obey.' [63]

He further narrated that they worked on farms more than anybody else in Medina. They used to rent the land and say to the owner, "The yield of this portion is for us and the yield of that portion is for you (as the rent)." One of those portions might yield something and the other might not. So, the Prophet forbade them to do so.[64]

Jabir bin Abdullah (Allah be pleased with them) is also vocal regarding the prohibition of sharecropping. He reported that Allah's Messenger (may peace be upon him) have forbidden Muhaqala, and Muzabana, and Mukhabara,

---

62 Wasaq was a volumetric measure. A Wasaq was equal to 60 measures of a Sa'. See http: www.baitulmaal.org/us/about/-zakat accessed on December 08, 2010. Sa' mentioned in different *ahadith* is a dry measure that is equal to about 3260 gram according to the scholars of Hanafi school of thought, and 2172 gram in the opinion of scholars of other schools of thought. The very reason of differences of opinion among the scholars lies in the very fact that people of different regions who sold dry substances used measuring vessels different in their volume. See http:// umma.ws/questions/zakiatul accessed on December 9, 2010.

63 *Sahih Bukhari,* Vol. 3, Book 39: Agriculture, Hadith no. 532. See *Sahih Muslim,* vol. 3, Book: 10 The Book of Transactions (Kitab Al- Buyu) , Chapter 18: Renting of Land for Food, Hadith no. 3745 & 3746. See also *Sunan Ibn-i-Majah,* Vol. III, Book 16: The Book of Mortgages (Security Deposits) *(Kitab-ur-ruhun)*, Chapter No. X: Muzara'a That is Undesirable, Hadith No. 2459, p. 455. See also *Sunan Abu Dawud*, Vol.3, Book: 22 Commercial Transactions (Kitab Al-Buyu), Hadith no. 3385. The English translation of all the ahadith of *Sunan Abu-Dawud* mentioned in this write up are adopted from the *Sunan Abu-Dawud,* Partial English Translation, Hassan, Prof. Ahmad, retrieved from http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/abudawud/ accessed on May 20, 2009.

64 *Sahih Bukhari*, Hadith no. 525. See also *Sunan Abu Dawud*, Vol.3, Book: 22 Commercial Transactions (Kitab Al-Buyu), Hadith no. 3395. See also *Sunan Ibn-i-Majah,* Hadith no: 2449, pp. 450-451. *Sahih al Muslim,* vol. 3, Book: 10 The Book of Transactions (Kitab Al- Buyu) , Chapter 17: Leasing Out Land, Hadith no..3736. See also Hadith nos. 3733, 3734, 3735, 3737, 3738, 3739, 3740 and 3741. See also *Sunan Ibn-i-Majah,* Vol. III, Book 16: The Book of Mortgages (Security Deposits) *(Kitab-ur-ruhun)*, Chapter No. VII: Letting Out Land (for Cultivation ON (the payment of) One Third or One Fourth (Share of Produce), Hadith no: 2450, p. 451.

and the buying of date-palm until its fruit is ripened (ripening means that its colour becomes red or yellow, or it is fit for being eaten). And Muhaqala implies that crops in the field are bought for grains according to a customary measure. Muzabana implies that date-palm should be sold for dry dates by measuring them with wasqs, and al-Mukhabara is (a share), maybe one-third or one-fourth (in produce) or something like it. Zaid (one of the narrators) asked Ata' b. Abu Rabah (the other narrator): Did You bear Jabir b. Abdullah (Allah be pleased with them) making a mention of it that he had heard it directly from Allah's Messenger (may peace be upon him)? He said: Yes.[65]

In another *hadith* he reported that Allah's Messenger (may peace be upon him) had forbidden renting of land.[66]

Abu Huraira reported that Allah's Apostle said, "Whoever has land should cultivate it himself or give it to his (Muslim) brother gratis; otherwise he should keep it uncultivated."[67] In another *hadith* he reported that Allah's Messenger (may peace be upon him) has forbidding Muhaqala and Muzabana.[68]

---

65 *Sahih Muslim,* vol. 3, Book: 10 The Book of Transactions (Kitab Al- Buyu) , Chapter 16: Forbiddence of Al-Muhaqala, and Al-Muzabana, and Al-Mukhabara, and the Sale of Fruits Before Their Good Condition is Clear, and Al-Mu'awama. i.e. The Sale for Some Years, Hadith no. 3710. See also Hadith nos. 3709, 3711, 3712, 3713 & 3714. See also Chapter 17: Leasing Out Land, Hadith nos. 3721 & 3730. See also *Sahih Muslim,* vol. 3, Book: 10 The Book of Transactions (Kitab Al- Buyu) , Chapter 17: Leasing Out Land, Hadith no. 3715. See also Hadith no. 3718. See also *Sahih Muslim,* vol. 3, Book: 10 The Book of Transactions (Kitab Al- Buyu) , Chapter 17: Leasing Out Land, Hadith no. 3716. See also Hadith nos. 3717, 3722, 3723, 3724, 3725. See also *Sunan Ibn-i-Majah,* Vol. III, Book 16: The Book of Mortgages (Security Deposits) *(Kitab-ur-ruhun),* Chapter No. VIII: Leasing Out Land, Hadith no: 2454, pp. 453. See also *Sahih Bukhari,* Vol. 3, Book 39: Agriculture, Hadith no. 533(A).

66 *Sahih Muslim,* vol. 3, Book: 10 The Book of Transactions (Kitab Al- Buyu) , Chapter 17: Leasing Out Land, Hadith no. 3726.

67 *Sahih Bukhari,* Vol. 3, Book 39: Agriculture, Hadith no. 533(B). See also *Sahih Muslim,* vol. 3, Book: 10 The Book of Transactions (Kitab Al- Buyu) , Chapter 17: Leasing Out Land, Hadith no. 3729. *Sunan Ibn-i-Majah,* Vol. III, Book 16: The Book of Mortgages (Security Deposits) *(Kitab-ur-ruhun),* Chapter No. VII: Letting Out Land (for Cultivation on (the payment of) One Third or One Fourth (Share of Produce), Hadith no: 2452, pp. 452.

68 *Sahih Muslim,* vol. 3, Book: 10 The Book of Transactions (Kitab Al- Buyu) , Chapter 17: Leasing Out Land, Hadith no. 3731.

Abu Sa'id al-Khudri (Allah be pleased with him) reported that Allah's Messenger (may peace be upon him) has forbidden Mazabana and Muhaqala. Muzibana means the buying of fruits on the trees and Muhaqala is the renting of land.[69]

5.2 Exploring the Real Ruling of *Sharia* Regarding Sharecropping

Now we would explore the real ruling of the Sharia regarding this matter. Maududi has asserted several interpretations[70]. Firstly, the Prophet (PBUH) was not only a jurist and teacher but also a ruler and administrator. In fact, the whole administration was in His hands and it was impossible to think that the person like Him would allow such kind of prohibited method of cultivation to exist. So it becomes incumbent on the jurists to explore the real *hukm* of Sharia regarding sharecropping. Secondly, it is inconceivable that this matter relating to land which is inseparably related with the administration were known to only few people. Rather this should be turned into a common practice during the regime of the Prophet (PBUH) and the rightly guided Caliphs. Thirdly, it is beyond imagination that i) the Prophet (PBUH) himself didn't take steps to establish an approved form of cultivation rather allowed to continue a prohibited form or ii) the Prophet (PBUH) yearned for implementing an approved method of cultivation but the Companions disobeyed Him or iii) the Companions especially the rightly guided Caliphs didn't take any bold step to put into practice the desired method of Prophet (PBUH) during their Caliphate notwithstanding the very fact that they were aware of the command of the Prophet (PBUH).

So, no intelligent, wise and farsighted people could perceive that the prohibition on sharecropping was obscure to all people except few companions up to the primary or middle stage of the regime of Muwabia. It is surprising to note that the Prophet (PBUH) himself and other senior Companions used to practise sharecropping and this practice was in vogue during the Caliphate of the Rightly Guided Caliphs. Nafi narrated that Ibn 'Umar used to rent his farms in the time of Abu Bakr, 'Umar, 'Uthman, and in the early days of Muawiya. Then he was told the narration of Rafi 'bin Khadij that the Prophet had forbidden the renting of farms. Ibn 'Umar went to Rafi' and he [Nafi] accompanied him. He asked Rafi who replied that the Prophet had forbidden the renting of farms. Ibn 'Umar said, "You know that we used to rent our farms in the life-time of Allah's Apostle for the yield of

---

69 *Sahih Muslim*, vol. 3, Book: 10 The Book of Transactions (Kitab Al- Buyu) , Chapter 17: Leasing Out Land, Hadith no. 3732.

