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Submission

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Journal article: Multiple authors

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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].

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Chapter in a book

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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 (Unpublished PhD thesis).

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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].

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Contents:

Iranian Constitutionalism: Religious, Political, and Legal Dimensions

Professor Dr. Md. Maimul Ahsan Khan[*]

Iranian Islamic Constitutional system is a bit older than three decades' history of trials, errors, and triumph. It is quite difficult and early, maybe even unfair, to reach to any conclusive remarks about the achievements and shortcomings of the Iranian constitutional system. However, a comparative study of Iranian system with that of Pakistan, Egypt, Saudi Arabia, and many other Arab and Muslim countries might be immensely helpful to examine how Muslim elite and political forces of these countries try to explain and implement their religious relevance and/or adherence to the issues related to executing state powers, social authority, and cultural reality. The rise of religious forces in the struggle for political and economic powers in Iran is not at all an isolated phenomenon in modern political history.

The rise of religious fundamentalist forces up to the top levels of state and government in Saudi Arabia and Pakistan is quite different from that of Iran. Iranian *Shiiteulema* led Iran to a successful revolutionary process by capturing state power and adopting a constitution that has promulgated Islam of the *Jafari* School of law as state religion and ideology. From this point of view, Islamic system of Iran is much more sectarian than that of Pakistan and Saudi Arabia. However, in terms of constitutional organization and its implication to the real dynamics of state and societal affairs, Islamic Iran is less dogmatic and more flexible than many other contemporary Muslim countries poised to make their governmental system compatible to the fundamental tenets of Islam. The call for a return to the "original Islam" by many Muslim political parties and regimes had ultimately put most of the vital constitutional issues in limbo and led many Muslim countries in stagnation or in chaos and confusion. Here Islamic Iran is an exception to the rule for its constitutional commitment to its people.

Unlike Pakistan or Saudi Arabia, Iran had adopted a written constitution immediately after the revolution with a view to setting the stage of political discourse and legal development. Of course, Islamic Iran did not claim that the Quran should be its state constitution or did not allow the religious and political forces to fight endlessly over the issues of

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constitutional importance or structure of the government. This article has been deigned to provide a deeper analysis of fundamental constitutional principles of Iran, juxtaposing Iranian constitutional experiments with the Pakistani political history and state-sponsored religious orthodoxy in Saudi Arabia. Moreover, it would try to reveal the *Shia-Sunni* differences over the issues of constitutional system of governance and implementation of the theological and cultural contents to the matters of overall justice pattern to various political, civil, and economic rights.

Ideological Foundation of the Iranian Islamic Constitutionalism

Just after the 1979 Islamic revolution of Iran, speculation was very high both at home and abroad that Iran would follow the doctrines of the Hidden Imam (*Wali al-Asr*) and source of imitation (*marja al-taqlid*), according to which scope of political discourse and implementation of innovative ideas in the areas of constitutional development are very narrow. In theoretical terms, the doctrine of Hidden Imam could not be abandoned in a *Shia*-majority country like Iran. However, in practical terms *marja al-taqlid* was not followed as *vilayat-e faqih* (rule of the jurist), exponent of which was the main architect of the Islamic revolution of Iran, Imam Khomeini.

Article 5 of the Iranian Constitution established an office of religious leader for Imam Khomeini and clearly stipulated that Imam Khomeini was not the Hidden Imam, who could claim his full innocence in all religious and worldly affairs. Thus with the help of the doctrine of *vilayat-i faqih* (rule of the jurist),[1] Imam Khomeini did not allow any religious leader to emerge as a stumbling block in the way of Iranian constitutional development, and after his death Article 107 has been inserted to the constitution to put an end to disputes over the issues of *Wali al-Asr* and *vilayat-i faqih*. Article 107 stipules that a group of experts elected by the people would appoint a religious leader in

[1] "I [Imam Khomeini] stated earlier that the function of a judge belongs to exclusively to a just faqih; this is a fundamental aspect of *fiqh*, which is not a matter of dispute. Let us now see whether the three-fold qualifications for exercising the function of judge are present in the *fiqih*. Obviously we are concerned here only with just faqih, not with any *fiqih*. The *faqih* is, by definition, learned in matters pertaining to the function of judge, since the term faqih is applied to one who is learned not only in laws and judicial procedure of Islam, but also in the doctrines, institutions, and ethics of the faith --- the *faqih* is, in short, a religious expert in the full sense of the word. If, in addition, the *faqih* is just, he will be found to have two of the necessary qualifications. The third qualification is that he should be an imam, in the sense of the leader." In: Khomeini, Imam, *Islamic Government: Governance of the Jurist,* The Institute for the Compilation and Publication of Imam Khomeini's Works, Second Edition, Tehran, 2005, pp. 69-70.

accordance with Article 5 and 109. Article 107 does not give any special privilege to the religious leader, who is regarded as a regular Iranian citizen in the eyes of constitutional law or other laws. The Article says:

> *In the event of them [experts] finding someone more learned in Islamic ordinances and subjects of Islamic law or in political and social issues, or possessing general popularity or a special prominence in respect of the qualifications mentioned in Article 109, he will be appointed as the Leader. Otherwise, they elect one of them as the Leader. The Leader thus appointed [or elected] by the Experts shall assume the Vilayatal-amr and all responsibilities arising from it. The Leader is equal to all other citizens in the eyes of law.*[2]

This can be regarded now as one of the fundamental principles of Iranian constitutional system. During the life time of Imam Khomeini, there was also a serious controversy over the issue of the supremacy of law and its relation to the religious injunctions derived from the sources of Islamic law i.e., *sharia*. In fact, the Council of Guardians as a watch dog of the legislative powers of the parliament had started to suspend many laws by arguing that those laws were not enacted in accordance with the principles of Islam and its sources of law. This is a very age-old problem with Muslim nation-states that have been trying to develop or establish a constitutional system of their own.

With the exception of few modern Muslim states, most of Muslim nations claims in their written constitutions or otherwise that the fundamental source of their legislation, including constitutional laws, is the *sharia* or the Quran and *sunnah*. However, when it comes to resolve the disputes over the legal matters, religious and secular scholars are in loggerheads over the issues of God-made laws and man-made laws. This dispute had remained unresolved in many Muslim countries.

Even the author like John Austin[3] (1790-1859) divides laws broadly into two categories:

> *Laws set by God to his human creatures, and laws set by men to men. The whole or portion of the laws set by God to men is frequently styled the law of nature, or natural law...I name those*

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2 Article 107, *The Constitution of the Islamic Republic of Iran*, ALHODA International Publication and Distribution, Tehran, 2010, p. 63.

3 He was a noted British specialist on jurisprudence and philosophy of law. He authored his very famous book entitled The Province of Jurisprudence Determined in 1832 where he explained his "command theory" of law that practically links modern legal system solely to the sovereign power of a state.

laws or rules, as considered collectively or in a mass, the Divine law, or the law of God.[4]

Thus there is nothing fundamentally wrong with the divine character of a particular type of law. However, by raising the question of divinity of law, one cannot and should not be aggressive or should not try to impose a set of rules and regulations upon the unwilling people to follow them. In fact, in many Muslim nation-states, religious orthodoxy tended to undermine the state authority of enacting new laws for the welfare of the people, while the doctrine of *Istihsan* (equity) and *Maslahah Mursala* (considerations of public interests) are the corner stones of *sharia* law.[5]

Imam Khomeini was quite aware of this problem of Muslim jurisprudence and in 1987 he had created an institution named *Majma*-e-*Tashkhis*-e *Maslahat*-e *Nezam* (Expediency Discernment Council of the System) that had taken away prerogative powers of the Council of Guardians to nullify laws enacted in the parliament. Thus the ongoing deadlock between parliament and the Council of Guardians was ended during the life time of the main founder of the Islamic Republic of Iran. This is a very unique situation with the constitutional development of Iran as a Muslim nation-state. If we compare this aspect of the Iranian constitutional system with that of countries like Pakistan, Turkey, Egypt, Saudi Arabia, and others we find the situation in those countries is either in open-ended dispute or in extreme hostility between government on the one hand and religious establishment and cultural values on the other.

The Turkish ultra-secularist system, for example, even denied many religious and secular rights of the students and women for a long time. Pakistan did not know how to solve this problem and the united Pakistan had to wait for nine years to see a constitution adopted with a stipulation that no laws of Pakistan should be enacted against the Quran and *Sunnah*. However, in reality the united Pakistan (1947-1971) deceived its own people of making laws to limit the state authority to dominate and exploit masses unjustly. The long-lasting execution of brutal and horrible exploitative state policies in Turkey and Egypt had been carrying out in the name of secularism and socialism respectively for many decades.

However, in the recent time, the political scenario has been changing gradually because of the popular demands and very strong reaction of masses to the endemic violations of all kinds of human rights and women's right on the part of government with an intolerable high rate of

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4 Cited from Feinberg, Joel, and Gross, Hyman (eds.). 1991. *Philosophy of Law*, Third Edition, Wadsworth Publishing Company, California, U.S.A., p. 26.

5 See for details, Kamali, Mohammad Hashim. 1991. *Principles of Islamic Jurisprudence*, Islamic Texts Society, Cambridge, U. K., pp. 245-296.

unemployment and object poverty in many Muslim countries. The most unfortunate phenomenon is that the governments of many Muslim countries tend to justify such a horrible political and economic exploitation of Muslim masses in the name of Islam and/or Arab nationalism.

Many western governments support Muslim regimes simply because the latter claim themselves as secular and anti-Islamic. There is no way that we can simply support or give preference to one extreme political or national ideology over another be it Arab, Turkish or Pakistani character. By its very essence, any autocratic and dictatorial regime is of same nature in terms of its anti-people and pro-fascist character. These types of regimes operate based on dynastic privileges or royal prerogatives of some families in the name of this or that ideology or doctrines. In this regard James Penner says:

> *Policies are aggregative in their influence on political decisions and it need not be part of a responsible strategy for reaching a collective goal that individuals be treated alike. It does not follow from the doctrine of responsibility, therefore, that if the legislature awards a subsidy to one aircraft manufacturer one more it must award a subsidy to another manufacturer the next. In the case of principle, however, the doctrine insists on distributional consistency from one case to the next because it does not allow for the idea of a strategy that may be better served by unequal distribution of the benefit in question.*[6]

It appears that the Iranian religious leadership from the early days of Islamic revolution was quite conscious about the problems of implementation of people's political, civil, and economic rights in general, and women's rights in particular. Though apparently it is believed that the main catalysts of the 1979 Islamic Revolution of Iran were the *Ayatullahs*, representing predominantly the traditional *Shiite* religious forces, yet without the enthusiastic and active participation of the Iranian women and ordinary folks in the street, revolutionary process of overthrowing the Iranian Shah from the power could not be possible at all. Combined struggle of the religious, reformed socialist, and Iranian feminist forces made the Iranian revolution a reality with its special emphasis on the rights of the *mustaeafin* (oppressed and downtrodden people). In fact, the popular name of the Iranian revolution was the *encalabemustaefin* (Revolution of the Poor).[7]

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6 Penner, James. 2002. "Law and Adjudication: Dworkin's Critique of Positivism", In: Penner, James; Schiff, David; Nobles, Richard, (eds.). *Introduction to Jurisprudence and Legal Theory: Commentary and Materials*, Butterworths, LexisNexis, p. 367.

7 "With due attention to the Islamic content of the Iranian Revolution, as a movement aimed at the triumph of all the *mustaeafin* (oppressed) over the *mustakbirin*

Imam Khomeni claims that the main feature of Islamic government is that the ruling class or elite cannot claim any superiority over the ruled under any circumstances. To ensure Islamic egalitarian system of governance, the concerned governmental and religious institutions must keep adequate economic resources at hand all the time to keep every citizen financially solvent, visible and capable of raising voices against the misdeeds of the ruling elites. According to him, even clergy at the helm of political power may also turn into a formidable force to destroy any nation, country, and human dignity guaranteed by Islamic legal postulates and doctrines.[8] Imam Khomeini says:

> *Islamic government is not a form of monarchy, especially not an imperial one. In that type of government, the rulers are empowered over the property and persons of those they rule and may dispose of them entirely as they wish. Islam has got the slightest connection with the form and method of government. For this reason, we find that in Islamic government, unlike monarchial and imperial regimes, there is not the slightest trace of vast palaces, opulent buildings, servants and retainers, private equerries, adjutants to the heir apparent, and all the other appurtenances of monarchy that consume as much as half of the national budget.*[9]

In fact, at the core of *Shiite* ideology we can observe a strong realization of the recognition of the truth that a disproportionately big and iron-fisted government is always a threat to the interests of the people. Moreover, in orthodox circles of *Shiism*, there always remains a fear of *Yazidism* at the helm of governmental powers. However, extreme brutality carried out by the Iranian Shahs against the Iranian clergy and people had ultimately led the collapse of Iranian monarchy, which was no different than that of any other Muslim or Arab monarchy in the Middle East.

In the preamble, the Constitution of the Islamic Republic of Iran says:

> *This great movement, which triumphed through reliance on faith, unity, and the decisiveness of its leadership at every critical and sensitive juncture, as well as on the self-sacrificing spirit of the people, succeeded in upsetting all the calculations of imperialism and destroyed all its nexuses and institutions, thereby opening a*

(oppressors), the Constitution provides the necessary basis for ensuring the continuity of the Revolution at home and abroad." In: *The Constitution of the Islamic Republic of Iran*, ALHODA International Publication and Distribution, Tehran, 2010, p.19.

8 See, Khomeini, Imam. 2006. *Pravleniye Fakhiya: Islamskoye Pravleniye, Institut po sboru I izdannio trudov Imam Khomeini*, Tehran, pp. 41- 49.

9 See above note 8.

> *new chapter in the history of all-embracing popular revolutions of the world....The mission of the constitution is to realize the ideological objectives of the movement and to create conditions conducive to the development of Man in accordance with the sublime and universal values of Islam....the Constitution guarantees the rejection of all forms of intellectual and social tyranny and economic monopoly, and aims to entrust the destinies of the people to the people themselves in order to break completely with the system of despotism....As a part of this process, it is only natural that women should benefit from a larger restitution of their rights, because of the greater oppression that they suffered under the taghuti order....Thereby, while she [woman] recovers her momentous and precious function of motherhood and of rearing human beings committed to Islamic ideals, she also assumes a pioneering social role and becomes the fellow struggler of man in all vital areas of life.*[10]

Such a pronouncement by a constitution adopted under the religious leadership in a Muslim country, was and in fact, remains quite revolutionary in compare to the dominant and orthodox religious views of many contemporary Muslim governments and establishments. This is not at all a rhetorical pronouncement of the Constitution of the Islamic Republic, but most of the Iranian state and religious institutions at central and local levels are quite serious in implementing these missions declared in the fundamental law of the country. The achievements of the ordinary Iranians and women folks cannot be trivialized by just saying that Iran has been run by a religious orthodoxy or theocracy. In fact, in Islamic constitutionalism, place and role for any kind of theocratic governance of a state is very slim, if not too negligible at the time of peace and harmony when every Muslim community can feel safe and secure and does not have to be fearful of imperialistic or military onslaught from within or outside.

These constitutional principles were not simple lip service to the Iranian people and for that matter, not even to rest of the world either. A thorough examination of the mind-set of the Iranian lawmakers may easily demonstrate that from the religious and ideological vantage points of view as well, they could not deny the fundamental rights of the Iranians as Shahs did. The adoption of these apparently newly-arrived principles in the Iranian Islamic constitution did not serve only ornamental purposes as we have witnessed in many Muslim countries. Rather these changes have led to specific governmental steps to address the need of education for all Iranians irrespective of sect and gender. As a

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[10] *The Constitution of the Islamic Republic of Iran*, ALHODA International Publication and Distribution, Tehran, 2010, pp. 17, 18, 19, 22, 23.

result, now more than ninety percent of Iranians are educated and more than seventy percent of university students are female.

However, still the number of *kadis* (judges) among the women is quite low. It appears that like many *Sunni* orthodox views, *Shiite* interpretation of having too many female *kadis* is an obstacle in employing more women judges. Iran still has been struggling between religious orthodox views and revolutionary ideals of changing a Muslim society to make it competitive in global marketplace and international ways of resolving disputes. Olivier Roy says:

> *Every time Khomeini had to clarify the complex relations between religious law and revolutionary legitimacy, he opted to put the latter first...Here also the dominance of state is written into the constitution, even if lip-service is paid to the sharia.*[11]

What Western and secular authors and observers tend to miss most is the chapter three of the Iranian Constitution that elaborates the rights of the Iranians in details. There might be two reasons behind this deliberate avoidance of the Articles from 19 to 42 of the Iranian Constitution as the fundamental rights stipulated for Iranians.[12] Firstly, many believe that under any proclaimed Islamic system, such a wide raging fundamental rights cannot genuinely be meaningful for citizens at large. Secondly, there exists a strong *Islamophobia*,[13] which is a psychological impediment for the Westerners to recognize any legal or moral values conducive to the wellbeing of the entire society.

Many Westerners and ultra-secularists take progressive articles of the Iranian Constitution simply as a decorative aspect of Persian cultural legacy or they simply cannot believe that an overly Islamic Republic like Iran can follow such a constitutionalism allowing citizens to enjoy so many rights leading to the empowerment of people, particularly Muslim women folks. Moreover, there remains a serious gap between the ideals preached by the Muslim clergy and what really religious circles mean or do in real life.

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11 Roy, Olivier. 2004, *Globalized Islam: The Search for a New Ummah*, Columbia University Press, New York, p. 87.

12 Under the title of "The Rights of the People", the Iranian Constitution declares those rights equally applicable and implementable to all Iranians regardless of ethnic group, tribe, color, race linguistic groups or any other segment of population irrespective of gender, religion and life-style some Iranians may prefer for themselves.

13 "Islamophobia is prejudice against, hatred or irrational fear of Islam or Muslims. The term seems to date back to the late 1980s, but came into common usage after the September 11, 2001 attacks in the United States to refer to types of political dialogue that appeared prejudicially resistant to pro-Islamic argument." In: <http://en.wikipedia.org/wiki/Islamophobia> last accessed on 3 December 2011.

It would not be an exaggeration to acknowledge that Imam Khomeini and many Iranian religious leaders were successful to bridge this gap significantly, especially when they tried hard to do that by reinterpreting religious dichotomies prevailing in the Iranian society. Moreover the Iranian leaders had to deal with too many complexities of their own, related to religious tenets and their purposes to be achieved through the participation of masses. The *Shiite* legal doctrines derived from the sources of Islamic jurisprudence as their official reference of interpretations of legal, social, and religious issues are quite different from traditional belief in fatalistic mentality. Olivier Roy says:

> *Khomeini explains, for example, that the government might cancel pilgrimage if it is in the interests of the Islamic state to do so...But here again it is political considerations that decide what essentially Islamic, as opposed to the rules prescribed by religion.*[14]

Many Muslims also suffer from such wrong perception of Islamic religiosity, which is quite different from other religions. Islamic rituals are not an end by themselves; many religious rituals and doctrines are simply a means to reach the goal of ultimate spiritual salvation. Iranian Constitution in its preamble says that it regards economy also as a means rather than an end in itself.[15] Ismail Buyukcelebi says:

> *The universe's exact measure and balance, order and harmony, as well as that of all it contains, clearly show that everything is determined and measured, created and governed by God Almighty. Therefore, Divine Destiny exists. Such assertions as determinism, which is upheld by many people and even some Marxists, to explain such an obvious universal order and operation are tacit admissions of Destiny. But we have to clarify one point here: According to Islam, absolute determinism cannot be used in the context of human action.*[16]

Theoretically, it is not that difficult to articulate the ultimate goals of a Muslim or Islamic government for which they strive for. However, it is quite ambitious and challenging job for a government to convince its citizens to follow such a spiritual way of life concerning the state policies

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14 See above note 11, pp. 87, 88.

15 "In materialist schools of thought, the economy represents an end in itself, whereby it becomes a subversive, corrupting and ruinous factor in the course of man's development. In Islam, the economy is a means, and all that is required of a means is that it should be an efficient factor contributing to attainment of the ultimate goal." (Cited from the Preamble of the Constitution of the Islamic Republic of Iran).

16 Buyukcelebi, Ismail. 2005. *Living in the Shade of Islam*, Light, New Jersey, USA, p.44.

and their implementation. Suppressing and regulating various types of urge or crave for material consumerism to bring the spiritual values of selflessness in governing a country, is indeed, a difficult task.

The Iranian constitutionalism has been facing many challenges in keeping the religious and political leaders incorruptible and dedicated to the envisioned ideal society it intends to establish and nurture. The perception that Iranians wanted to become a regional power is nothing new. As a nation, Iran wanted to emerge as an influential power in the Middle East with the help of the Americans and Israelis. In the mid-1960s, American government sold a 5-megawatt reactor with 6.5 kilograms of uranium of special quality very close to nuclear weapon.[17] Ronen Bergman says:

> *Iran's desire for weapons of mass destruction was not born of the 1979 Khomeini revolution. On the contrary, the revolution actually delayed the process. The shah was very fearful of the Soviet Union, which shares a border with Iran, and wanted a position his country as an international superpower. He tried to acquire nuclear energy technology, and he signed a huge military agreement with Israel for the joint acquisition and manufacture of "missiles capable of carrying nuclear warheads."...But then, the interim prime minister appointed by Khomeini, Mehdi Bazargan, suddenly announced that all the contracts were annulled. He did so at the orders of the Ayatollah who, according to several sources, saw nuclear weapons as "anti-Islamic." Khomeini spoke of America's use of atom bombs at Hiroshima and Nagasaki and the killing of innocent civilians as evil deeds that were sharply opposed to the spirit of Islam. He did not want to replicate that sin, and so he issued a fatwa cancelling the entire project and forbidding the production of nuclear or other weapons of mass destruction. Until the end of the war against Iraq in August 1988, Iran did nothing to develop its nuclear potential further.*[18]

In fact, there is a consensus among the Islamic jurists that the entire process of making nuclear weapon and using it, even in the battlefields, is a sin against humanity and can never be allowed by any Muslim government. Killing of innocent civilians is equally a grave sin remained to be forbidden all the time for all parties concerned. By the instigation of the major Western powers, Saddam Hussein of Iraq wanted to have weapons of mass destruction to kill many more Iranian civilians during

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17 See Bergman, Ronen. 2010. *The Secret War with Iran: The 30-Year Covert Struggle for Control of a 'Rouge' State*, translated by Ronnie Hope, One World, Oxford, First South Asian Edition, p. 316.

18 *Ibid*, pp. 316-7.

his waged *'jihad'* against Islamic Iran for eight years (1981-88). Acquiring nuclear weapons cannot bring any benefit to any nation, Muslim and non-Muslim alike for there is a permanent ban on it by the *sharia* injunctions. Imam Khomeni's *fatwa* about nuclear weapon was in the full conformity with the sources of Islamic law and its application.

Separation of Powers between Three Branches of Government: Iranian Experiment with Islamisation Process

Unlike many other Muslim States, Islamic Republic of Iran was careful not to allow any particular branch of government or the executive head of the state to dictate all state policies at once. In compare to the American President or Prime Minister of the United Kingdom, Iranian President is less powerful constitutionally. According to Article 117 of the Constitution, Iranian president must be elected directly by an absolute majority of votes, who exercise their voting right in any given presidential election. Article 113 puts president's position in the second place after the office of the Supreme Religious Leader. A long list of duties and powers of the religious leader that has been stipulated in Article 110 may sound that Iranian President's position is quite subordinate to the former and president himself cannot exercise his own power without prior endorsement of the religious leader. With the help of the Guardian Council (article 110), religious leader can easily disqualify someone to run for the presidency or even can dismiss him after he has been elected.

Though theoretically, religious leader holds such power, yet in reality, the supreme religious leader in Iran does not intervene directly in the activities of the President. It was an open secret that as a candidate in the presidential race in 1997, Mohammed Khatami did not have the backing of the religious leader, Ayatullah Ali Khamenei, who constitutionally could block the way for the former to become President. Moreover, Mohammed Khatami was elected for the second term (2001-2005) and completed his term of presidency without any apparent opposition from the religious leader and the Guardian Council. Olivier Roy says:

> *Today there are no Islamists in Iran. The former revolutionaries have turned into either liberals or conservatives...Khatami's election expressed a call for democracy that is possible only because the entire population has been incorporated into a common political space by a popular and deep-rooted revolution.*[19]

Such kind of finding by Western author does not reflect any real dynamics of religious and political situation in Iran. Khatami earned good popular reputation of a reformist president of Iran and he

[19] See above note 11, pp. 76, 77.

practically withdrew a large number of clergymen from direct political engagement. In the surface, Iran is now fully controlled by so-called Westernized and modern elite under the indirect guidance of religious leadership.

Religious control over state machinery is no more apparent as it was before. Stronger institutionalize religious influence can be observed in the judicial system of Islamic Iran. Articles 156 to 174 ensure the full independence of judiciary and provide full protection to the judges in terms of their job, social status, and economic affluence. Article 164 says that

> *[a] judge cannot be removed, whether temporarily or permanently, from the post he occupies except trial and proof of his guilt, or in consequence of a violation entailing his dismissal. A judge cannot be transferred or re-designated without his consent ...The periodic transfer and rotation of judges will be in accordance with general regulations to be laid down by law.*

One of the endemic problems with the administration of justice in the Muslim world is the absence of good codified laws in the hands of the judges and also there are too many conflicting ideas and precedents of the past. Islamic Iran has come up with very rational and prudent ideas to resolve this problem. Article 167 stipulates that a judge have to use codified laws thoroughly and cannot ignore any codified law by showing the argument that a particular law is not compatible with the sources of *sharia* law. Article 167 says:

> *The judge must endeavor to base his judgment in each case on codified laws. If he cannot find such basis, he should deliver judgment on the basis of authoritative Islamic sources and reputable ruling (fatwa). He may not refrain from admitting and examining cases and delivering judgment on the excuse of silence of or deficiency of law in a matter, or its being general or ambiguous.*[20]

Thus one can observe that the judges in Islamic Iran are quite powerful and at the same time are duty-bound to dispense justice diligently and without any delay. Complexities within different schools of *sharia* and contradictory positions of different *madhhabs* are not supposed to hinder the system of administering justice in Iran.

However, in some areas, Iranian official interpretations of the Quran and other sources of *sharia* almost remained as orthodox as many Arab countries. For example, a knowledgeable Muslim is aware that there is no provision in the Quran that a person can be or should be killed by

[20] Article 167, *The Constitution of the Islamic Republic of Iran.*

stoning for any crime and this is a pre-Islamic punishment practiced by non-Muslim communities in the then Arabia. When and how after the demise of the Prophet of Islam such an inhumane and cruel punishment had become an acceptable form of punishment theoretically within the Muslim communities? Many supporters of this kind of punishment used some *hadiths* that do not have full credibility and authenticity to become prophet's example to be practiced in the first place. Nalise Ruthven says:

> *Zina, meaning both adultery and fornication, is punishable by flogging – one hundred strokes for each partner, irrespective of whether they married...This was amended in Islamic law, during the reign of the Caliph Umar, to death by stoning for offenders who are or have been married.*[21]

There is no reason why *Shiite*Iran would accept such kind of so-called Sunni position referred to the Caliph Umar. In fact, this is not a religious issue; rather it has direct legal implications. However, in theological discourse, many *Shias* are keen to prove that Umar as a Caliph was wrong in his legal interpretation here as well and like to bring the opinion of Imam Ali as the final words to deal with this serious legal matter. Thus the *Shias* tend to avoid the interpretations of the Quranic injunctions presented by others and wish to follow the examples set by Imam Ali.

It is still surprising to note that many *Shia* clergymen also could not abandon harsher punishment introduced by the Second Caliph. Legal issues in Islam cannot be remained personal or sectarian and ultimately people should have direct access to the original sources of Islam. This problem of rudimentary legal opinion based on *fatwa* directives revisits Muslim nations again and again. Thus it is not surprising that it took three decades for the Iranian clergymen to stop completely any kind of stoning to anybody for any kind of sin and/or crime.[22] Annemarie Schimmel says:

> *Persian poetical tradition has praised Hallaj; .... -sometime in terms of pity, sometimes in admiration, and sometimes rejecting him or declaring him to be merely a beginner on the mystical Path...In Iran, the name of the martyr-mystic has become a commonplace in the verses of almost all poets....Even among the taziyas, the plays*

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21 Ruthven, Nalise. 2006. *Islam in the World*, Third edition, Oxford University Press, p. 64.

22 In August of 2008 stoning as a form of punishment was suspended or stopped in Iran completely by adopting a new legislation. In fact, stoning to death as a mode of punishment has no place in Islamic jurisprudence, though many Muslim societies have inherited this horrible form of punishment from the Greeks, Romans, and from the pre-Islamic practices. Even the imprisonment as a widespread form of punishment was not a commonplace in Islamic history for the criminals.