70 See n. 9. pp. 53-54.

the banks of the water streams (rivers) and for certain amount of figs.[71] Salim also clarified this incident when he mentioned that Abdullah bin 'Umar said, "I knew that the land was rented for cultivation in the life-time of Allah's Apostle." Later on Ibn 'Umar was afraid that the Prophet had forbidden it, and he had no knowledge of it, so he gave up renting his land.[72]

A question may naturally arise if Ibn Umar were certain regarding the sharecropping and renting of land why he had abandoned this practice after hearing the hadith of Rafi Bin Khadij.[73] The answer lies in the very fact, as Maududi affirms, that Ibn Umar had reached the last stage of circumspection.[74] If Ibn Umar had a bit confusion regarding the validity of sharecropping he would not pronounce the following statement: "Rafi forbade us from benefitting from our land (in the form of rent)."[75]

Abdullah bin Umar reported that the Prophet (PBUH) concluded a contract with the people of Khayber to utilize the land on the condition that half the products of fruits or vegetation would be their share. The Prophet used to give his wives one hundred Wasqs each, eighty Wasqs of dates and twenty Wasqs of barley. (When 'Umar became the Caliph) he gave the wives of the Prophet the option of either having the land and water as their shares, or carrying on the previous practice. Some of them chose the land and some chose the Wasqs, and 'Aisha chose the land.[76] Ibn Qudamah has rightly observed:

> This practice cannot be considered to be abrogated because an abrogation is valid only if it was implemented by the Prophet himself (peace be on him) during his own lifetime. Now, if he practiced a thing until his death, and thereafter his successors and all the Companions (may Allah be pleased with them) acted on it and none of them opposed it, how then is anyone else entitled to invalidate it? And if it was (actually) abrogated during the lifetime of the Prophet (peace be on him), why then did he continue to practice it after abrogating it? And how was it possible that his closest Companions and successors should remain ignorant of its abrogation while the story of Khayber was circulating widely and they were (themselves) acting according

71 *Sahih Bukhari,* Vol. 3, Book 39: Agriculture, Hadith no. 535.
72 *Sahih Bukhari,* Vol. 3, Book 39: Agriculture, Hadith no. 536.
73 See n. 9, p.56.
74 Ibid. See also Qayyim, Ibn, *Ja'adul Mayad*, p.226.
75 *Sahih Muslim,* vol. 3, Book: 10 The Book of Transactions (Kitab Al- Buyu), Chapter 17: Leasing Out Land, Hadith no. 3735.
76 *Sahih Bukhari,* Vol. 3, Book 39: Agriculture, Hadith no. 521. See also n. 30.

> to it? And where was the narrator of (the report on this abrogation, that none of them knew him or had heard about him?[77]

Ibn Umar further narrated that Umar expelled the Jews and the Christians from Hijaz[78]. When Allah's Apostle had conquered Khaibar, he wanted to expel the Jews from it as its land became the property of Allah, His Apostle, and the Muslims. Allah's Apostle intended to expel the Jews but they requested him to let them stay there on the condition that they would do the labor and get half of the fruits. Allah's Apostle told them, "We will let you stay on this condition, as long as we wish." So, they (i.e. Jews) kept on living there until 'Umar forced them to go towards Taima' and Ariha'[79].[80]

Last two traditions confirm the validity of sharecropping. In response to this view, some jurists claim that the contract of Khayber is not the evidence of sharecropping rather that was *Jizya*[81]. Their juristic view, Maududi insists

---

77 Qudamah, Ibn, *Al-Mughni*, vol. 5, p.384, mentioned in n. 30.

78 The very word Hijaz (sometimes spelt as al-Hejaz) literally connotes barrier. It's a region in the west of present-day Saudi Arabia. This area is primarily defined by its western border on the Red Sea, it extends from Haql on the Gulf of Aqaba to Jizan. Though its main city is Jeddah it is probably better known for the Islamic holy cities of Makkah and Madinah. Hijaz occupies a very special place in the Arab and the Islamic historical and political landscape for being the site of Islam's holy places. This nomenclature is given since it separates the land of Najd in the east from the land of Tihamah in the west. Retrieved from http:// en.wikipedia.org/wiki/Hejaz, accessed on December 07, 2010.

79 Taima and Ariha are basically two villages in Arabia. But these are situated outside of Hijaz.

80 *Sahih Bukhari,* Vol. 3, Book 39: Agriculture, Hadith no. 531.

81 As regards the derivation of the word *Jizya* (sometimes spelt as *jizyah)* jurists differ in their opinions. To Monqiz-As-Saqqar, this term is derived from the root word *jaza* meaning compensate. He furher adds that "Jizya" is a derived term in the form of "ficla" from "Mujazã" which is the noun "compensation", meaning "a sum of money given in return for protection". On the other hand, Ibn Al-Mutaraz opined that it is derived from "'idjzã" or "substitute" or "sufficiency" because it suffices as a substitute for the "dhimmi's embracement of Islam". See Saqqar, Moqiz-As, *Jizya in Islam,* translated from Arabic to English by Elisawy, Hayem retrived from See http://www.loadislam.com/ artical_det.php?artical_id=481&section=wel_islam&subsection=Misconceptions accessed on December 09, 2010.Yusuf al Qaradawi mentions that the word *jizya* is derived from the *jazaa'*, meaning "reward", "return", or "compensation", and defines it as "a payment by the non-Muslim according to an agreement signed with the Muslim state". See http://en.wikipedia.org/wiki/Jizya accessed on December 9, 2010. Qaradawi opines that Jizya is an annual tax charged on per capita and every major, sane and capable non-Muslim male are bound to pay it. See Qaradawi, Dr. Yusuf al "*Ghayr al-Muslimeen fil-Mujtama' al-Islami*" ,"Generosity Towards Non-Muslims In Islam"

on, is applicable only to the half of the land of Khayber which belonged to the State but that is quite inapplicable for the remaining half of the lands divided among the *Mujahids*[82] [83]. Other group of jurist claims that the Jews of Khayber was not *Dhimmi*[84] as poll tax or *Jizya* was not imposed on them

---

originally written in Arabic, translated into Bengali by Hasan, Mahmudul as "O-Muslimer Proti Islamer Udarata published by Sarwar Kamal, 1st edition, Chittagong, 1994, p. 44. Women, children, old, insane and the poor persons are exempted from paying jizyah. If the Islamic State is unable to give protection, it will not collect jizyah from the Non-Muslims. If after collecting Jizyah, the State becomes unable to render protection it is bound to return the jizyah to the respective persons. See Ibid, p. 48. The amount of the jizya is fixed by the head of the state with due consideration of the capability of payers. It is noteworthy to mention that if the term jizya is too offensive to non-Muslims it is liable to be changed. Umar bin Khattab, the second Caliph of Islam levied the jizya upon the Christians of Banu Taglibh and named it sadaqah (alms) out of consideration for their feelings. The jizyah was also imposed on Muslim men who could afford to buy their way out of military service. For instance, during the Ottoman Empire Egyptian Muslim peasants exempted from military service was required to pay the jizyah. Conversely, if a Christian group elected to serve in the state's military forces, it was exempted from the jizyah. Historical examples of this abound: the Jarajima, a Christian tribe living near Antioch (now in Turkey), by undertaking to support Muslims and to fight on the battle front, did not have to pay the jizyah and were entitled to a share of the captured booty. See http://www.islamonline.net/servlet/ Satellite?cid =1119503544994&pagename=IslamOnline-English-Ask Scholar%2FFatwa E%2 FFatwa EAsk The Scholar accessed on December 09, 2010.

82 The very term *mujahid* is glossed as a person engaged in jihad or who strives in the cause of Allah and exerts efforts which make him feel fatigued. In fact, A *mujahid* is that person who is sincerely devoted to his or her cause; who use all physical, intellectual, and spiritual recourse to serve it; who confront any power that stands in its way; and when necessary, dies for this cause. See, Gulen, M. Fethullah, *Sonsuz Nur:Insanligin Iftihar Tablosu (Muhammad The Messenger of God An Analysis of the Prophet's Life)*, translated from Turkish to English by Unal, Ali, Tughra Books, New Jeresy, 2010, p. 202. Linguistically, the very word jihad is derived from the Arabic word '*Jahd'* which connotes fatigue or the word '*juhd*' which means effort. Thus, the word jihad implies exerting effort to achieve a desired thing or prevent an undesired one. In other words, it aspires to bring about benefit or prevent harm. In the Qur'an this word is used in its different connotations 33 times. Jihad can be observed through any lawful means permitted under *Sharia* and in any field whether material or moral. For instance, struggling against one's desires, the accursed Satan, poverty, illiteracy, disease and fighting all evil forces in the world. See http://www.islamonline.net /servlet/Satellite?cid=1119503544994&pagename=IslamOnline-English-Ask Scholar %2 FFatwaE%2FFatwaEAskThe Scholar accessed on December 11, 2010. For a comprehensive discussion on Jihad see Qaradawi, Dr. Yusuf Al, *Fiqh of Jihad*, Wahba Bookshop, Egypt, 1st edition 2009.

83 See n. p.58.

84 The very term '*dhimmi*' is used to refer permanent residents of Muslim dominated territory. See n. 4, p.78. They are referred to as the 'protected people' (*ahl-al-dhimmah* or *dhimmies*), implying that Allah (SWT), His Prophet (PBUH) and the community of

and Muslims had all the right to recover anything from them. Maududi affirmed that the ruling of *Jizya* was revealed after the battle of Khayber and it is illusory to base their claim on the standard of *Jizya* in the absence of the ruling of *Jizya.*[85] The Jews were *dhimmi* and they settled down their residence in *Khayber* under a treaty and the laws were indiscriminately applicable both to the Muslims and Jews.[86] The principle of *qasamat*[87] originated from the incidence of murder of a Muslim by an assassin in *Khayber.*[88] The very reason of not imposing *Jizya* even after the revelation of the verse of *Jizya* is the existence of a treaty.[89] Few jurists made an attempt to contradict their identity as *dhimmi.* In response to this point, Maududi opined that they were ousted in accordance with the provision of the treaty entered into between the Islamic State and the Jews.[90] Few others argue that this contract is not the evidence of sharecropping as it didn't fix up the period of the contract. This argument is also invalid as one of the stipulations of that treaty is that "We will let you stay on this condition, as long as we wish." For this, Maududi vehemently argued that the determination of time was entirely left to the discretion of the owner i.e. Islamic State.[91] In a *hadith* Abu Huraira narrated that the Ansar said to the Prophet "Distribute the date palm trees between us and our emigrant brothers." He replied, "No." The Ansar said (to the emigrants), "Look after

---

Muslims have made a covenant with them that they may live in safety and security under the Islamic Government. In modern parlance, *dhimmis* are citizens of Islamic state. From the earliest times to the present day Muslims unanimously agree that they are entitled to enjoy the same rights and carry the same responsibilities as Muslims themselves, while being free to practice their own faiths. Usually their rights, duties and status are determined by a kind of socio-political contract known as *aqd al-dimmah.* See Qaradawi, Yusuf al, *The Lawful and Prohibited in Islam,* Chapter 4: The Halal and the Haram in the Daily Life of the Muslim, Section 4: Social Relationships, Non-Muslim Residents of an Islamic State. Retrieved from http://www.witnesspioneer.org/vil/Books/Q_LP/ch4s5pre.htm#NonMuslim%20Residents%20of%20an%20Islamic%20State accessed on December 11, 2010. See also Ramadan, Said, *Islamic Law Its Scope and Equity,* P.R. Macmillan Limited, London, 1st edition 1961, p.109.

85 See n.9, p.59.

86 Ibid.

87 This is a principle of Islamic Criminal Jurisprudence. If the murderer of a person cannot be identified and the death seems very abnormal but symptoms of murder is very obvious in dead person then all the inmates of that particular area need to vow before the court collectively. This is the essence of the principle of Qasamat/Qasamah.

88 See n. 9, p.59.

89 Ibid.

90 See n. 9, p. 60.

91 Ibid.

the trees (water and watch them) and share the fruits with us." The emigrants said, "We listen and obey."[92]

The above description makes it crystal clear that the sharecropping was widely practised during the era of the Prophet (PBUH) and the Rightly Guided Caliphs. None could perceive any prohibition regarding this mode of cultivation before the tradition narrated by Rafi bin Khadij. The aforesaid discussion repels the cloud of doubt cast by the narration of Rafi bin Khadij and make out the real meaning.

5.3 Evaluation of the Traditions in the Light of "Conscience"

It is one of the common features of the *Sharia* that the rulings of *Sharia* are not contradictory to one another. Though it is possible that there may be apparent contradictions between different rulings but an in-depth analysis would reveal the truth that they are not inconsistent with each other rather harmonious. It is generally recognized as one of the intrinsic aesthetical aspect of the *Sharia*. The same argument is liable to be applicable regarding *muzara'a* or sharecropping. If the prohibitions relating to sharecropping are allowed to subsist this would hit the basic spirit of *Sharia* and of course would be contrary to the *maqasid al sharia*. Sayyid Abul A'la Maududi puts forward the following contradictions[93] which would be the ultimate consequences if the traditions relating to sharecropping are construed to subsist.

Primarily, if sharecropping is not recognized as a permissible means of cultivation the concept of ownership would be very much alien and meaningless for the women, child, aged persons, sick and disabled persons. Secondly, under Islamic scheme of inheritance it is not likely to be a very outlandish situation that a person whether male or female may become the owner of many acres of land. If cultivation through others becomes impermissible he or she has to abandon a lot of lands for the impossibility of cultivating all the lands by him or her. Thirdly, prohibition regarding sharecropping would also violate the principles of buying and selling as under the tenet of latter an individual has the right to sell and buy any lawful thing without any limitation.[94] So it seems very paradoxical that under the Civil Law of Islam a person would be allowed to purchase lands according to his yearning but would be debarred from receiving the benefits beyond a

---

92 *Sahih Bukhari,* Vol. 3, Book 39: Agriculture, Hadith no. 518.

93 See n. 9, pp.64-67.

94 Of course, the govt. can impose any lawful restraint upon the selling and buying in a given time and society.

certain limit under the Islamic Land Law. Fourthly, Islam is unwilling to impose any restriction upon the ownership of any thing in terms of quantity and quality. The same principle is equally applicable regarding agricultural land. If the practice of sharecropping is discarded the above principle of ownership becomes an irony.[95] Fifthly, Islam encourages charity in all spheres of life- this principle cannot be construed to mean that a person is obliged to do more even but after the fulfillment of his indispensable duties e.g. Islam encourages a person to give charity who pays *Zakat* but does not compel him to do so. So it seems very illogical to compel a person to lend his extra lands to another free of charge even after the payment of *Ushr*[96] instead of making recourse to the sharecropping. Lastly, the proscription on sharecropping negates the spirit of *musharaka* or partnership.

Thus, impermissibility of the sharecropping is inconceivable within the overall framework of Islam.[97]

5.4 Examining the Traditions Prohibiting *Muzara'a*

This would be very much unwise to conclude that the traditions transmitted by the aforesaid Companions are erroneous i.e. *daif* (weak) or *mauduat* (fabricated). The real significance, as per Maududi's observation is concerned, lies in the fact of misapprehension of the words of the Prophet (PBUH). A thorough investigation of all the traditions supporting and negating the prohibition reveals the fact that the transmitters erred in apprehending the real message of the Prophet (PBUH). Even as Maududi asserts, if the statements of Rafi bin Khadij, Jabir bin Abdullah are considered in the light of interpretations given by other elder Companions, this would become very much crystal clear.[98]

Up to the primitive stage of the regime of Hazrat Muwabia sharecropping and renting of land were practised by common people of the Islamic State

---

95 Maududi vehemently mentioned that the govt. reserves the right to limit the maximum ceiling of land under a special circumstance until the cause of restriction is abolished.

96 In its literal sense, *ushr* means one-tenth. It is generally defined as "land on which a tithe is paid, belonging to a Muslim at the time of his conversion or distribution to a Muslim soldier as his share of the spoils of war; *ushr* describes both the land itself and the tithe. It is also known as *'Zakat-ul-Ard'* or the Zakat of land. See n. 16, p.233. See also Shafi, Mufti Mohammad, *Islamey Bhumi Babostha(The Law of Land in Islam)*:in Urdu and translated by Nijamee, Maulana Karamat Ali into Bangla, Islamic Foundation Bangladesh, 2nd edition, Dhaka, June 1995, p.165.