> *written in commemoration of Husayn ibn Ali's martyrdom at Kerbela on the tenth of Muharram 680, Enrico Cerulli has discovered one piece that deals with the fate of Hallaj, who is here in strange juxtaposition with SMaulana Rumi and his mystical preceptor and beloved Shams-i Tabriz.*[23]

To find a very strict demarcation between sin and crime in Islamic jurisprudence is a complicated and difficult task to accomplish. Legislative acts through codified laws in any Muslim country have never been succeeded fully to differentiate criminal offence from misconduct, mistake or negligence of civil nature. After Islamic revolution in Iran some religious leaders strongly opposed any hard-line policies in regard to criminal justice system. However, the killings of hundred of religious leaders by *Mujahedin-e-khalk* and its direct involvement with foreign agents have hardened the criminal justice system in Iran. On the other hand, many Arab and Muslim religious circles had been trying to prove that Islamic revolution in Iran was not in right track in terms of implementation of the Quranic system of punishment.

Independence of judiciary in Islamic jurisprudence is of absolute character and even the legislative body cannot have an upper hand over judiciary by just adopting new laws without popular mandate identified through the avenues of *ijtihad*. Islamic Iran had to face this dilemma from the very beginning of the triumph of Iranian Ayatullahs at the helm of political and military powers in the country. Controlling state powers, religious leaders might become similarly dangerous like the secular Muslim elite, who in post-colonial era have remained unaccountable to the state and judicial authorities of Muslim nation-states. Iran under the political leadership of President Mohammed Khatami, who himself was a clergyman, has solved this problem successfully and made every segment of Iranian society accountable to the judicial system that had been developed under the spiritual leadership of Imam Khomeini.

Keeping the independence of judiciary under the influence of religious circles, how could Iran have a progressive system of governance in its relation to legislative and executive powers of the country? In fact, even under the regimes of the Iranian *Shias*, *ulema* in Iran had never lost its independence as it was in most of the Muslim countries. Parallel to the state authorities and judiciary, Iranian *ulema* did retain power and influence in resolving disputes in their respective localities. The role of Iranian *ulema* had ultimately shaped the course of development to the Islamic revolution of Iran in 1979. In many secular circles, there was a strong belief that Iranian religious leadership would not appreciate the necessity of the separation of powers at the highest levels of governance.

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[23] Schimmel, Annemarie. 2008, *Mystical Dimensions of Islam,* Islamic Book Trust, KL, ASEAN Edition, pp. 73, 75.

That speculation has been proved to be partially true time to time in diving the responsibilities between the religious and secular circles, both at the provincial and central levels. Joseph Schacht says:

> *The kadi cannot give judgment in favour of his near relative. On the other hand, his competence extends beyond the judicial office, and includes the control of the property of the missing person, the orphan, the foundling, and the person with restricted capacity to dispose, of found objects, pious foundations, and estates of inheritance. His power to dispose goes further than that of the guardian, even than that of father; he may, for instance, lend the money of an orphan...Finally, the kadi is in charge of public welfare in general, e.g. he forces the speculator on rising prices of food (muhtakir) to sell; he is, generally speaking, 'the guardian of those who have no other guardian'.*[24]

This was the main challenge the Iranian government had to face after the eight years long war against Bathist Iraq under the tyrannical rule of Saddam Houssain, who had been used by the Western and monarchical regimes of the Arab world to destroy Islamic Iran in every way possible. Islamic Iran could not go for any dramatic and/or progressive legislative process that might harm the Iranian religious leadership that had been suffering from image problem in the Muslim world because of its Shiite character and flavor. *Shias* have remained a minority all through the fourteen hundred years of Muslim history and Iranian *Shiiate* legacy was only five hundred years old. As a result, most of the Muslims around the world were quite suspicious and/or skeptical in regard to the revolutionary Iran and its intension to become a part of mainstream Islamic movement.

Islamic governments of Iran had been thinking that they were creating a new history of Islamic resurgence by bringing the Islamic values and ethnics in the forefront of political and religious struggle to save Muslim nations from further neo-colonial domination and cultural aggression. Iranian religious leadership and revolutionary forces in Iran could not imagine that they were isolated and remained practically alone in their struggle against Western and Muslim tyrannical forces around the world.

In many issues, religious orthodoxy could not come out from the rhetorically theological internecine fighting within itself and it was inviting revolutionary forces as well to be a part of fanatical and/or fundamentalist movement for the so-called pure revival of Islam. Maybe that was one of the reasons why it took a longer time for the Iranians to go for more progressive set of legislation in regard to reform its religious, political, and cultural systems. A good number of Iranian *ulema* and

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[24] Schacht, Joseph. 1964. *An Introduction to Islamic Law*, Oxford at the Clarendon Press, p. 188.

revolutionary elements in Iran have been trying to make *maslahat* (public good) a serious relevant issue to the system of legislation and governance for the benefit of the masses, while others are engaged in corrupt methods of amassing wealth in their hands. Olivier Roy says:

> *Such an approach is in the line with the traditional concept of 'public good (maslahat), which stresses the spirit and the meaning of law as opposed to a formal conception of it. The terms like adab (educated man's good manners), fitrat (man's nature) and ekhlaq (ethics; ihlak in Turkish) are given new importance. Norms are reformulated in terms of values, and are subsequently 'negotiable', meaning that the issue is not to follow the letter but the spirit of the law...Ethics and moral values are propounded because the strictly legal approach does not work, or for neo-fundamentalists has to be recast as a code.*[25]

From the considerations of social, political, economic, and constitutional development, Iran was a right place for an Islamic revolution to set the stage for a series of progressive changes to empower downtrodden people, especially extreme poor and under-privilege women. Iranian Islamic forces have rightly called their revolution dedicated to the *mustaefin* (poor, neglected, and underprivileged).

Western and tyrannical Muslim regimes around the world did not try to portray Islamic revolution of Iran as a Proletariat Revolution because hard-core communist and socialist elements could be accommodated in the revolutionary upheaval and its aftermath history of the country. Islamic Iran stood firmly against all kinds of hegemonies coming from the capitalist and communist blocs. However, Islamic Iran's anti-monarchial stand has made Tehran a target of military aggression of Arab monarchial and dictatorial regimes in general and Iraqi Bathist leader Saddam Houssain in particular, who wished to take advantage of anti-Iranian sentiments in the Arab world.

Eight years-long war against Bathist Iraq could made Islamic Iran a totalitarian state devoid of any constitutional system of governance based on the principles of separation of powers at the highest levels of government. Fortunately, Iranian leaders, religious and Westernized, were in consensus that they would strictly follow the constitutional system of transfer of power through popular elections and no branches of government should intervene in the affairs of others. The success story of the Iranian constitutionalism and power-sharing system based on

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[25] See above note 11, pp.189 -191.

popular mandate was either undermined or under-estimated by most of the Western and Muslim governments so far.

There is a widespread speculation that the Iranian President has no real powers and every time he wishes to do something he needs a prior permission from the religious leadership of the country, especially from the Supreme Leader. This is practically a serious misreading about the powers and functions of the Iranian President in particular and the executive branch of the state in general. The chapter IX of the constitution of the Islamic Republic of Iran consisting of 38 articles (from 113-151) specifically explains what are the powers the Iranian President can exercise in regard to domestic as well as foreign affairs. Stipulating the position of the President, Article 113 clearly says that the Iranian President is the second most powerful person in the country after the Supreme Leader. Article 113 says:

> *After the office of Leadership, the President is the country's highest official. He is responsible for implementing the Constitution and presiding over the Executive, except in matters directly concerned with the Leadership.*[26]

Some readers find too many limitations of the powers of the Iranian President, who apparently cannot exercise any significant state power just by his own initiatives. Iranians are very reluctant to give any one person or institution all state powers as their previous monarchs used to exercise. The trust building avenues between the people and religious leaders are quite open and it was a religious tradition in Iran since its emergence predominantly as a Muslim nation.

However, many Iranian Shahs or Kings underestimated the broad-based alliance between the Iranian *ulema* and regular Iranian people. In fact, that misreading of the minds of the Iranian clergy and religious people ultimately lead to the successful orchestration of the Islamic Revolution of Iran based on grass root support of all people of Iran, especially the Iranian youth and women folks. Iranian youth and the women were the main catalysts of the Islamic Revolution of Iran.

The official and unofficial clergy were somewhat hesitant to make the revolutionary events expedite and they took about one hundred years to take decisive stands to side of the people against the monarchical regime up to its complete abolition. In this background and with some bitter experiences with some early presidents just after the Islamic Revolution in 1979, the Iranian people did not want to have a president with too

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[26] Article 113, *The Constitution of the Islamic Republic of Iran.*

many powers. Moreover, ratification process of the Iranian Parliament to the President works in relation to foreign affairs is quite justified by any modern constitutional system around the world. Article 125 says:

> *The President or his legal representative has the authority to sign treaties, protocols, contracts, and agreements concluded by the Iranian government with other governments, as well as agreements pertaining to international organizations, after the approval of the Islamic Parliament of Iran.*[27]

This is a very prudent, wise, and realist way to handle the powers of a president elected by the people directly, otherwise he or she might become autocratic and may even act against the national interests as we have been witnessing in many Muslim and Third World countries. In some cases, the head of the government can sign treaties with other countries about which people may even not aware of the terms and conditions of those signed treaties. However, problem with the Iranian President is that he is not the head of the government, but the head of the State. As a constitutionally elected president he can never exercise any power conferred upon the office of the Supreme Leader of the country. Here the paradox is that the president is elected by the voters directly, still his powers are constrained by an unelected spiritual authority named as the Supreme Spiritual Leader of the country.[28]

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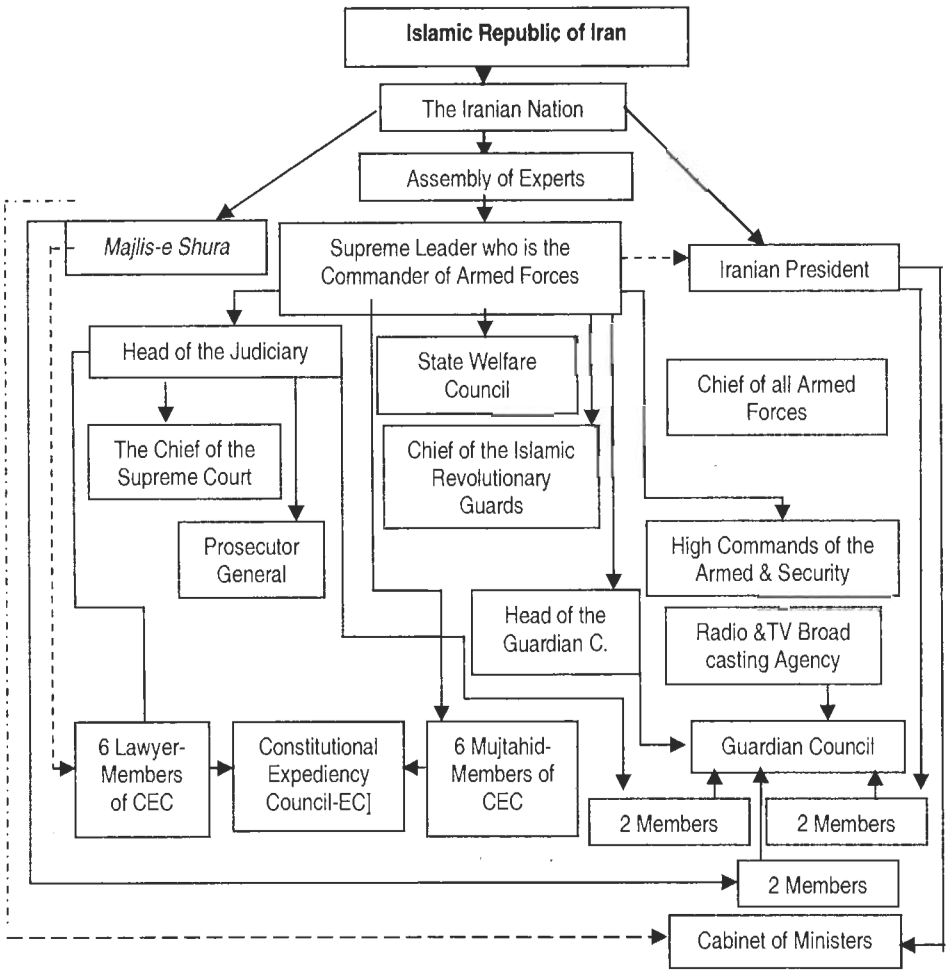
[27] Article 125, *The Constitution of the Islamic Republic of Iran*, ALHODA International Publication and Distribution, Tehran, 2010, p. 71.

[28] "The president is the second highest ranking official in Iran. While the president has a high public profile, however, his power is in many ways trimmed back by the constitution, which subordinates the entire executive branch to the Supreme Leader. In fact, Iran is the only state in which the executive branch does not control the armed forces."

In: <http://www.iranchamber.com/government/articles/structure_of_power.php> last accessed on 3 December 2011.

State Structure of the Islamic Republic of Iran[29]

(People, Selected and Elected Leaders)



From the depicted presentation of the form of the Iranian government, it is hard to have full and clear-cut picture of the power configuration designed by the Iranian Constitution. However, a duality can be detected at different levels of the state governance and the Iranian governmental system, which is rather very complicated and complex. The diagram gives a bit of distorted picture about the relationship between the Supreme

[29] Here we are mentioning a diagram made by Nur Houssain Majidi in his book titled *Islamic State and Leadership* (in Bengali) published by the Iranian Cultural Center in Dhaka, June 1997, p. 108.

leader and the president. The Iranian President constitutionally is not at all a weak institution unless it looses the endorsement of the Supreme Leader, who has a higher responsibility to keep the nation united. By doing great things and signing good legislations, Iranian President may emerge as a very powerful institution.

There is a kind of combination of selection and election methodologies in the process of establishing state structure, constitutional system, and governmental institutions. For example, the Constitutional Experts Council (Assembly of Experts) is a selected body, but the Guardian Council keeps a very vigilant eye on persons who are eligible to become the members of the Assembly of Constitutional Experts. Apparently, it is very similar institution like the House of the Lords of the English system. But in terms of its formation and functions, the Assembly of Experts has no similarities with that of the House of Lords in England. Moreover, the Assembly of Experts works like a Constitutional Court that we find in Germany and other countries. There is also the Highest Security Council consists of the following members:

1. President, 2. Speaker of the *Majlis-e Shura-ye Eslami* (Parliament), 3. Head of the Judiciary, 4. Chief of all Armed Forces, 5.Chief of the Planning and Budgetary Division, 6. Two Representatives of the Supreme Leader, 7. Ministry of Foreign, Home, and Information Divisions (National Security Division), and Ministers, 8.Relevant Ministries (Minister of Defense, Chiefs of the Armed Forces and Islamic Revolutionary Guards).