97 See n. 9, p.67.

98 Ibid.

and none perceived any prohibition regarding this matter.[99] This news was transmitted approximately at 50 Hijri all of a sudden and this created a chaotic situation.[100] In order to quench their thirst relating to sharecropping they asked the Companions of the Prophet (PBUH). Among the companions those are also included who transmitted the prohibitory traditions on sharecropping.[101] The inner and actual meanings of those prohibitory traditions are analyzed in the words of narrators.

Firstly, we would like to analyze the *ahadith* narrated by Rafi bin Khadij.

Hanzala bin Qais al-Ansri reported that he asked Rafi' b. Khadij about the renting of land for gold and silver, whereupon he said: There is no harm in it for the people to let out land situated near canals and at the ends of the streamlets or portion of fields. (But it so happened) that at times this was destroyed and that was saved. Whereas (on other occasions) this portion was saved and the other was destroyed and thus no rent was payable to the people (who let out lands) but for this one (which was saved). It was due to this that he (the Holy Prophet) prohibited it. But if there is something definite and reliable (e. g. money). there is no harm in it.[102]

Even from another *hadith* narrated by Rafi' bin Khadij himself the underlying cause of the prohibition regarding sharecropping becomes clear. He mentioned that they worked on farms more than anybody else in Medina. They used to rent the land at the yield of specific delimited portion of it to be given to the landlord. Sometimes the vegetation of that portion was affected by blights etc., while the rest remained safe and vice versa, so the Prophet forbade this practice. At that time gold or silver were not used (for renting the land). If they provided the seeds, they would get so-and-so much. Al-Hasan said, "There is no harm if the land belongs to one but both spend on it and the yield is divided between them." Az-Zuhri had the same opinion. Al-Hasan said, "There is no harm if cotton is picked on the condition of having half the yield." Ibrahim, Ibn Siain, 'Ata', Al-Hakam, Az-Zuhri and Qatada said, "There is no harm in giving the yarn to the weaver to weave into cloth on the basis that one-third or one-fourth (or any other portion) of the cloth is given to the weaver for his labor." Ma'am said, "There is no harm in hiring animals for a definite (fixed) period on the basis that one-third or one-fourth

99 Ibid.

100 See n. 9, pp.67-8.

101 See n. 9, p.68.

102 *Sahih Muslim,* vol. 3, Book: 10 The Book of Transactions (Kitab Al- Buyu) , Chapter 19: Renting of Land by Gold and Silver, Hadith no. 3748.

of the products carried by the animals is given to the owner of the animals."[103]

In another report, Hanzla bin Qais narrates that Rafi bin Khadij said that his two uncles told him that they (i.e. the companions of the Prophet) used to rent the land in the life-time of the Prophet for the yield on the banks of water streams (rivers) or for a portion of the yield stipulated by the owner of the land. The Prophet forbade it.[104]

Now, we, to comprehend the real stance of the Prophetic traditions on the prohibition of sharecropping, should consider the traditions narrated by Zayd bin Thabit critically. As for instance

> Zayd ibn Thabit: Zayd ibn Thabit said: May Allah forgive Rafi' ibn Khadij. I swear by Allah, I have more knowledge of Hadith than him. Two persons of the Ansar (according to the version of Musaddad) came to him who were disputing with each other. The Apostle of Allah (peace_be_upon_him) said: If this is your position, then do not lease the agricultural land. The version of Musaddad has: So he (Rafi' ibn Khadij) heard his statement: Do not lease agricultural lands.[105]

From the *ahadith* reported by Ibn Abbas the real meaning of the prohibition relating to sharecropping becomes obvious. 'Amr narrated: I said to Tawus, "I wish you would give up Mukhabara (Share-cropping), for the people say that the Prophet forbade it." On that Tawus replied, "O 'Amr! I give the land to share-croppers and help them. No doubt; the most learned man, namely Ibn 'Abbas told me that the Prophet had not forbidden it but said, 'It is more beneficial for one to give his land free to one's brother than to charge him a fixed rental."[106] In another place, Ibn Abbas narraterd: Amr ibn Dinar said: I heard Ibn Umar say: We did not see any harm in sharecropping till I heard Rafi' ibn Khadij say: The Apostle of Allah (peace_be_upon_him) has forbidden it. So I mentioned it to Tawus. He said: Ibn Abbas told me that the Apostle of Allah (peace_be_upon_him) had not forbidden it, but said: It is better for one of you to lend to his brother than to take a prescribed sum from him.[107]

---

103 *Sahih Bukhari,* Vol. 3, Book 39: Agriculture, Hadith no. 520.

104 *Sahih Bukhari,* Vol. 3, Book 39: Agriculture, Hadith no. 537.

105 *Sunan Abu Dawud*, Vol.3, Book: 22 Commercial Transactions (Kitab Al-Buyu), Hadith no. 3384.

106 *Sahih Bukhari,* Vol. 3, Book 39: Agriculture, Hadith no. 523.

107 *Sunan Abu Dawud*, Vol.3, Book: 22 Commercial Transactions (Kitab Al-Buyu), Hadith no. 3383.

5.5 Legal Justification of *muzara'ah* – Views of Different Schools of Jurisprudence and Scholars

5.5.1 The Hanafi View:

The Hanafi Jurists disagreed about the contract of *muzara'a* with Abu Hanifah maintaining that it is not legally justifiable.[108] Abu Yusuf and Muhammad al-Shaybani, two prominent companions of Abu Hanifah held that it is legally maintainable.[109]

One renowned author mentions: "it has gained publicity somehow that Imam Abu Hanifa holds all forms of *muzaria* to be impermissible"[110]. Imam Abu Hanifah made recourse to the following arguments to prove the invalidity of *muzara'a.* At the very outset, he mentions that reliable traditions of the Prophet (PBUH) declare the invalidity of *muzara'a.* On the other hand, the traditions which contract the invalidity of *muzara'a* and prove the validity of the same are not reliable.[111] Secondly, the transaction of the Prophet (PBUH) with the people of *Khayber* was a type of *kharaj*[112] imposed on them due to their submission and not a type of *muzara'ah.*[113] To him, *kharaj* is divided into two classes, the first type is one in which the *imam* imposes a fixed levy in accordance with what the land is able to bear and the second type denotes the taking of a portion of the produce as k*haraj* and both have got validity under the *Shariah.*[114] Imam Abu Hanifah strictly stresses that the people of Khaibar were subjected to the second type. He substantiates his argument by saying that the Prophet (PBUH) did not stipulate a fixed period for them.[115]

---

108 See n. 40, p. 278; n. 9, p. 81; *Islamic Bishwakosh*, The Encyclopaedia of Islam in Bengali, compiled and edited by the Board of editors, The Islamic Foundation Bangladesh, 20th vol. p. 210.

109 Ibid.

110 See n. 50, p. 174.

111 Rahman, Ghazi Shamsur, 'Muzara'a', *The Islamic Foundation Patrika, 24th year: vol.1July-September, 1984, p.30*, The Islamic Foundation Bangladesh, Dhaka.

112 The very word Kharaj, in literal sense, means the revenue derived from a piece of land or a slave. In technical connotation, it implies the tax imposed on land. Basically, it is a tax levied on the producer of the landed property owned by the non-Muslims in an Islamic State. For details see, Aghnides, Nicolas P. *Mohammedan Theories of Finance with an Introduction to Mohammedan Law and a Bibliography*, Premier Book House, Lahore, 2nd Impression, 1961, pp.376-396; See also Doi, Abdur Rahman, I, *Shariah: The Islamic Law,* TaHa Publishers Ltd. London, 1st edition 1984, Reprint 1997,pp. 389-390.