You may interpret Article 123 of the Constitution of the Islamic Republic of Iran in a very dubious ways. You may even find the Iranian President somehow helpless in the face of conflict between him on the one hand and the Supreme Leader and the Parliament on the other. It is true that President cannot afford to make the Parliament and the Supreme Leader angry at the same time as Article 123 stipulates:

> *The President is obliged to sign the legislation approved by the Parliament, or the result of a referendum, after it is forwarded to him and the legal stages are covered, and to forward to the relevant authorities for implementation.*[30]

From an apparent reading of the Constitution of the Islamic Republic of Iran, one may reach to a conclusion that the Head of the Judiciary, Chief Justice of the Country and the Prosecutor General maintain the similar types of powers and functions, which are practically shared on equal footing. However, in reality the Prosecutor General is a much smaller institution compared to the Chief Justice of the country.

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[30] Article 123, *The Constitution of the Islamic Republic of Iran.*

The Head of the Judiciary may appear to many outsiders a higher post than the Chief Justice of the country. In reality, the Head of the Judiciary is an executive post with too many administrative functions to protect the judiciary from the financial difficulties as well as corruption. On the other hand, the Chief Justice of the country can maintain his superiority and neutrality to all because of his total independence from all other religious and state institution and authorities.

The relationship between the Constitutional Expediency Council and the Guardian Council is also complicated and for an outsider it is quite difficult to tell which one is standing above over the other.[31] An analysis of the electoral laws demonstrate that the Guardian Council can only oversees and approves the candidacy of the aspirants wish to become elected as parliament members. The Guardian Council in terms of its original power of approving the members of the Assembly of Experts (AOE) performs a very crucial job. The AOE as body of supervising the legislative functions of the Parliament shares powers with the Guardian Council. The Council of Guardians headed by the former president Ayatollah Ali Akbar Hashemi Rafsanjani had asserted a lot of powers in interpreting the constitution and determining the compatibility of the laws passed by Parliament with the doctrinal stands of Islamic jurisprudence.

Because of that historical development in the Iranian constitutional system, some analysts practically try to establish that the elected Parliament members, in real terms, does not have the capacity to enact laws with the prior approval of the Council of Guardians (COG) The argument was that the COG had practically enjoyed a veto powers over the lawmaking authority of the Iranian Parliament. In practical terms as well it appears that the COG maintains an effective veto power over the legislative function of the Parliament. By juxtaposing the powers and function of the COG with the Council of Experts and Parliament, we find a unique system of check and balance in the lawmaking process and its deliberation. This is the reason why every candidate aspiring to become PM (Member of the Parliament) has to prove that he or she is not a corrupt person before the COG. Whether or not the COG is doing its work accurately is one of the main functions of the AOE. Both these councils have trying to keep the electoral system in Iran fair, neutral and incorruptible as much as possible. In this respect, Article 112 states

> *The State Expediency Council will meet by the Leader to decide what is most expedients whenever the Guardian Council considers a bill approved by the Islamic Parliament of Iran to be contrary to*

[31] The COG comprises of 12 prominent jurists. The Supreme Leader appoints 6 of them and other six are appointed by the Parliament.

> *the principles of the Sharia or the Constitution and Parliament is unable to secure the satisfaction of the Guardian Council on the basis of national expediency. The State Expediency Council will also meet to consult on any issue referred to it by the Leaders or related to its duties as mentioned in this Constitution.*[32]

Iranian constitution is a rigid one; no person or body can change or amend any Article or any rule of it so easily. In Iran, there is no constitutional court and no institution except, the Guardian Council which can interpret any of the constitutional provision officially. However, wide ranged academic interpretations are allowed and encouraged for the purposes of assimilation of good constitutional ideals and thoughts in view of its further development. Moreover, other constitutional institutions and lawmakers take serious note of any well-articulated academic criticism of constitutional system. Article 98 clearly sets a provision of amending any type of constitutional amendment. The Article says:

> *The right of interpretation of the Constitution is vested in the Guardian Council and is subject to the consent of three-fourths of its members.*[33]

Family and Women's Rights under Iranian Constitution

Any discussion about women's rights in Iran would face serious prejudice from Western and Muslim secular view-points, simply because of different kinds of paradigms they are habituated to use against traditional and tribal phenomena occurring in many parts of the Muslim world. Moreover, for various types of cultural and political reasons, many Muslim nation-states have adopted many discriminatory laws against women of their respective countries by arguing that those laws were found or based in the sources of Islamic law or jurisprudence. What many Westerners, including noted authors, do not see is that in Islamic Iran, there has been a great shift from the orthodoxy to reformisms that had also engulfed many Muslim nation-states, especially Asian Arab countries, Pakistan, and Afghanistan. Khaled Abou El-Fadl says:

> *Wahhabism exhibited extreme hostility to all forms of intellectualism, mysticism and sectarianism within Islam... Wahhabism also rejected any attempt to interpret the divine law from a historical, contextual perspective; in fact, it treated the vast majority of Islamic history as a corruption of, or aberration from, true and authentic Islam. The dialectical and indeterminate hermeneutics of the classical jurisprudential tradition were*

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32 Article 112, *The Constitution of the Islamic Republic of Iran.*

33 Ibid, Article 98.

> *considered corruptions of the purity of the faith and law. Furthermore, Wahhabism became very intolerant of the long-established Islamic practice of considering a variety of schools of thought to be equally orthodox, and attempted to narrow considerably the range of issues upon which Muslims may legitimately disagree... Perhaps the most extreme form of Wahhabi fanaticism took place recently, on 11 March 2002, when the mutawwa'in (religious police) prevented schoolgirls from exiting a burning school in Mecca, or from being rescued by their parents or firemen, because they were not "properly covered". At least fifteen girls are reported to have burned to death as a result.*[34]

This kind of orthodoxy has no place in Islamic theology and jurisprudence. Unfortunately, because of these kinds of incidents, Muslims have been suffering from serious image problem for quite long time and many Westerners and Muslim secularists had speculated similar kind of behavior and/or practice from the Iranian revolutionaries. Hardly any type of mainstream Western and Muslim media could imagine that the Iranian Islamists would behave differently. However, they were surprised to see the Iranian women's involvement in the revolutionary process of the post-Shah Iran.

Practically, without the direct and enthusiastic involvement of the Iranian Muslim women, the triumph of the Islamic revolutionaries in Iran could not be sustained at all. Countries like Pakistan and Saudi Arabia, by suppressing women folks, have practically done unimaginable damage to Muslim culture and Islamic heritage that had been always very supportive to underprivileged in general and women in particular. Muslim religious establishments in many Muslim countries either do not understand the importance of the empowerment of women in their respective countries or do not know how to take the empowerment system as a continuous process through education and professionalism.

A vast majority of Muslim and Western authors, who try to understand Islamic tenets and an appropriate system of criminal justice to run a so-called Islamic government, usually end up with discovering a penal law based on private vengeance and retribution against criminals committing crimes such as *zina* (unlawful sexual intercourse), *kadhf* (false accusation of such crime), *shrub al-khamr* (unlawful alcohol or wine consumption), *sarika* (theft), and *kat al-tarik* (highway robbery).

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[34] El-Fadl, Khaled Abou. 15 March 2002. *The Orphans of Modernity and the Clash of Civilizations*, 2008, cited from Saudi Police 'Stopped' Fire Rescue", *BBC News Report*, <http://news.bbc.co.uk/1/hi/world/middle_east/1874471.stm> last accessed on 3 December 2011.

Pakistani legislation has made a mess of these understanding of crimes and practically everything went against the interest of the poor and women, whose protection was at the core of Islamic jurisprudence derived from the sources of Islam. Orientation and foundation of Saudi and many other Muslim countries revolves around the idea of "*hadd* (plural *hudud*), Allah's 'restrictive ordinances' *par excellence*; they are death penalty, either by stoning...or by crucifixion or with the sword...cutting off hand and/or foot...flogging with various numbers of lashes...Imprisonment (*habs*) is not a punishment, except as *tazir*, but a coercive measure which aims at producing repentance (*tawba*) or ensuring a required performance. There are no fines in Islamic law."[35]

Muslim jurists interested in supporting and/or protecting Islamic ideal society from notorious criminals and heinous crimes perpetrated against society and individual citizens, have been suffering from this tunnel vision syndrome of delusion of miscalculating the effects and sequence of the means and ends of Islamic justice system as a whole. The worst victims of such delusive understanding of ways and means of combating crimes are always poor people and women folks.

Islamic revolution of Iran did offer an alternative to that distorted understanding of criminal justice and set the stage for Iranian women to become at the center of revolution, family system and societal activities, including professional drive for excelling the skill at working place. As a result, today Iranian women are much more advanced than their counterparts in many Muslim countries around the world. Such a progress has remained either unnoticed or unrecorded, because of the anti-Shiiate and anti-Iranian feeling in many parts of the Muslim world.

Constitutionally Iranians brought the family at the core of their nation-building efforts. Article 10 of the Constitution of the Islamic Republic of Iran says:

> *As the family is the fundamental unit of Islamic society, all laws, regulations, and relevant planning must be directed towards facilitating the formation of family, safeguarding its sanctity and the stability of family relations on the basis of Islamic laws and morality.*[36]

Main concern of any activist for women's rights in Iran is how to make a balance between family life and professional engagement. Neither the Western feminists nor Muslim secularists would ever agree that the women's rights could be better served or protected on the basis of Islamic

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35 See above note 24, p. 175 -76.

36 Article 10, *The Constitution of the Islamic Republic of Iran.*

ethics. However, feminist movements in the Muslim world got so many bad images that a regular Western mind can hardly think of.

Western social scientists, historians, and feminists have been either deliberately hiding the failure of feminist movements or do not know what went wrong with those movements and their consequences on family life in the West. Only some of the very recent objective studies on feminist movements in the West have started to reveal its failure to bring any substantial positive change in the lot of women's folks in the West.

Article 1118 of the Iranian Civil Code clearly stipulates that under all circumstances "wife can independently do whatever she likes to do with her property." Any feminist should be happy with this Article. However, the preceding Article (1117 of the same civil code) says that a "husband can prevent his wife from occupations or technical work which is incompatible with the family interests or the dignity of himself or his wife."

This is quite an unacceptable legal principle for Westerners and maybe of all kinds of feminists as well. It appears that the intension of the legislator here is to create obstacle for Iranian women to become sex-workers or engage in any other so-called modern profession not allowed in Islam. However, question may arise why such prohibitive measures had not been taken against husband as well. It is true that Muslim woman as a wife and mother still wish to play more traditional role in the family than becoming breadwinner like their Western counterparts. Even in the most secular Muslim country like Turkey, one in four adult women only work outside home. The Turkish Odyssey says:

> *To very briefly summarize the position of women in Turkey today, it can be said that unless you are a woman living in a metropolitan city and financially independent, life is still likely to be bound by the customs of traditional family life.*[37]

Under the Iranian Shahs, the Iranian women were also bound by many social and cultural customs, but apparently they were free to do whatever they like. In reality, in terms of educational and professional achievements, neither the Turkish nor the Iranian women could claim any substantial progress in compare to the Western women. What century-long secularism could not bring to the Turkish women, Iranian revolution wanted to offer that in practical terms by providing them a legal framework based on Islamic ethical values. That desire has been reflected in many Articles in the Iranian Civil Code as well.

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[37] Turkish Odyssey, In: <http://www.turkishodyssey.com/turkey/culture/people.htm> last accessed on 07 May, 2011.

Article 1119 of the Iranian Civil Code makes it clear that a girl or women "can stipulate any condition to the marriage which is not incompatible with the nature of the contract of marriage, either as part of the marriage contract or in another contract." In this Article, Iranian women has been empowered in the line of Islamic legal thought in a way that satisfies the demands of Islamic and Muslim cultural values on the one hand and empowers a married woman in such a way that she can obtain a divorce order though a court at her sweet will or just by appointing an attorney to do the job.

In contrast to Pakistani or Saudi legislation, this is a revolutionary legal arrangement for obtaining divorce by a married Muslim woman. Many observers and legal experts simply do not appreciate such a provision, which is fully compatible with the Islamic tenets and ethical principles.

Most of the Sunni jurists tend to argue that because of the temporary marriage[38] system sustained by the *Shia* communities, such a liberal position can be drawn by the Iranian *ulema*. This is again a misreading of the Iranian Islamic revolution and its consistent efforts to give better treatment to Muslim women, who are the most genuine catalysts of Islamic reforms both at state and family levels. The empowerment of the Iranian women through legal avenues is practically unparallel in the contemporary Muslim world.

As regards women rights, a news report says:

"Iran's 35 million women have greater freedoms and political rights than women in most neighboring Arab states, particularly Saudi Arabia."[39] Such an achievement still has remained unnoticed; either we do not see the legal stage set forth by the Iranian constitutional system or we can not relate the ongoing reforms of the Iranian society to its legal development that is of paramount importance. Iranian constitution and other laws give special emphasis on the importance of family relation by providing a wide range of rights to the women folks of Iran. Islamic views of Iran about the stronger family ties are very clear to comprehend and we can see its sensitivity to the women's rights and their implementation. The Constitution runs:

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[38] "Fixed-term marriage puts the limit on a woman that she must not be the wife of two men at the same time. Evidently such a restriction upon the women itself necessitates a restriction upon the man. When every woman has exclusive attachment to a particular man, every man will necessarily be attached to a particular woman...When both parties have the means for permanent marriage, and have full and satisfactory information regarding each other, and have full trust in each other, they may very well bind themselves in the pact of marriage for ever." In: Mutahhari, Murtada. 1981. *The Rights of Women in Islam,* WOFIS, Tehran, pp. 31, 37.

[39] In: <http://www.msnbc.msn.com/id/26547004/> last accessed on 09 May, 2011.

Such a view of the family unit delivers women from being regarded as objects and tools for the promotion of consumerism and exploitation. Thereby, while she recovers her momentous and precious function of motherhood and of rearing human beings committed to Islamic ideals, she also assumes a pioneering social role as a fellow struggler of man in all vital areas of life, thus shouldering a more serious responsibility and enjoying a higher worth and nobility from the Islamic viewpoint.[40]

Human Rights Situation in Iran: Constitutionalism vis-à-vis Fundamentalism

To any ordinary or regular Westerner, and even to the most Muslim secularists, human rights situation in Iran is very appalling because of its adherence to the doctrine of apostasy. For many Muslims, punishment for an apparent apostasy is death sentence. Death sentence as a punishment is no more acceptable to many Western and European countries. Among the Muslim countries, Saudi Arabia, Iran, and Mauritania keep the death sentence as a legal form of punishment for a public act of apostasy. At present, many human rights related organizations have been actively engaged in many activities related to death penalty abolition campaign.

In the overall perception of penal law, mainstream American thought still favors to keep death penalty against the perpetrators of heinous and violent crimes such as murder, rape, kidnap, armed robbery and so forth. In many Christian religious perceptions, abortion or homosexuality has been regarded as heinous crime to be persecuted with severe punishment including death penalty. From this perspective, Iranian penal law is not at all different from the American or Saudi system of criminal justice.

However, though officially Tehran denies the presence of homosexuals in Iranian soil, for such a crime of a known homosexual may end up with a death penalty[41] in a similar fashion that has been practiced in the case of drug dealers engaged in illegal business of narcotics coming through the boarders of Afghanistan and Pakistan. If we examine the criminal procedure law and the degrees of closed door and/or transparent character of its application, we can observe a lot of differences in the administration of criminal justice in these countries.

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40 *The Constitution of the Islamic Republic of Iran.*

41 In 2007 "on a visit to Colombia University in New York, Iran's hardliner President Mahmoud Ahmadinejad said "there were no homosexuals" in Iran in response to a question from a student. "Iran: Death penalty for man accused of homosexuality," "In: <http://www.adnkronos.com/AKI/English/Security/?id=1.0.2506821385>last accessed on 17 May, 2011.

While prison population in the USA and Russian Federation has exceeded two millions in either case and more than 50% of registered marriages have been falling apart in many countries of the world. According to the reports of Amnesty International[42] by September 08, Iran has executed 232 persons accused of serious crimes during last eight months, while during the entire year of 2007 China topped the list of such execution with a total number of 407. These are not simple statistics but rather great indicators of where we are moving as nations and mankind. Jurisprudentially, Islam may serve as a great orientation in solving many of these problems in a positive manner that would allow us to be genuinely civilized and peace loving.

Islamic legal system has some fundamental differences with any other system of law in regard to dealing and ensuring all kinds of property rights for daughters, wives, and mothers. However, most of those legal postulates are either not codified or shrouded with many ambiguities in the imagination of a vast majority of Muslims. As a result, when it comes to the complexities of practical implementation of laws, then prudent and wise opinion and/or verdict hardly can be found.

From historical perspective, it appears that Muslim jurists wished to have a legal system combining the features of common law system and traditions of civil law of governance based on wider perspectives of rule of law aimed at the spiritual salvation and justice for all. For example, Iranian legislators are still quite flexible in regard to the customs of polygamy. "Iran is one of the few - along with Syria and Tunisia- that require the consent of the first wife before a husband can take another. Still polygamy is rare in Iran, where most people frown on the practice."[43]

Islamic legal vision is not limited to a set of ideals or ideas, rater it is a universal world view capable of finding reasonable solutions to almost all difficult problems of any age ranging from agrarian society to knowledge-based and technologically-driven highly industrial society. In this regard, most Muslim communities of modern era have failed miserably to demonstrate that Islamic law is the only alternative to the existing dominant powers that have been destroying ecological balance and degrading human dignity of indigenous and non-white people around the world.

The level of socioeconomic development and industrialization process in the Muslim world was not at all favorable to the emergence of a better

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42 See for details, <http://www.amnesty.org/en/library/recent> last accessed on 15 May, 2011.

43 Dareini, Ali Akbar, "Iran bill to ease polygamy angers women", <http://news.yahoo.com/s/ap/20080904/ap_on_re_mi_ea/iran_polygamy> last accessed on 17 May, 2011.

legal system than any Western system either based on case-made laws and/or enacted laws promulgated by the legislative bodies that has been protecting vested interests of richer sections of the population. Furthermore, in most cases, existing legal and judicial systems in the Muslim world based on the societal process are either grossly inefficient or completely inadequate to deal with urgent political and legal disputes and controversies at hand diligently and honestly. It is stated that

> *Article 23 [of the Family Protection Bill] required men simply to obtain a judicial permit to remarry to confirm they can provide financially for the new wife and that both wives will be treated equally. Under current legislation, a man in most cases has to prove his first wife's consent for another marriage...article, 25, imposed taxes on the dowry, the money or property pledged by the man to his bride, which she can claim at any time through the course of marriage or when getting a divorce. Iran's judiciary, which had originally drawn up the bill, said the two disputed articles had been added by the government.*[44]

The original legislation drafted by the Iranian Parliament's Judicial Commission as a form of bill did not have these two Articles, which were ultimately dropped from the enacted law.

In the absence of a strong precedent system based on which justice can be delivered quickly and efficiently, Muslim legal systems in place are either too expensive or corrupted to bring any substantial benefit to ordinary masses, especially to the poor and downtrodden people. This is not a Muslim legal phenomenon; this a phenomenon prevalent now in the entire world where poor and underprivileged are being seriously discriminated in the court of law. Overemphasis on some procedural matters ultimately frustrates many objectives of quick and timely discharge of justice to the aggrieved parties. There is also serious confusion about how to use the sources of Islamic law as positive laws enforced by state agencies directly. In this respect, Islamic Iran has proved itself innovative in resolving disputes.

There is no doubt that distinction and relationship between state law and customary or religious law is always a problematic one. Even the very definitions of these laws tend to create more confusions rather than solving any real problem. The entire lawmaking process in any society and state cannot be put a side just for internal maneuvering of some stakeholders, who are always interested to put themselves in some special legal positions with some kind of special treatment.

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44 "Iran MPs amend polygamy bill after protests", In: <http://news.yahoo.com/s/afp/20080908/lf_afp/iranwomenrightsparliament_080908123012> last accessed on 17 May, 2011.

Islam is unique in the regard. From its very inception, Islam stands by the side of the downtrodden people of all religions, races, and gender. However, throughout the centuries, Muslim rulers have been distorting the very core mission of Islamic jurisprudence and constitutional system. Moreover, later on the colonialists took the full advantage of the situation and brought the entire Muslim world under brutal exploitation of colonialism, wild capitalism, and vulgar consumerism. Amartya Sen says:

> *Unlike the British rule in India where the rulers remained separate from the ruled, Muslim rulers in India were combined with the presence of a large proportion of Muslims in the population itself. A great many people in the land embraced Islam, so much so that three of the four largest Muslim national populations in the contemporary world are situated in this subcontinent: in India, Pakistan and Bangladesh. Indeed, the only non-sub continental country among the top four Muslim populations in the world, Indonesia, was also converted to Islam by Indian Muslims, mostly from Gujarat. Islam was by then a native Indian religion.*[45]

Islam is much more native in Iran than in the Indian sub-continent. However, because of its Shiite identity[46] with the Americanization process under the Iranian *Shias*, most outsider Muslims underestimate the influence of Islam on the Iranian psyche and culture. Throughout the Islamic history, some Muslim nations were more enthusiastic than others in adapting Islamic system within their own culture. As a nation, Persians were very enthusiastic in accepting Islamic principles and values in their state system. Commenting on that phenomenon the founder of Jafari school of law, Imam Jafar Sadique (699-765),[47] referred to the following Quranic verse and wanted to find a universal principle of organic relationship between Muslims of different nationalities and ethnic groups:[48]

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45 Sen, S Amartya. 1999. "Islamic Star over India." This article was presented/read at the UNESCO lecture series titled "An Assessment of the Millennium" held in New Delhi.

46 A large scale, even forceful, conversion of the Iranian Muslims from Sunnism to Shiism took place about four hundred years ago, specially during the reign of the King Shah Abbas, who at the age of seventeen inherited throne in 1588 and died as the most powerful Iranian Shah till then in 1629.

47 He is regarded as the Sixth Imam of the Twelvers (*ithna asharia*, followers of the twelve Imams) and his interpretations have been reCOGnized as an official *fiqh* (school of jurisprudence) of the Islamic Republic of Iran constitutionally.

48 See for detail, Mutahhari, Murtaza. 2004. *Islam o Iraner Parasparik Abodan* (Mutual Contribution of Islam and Iran), Embassy of Islamic Republic of Iran, Dhaka, pp. 27-59.

"If you turn away from God, He will cause other people to take your place, and they will not be the likes of you."[49] To Imam Jafar, who was born in Medina at a traditional and religious family, Arabs were already in the process of forgetting Islamic principles, while Persians had been taking Islam as a way of living seriously. It is important to note that during those days, Persian Muslims were the followers of Sunni-*Hanifimadhhab* and *Shia-Sunni* conflicting issues were not at the focal point for the Iranian Muslims. At present most Iranians along with many million Arab Shiites believe that Imam Jafar was one of the teachers of Abu Hanifa, whose teachings were the main terms of reference for Persian Muslims in regard to the rulings of Islamic sources up to the end of sixteen century. By converting themselves from *Sunnism* into *Shiism* and by orchestrating the Islamic revolution in 1979, the Iranian religious leadership has attempted to bring Islamic tenets to the hearts and minds of the ordinary Iranians.

Prior to the Islamic Revolution in 1979, Iranians were in complete seclusion in the Muslim World and the country's orientation to the anti-Islamic ideologies had been established to the eyes of Iranian public too vividly. Moreover, like many other Muslim countries, ordinary Iranian men and women lost their dignity as Muslims and human beings in the hands of the rulers. Human rights and fundamental constitutional rights were grossly violated for many decades in the name of Westernization, Americanization, modernization, secularization, and Islamization.

Islamic Iran has been trying to confront the above mentioned odds at home and abroad, and thus it has been taken as a challenge to the West as well as Sunni world. Moreover, Iranian leadership wishes to engage the Westerners and secularists in its own terms, those are either appeared to be unacceptable to the secular world or detrimental to the interests of Western and monarchial business circles.

Despite its many setbacks, Islamic Iran is keen to fill the gap left behind the Soviet Union, which kept the bi-polar world competing all over the planet for an international system based on socialist principles. Islamic Iran, though denounced the socialist ideals as an orientation for humane governmental system, in reality it has been trying to combine a kind of socialist system of distribution of wealth with the capitalist form of production. This is the reason that Iranian leaders are in loggerheads with one another over the issues of the State's role in regulating various aspects of creation of wealth and distribution of natural resources.

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[49] Quran, 47: 38.

Agreement and Disagreement between the Supreme Leader and the President

Compared to the Bolshevik or Chinese revolutions, Iranian Islamic revolution has remained a mystery for the outsiders. Even a large number of reputed Western authors have been failing to appreciate many human faces of "Iranian Fundamentalism" and find popular religiosity in Iran as a source of division rather than a source of unity for necessary reforms.[50]

After the Islamic Revolution of Iran in 1979, the first elected president Bani Al-Sadr was dismissed from the office for his disobedience to the Iranian Shiite clergy. This is apparently a paradoxical situation in the Iranian constitutionalism. Constitutionally the Iranian President cannot appoint or dismiss any minister without prior approval of the Supreme Religious Leader.

Imam Ayatullah Khomeini was the main architect and founder of the Islamic Iran and as a result, his authority remained unchallenged up to death in 1989. Neither the Iranian people nor the clergy did raise any angry voice against the Imam Khomeini's leadership even when he dismissed the first elected president, who found to be dubious in his loyalty to the people's trust and religious endorsement.

After serving two years as a president, Bani Sard was removed from the office quietly and quickly. Since then most Iranians and foreigners alike understand that an Iranian president does not have any constitutional authority to challenge any desire, wish or order of the Supreme Leader. A fair reading of the Iranian constitution also would tell us that an Iranian President should not dare to challenge the Supreme Leader in anyway or form.

However, the authority enjoyed by the founder of the Islamic Revolution in Iran and the constitutionally granted power to Ayatullah Ali Khameini as the Supreme Religious Leader cannot be compared. As a result, Rafsanjani and Khatami did not find much difficulties in exercising their political powers without much consultation with the Supreme Leader Ali Khameini.

Mahmoud Ahmadinejad was a big surprise for many quarters as he was first 'secular' Iranian president who commended the full confidence from the powerful groups of the Iranian clergy, including the Supreme Leader without whose support Mahmoud Ahmadinejad could not win in the presidential race in 2005 and 2009. However, during the second term in office, President Mahmoud Ahmadinejad has exhausted most of his

[50] See above note 11, pp. 76- 92.

foreign cards, which have gradually overshadowed by the popular uprising of the Arabs against their own dictatorial regimes.

Many Westerners thought that Islamic Iran would see similar type of uprising against the so-called Mullahs, who have been sharing state powers with the civilian and military bureaucracy for last few decades. In 2009 Rafsansani could not defeat Ahmadinejad in presidential race because the latter enjoyed the backing of many religious institutions and Revolutionary Guard (RG). In fact, the RG had played the instrumental role in making Ahmadinejad as the President of Iran twice and set the political tone and flavor for him. The rhetoric of the RG has a special importance for the Iranians at both peace and war. It has been believed that in May 2004 the RG set a voice like as follows:

> *Our missiles are ready to strike at the Anglo-Saxon civilization, and when we get the order from the leader we will launch them...There are twenty-nine sensitive targets in the United States and the West. We already ...know how we will attack them. We have a strategy for destroying the Anglo-Saxon civilization and to eradicate the Americans and the English. Iran has the means to attack Israel's nuclear facilities so that no trace of them will remain.*[51]

Iranian President has pronounced this kind of message many times and in the Muslim world, no official quarter took it seriously. However, Iranian public have enjoyed the rhetoric of their president against the Americans and Israelis, who could lunch a whole scale military attack on Iran long ago. Iranian religious and political leaders had played shrewd games of diplomatic maneuvers not to make them as a military target of the West anymore.

Apparently, the Supreme Religious Leader of Iran, Ayatullah Ali Khameini, had continued his unfettered support to President Mahmoud Ahmadinejad up to April, 2011, when President sacked the Minister of the Intelligence. It appears that Ali Khameini was quite unhappy with and annoyed by the President's earlier decision to appoint his brother-in-law Asfandyar Rahim Mashaie as Iran's vice president. Mashaie had to resign immediately in the face of people's opposition. In fact, it was a violation of the constitutional provision on the part of the Iranian President, who according to Article 121 of the constitution is duty bound of "refraining from every kind of arbitrary conduct."[52]

Many Iranians believe that during his second term in office since 2009, President Ahmadinejad deliberately challenged the constitutional

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51 Cited in: Bergman, Ronen. 2010. *The Secret War with Iran: The 30-Year Covert Struggle for Control of a 'Rouge' State*, translated by Ronnie Hope, One World, Oxford, First South Asian Edition. p. 296.

52 Article 121, *The Constitution of the Islamic Republic of Iran.*

authority of the Supreme Leader Ali Khameini. As a result, President dared to fire Meselhi, who was replaced by the president himself as the Minister of the intelligence. This has led a direct clash between the President and the Supreme Leader (SL), who reinstated Meselhi in the post of the Ministry of Security and Intelligence (MSI).

President Ahmadinejad refused to deal with Meselhi as the Chief of the MSI. However, the Members of the Shura Council demanded that President Ahmadinejad implement Khameini's orders. In response, Ahmadinejad refused to participate in cabinet meetings. More than one hundred conservative Members of the Parliament (MP) immediately drafted a resolution demanding the appearance of the President in front of the Iranian parliament to respond to their questions directly. Many more MP swiftly signed the resolution and demanding the questioning of the President Ahmadinejad about how he dared to disobey the Supreme Leader of the country.