113 See n. 40, p. 279.

114 Ibid.

115 Ibid, pp. 279-280.

Had it been *muzara'ah,* he would have done so.[116] The reason is that, according to the supporters of *muzara'ah*, it is not valid without stipulation of a period.[117] Thirdly, the Jewish cultivators of *Khaibar* were landless labour. No question of *muzara'a* can be raised here. They were used to cultivate lands and get half of the produce. In true sense this is not an instance of *muzara'a.*[118] Fourthly, all sort of fraudulent activities are forbidden in Islam. Half of the produce cannot be identified by an amount. There exists uncertainty as regards whether there will be any produce at all or not, and if grows how much. In Islamic terminology this is known as *gharar*[119] and the same is not supported by Islamic Law.[120]

Lastly, to Imam Abu Hanifah, the traditions which are quoted in favour of *muzara'a* are not acceptable under three grounds. These are a) As per legal principles are concerned, *gharar* is not acceptable. He further reiterates that if any tradition contradicts the established rule of *fiqh* the tradition is not acceptable.[121] b) Imam Abu Hanifah opined that permitting *muzara'a* amounts to getting a rent for what is produced by the (personal) labour of the workers, and is similar to asking the miller to share the profit generated through milling, that is purely his labour. Moreover, the wages for such hiring of services are unknown or non-existent. All this makes it void. This amounts to strict analogy from the general principle that no compensation for personal labour can be shared, as in begging; there can be no partnership in begging. It also opposes the principle that wages for labour must be known.[122] c) The fruits which are not ripened may also be divided in this system. But according to the Islamic legal principles such kind of settlement is not permissible.[123]

It is pertinent to mention here that Imam Abu Hanifah fails to appreciate the real spirit of those traditions supporting *muzara'a.* He questioned the reliability of these traditions which is incompatible with the actual status of

---

116 Ibid, p.280.

117 Ibid.

118 See n.111.

119 Literally, it implies uncertainty, hazard, risk or chance. "*Taghreer*" being the verbal noun o f *gharar* is to unknowingly expose oneself or one's property to jeopardy. Jurisprudentially, *gharar* embodies many definitions. It implies that sort of hazard which is likely to lead to a dispute in a contract. It does not imply speculation in goods or currencies or the acquisition of huge profits.

120 See n. 111, pp. 30-31.

121 Ibid, p. 31.

122 See n. 40, p.279.

123 See n.111, p.31.

the *ahadith*. We are also in view that his negation of resemblance of *muzara'a* with *mudaraba* or partnership is also erroneous. The treaty of the Prophet (PBUH) with the people of *Khayber* is the glaring example of *muzara'a* treaty which Abu Hanifah denied.

On the other hand, two renowned disciples of Imam Abu Hanifah differed from their teacher regarding the issue of sharecropping. They based their arguments on several grounds. Primarily, they mentioned that the Prophet (PBUH) entered into a contract with the people of the *Khaybar* for half of the produce, and this provides a strong precedent.[124] Secondly, they opine that it resembles a contract of partnership with wealth from one party and labour by the other, which is the same thing as *mudaraba*[125] on the basis of analogy (*qiyas*[126]).[127] Imam Abu Yusuf specifically mentions: ".....In my opinion *muzaria* is permissible because it comprises both, contract and partnership."[128] He also remarks: "To me *muzaria* is like *mudhariba* (limited partnership conditional with sharing the profit together)."[129] He further opines: "I hold *muzaria* permissible if it is under conditions approved in the traditions."[130] Thirdly, to them *muzara'a* also finds its validity on practical

---

124 See n. 40, p.278.

125 The term *mudaraba* is derived from the root word *darb fi al-ard,* which means journeying though the land seeking the bounty of Allah. See Nyazee p. 243 as he quoted it from al-Kasani, *Badai-al-Sanai,* vol. 8, p. 3588. The word *al-mudaraba* is synonymous with two other Arabic terms which are used to designate this contract: *al-qirad* and *al-muqarada*. These three terms are interchangeable as no significant distinction is absent in their connotation. This type of divergence is basically the contribution of geographical factors. The terms al-qirad and al-muqarada apparently originated in the Arabian peninsula, especially al Hijaz, while the term al-mudaraba was of Iraqi provenance. See n. 38, pp. 86-87. See also n. 40, p. 243. This is an agreement between two parties: one known as *Sahib-al-maal* provides hundred percent of the capital for the project and another party named *Mudarib* invests his entrepreneurial skills, labour and time in managing the venture. Profits arising from the project are shared between them at a pre-agreed ratio and the loss, not arising from the negligence of the *Mudarib* is borne by the *Shahib-al-maal* though he has no control over the management of the venture.

126 *Qiyas*, in literal sense, denotes measuring or ascertaining the length, weight or quality of something. It also implies comparison to suggest equality or similarity between two things. Generally it means analogical deduction. In *usul-al-fqh* this terminology is used to refer the extension of a Sharia ruling from *Asl,* original case to a *Far,* new case, because the new case has the same *Illah,* effective cause as the original case. See n. 13, p. 39. See also n. 10, p.197.

127 See n. 40, p.279.

128 Yusf, Imam Abu, *Al-Kharaj*, p. 91 as mentioned in n. 50, p. 169.

129 Ibid, p. 175.

130 Ibid.

necessity. It is very usual that the owner of a land may not be in a position to cultivate the same himself, while one who is able to invest his labour may be landless. Necessity, therefore, demands that both of them come to such an arrangement and conclude the contract. They reiterate that this is different from giving animals or birds to another on the basis of *muzara'a*, because the labour of the worker is not effective in generating yield.[131] Fourthly, the practice of the Companions and their followers till this day has set up precedents on which we may rely.[132]

Furthermore, Imam Abu Yusuf said that the opinions of Imam Abu Hanifah are not acceptable as he treated the Jewish cultivators of *Khayber* as slaves which is unjustified. If the Prophet (PBUH) himself prohibited *muzara'a* or treated it as a fraudulent act, Caliphs like Hazrat Abu Bakr (Allah be pleased with him) and Hazrat Umar (Allah be pleased with him) would not maintain this method of cultivation.[133] One eminent Islamic scholar points out that the few forms of *muzara'a* are held valid by Imam Abu Yusuf and Imam Moahammad Shaybani and the same author concludes that the verdict of *Hanafi* School is based on their opinions.[134] One valid form is that the land, seeds and agricultural implements shall be provided by the owner and only labour is of the cultivator. In this case it would be pre-determined that a particular portion of yield is to be given to the cultivator.[135] Other valid form is when both share the land, tools, seeds and labour and mutually decide their ratio in the yield.[136] On the other hand, impermissible form is that when the seeds and implements are of one person and the labour and land of another.[137] If certain quantity of the produce is fixed for one person and the remaining portion for another e.g. 10 quintals reserved for one and whatever remains shall go to the other this is also an illustration of impermissible form of sharecropping.[138]

5.5.2 Views of the Maliki School

The valid form of *muzara'a*, according to Maliki School, is that one person shall provide land and the other shall provide seeds, implements and labour

---

131 See n.40, p.279.
132 Ibid.
133 See n.111,p.31.
134 See n. 9, p. 81.
135 Ibid, p. 82. See also n. 50, p. 180.
136 Ibid. quoted from *Fatwa-i- Alamgiri*, vol. V, p. 59.
137 Ibid.
138 Ibid.

and the yield shall be divided in accordance with the pre-agreed ratio.[139] The proposed form of *muzara'a*, to them, is to determine the cost of land, labour and agricultural implements in terms of money through measurement or in case of the materials of the trade, to decide the exact amount of the product (except yield).[140] As for instance, the charge for utilizing the land for a particular period is 50 tk. or a certain feet of cloth. And the utilization charge of the implements of cultivation would be a certain sum of money. If a party, afterwards, provides something it has to be determined as regards that thing that he is going to be a partner in this partnership with such amount of capital. But both parties must provide seeds in an equal ratio. The profits shall be divided in accordance with the ratio of the capital of the parties.[141]

Ibn Rushd delineates that the Maliki opinion permits the renting of land for everything except for food.[142] He further points out that Imam Malik basically relied upon the same tradition of *mukhabarah* that is relied upon by Imam Abu Hanifah. The tradition prohibits the renting of land with its yield.[143] The Maliki jurists made recourse to go into the details different types of *kira*[144] of land.[145] Most of these are in the nature of partnerships in tools, agricultural implements and land. However, the *muzara'a* proper that is permitted by the Hanafi School is not allowed by the Malikis.[146]

5.5.3 Views of the Shafi'i School

The Shafii jurists held all forms of *muzara'a* invalid[147] even though the seeds and land are provided by the owner.[148] To them, the cultivators invest their labour without knowing how much yield would go to them.[149] For this,

---

139 Ibid, p.83.

140 Ibid.

141 Ibid.

142 Ibn Ruhsd, Abu al-Walid Muhammad ibn Ahamad ibn Muhammad (al-Hafid) *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*, Cairo, undated, vol. 2, p. 221; mentioned in n. 40, p. 281.