Khameini's representative in the Revolutionary Guard, Ali Saiedi, warned President Ahmadinejad and advised the latter to obey the directives and orders of the Supreme Leader Ali Khameini. In the Iranian constitutional system, the president's power is not unlimited. President's authority, though has been received from the direct popular votes of the people, its application is only possible with a prior endorsement of the Supreme Leader (SL), who is subsequently guided by the *Sharia* sources.

President Ahmadinejad did not attend two cabinet meetings as a protest against the Meselhi's presence as a Minister. He was withdrawn from his scheduled meeting with senior Ayatullahs (in Qum), whose support played crucial role in his reelection in 2009. It appears that the tug-of-war between President Ahmadinejad and the SL would continue over the assertion of the process of exercising Presidential power. Ayatullah Meshba, Mortada Aqa Tahrani and many others gave the president Ahmadinejad strong warning of impeaching him from the post of President, if the latter fails to obey the SL.

The ongoing disputes, disagreements, and apparently political battles between the Iranian President and the SL have been caused by their different interpretations of religious doctrines, foreign policies, and so forth. However, underlying economic problems are ingrained in the perception of future prosperous and independent Islamic Iran.

Any Iranian President might be interested in bringing tougher economic control in all its formal and informal sectors of production and distribution. On the other hand, most religious institutions wish to have their informal economic stakes going bigger than ever before. Even in the countries, such as Turkey and Russia informal economy still dominate many factors in the formal sectors of their economies. Euclidian

approach to resolve these economic, political, and religious disputes would not be helpful to the Iranian President or the SL.

It is a serious misunderstanding that the SL is above all kinds of law, once he is elected by the Committee of Experts. It is not at all a correct interpretation of the Iranian constitution that Iranian President has no real power to run that state affairs and the SL leader can intervene whenever he likes. Frequent interventions of the SL into that powers and functions of the President may discredit the SL with grave consequences. Apparently, SL is not accountable to anybody or any organization, including Parliament, President, People, and not even to the Expediency Council or members of the Guardian Council. But putting his prestige, honesty, and efficiency on line, SL leader can be replaced by another influential religious leader.

Article 111 of the Iranian constitutions stipulates:

> *Whenever the leader is incapable of carrying out his constitutional duties, or loses one of the qualifications mentioned in Articles 5 and 109, or it becomes known that he did not initially posses these, he will be dismissed...In the event of the death, resignation, or dismissal of the leader, the Parliament of Experts shall expedite the appointment of a new Leader. During this time a Council consisting of the President, Head of the Judiciary, and a jurist from the Guardian Council, as decided by the State Expediency Council, shall provisionally assume the duties of the Leader. In the event of any one of them being unable to fulfill these duties, for whatsoever reason, another person shall be appointed by the State Expediency Council, with due observance of a majority of the jurists on the [Provisional] Council.*[53]

Conclusion

Prior to the 1979 Islamic revolution of Iran, Islamic features of Iranian Muslims did not attract outsiders to investigate how deep the Islamic influence were on the overall psyche of Iranian Muslims. It was a strong belief that Iranians were more Americanized than any other Muslim nation or country.

However, Iranian society was not secularized as its neighbor Turkey or it was not an orthodox as Pakistani or Afghan society. The 1979 Islamic Revolution of Iran caught the entire world with a great surprise. Many Western powers and most of the Arab regimes were determined to bring back some secular segments of Iranian society led by the military to the power to neutralize the strong presence of religious elements at every steps of the system of governance and judiciary.

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[53] Article 111, *The Constitution of the Islamic Republic of Iran.*

By holding a referendum just after the revolution, Iranian Islamic circles got an endorsed of 98.2% of popular votes to govern the country in accordance with the principles of Islam i. e., *Shiite Sariah*. However, still no one knew exactly what type of Islamic governance the Iranian revolutionaries wanted to establish in pursuance of their envisioned state-system with judiciary upholding the moral standard of Islamic legality and the rights of *mustaefin* (poor/oppressed/ downtrodden).

It was clear that because of its Shiite and Persian heritage, Islamic Iran could not follow a system similar to that of Saudi or Pakistani model. How fundamentally Iranians could be different from the Pakistanis and Saudis in their interpretations of the Islamic tenets about the core constitutional issues and judicial system was a main query for all quarters concerned. Winner of the Nobel Prize in literature, V. S. Naipaul was also wondering about the issue and was traveling Islamic Iran just after the revolution. Finding not many resentments among the Iranians against any overly system of Islamic governance Naipaul writes:

> *The paper [Iranian newspaper] was for the revolution, but it was protesting against what had begun to come with revolution, all the Islamic bans on alcohol, western television programmes, fashions, music, mixed bathing, women's sports, dancing...The revolution continued. The election results showed – although there were charges of rigging – that the people had done as Khomeini had told them, and voted in mullahs and ayatollahs to the constitutional Assembly of experts*[54]

Unlike orthodox religious circles of many important Muslim countries, revolutionary Iran was maintaining to have an Islamic legitimacy based on popular mandate. In compare to any other important Muslim country, national elections in Iran are more credible, fair, and transparent and in contrast to other religiously bias Muslim state, Islamic Iran tends to seek out their legitimacy in the public opinion through traditional and constitutional ways. This Iranian constitutional reality has remained ignored or suppressed because of the fact that the Western powers did not recognize Iranian electoral system as a democratic one. Moreover, both the Western and Muslim media divide Iranian religious and state authorities into fundamentalist and reformist camps respectively.

After the demise of the Imam Khomeini in 1989, many observers strongly predicted that Iranians might abandon Islam as a state ideology and would return to the process of westernization as introduced by the Iranian Shahs. In post-Khomeini era, it was not that hard to divide the Iranians into conservative and reformist camps. However, the dividing lines between theses conflicting groups were blurred rather very quickly.

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[54] Naipaul, V. S. 1982. *Among the Believers: An Islamic Journey*, Penguin Paperback, U. K., pp. 28, 39.

Mohammed Khatami, a clergyman was accepted as a leader of the reformists and was elected as a president of the country in 1997.

Mohammed Khatami was elected as a president of the second term and ran the country successfully up to 2005. Even the Iranians still do not know how successful Khatami was as a president and what the areas where he had failed. Akbar Hashemi Rafsanjani, who was also an Iranian president for two terms (1989-1997), tried to become the president in 2009 by using his conservative credential, but failed to defeat Mahmoud Ahmadinejad, who by then has proved himself more religious and orthodox as a president than any of his predecessors.

Rafsanjani's failure to become elected as a president again in 2009 had surprised many Iranians as well and the religious circles immediately made him the Chairman of the Expediency Discernment Council, which is supposed to resolve any dispute over legal issues between the Parliament and the Council of Guardians. If someone is serious and careful to see the system of check and balance in the Iranian constitution, it would not be difficult to find that no one person or institution at the system of governance and judiciary can use any kind of power absolutely, including initiating a new bill to be enacted as a law or just adopt a new law and repel an old one.

Such a kind of separation of power is almost absent in any other Muslim country. Iranians, liberals or democrats, and religious conservatives or secular anti-Islamists, in a vast majority did not want to go back to any kind of kingship or militarism that still remains a pattern of exercise of state powers in most Muslim and Third World countries. By uprooting the monarchial circles from the state powers, Iranians were in great danger of military takeover of the entire state machinery and in fact, many outsiders had been predicting a military rule in Islamic Iran.

In every important Muslim country, from Sudan to Indonesia, we can witness such a military takeover of civilian government at any time of crisis or vacuum in state power. Most outsiders were in view of that the Iranians would follow the footsteps of Pakistanis or Egyptians in exercising their powers over their own population.

However, the Iranian religious and governmental leadership went for a pragmatic way of running its state affairs and established a constitutional system of their own. Iranian religious pragmatism and political pluralism was either misunderstood or undermined by the Western and neighboring Muslim powers. The assertion of Iranian masses at state and regional levels had cost the Iranian nation huge price and causalities in terms of its human and financial resources.

Constitutional system that the Iranian leadership adopted and continuously has been revising to reflect the unfolding power configuration of Iranian society appears to be working for them and empowering the under-privileged, including women folks of the country.

Apparent religious domination over the political power has been diminishing gradually and state organs have been becoming people-oriented than ever before.

However, western cultural influence on Iranians has not been diminishing as the religious leadership wished for. Iranians in general are now less hostile than Turkish or Pakistani Muslim to the hegemony of American regime in the Arab or Muslim world. Iranians are happy as long as the Americans or Israelis do not attack the Iranian soil and target to humiliate them as Muslim nation or *shiite* power that has its own world view and way of life to follow.

Knowingly or unknowingly, Iranians along with the Turks and Russians have been replacing the Soviets in terms of their antagonism to the Western powers in the region and beyond. For the Russians and Turks it is a fight for their national survival and for the Iranians it is equally so who tried to set the tone for a worldwide Islamic renewal, revitalization, and revival far beyond the boarders of Arab or Muslim countries. This phenomenon is an integral part of the global religious and spiritual awakening for the protection of mankind, environment, eco-systems, and human dignity in general and individual rights in particular. This has now become a common yearning of millions of people of many religious and non-religious faiths across the boards as we all inherited one human race to share only one planet to live and thrive so far.

Maintenance to Muslim Women in Bangladesh and Malaysia: Is the Judiciary Doing Enough?

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Dr. Raihanah Abdullah[**]

Introduction:

Islamic family law system has been successfully in practice by the Muslim community since the early centuries of Islam until the present day. In the beginning of the nineteenth century, an attempt was made to reform the traditional Islamic family law. The idea in reforming the law began when the classical doctrine of Islamic Law was felt by the authorities of certain Muslim country to be unsuitable to cope with several problems faced by the Muslim community. Several Muslim countries have started to promulgate their family law in a codified form. Not every aspect of family law was subject to reform. Polygamy, *Talaq*, minimum age of marriage was among the matters of concerned to the reformers. Other areas such as maintenance seemed to remain untouched by the reformers and thus were left to be governed by the classical law.

Women's rights of property through maintenance are already granted in the *Sharia* law and under official law. However, after several decades of implementation of the legal provisions at the courts, several problems have been encountered by Muslim women especially in their ways to get justice and their rights. As those rights are not being implemented women are actually deprived of those rights which can empower them and bring about the economic empowerment. With the growth of women's studies, more and more authors have identified labour, power and sexuality as the main structural elements shaping the relationship between gender and power.[1]The economic position of women in society is reflected according to an eminent author as ability to own, or inherit and control, income earning assets; ability to participate in economic activities; control over their husband's income and right and ability to control property.[2]

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1 See for example Connell, R.W. 1986. *Gender and Power*. London, p.104.

2 Ahmad, Alia. 1991. *Women and Fertility in Bangladesh*. New Delhi, Newbury Park and London, p.31.

Women in Bangladesh are, marginalised within an intensely hierarchical system of gender relations which continually challenge to deny women not only access to social power and control over their own lives but also granted rights to which they are entitled.[3] Female employment in Bangladesh did not provide women control over main production, landownership or income earned.[4] However, Muslim women in Malaysia seem to have a better position than Bangladesh. The Government of Malaysia through the National Policy of Women in 1989 has underlined strategies for women's advancement. Women were given equal opportunities to higher education, better access to health-care and encouraged women to participate in workforce not only on the insignificant occupations but also in professional and managerial positions.[5] The government developed several programs to improve the legal and socio-economic status by providing greater opportunities in education, employment and monitoring programs for integration of women in development. Despite of industrialization and modernization, Muslim women in Malaysia did not abandon their religion, culture and tradition in order to improve their status.[6]

The practice of Muslim majority countries is shared like Malaysia and Bangladesh to lead to a reduction in improper application of *Sharia* law, particularly affecting women. The difference of social attitude towards women in Bangladesh and Malaysia is the main reason for comparison of this analysis. Therefore, this article will enhance access to the legal justice system by reviewing the relevant judicial system and mechanism in the legal framework and processes for the enforcement of Laws on women. The article aims to evaluate the potentiality of *Sharia* law for better protection of women in relation to her rights of maintenance. The impact of legal practice is exposed by the court cases, from which the views of the judiciary about the application of the laws for the empowerment of women of Bangladesh and Malaysia can be analysed. In view of our premises, we shall need to focus particularly on the question whether judges protect women from abuse and exploitation.

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3 Kabeer, Naila. 1988. "Subordination and Struggle: Women in Bangladesh". *New Left Review*. No.168, pp. 95-121, at p.101.

4 Khan, Zarina Rahman. 1992. *Women, Work and Values: Contradictions in the Prevailing Notions and the Realities of Women's Lives in Rural Bangladesh*. Dhaka, p.198.

5 Omar, Roziah. 2003, "Negotiating Their Visibility: The Lives of Educated and Married Malay Women", *Women in Malaysia: Breaking Boundaries*. Kuala Lumpur, p. 124.

6 *Ibid.*

The Law of Maintenance in Bangladesh

The laws which are in force in Bangladesh comprise the general law and the family law. The family law in Bangladesh is based on religion. Women's rights to property are already granted in the *Sharia* Law[7] and under official law but such rights are not enforced. There are misconceptions that as women are maintained they are not to be provided of their landed entitlements granted under Islamic and official law. Thus, the patriarchal argument that women are subordinated by religion is not completely true, as even the rights which are granted in the religious law are often not enforced in a male-dominated patriarchal society.[8] An innovative study showed that women are being deprived economically by the customs and conventions of the society that put an embargo to secure their inheritable entitlements.[9]

In cases of maintenance, the courts did not previously provide for past maintenance unless stipulated in the *Kabinnama* (Contract of Marriage), nor would it allow post-*Iddat* period (waiting period to remarry) maintenance to divorced Muslim wives. In Bangladesh, women had to rely on other techniques to secure some post-divorce maintenance. One writer suggested a hopeful trend towards adoption and enforcement of clauses in the marriage contract or *Kabinnama* which would clearly and in unambiguous terms provide for maintenance, as this offers protection against arbitrary and impulsive subjugation.[10]

The law of maintenance in Bangladesh is a combination of codified law, local traditions and the traditional Muslim law. The quantum of maintenance is regulated under the schools of Muslim law by considering different circumstances. The *Hanafi* law determines the scale of maintenance by referring to the social position of both husband and wife. Whereas, the *Shafie* law only considers the position of the husband

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7 Lateef, Shaheeda. 1973. "In a Community". Paper presented in the seminar on the status of women, held in Dhaka, pp.29-34; Serajuddin, Alamgir Muhammad. 1987. "Muslim Family Law and the Legal Rights of Muslim Women in South Asia". *Journal of Asiatic Society of Bangladesh* (Hum). Vol. xxxii, No.2, Dec. pp.128-147, at p. 128.

8 Monsoor, Taslima. 2005. *Judiciary & Gender on Trial.* Published by British Council and Foreign and Commonwealth Office, Dhaka; Monsoor, Taslima. 2008. *Gender Equity and Economic Empowerment: Family Law and Women in Bangladesh.* Published by British Council under EWLR (Empowerment of women in the legal regime) a Higher Education Link programme of Law Dept Dhaka University and Law Dept SOAS (School of Oriental and African Studies University of London), Dhaka.

9 See for details Monsoor, Taslima. 1998. "In Search for Security and Poverty Alleviation: Women's Inheritable Entitlements to Land, the Untapped Resources". *BILIA'S Journal of International Affairs*, Vol. 4, No. 2, July-Dec, pp. 42-57.

10 Malik, Shahdeen. 1990, "Saga of Divorced Women: Once again Shah Banu, Maintenance and the Scope for Marriage Contracts". 42 DLR (Journal), pp. 35-40, at p. 39.

and the *Shia* law focuses on the requirements of the wife.[11] Bangladesh mainly follows *Hanafi* law but the cases do not reveal that the courts take into consideration the social position of both husband and wife while ascertaining the amount of maintenance. The query analysing the case law in Bangladesh will project whether the courts give more preference to the Muslim women in Bangladesh to realise their rights of maintenance.

Application of the Legislation Relating to Maintenance by the Courts in Bangladesh

It may be expected that the effects of a male-dominated patriarchal society have an impact on the courts. But some judicial decisions are remarkably enlightened and can be seen as a departure from the patriarchal mould. These decisions signify concern of the higher courts not only about giving general emphasis on women's rights but also about the need to protect women from cruel treatment and deliberate economic deprivation. There are also many judgments, however, in which the courts interpreted the legislation only on the basis of orthodox concepts and fail to give effect to the underlying social purpose of the *Sharia* law or legislation.

The views of the judiciary about the application of the laws for the empowerment of women in Bangladesh was analysed by reported and unreported cases. In view of this premises, we shall need to focus particularly on the question whether judges protect women from economic abuse and exploitation. To analyse how far judicial decisions are enforced to protect or safeguard women's interest, or whether they are merely rhetoric, we have to go into details of the family law judgments.

Thus, this part of the paper will focus on the application of this legislation as reflected through case-law. First of all, we are concentrating on the decisions of the higher tier of the judiciary to observe the attitude of the judges towards granting maintenance to women then we will deal with the unreported decisions of the family courts. Finally we will focus on the problems faced by women when they want to enforce the law.

The reported cases of maintenance of the higher level of judiciary do not generally project a modernist trend of the law. Although, the latest decisions of the highest tier of the judiciary has suddenly made a substantial development in the law of maintenance.

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[11] Tyabji, Faiz Badruddin. 1968. *Muslim Law*. Bombay, pp. 265-266; Ali, Syed Ameer. 1917. *Mohammedan Law*. Vol.II, Calcutta, p. 462; Anderson, Norman. 1976. *Law Reform in the Muslim World*. London, pp. 132-133.

In a reported case on maintenance, the High Court shows itself to be static and does not deviate from the traditional concept of providing past maintenance unless the claim is based on specific agreement or a decree of a court. In *Rustom Ali v Jamila Khatun*[12], the High Court Division of the Supreme Court did not grant past maintenance allowed by the lower Court as the wife was not staying with her husband. Thus, the husband, with his sexual rights over the wife, controls residence in his marital home. Where the wife refuses to cohabit, she becomes a disobedient wife or *Nashuza*, which was in this case regarded as a *prima facie* cause for not allowing maintenance.[13] Muslim law only allows the wife maintenance if she is staying in her father's house, when the husband did not request her to come to his house, or it would involve danger or risk to her life or health to remove her from her father's house.[14] The court did not consider the conditions which compelled the wife in *Rustom Ali v Jamila Khatun*[15] to stay separate. This conveys an impression of insensitive attitude towards women and also exhibits a strong desire to control women's movement. The court only allowed maintenance from the date of institution of the suit till three months after the decree for dissolution of marriage, i.e. during the period of her *Iddat*.

In *Hosne Ara Begum v Md. Rezaul Karim*[16], the High Court Division of the Supreme Court ordered the husband to pay maintenance even when the wife left the husband's residence. The wife was living away from the matrimonial home on the ground of cruelty. Perhaps, the evidence of cruelty of the husband made the court considerate towards the wife. However, in *Sirajul Islam v Helana Begum and others*[17] the High Court Division of the Supreme Court decided that the court has the jurisdiction to pass decree for past maintenance in an appropriate case and the decision of *Rustam Ali v Jamila Khatun*[18] was held not to be applicable.

The latest position of Sunni Law in the subcontinent regarding past maintenance of Muslim wife is held by the Appellate Division of the Supreme Court in *Jamila Khatun v Rustom Ali*[19] is that the wife is entitled to past maintenance even in the absence of any specific agreement.

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12 43 DLR 1991, HCD 301.

13 For the law on this see Mahmood, Tahir. 1986. *Personal Laws in Crisis*. New Delhi, pp. 76-79; Tyabji, above note 11, pp. 263-267.

14 Ali, above note 11, p.461.

15 43 DLR (1991) HCD 301.

16 43 DLR (1991) 543.

17 48 DLR (1996) 48.

18 43 DLR (1991) 310.

19 16 BLD (AD)(1996) 61.

Unreported judgments on realisation of maintenance in the family courts of the capital city of Dhaka were gathered. The cases are usually brought for the realisation of dower and maintenance together. Because the rift between the parties has already started, a maintenance claim is the only weapon women have to restore their position or at best to have some relief from economic constraints. The cases on the issue of maintenance as a fundamental right of Muslim women apparently show that the family courts strictly apply the traditional Muslim law, in fact they are not. Other judgments revolve in a similar trend where the doctrines of traditional Muslim law are forcefully applied even when it is not applicable. As for example the doctrine of *Nashuza* or disobedience is applied to wives and it is regarded as their fault if they leave their matrimonial home even when their husbands lives abroad and the mother-in- law ill-treats them. But in accordance to the *Sharia* law if there is sufficient cause for the wife to refuse to live with the husband she is entitled to maintenance. According to Mahomed Ullah Ibn S. Jung:

Maintenance is due to the wife even when she is in her father's residence, unless she refuses to live in her husband's house.[20]

In *Monawara Begum v Md. Hannan Hawladar*[21], the family court of village Madhurchar in Dohar *upazila* (unit of administration) of the Dhaka district did not allow the wife maintenance on the ground that she was not present in her in-law's house while her husband was working abroad. This means that the judges are concerned for the presence of the wife in the matrimonial home, not only for the performance of the marital obligations. This is further evidence that judicial attitudes are influenced by stereotyped concerns about controlling women's movement. In the above case, what was the wife expected to do in the in-laws' house? It had been held in a very old case[22] that the wife is not entitled to maintenance in such a situation, as quarrels and disagreement with her mother-in-law did not constitute a legal reason for her to leave her husband's house. This situation could be tackled if the right of separate residence and maintenance for such ill-treatment or differences had been stipulated in the *Kabinnama*, as in a much older case.[23] The court may have based the judgment on the former case, although there is no reference to any case law. On the other hand, the court was relying on the wrong or fault of the plaintiff and not the defendant's staying abroad.

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20 Jung, Mahomed Ullah Ibn S. 1926. *A Dissertation on the Muslim Law of Marriage-Compiled from the Original Arabic Authorities*, Allahabad, p. 41.

21 Family Suit No.15 of 1989 (unreported).

22 *Mohammad Ali Akbar v Fatima Begum*, AIR 1929 Lahore, 660.

23 *Sabed Khan v Bilatunnissa Bibi*, AIR 1919 Calcutta, 825.

This might itself be the effect of the patriarchal notions influencing the attitude of the judge. The court ascertained that the wife had left her husband's residence without his permission, as she could not produce any letter showing that her husband has given approval for her to leave the residence.

The courts interpret the fact that when a plaintiff is not living with her husband it is equivalent to refusal to perform marital obligations (See for details *Ambia Khatoon v Md. Yasin Bepari*[24], *Mst. Hafeza Bibi v Md. Shafiqul Alam*[25], *Mst. Razia Akhter v Abul Kalam Azad*).[26]

Sometimes the family courts do not recognise the false allegations of the husband that the wife does not have any moral character and was married before but strangely allow the maintenance of the *Iddat* period. In *Mst. Shahida Begum v Md. Mahbub Hossain*[27], the plaintiff prayed for the realisation of maintenance only for the *Iddat* period. The defendant alleged that the plaintiff had married him while her marriage was already subsisting with another man and she did not have a good moral character. The court rejected these defences as the defendant could not prove any of them sufficiently. The court held that as the defendant had given *Talaq* (one form of dissolution of marriage) to the plaintiff, she was entitled to maintenance for the period of *Iddat*.

In *Mst. Meherunnahar v Rahman Khondakar*[28], the family court squarely applied the classical Muslim law that when the marriage is not consummated, the wife is not entitled to any maintenance.[29] The court rejected the allegation of the defendant that the wife had venereal disease but decided that *Talaq* was effectively given. The court ascertained that the defendant had failed to provide maintenance to the plaintiff but did not allow maintenance to the wife as she herself had stated that there was no consummation of the marriage. Although the facts and circumstances showed the opposite, the court ruled that admitted facts need not be proved. It was evident that the plaintiff (wife) lied in the court about not having intercourse with her husband. But why did she lie? Was the force of female seclusion (Shame or *Lojja or Sharam*) even stronger than her claim for maintenance? However, such attitudes of women are never considered in a court of law. There is a strong sentiment of female seclusion of *Lojja* and *Sharam* working within women

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24 Family Suit No.98 of 1990 (unreported).

25 Family Suit No.28 of 1992 (unreported).

26 Family Suit No.193 of 1989 (unreported).

27 Family Suit No.112 of 1991 (unreported).

28 Family Suit No.24 of 1987 (unreported).

29 See Ali, Ameer Syed. 1917. *Mohammedan Law*. Vol. II, Calcutta, p.463.

of Bangladesh, so that they do not like their private affairs to be opened in public. These emotions might have changed their attitude in the legal battle.

It is important to point out that it can not be gathered from the judgments whether the courts follow the traditional doctrine of taking into consideration the social position of the parties for ascertaining the quantum of maintenance. It could not also be assessed what principle they follow to ascertain the precise amount of maintenance. In the *Kabinnama*, maintenance is usually regarded as to be given in a respectable manner (*Bhodrochito hare*). But it is not expressed how much maintenance can be regarded as respectable.

In some cases, where the husband resides abroad, the family courts grant a higher scale of maintenance. In *Margubater Rouf v A.T.M. Zahurul Haq Khan*[30], a suit for the realisation of dower and maintenance, the facts of the case disclose that the parties were married on 20.10.88 and the marriage was registered. In the *Kabinnama* the dower was fixed to the extent of 300,000 taka, which might be for show of status or security for the wife. The plaintiff pleaded that the defendant left for abroad and did not provide any maintenance for her. The defendant alleged that the plaintiff was having an affair with another man and was unwilling to lead a conjugal life with him. The reasons behind this might be the migration dilemmas arising when husbands work abroad, as well as the social disapproval of the wife living without her husband. The husband gave *Talaq* to the wife on 25.2.90. The court decided that, as *Talaq* has been given effectively, in accordance with the *Muslim Family Laws Ordinance* 1961, no marriage subsisted and the wife was entitled to maintenance during the *Iddat* period. The court reasoned that the wife was not entitled to any maintenance during the subsistence of the marriage as she was not willing to have conjugal relations with the husband. But it is interesting to note that the court ascertained 40,000 taka as the maintenance of the wife for three months, i.e. 13,000 taka per month, whereas in similar cases only 600 to 1,000 taka per month were given. It may be assumed that the court was here taking into account the financial ability of the husband, who was working abroad. Alternatively, it was compensating the wife for the fact that matrimonial cohabitation ceased not due to her fault, but the husband's absence for being abroad. However, in *Nasima Bilkis v Md. Abdus Samad*[31], the maintenance for the *Iddat* period was ascertained at as 2,500 taka per month when the husband was not working abroad. It cannot be gathered from the

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30 Family Suit No.1 of 1992 and Family Suit No.3 of 1992 (analogous hearing) (unreported).

31 Family Suit No.12 of 1992 (unreported).

judgment why the court awarded such a high amount. The plaintiff divorced the defendant on the basis of her delegated power of divorce on 2.6.91 and registered the *Talaqnama*. The family court decided on the evidence of a letter of the plaintiff's father that the relationship of the parties was not harmonious and so the plaintiff was not entitled to maintenance during the subsistence of the marriage not even for the seven days when she was staying with the defendant. But the family court decided that the plaintiff was entitled to maintenance for the *Iddat* period.

There are some unreported cases in the family courts of Dhaka which portrays a positive picture where the courts not only allowed maintenance in the subsistence of marriage but also in *Iddat*. In *Mst. Roksana Begum v Md. Abul Khair*[32], the defendant claimed that he has given *Talaq* to the wife but he could not prove it in the court. The court therefore held that the *Talaq* was not effective. The court decided that the defendant must pay within thirty days of the judgment maintenance of 1,000 taka per month to the plaintiff for the time when the proceedings were conducted, i.e. from the date of instituting the suit to the date of judgment (May 1991 to March 1993). The court also directed the husband to pay the monthly maintenance to the wife within the first 10 days of the month. The same situation arose in *Mst. Angari Begum v Md. Iqbal Rashid*[33]. In *Mst. Fatima Begum v Mohammed Golam Hossain*[34], the court held that the wife was entitled not only to maintenance for the present time but also past maintenance for the last seven months, as there was an agreement to pay maintenance in the negotiation or *Shalish* in the Commissioner's office. This shows that the courts are also considering other contracts than the *Kabinnama* to ascertain the maintenance and, in particular, that they are willing to build negotiated settlements into their decisions.

In South Asia the jurists had also argued that the husband should provide maintenance during subsistence of marriage and during the *Iddat* period.[35] This is because in Islam after dissolution of marriage the parties are entitled to remarriage and the woman returns to her natal family.[36] It is just not fair to burden a man with the obligation of maintenance when he is no more her husband as marriage is a religious and social contract under Islamic law. Moreover, according to Islamic

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32 Family Suit No.96 of 1991 (unreported).

33 Family Suit No.52 of 1991 (unreported).

34 Family Suit No.61 of 1991 (unreported).

35 Fyzee, A. A. A. 1974. *Outlines of Mohammedan Law.* Delhi, p.186; Diwan, Paras.1985. *Muslim Law in Modern India.* Allahabad, p. 130.