143 Ibn Rushd, *Bidayat al-Mujtahid*, vol. 2, p.222. See n. 40, p. 281.

144 The very term *kira* is used to denote rent for land. This is permitted by Imam Malik.

145 Al-Dasuqi, Muhammad ibn Ahmad ibn 'Arafah, *Hashiyah 'ala Mukhtasar al-Khalil*, Isa al-Babi al-Halabi wa Shurakah, Cairo, 1931-34, vol. 3, p. 372; Sahnun, 'Abd al-Salam ibn sa'id ibn Habib al-Tanukhi, *al-Mudawwanah al-kubra,* Matba'at al-Sa'adah, Cairo, 1905, vol. 5, p.52; see n.40, p. 281.

146 Ibn Rushd, *Bidayat al-Mujtahid*, vol. 2, p.222. See n. 40, p. 281.

147 See n. 9, p. 84. See also n. 108, p. 210, and n.111, p. 32.

148 See n. 9, p. 84.

149 Ibid.

it is a trade of deception.[150] The Shafii's maintain that *mukhabarah* is not permitted as it is a contract in which the seed is provided by the worker and all the four schools consider it void.[151] They further opine that in such kind of arrangement the landowner only invests land which is not a basis for entitlement to revenue or profit.[152] To this school, there are certain proper forms of sharecropping namely, the land owner shall purchase the labour of the cultivator at a certain price and the yield shall go to him[153]; or the cultivator shall hire the land from the owner at a certain price and the yield shall go to him.[154] One reputed author describes that the Shafiis permit *muzara'a* only when it is subservient to *musaqah*. In this case, there must be some fruit bearing trees on the land or land should be between two groves that are part of the contract of *musaqah*.[155] The agreement with the people of the *Khayber* is presented in support of their justification.

5.5.4 Views of the Hanbali School

The views of Hanbali School are similar to those of Imam Abu Yusuf and Imam Muhammad.[156] To one author, they provide identical arguments.[157] The only distinction is that Hanbali School made it compulsory or obligatory for the land owner to provide seeds.[158] However, it seems to Maududi that the Hanbali jurists probably changed this stipulation to a certain extent afterwards.[159] In order to reaffirm his statement he quoted the following lines from a renowned book entitled *'Al Fiqhu Majahibil Arba'a'*:

> It is correct not to provide seeds by the land owner. In fact, the real stipulation is that both the parties must provide some basic materials. One person shall provide only land and other shall provide seeds, labour and implements- this method is also valid. And it is also valid that seeds or implements or both shall

---

150 Ibid.

151 Al-Ramli, Shams al-Din Muhammad ibn Abu al-Abbas Shihab al-Din Ahmad ibn Ahmad ibn Hamzah, *Nihayat-al-Muhtaj li Sharh al-Minhaj,* Cairo, 1967, vol. 5, pp. 245-46; See n. 40, p. 281.

152 See n. 40, p. 281.

153 See n. 9, p.84.

154 Ibid.

155 Ibid.

156 See n. 40, p. 282, n. 9, p. 83.

157 Ibn Qudamah, *al-Mughni,* vol. 5, 418, 421 as mentioned in n. 40, p. 282.

158 See n. 9, p. 83.

159 Ibid.

> be provided by the landowner and in this case it is the duty of the other person to provide labour and seeds or labour and implements.[160]

On the other hand, another eminent author feels doubt as regards what principles are being invoked by the Hanbali jurists.[161] Rather he points out that their reliance on necessity creates a methodological problem. Because, he continues, the Hanafi jurists could invoke *darurah* on the basis of the principle of *istihasan*[162] but the Hanbali jurists do not believe in this principle. Therefore, Nyazee, the prominent scholar poses the question how then are they invoking necessity and *darurah*?[163]

5.5.5 Views of other Classical and Modern Scholars

Ibn Hazm, the great scholar of Zahiri School points out that the Prophet (PBUH) had prohibited all forms of customary *raiyati* and *muzara'a* prevalent at that time.[164] In a subsequent stage, he entered into an agreement with the cultivators of *Khayber* in exchange of labour.[165] To him, the agreement of *Khayber*, in the eyes of law, is an exceptional illustration.[166] The cultivation of land in exchange of money should not be supported for the very reason that in this form the cultivator has to suffer a lot; if no yield grows in any season and the tiller has to pay money to the landowner it would affect the farmer.[167] Such kind of harm is not permissible and should not be supported. But if the land is cultivated in exchange of yield neither the landowner nor the cultivator would suffer any harm. Rather the interest of both the parties is protected here. To Ibn Hazm, cultivation of land in exchange of rent is prohibited; but cultivation for yield is permissible. The practices of the Prophet (PBUH) and the first Caliph Abu Bakr in *Khayber*

---

160 Ibid.

161 See n. 40, p. 282.

162 In literal sense, *istihsan* means to deem something preferable. The very word *istihsan* is derived from *hasuna*, which means being good or beautiful. In its juristic sense, *istihsan* is a method of exercising *ra'y*, personal opinion, in order to avoid any rigidity and unfairness that might ensue from strict or literal application of the law. *Istihasan* as a concept is close to equity in western law though there exist an obvious distinction between them i.e. *istihsan* is essentially based on divine law whereas equity is based on natural law. See n. 13, p. 47. See also n. 10, p.246.

163 See n. 40, p.282.

164 See n. 111, p. 32.

165 Ibid.

166 Ibid.

167 Ibid.

reveal so. Umar, the second Caliph practised this for a certain period.[168] He summarized the issue in the following words:

> When the Prophet (peace be on him) arrived (in Madinah), the people used to lease their farms, as is reported by Raf'i and others. This practice had undoubtedly been common among them before the time of the Prophet (peace be on him), and it continued after he became the Messenger; it is not permissible for any sane person to doubt this fact. Then, as is authentically transmitted by Jabir, Abu Hurairah, Abu Sa'id, Zahir al-Badri, and Ibn 'Umar, the Prophet (peace be on him) totally prohibited the leasing of land, thus nullifying this practice; this is certainly correct and there is no doubt concerning the matter. He who asserts that what was nullified (i.e., the leasing of land) has been restored and that the certainty of nullification is not established is a liar and denies the veracity of others saying what he does not know. According to the Qur'an, making such an assertion is *haram* unless one brings proof for it. And he can never find a proof for it except in the instance in which the land is let for a given proportion (such as one third or one-fourth) of the total yield, as it is authentically reported that the Prophet (peace be on him) did this with the people of Khayber after prohibiting it for several years, and he continued to give them land on a share-cropping basis until his death.[169]

Another noted author has splendidly interpreted the philosophy of the stance of the jurists like Ibn Hazm in the following words:

> Their contention is that although initially the Prophet, may the peace and blessings of God be on him, discouraged both sharecropping both sharecropping and fixed-rent tenancy, he later on allowed share-cropping, and this became a widespread practice among the Prophet's companions and their successors.[170]

Ibn Taymiyyah, one of the greatest scholars of Islam also supports sharecropping. In his renowned treatise *Al-hasbah fi al-Islam,* he appositely remarked:

> Share-cropping is preferable to renting and closer to justice and to the principles of the *Shari'ah,* since in this case both parties share in the profit or loss, in contrast to leasing for rent, under which the land owner takes his rent, while the lessee may or may not receive the harvest.[171]

Another eminent scholar, Ibn al-Qayyim, also speaks in support of the equitable form of sharecropping. He says:

---

168 Ibid.

169 Hazm, Ibn, *Al- Muhallah*, vol. 8, p.224, mentioned in n. 30.

170 See n. 3, *'Islam and Economic Challenge'* p.266, and *'Islam and Economic Development'*, p.101.

171 Taymiyyah, Ibn, *Al-hasbah fi al-islam*, p.21 mentioned in n. .30

> ...The equitable form of share-cropping is that in which both the landowner and the cultivator are on equal footing, neither of them enjoying any of those privileges for which Allah has sent down no authority. These customs which they (the soldiers and rulers) have introduced are ruining the country, corrupting the people, and have kept away Allah's help and blessings. Many of the rulers and soldiers are consuming what is *haram,* and if the body is nourished by what is *haram,* the Fire is its fitting abode. Such equitable share-cropping was the practice of the Muslims during the time of the Prophet (peace be on him) and during the time of the rightly-guided Caliphs. Such was the practice of the families and descendants of Abu Bakr, 'Umar, 'Uthman, 'Ali and of the families of other emigrants *(muhajireen).* Great Companions of the Prophet (peace be on him) such as Ibn Mas'ood, Ubay bin K'ab, Zaid bin Thabit, and others expressed their opinions favorably concerning it, and this was also the opinion of the jurists who rely on the *hadith,* such as Ahmad bin Hanbal, Ishaq bin Rahawait, Muhammad ibn Isma'il al-Bukhari, Daoud bin 'Ali, Muhammad bin Ishaq bin Khazimah, and Abu Bakr bin Nasr al-Maruzi. Other great Muslim scholars, such as al-Laith bin Sa'd, Ibn Abu Laila, Abu Yusuf, Muhammad bin al-Hasan and others, have all expressed the same opinion.[172]

Shah Wali-Allah, a leading Islamic Scholar in his well-known treatise *Al-Budur-al-Bazigha,* observed that the nature, physical features, mental faculties and qualities of human beings are different and distinct from each other and thus inter-dependent which requires mutual help, co-operation and sympathy. He then focused on the justification of sharecropping and partnership in other movable and immovable property. He says:

> ...one person possesses cultivate land, but is short of agricultural accessories, or even if he has the implements he lacks in energy and courage to carry on cultivation himself. The same is the case with all movable properties. One has the capital but has neither time nor courage to take up a trade, or he is engaged in some more important work so he requires a partner to invest his capital on partnership basis.[173]

In his book *Musaffa, Sharh Muatta,* his verdict about *muzara'a* is:

> Whereas, the written information (about *muzaria* is working on land on the condition that a portion of the land yield will be for landowner, while seeds and labour for others. When asked for his formal opinion whether *muzaria* (tilling a land on share-cropping contract) on condition of supplying the seeds by the owner and labour by the cultivator, is permissible under law or not? He replied: "In this matter, I tend to the school of thought of Imam Ahmad i.e. permissibility of both.[174]

---

172 Qayyim, Ibn, *Al-turuq al-hikmiyyah fil- Islam,* pp.248-250, quoted in n. 30.

173 *Al-Budur-al-Bazigha,* p. 70 as mentioned in n. 50, p. 177.

174 *Musaffa, Sharh Muatta,* mentioned in n. 50, p. 177.

Maududi, an eminent Islamic scholar points out that the renowned scholars of the whole *ummah* except Zahiri School opine that it is not mandatory to keep the ownership of agrarian property only within self cultivation.[175] He also asserts that man can give his uncultivated land to his (Muslim) brother gratis or otherwise keep it uncultivated and the Sharia does not support any other method of cultivation.[176] He reasserts that though different schools of jurisprudence differ as regards the mode of sharecropping each. school, at least in its *fiqhi* domain has supported it in any form.[177] Moreover, he emphasized on the point of ensuring justice in order that the interest of the cultivator would not be infringed.[178] For determination of the proportion of crop prime stress, according to him, would be on justice not on existing prevailing custom of the society.[179] He also opined that the supervisory authority of the landlord should not be used in such a manner which in its ultimate sense would lower the status of the cultivator to a mere employee or labourer as the latter is not so rather the partner of the former in cultivation.[180]

While speaking on the land reforms Dr. Umer Chapra devoted few words on terms of tenancy specially sharecropping and fixed-rent tenancy.[181] He mentioned that a small minority of jurists permit neither sharecropping nor fixed rent tenancy while others (a great minority) allow sharecropping only. Apart from that a predominant majority of jurists, however, allow both sharecropping and fixed-rent tenancy.[182] Then he explicitly opined that:

---

175 See n. 9, p.84.

176 Ibid, pp. 84-85.

177 Ibid, p. 85.

178 Maududi , Sayyid Abul A'la, *Islami Orthoniti (Islamic Economics),* compiled by Ahmad, Prof. Dr. Khurshid. Translated into Bengali by Khan, Abbas Ali, Naseem, Abdus Shaheed and Talib, Abdul Mannan, Shotabdi Prokashoni, Dhaka, 1st edition Oct, 1994, 3rd print May, 2002, p.171.

179 Ibid.

180 Ibid.

181 See n. 3, *'Islam and the Economic Challenge'* pp.266-8, and *'Islam and the Economic Development'* pp.101-3.

182 See n. 3, *'Islam and the Economic Challenge'* p.266 and *'Islam and Economic Development',* pp.101-2. The last group based their argument on the permissibility of both *mudarabah* and leasing in the *Shariah*. M. Umer Chapra has summarized their philosophy in the following manner: "their rationale is that poverty of most Muslims in the early Madinan period had led the Prophet, may the peace and blessings of God on him, to be more-demanding on the rich. He hence discouraged both sharecropping and fixed-rent tenancy, and encouraged landlords to allow the peasants to cultivate, without paying any compensation, whatever lands the landlords could not cultivate themselves.

> Since tenants and landless farmers are weak and powerless are likely to remain so for some time, in spite of the enforcement of a higher limit on the size of landholdings, fixed-rent leasing of land may continue to be a source of injustice and poverty when rents are high and output continues to be uncertain. It would hence be desirable for Muslim governments to make share-cropping the general basis of land lease and to strive for a just sharing of the output between the landlord and the tenant. This should continue at least until the power base in rural areas has become sufficiently broadened and the exploitative edge of land-holding families has been effectively blunted. The radical practice instituted by the Prophet, peace and blessings of God be on him, in the early Madinan period indicates that the Islamic state has the authority to undertake all measures considered necessary for improving the well-being of the peasants and landless farmers and for reducing concentration of wealth in Muslim societies.183

Justice Taqi Usmani opined that the root cause of injustice upon the cultivators by the landlord does not lie on the very fact of the validity of sharecropping rather those illegal stipulations which are imposed by the latter group on the former group through written or oral agreement especially by taking the chance of helplessness of landless cultivators.[184] To him, these imposed conditions are completely unlawful for being contrary to Islam.[185] He is in the line of introducing such method of sharecropping which has the end of upsetting the gradual accumulation of wealth and alleviating the distribution system of same.[186] He opines that imposition of unlawful stipulation on sharecropping must be declared punishable offence and uplift the status of cultivators so that they can get the equal status as a party to the agreement of sharecropping.[187] Apart from these measures, he vehemently asserts that Islamic state preserves the right to fix the minimum amount of yield produced by the cultivators under a *muzara'a* contract so that they can get the appropriate price of their sweat and would be sufficient for their livelihood.[188] In order to accomplish this objective he suggests forming a board consisting of cultivator, landlord and the representatives of

---

However, later on when the economic condition of Muslims improved, he allowed both and not just sharecropping."

183 See n. 3, *'Islam and the Economic* Challenge'p. 267, and *'Islam and Economic Development'*, pp.102-3.

184 Usmani. Allama Mufti Muhammad Taqi, *Ecomomic Philosophy of Islam*(Islamer Arthanaithik Darsan in Bangla or Hamara Ma'ashi Nizam in Urdu) translated into Bangla by Alam, Maulana Shamsul, Madina Publications, Dhaka, 1st edition December 2007, p. 29.

185 Ibid.

186 Ibid, p.123.

187 Ibid.

188 Ibid, pp.28-29.

the government. Even he also goes on to say that Islamic state has the authority to take any temporary alternative lawful measures (e.g. employment of cultivator under the landlord as labourer for a fixed wage prescribed by the government) instead of sharecropping with a view to uproot the oppressive conditions imposed on the cultivators.[189]

6. Illegal (*haram*) Forms of Sharecropping

The aforesaid discussion offers a very significant notion that all types of sharecropping are not valid. The picture which is depicted in the *ahadith* of the Prophet (PBUH) sheds light on the prohibited form of sharecropping which was in vogue during His lifetime. The common form was that the landowner would give out his land on the condition of getting the yield of one part of it and the cultivator the produce of the remaining part. It also assumed the form that the landlord would get a specified weight or measure of the crop produced and the cultivator the rest. Occasionally due to inclement weather, ravages of nature, irregularity of plantation, under-cultivation it happened that yield was produced in one part while the other part bore the pain of tolerating the absence of the smile of produce. Consequently, one of the two would receive everything, while the other took nothing or very meager. In the same vein, if the total produce did not exceed the specified weight or measure, the owner would get everything while the cultivator would receive nothing. Undoubtedly, this transaction incorporates the element of *gharar* which goes against the spirit of *adl* in Islam. After noticing this type of flagrant injustice in the society He vehemently observed and declared that justice demands that both should share of the total produce according to the agreed-upon ratio. Proportion of the total yield must be specified so that if the crop is bountiful, it is bountiful for both; if it is meager it is meager for both, and if nothing is produced, neither of them receives anything. This ensures the proper distribution for both parties. Thus, it is fixed sharecropping which is repugnant with the spirit of the *Sharia* and thus null and void. On the other hand, variable sharecropping is valid.

The above fact of prohibition on fixed sharecropping becomes obvious from the *hadith* narrated by Rafi' bin Khadij. He narrated that they worked on farms more than anybody else in Medina. They used to rent the land at the yield of specific delimited portion of it to be given to the landlord.

---

189 Ibid, p.29.

Sometimes the vegetation of that portion was affected by blights etc., while the rest remained safe and vice versa, so the Prophet forbade this practice.[190]

In another tradition, Hanzala b. Qais al-Ansri reported that he asked Rafi' b. Khadij about the renting of land for gold and silver, whereupon he said: There is no harm in it for the people to let out land situated near canals and at the ends of the streamlets or portion of fields. (But it so happened) that at times this was destroyed and that was saved whereas (on other occasions) this portion was saved and the other was destroyed and thus no rent was payable to the people (who let out lands) but for this one (which was saved). It was due to this that he (the Holy Prophet) prohibited it.[191]

To clarify which type of sharecropping is allowed under the Land Law of Islam Hanzala reported that he heard Rafi' b. Khadij (Allah be pleased with him) say: We were the major agriculturists of the Ansar and so we let out land (saying): The produce of this (part of land) would be ours and (the produce) of that would be theirs. But it so happened that at times this (land) gave harvest, but the other one produced nothing. So he (the Holy Prophet) forbade this. But so far as the payment in silver (dirham, a coin) is concerned, he did not forbid.[192]

Even from a tradition reported by Rafi bin Khadij the ruling regarding the prohibition of sharecropping specifically about which type of sharecropping would fall within the circle of prohibition and why this kind of sharecropping is disallowed under *Sharia* becomes very clear. Rafi bin Khadij reported that his uncle Zuhair said that Allah's Apostle forbade them to do a thing which was a source of help to them. He [Rafi] said that Whatever Allah's Apostle said was right. He said that Allah's Apostle sent for him and asked, 'What is he doing with his farms?' He replied that they give their farms on rent on the basis that they get the yield produced at the banks of the water streams (rivers) for the rent, or rent it for some Wasqs of barley and dates.' Allah's Apostle said, 'Do not do so'.[193]

Yusuf al Qaradawi stated that what is meant here is that the land owner would take this fixed quantity as "overhead" and would also share in some proportion of the remainder, for example, the entire produce of the specified

---

190 *Sahih Bukhari*, Vol. 3 Book 39: Agriculture, Hadith no. 520.

191 *Sahih Muslim*, vol. 3, Book: 10 The Book of Transactions (Kitab Al- Buyu) , Chapter 19 Renting of Land by Gold and Silver, Hadith no. 3748.

192 *Sahih Muslim*, vol. 3, Book: 10 The Book of Transactions (Kitab Al- Buyu) , Chapter 19 Renting of Land by Gold and Silver, Hadith no. 3749. See also Hadith no. 3750.

193 *Sahih Bukhari*, Vol. 3 Book 39: Agriculture, Hadith no. 532.

one-fourth of the area, plus one-half of the produce of the remaining three-fourths of the area.[194]

He aptly observed that the Prophet (peace be on him) was eager to establish perfect justice in his society and to remove every source of conflict and discord from the community of Believers.[195]

However, in another *hadith,* Zayd ibn Thabit emphatically pointed out the misconceived idea which Rafi bin Khadij had and which fact really misled him. Zayd ibn Thabit said: May Allah forgive Rafi' ibn Khadij. I swear by Allah, I have more knowledge of Hadith than him. Two persons of the Ansar (according to the version of Musaddad) came to him who were disputing with each other. The Apostle of Allah (peace be upon him) said: If this is your position, then do not lease the agricultural land. The version of Musaddad has: So he (Rafi' ibn Khadij) heard his statement: Do not lease agricultural lands.[196]

For this Qaradawi stated that the landowner and the cultivator must therefore be generous to one another; the landowner should not demand too high a share of the yield and the worker should take proper care of the land.[197] He quoted a hadith in which Ibn 'Abbas said that the Prophet (peace be on him) did not prohibit share-cropping but advised the owner and the cultivator to be considerate of each other.[198] Another *hadith* really depicted the true picture relating to the sharecropping. 'Amr narrated: I said to Tawus, "I wish you would give up Mukhabara (Share-cropping), for the people say that the Prophet forbade it." On that Tawus replied, "O 'Amr! I give the land to share-croppers and help them. No doubt; the most learned man, namely Ibn 'Abbas told me that the Prophet had not forbidden it but said, 'It is more beneficial for one to give his land free to one's brother than to charge him a fixed rental."[199]

Qaradawi tartly remarked that his concern was not simply that he should earn something from his land regardless of whether those who were employed on it got something or suffered hunger; rather, he helped them and

---

194 See n. 30.

195 Ibid.

196 *Sunan Abu Dawud*, Vol.3, Book: 22 Commercial Transactions (Kitab Al-Buyu), Hadith no. 3384.

197 See n. 30.

198 Reported by Tirmidhi, who calls it sound.

199 *Sahih Bukhari,* Vol. 3, Book 39: Agriculture, Hadith no. 523. Qaradawi gives the reference of *Ibn Majah.*

took care of them. That was the true Muslim society.[200] Qaradawi makes an attempt to consider another case where there may be a landowner who prefers to keep his land idle, not planting any crops or fruit trees on it, rather than renting it to a farmer for a small proportion of the yield, since he may consider the return too little. For resolving this problem he mentioned an example from the glorious regime of the Caliph 'Umar bin 'Abdul-Aziz who issued a decree to all concerned saying, "Let out your land for one-third, one-fourth, one-fifth and up to one-tenth of the yield, but do not leave the land uncultivated."[201]

7. Conclusion

Islam does not distinguish between the ownership of land and the ownership of other things. Islamic Sharia does not prescribe any particular ruling as regards the ownership of land for which it would become, in real sense, meaningless. No limitation as regards the size of holding should be imposed as a permanent rule though it is within the capacity of the ruler of the state to impose any reasonable restriction on land or other things in a given circumstance after taking into consideration public interest or welfare or *muslahah*[202]. The above-mentioned discussion also clarified that Islamic Sharia permits a person to cultivate the land himself, lend the land to others for cultivation, take a proportion of the crop and rent the land for gold or silver. Concerning sharecropping it is also clear that only variable sharecropping i.e. sharecropping on the basis of prefixed percentage share of the total produce is valid and treated as an approved mode of cultivation of land. The rationale is centered on the focal point that *muzara'a* is valid regarding land as because *mudaraba* and *musharaka* are extensively used in case of trade and business as lawful mechanism of investment. But the terms and conditions of the agreement of *muzara'a* must be based on the spirit of justice and mutual co-operation. It is needless to say that both parties must stand on an equal footing. The state also reserves the authority to put any reasonable restriction on the sharecropping to bring an end to the blatant injustice and oppression on the cultivators, if any. Apart from that, the state can, within the purview of its *Siyasa al Sharia*, legislate to declare any imposition of unlawful stipulation on sharecropping as punishable offence

---

200 See n. 30.

201 Ibid.

202 In literal sense, *maslahah* implies 'benefit' or 'interest'. To Imam Ghazali, *maslahah* consists of considerations which secure benefit or prevent a harm but which are, simultaneously, harmonious with the ultimate objectives *(maqasid)* of the *Shariah*. It is synonymous with *istislah*. Generally, it is of three types, namely, the 'essentials' *(daruriyyat)*, the 'complimentary' *(hajiyyat)*, and the 'embelishments *(tahsiniyyat)*.

and to boost up the standard of their lifestyle so that they can get the equal status as a party to the agreement of sharecropping. Apart from these measures, an Islamic state preserves the right to fix the minimum amount of yield produced by the cultivators under a *muzara'a* contract so that they can get the appropriate price of their sweat and which would also be sufficient for their livelihood.

The *ahadith* of the Prophet (PBUH), juristic writings of the many reputed scholars spoke in the same tone though few jurists erred in their *ijtihad* regarding sharecropping. This discussion also focuses on the different types of permissible and impermissible forms of *muzara'a*. Keeping in view this matter, we can infer that Islamic Land Law is so practical in its attitude and spirit that it permits few forms of sharecropping but not all. But in all cases, justice must be ensured between the landowner and the cultivator.