36 Mahmood, above note 13, p.87.

law, the deferred dower is seen as the safeguard for divorced women. Nevertheless, women in Bangladesh are usually deprived of their deferred dower. But what happens to those women whose natal family cannot provide for them? There is no state welfare system in South Asian countries as in the West. Islamic law states that if the natural family cannot maintain the divorcee her maintenance will be charged on collective resources of the Muslim community as a whole. If there is a *Baitul Mal* or a community fund the divorcee could be provided from it or from savings out of *Waqf* property can also be used for such purpose.[37]

In India it has been argued that maintenance after divorce is an obligation of the ex-husband on the basis of the argument provided in the original sources.[38] The appellant stressed that the amount which was stated to be given after divorce is the deferred dower. Conclusively *Mataa* (consolatory gift) is a gift to be given to divorcee or at the time of departure to console her or to conciliate her grief at the critical and delicate moment. But this argument did not satisfy the court and they decided that divorcee should be provided for maintenance till remarriage or death. This decision by the apex of judiciary in India exploded the Muslim community into great controversy and debate. Majority of the Muslim community was of the opinion that the line of reasoning adopted by the Supreme Court was contrary to the *Sharia*. It was opined that it is neither desirable nor reasonable to bend the personal laws beyond their limit to unsettle the well-established rules of Muslim personal law.[39] This agitation in the Muslim circle led to the passing of the *Muslim Women (Protection of Rights on Divorce) Act*, 1986.[40]

From the women's viewpoint it is seen that the wife who has spend her whole life and labour for her husband's household, which was not rewarded, should not just be turned out of her house without any subsistence. In Bangladesh these problems are not articulated yet. The High Court Division of the Supreme Court had taken steps to provide for post-divorce maintenance. In *Hefzur Rahman v Shamsun Nahar Begum*[41] it was held that a person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of *Iddat* for an indefinite period till she loses the status of a divorcee by remarrying another

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37 Shabbir, Mohd. 1988. *Muslim Personal Law and Judiciary*. Allahabad, p. 288.

38 In the celebrated case of *Shah Bano v Mohd. Ahmed Khan* (AIR 1985 SC 945) in India the court allowed post divorce maintenance. See for details, Naseem, Mohammad Farogh. 1988. *The Shah Bano case: X-rayed*. Karachi, Ali, Asghar (ed.). 1989. *The Shah Bano controversy*. Bombay.

39 Shabbir, above note 37, p. 285.

40 For the current developments under the Muslim Women (Protection of Rights on Divorce) Act of 1986 see Menski, W.F. 1994. "Maintenance for Divorced Muslim Wives." *Kerala Law Times.* Vol. (1), pp.45-52.

41 47 DLR (1995) 54.

person. The verse in the Holy Quran (2:241) translated by Abdullah Yusuf Ali was relied on:

'For divorced women maintenance (should be provided) on a reasonable scale.[42] This is a duty on the righteous.'[43]

The High Court Division considered only the literal meaning of the first part of the verse. The transliteration runs as: "*Wa lil-mootalla Kate Mataaoon bil-maaroof*".[44] However, the Appellate Division of the Supreme Court held that the learned judges of the High Court Division did not give any attention to the real translation of the two Arabic words "*Mataa*" (consolatory gift) and "*Nafaqa*" (maintenance) and wrongly held that a divorced woman is entitled to maintenance till she remarries.[45] *Mataa* has been translated as consolatory gift or compensation or indemnity. It is basically different from regular maintenance of the divorcee.[46]

Traditional Muslim juristic opinion is to the effect that the injunction of the Quran does not go beyond the *Iddat* period. According to *Hedaya* translated by Charles Hamilton (Book IV, 145). Neil BE Baillie in his book also imitated the view from the *Hedaya* and stated that a *Mooutuddah* or women who are divorced on account of repudiation for any cause other than her own, is entitled to maintenance and lodging during her *Iddat*.[47] This has been recently upheld by the Appellate Division of the Supreme Court of Bangladesh in *Hefzur Rahman v Shamsun Nahar Begum*.[48] The Quranic verse 65:6 which is considered in this regard directs the husband's to pay maintenance to their divorced wives during *Iddat*, it says:

> *Let the women live (In Iddat) in the same style as ye live, According to your means: Annoy them not, so as to restrict them. And if they carry (life in their wombs), then spend (your subsistence) on them until they deliver their burden: and if they suckle your (offspring) give them their recompense: and take mutual counsel together; according to what is just and reasonable.*

Consequently, the Appellate Division ruled that the judgment of the High Court Division is based on no sound reasoning's and it is against the principles set up by Muslim jurists of the last fourteen hundred years.

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42 The Quran, 2:228 and 2:241.

43 Ali, Abdulla Yusuf. 1979. *The Holy Quran*, Delhi.

44 *Ibid.*

45 51 DLR (AD) (1999) 172.

46 *Ibid*, 173.

47 Baillie, Neil B.E. 1875. *A Digest of Moohummudan Law.* 2nd ed. London, p. 450.

48 51 DLR (AD) (1999) 172.

The judgment was perhaps a reflection from earlier decisions. In[49]an old case as early as in 1870 it was held by the Privy Council that it would be wrong for the court on a point of this kind to attempt to put their own construction on the Quran in opposition to the express ruling of commentators of such great antiquity and high authority.[50]

In the above case of *Hefzur Rahman v Shamsun Nahar Begum*[51] it was also held by chief justice ATM Afzal that the Quranic verses can not be understood in total isolation and not only on its literal construction but with the help of the prophet's (peace be upon him) teachings and practices and subsequently by the enunciations of Islamic jurists and scholars. Justice Mustafa Kamal in his decision stated that if *Mataa* means maintenance it will run counter to *Ayats* 233, 236 and 237 of *Sura Al-Baqarah* and *Ayats* 6 and 7 of *Sura Al-Talaq*. If *Mataa* does not mean maintenance it means consolatory gift or compensation or indemnity which should be provided to the divorced women in accordance with the Holy Quran. Recently authors are echoing in the same direction that this remedy is treated as a compensation for an arbitrary *Talaq* and is not an automatic, general entitlement, which has been ignored in South Asia.[52]

The execution of family court decrees in accordance with the *Family Courts Ordinance*, of 1985 is dealt in section 3 which states that if the decree is the payment of money and the decretal amount is not paid within the time specified by the court, the family court will act as the civil court. But if it is for the order for payment of fine the family court will act as the criminal court and may issue a warrant, pass an order for imprisonment if the decretal amount is not paid. The execution of maintenance decrees is similar to the decree of the payment of money. It is suggested here that also where the decree is the payment of money the family courts power should be as the criminal court. This will ensure that the husbands pay maintenance. It is also recommended that the sanctions of the family courts could be strengthened by providing them with a criminal court's power to attach the property of husbands to pay maintenance to the wife.

The real difficulty in availing the legal remedy for obtaining maintenance is the time factor involved in getting a decree for maintenance. It has been rightly pointed out by an author that maintenance for the wife is an immediate need and the delays in litigation often defeat the purpose.[53] It

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49 *Aga Mahomed Jaffer Bindamen v Koolsoom Beebee and others.*

50 25 ILR(1870) Cal 9.

51 51 DLR (AD) (1999) 173.

52 Pearl, David and Menski, Werner. 1998. *Muslim Family Law*. Lahore.

53 Patel, Rashida. 1979. *Women and Law in Pakistan*. Karachi.

is suggested that reforms should be made in the *Family Courts Ordinance*, 1985 for providing interim orders not only for preventing persons from frustrating the suit as provided under section 16A of the Ordinance. But providing for an interim order pending final disposal of the suit, for a deposit in the family court every month, an amount tentatively determined by such court for payment as maintenance of wife and children. The powers of the family courts should be enhanced in this regard. By this method for an interim maintenance order it will give relief to the deserted and poor wives who do not have any other means of livelihood. Although this article is circumscribed to legal connotations and does not specifically deal with the social implications. It is undisputed that negligible portion of disputes actually comes to the courts for the reasons of social stigmas and customs attached to it in this patriarchal society.

The Law of Maintenance in Malaysia

The provisions on maintenance are provided in Part VI which includes maintenance of a wife, children and others.[54] These provisions are largely based upon the Islamic classical law, mainly *Shafie* law. There has not been any reform on matters pertaining to a wife's right to maintenance. The law provides that the wife is entitled to maintenance. In exercising the provision of the *Islamic Family Law* (Federal Territories) Act, 1984, the court may order a husband to pay maintenance to his wife or his former wife up to the period of *Iddat*.[55] Failure to provide maintenance, entitles a wife to approach the *Sharia* court. The court, then, will order a husband to pay maintenance.[56] In determining the amount of the maintenance claims by the wife, the court will base its assessment primarily on the means and needs of the parties, regardless of the proportion the maintenance bears to the income of the person against whom the order is made (for example wife). In *Ismail v Norsiah*[57] the parties were married in 1961. The husband failed to provide maintenance and the wife claims maintenance for 5 years, 1 month and 17 days on the ratio of RM 1 per day in which the total was RM 1,847. The trial Judge ordered the husband to pay the amount and the husband appealed to the higher court. The appeal court then, ordered the husband to pay the maintenance and reduced the amount to RM 955 based on the husband's financial background.

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54 Section 59 to 80 of the *Islamic Family Law* (Federal Territories) Act 1984.

55 Section 59 (1) and section 65 (1), *Ibid.*

56 Section 60, *Id.*

57 1970 JH 111.

If the husband violates the court order, he is then punishable under the law.[58] In fact, a wife is entitled to obtain an order from the court to terminate her marriage by *Faskh* (judicial recession), if the husband has failed or neglected to provide maintenance for a period of three months.[59]

The *Islamic Family Law* in Malaysia grants a right to the wife to claim for maintenance while in marriage or upon being divorced. If the husband defaults the order, he may be penalised. In issuing an order to the husband or ex-husband to provide maintenance, the Court will take into consideration the background of the husband's financial standing in ascertaining the amount to be paid to the wife or ex-wife. In fact, the wife is given the right by the law to dissolve the marriage by way of *Faskh* or *Talaq* in the event that the husband refuses to pay maintenance within a period of three or four months. As in the case of *Sakdiah* v *Ahmad*,[60] the *Sharia* Court of Appeal in Kedah decided according to the *Hukum Syarak* (order of the *Sharia* Court) based on the book by *Sunan al-Matalib bi Syarhi Rawd al-Matalib* giving an option to the wife whether:

To be patient until the husband secures a job that will enable him to earn in order to pay maintenance for which he is liable; or

Demand for *Faskh* of the marriage to the relevant party if the wife refuses to be patient.

Sections 59 and 65 of the *Federal Territories Act* 1984 guarantee the rights of a wife who is being divorced to obtain maintenance during the period of *Iddat*. However, this provision does not clarify whether the wife was divorced by way of *Talaq raj'i* or *Talaq ba'in* (or even *al-Mabtutah*).

Section 71 of the *Islamic Family Law* (Federal Territories) Act, 1984 also provides a right to accommodation for the wife who is divorced during the period of *Iddat*. This means that the divorced woman is entitled to both, namely maintenance for herself and a place of accommodation (*Sukna*) based on the view of *Hanafi* School. However, both these forms of maintenance are subject to supplementary conditions, namely that the said wife does not commit adultery within the said period.

In the case of *Mashitah v Hussain*[61], the husband failed to provide maintenance for a certain number of years. The court held that, the wife was entitled to terminate her marriage by *Faskh*. The 1984 Act furthermore provides, that a disobedient (*Nashuza*) wife is not entitled to

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58 Section 132 of the Islamic Family Law (Federal Territories) Act 1984.

59 Section 52 (1) (b), *Ibid*.

60 1981 J H 2, p. 101.

61 1972 J H 2, p. 153.

maintenance. The Act provides various conditions to consider a wife as a *Nashuza.*[62]

The category of divorced woman is not provided for under this Act. Thus, the court will have to follow the rules found in the classical *Shafie* legal manuals. A wife's right to maintenance will therefore be affected on account of her being *Nashuza.*[63]Any arrears of maintenance however are recoverable at any time[64] (Section 69 of the 1984 Act).

On the question of rights of a divorced woman to financial assistance after the completion of her *Iddat* period the Act provides in various sections, that she may have rights such as *Mataa* and *Mahr* but there is no specific provision for *Nafaqa.*

In Malaysia, any type of dissolution of marriages is required to be registered under section 55 of the Register of Divorce[65] *Islamic Family Law* (Federal Territories) Act of 1984. Before any registration is made, the Act provides a significant provision for the *Sharia* courts to make an order for a divorced wife. This will include custody and maintenance of the dependent children, for the maintenance and accommodation of the divorced wife, and for the payment of *Mataa* to her.[66] Therefore, it could be said that, the *Sharia* court in Malaysia guarantees financial aid to a divorced wife before any attempt of divorce registration is made.

In addition to the above provision for a divorced wife, the *Islamic Family Law* (Federal Territories) Act 1984 of provides for interim maintenance in order to assist them. Where the court is satisfied that there are grounds for the payment of maintenance, it may make an order against the husband for payment of interim maintenance to take effect at once and to be in force until an order of the Court is made on the application for maintenance. The interim maintenance received by the wife is to be sufficient for her basic needs.

In a situation where a husband divorces his wife without just cause, the *Islamic Family Law* (Federal Territories) Act 1984 provides that a divorced wife may claim for the payment of a *Mataa* (consolatory gift). This provision is clearly based upon the Quranic injunction which is from the word *Mata'*[67]. The 1984 Act however does not provide any amount of *Mataa* that should be paid. Therefore, in deciding the payment, the court

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62 Section 59 (2) of the Islamic Family Law (Federal Territories) Act 1984.

63 *Ibid.*

64 Section 69, *Ibid.*

65 *Ibid.*

66 *Id.*

67 Al-Quran 2: 241.

will order the husband to pay such sum as may be fair and just according to *Hukum Shar'i.*

In the case of *Rahaniah v Haji Ujang,*[68] the divorced wife claimed *Mataa* in addition to *Nafaqa Iddat.* She claimed RM 10 000 as a *Mataa* but the husband offered to pay only RM 1 000. In this case there was a dispute in ascertaining the amount of *Mataa* and the court referred to the *Mughni al-Muhtaj* and the *Qur'an*[69]. The court held that the husband had to pay RM 2000 as a *Mataa.*

In another case *Tengku Anun Zaharah v Dato Dr Hussein,*[70] the divorced wife claimed *Mataa* of RM 25000 in addition to other payments. The court held that the wife is entitled to RM 25000 as a *Mataa* and the husband had to make the payment in three months time. This amount was considered the highest amount paid as a *Mataa* under the Family Law Act in Malaysia at that time.

From the above cases it is clear that the payment of *Mataa* is obligatory upon a husband on divorce. The *Sharia* court in Malaysia will order a husband to provide *Mataa* irrespective of a divorced wife's circumstances. This differs from the payment of maintenance during *'Iddat* period where a *Nashuza* (Disobedient wife) (Malaysia refers them as *Nashiza*) wife is disentitled from claiming her maintenance. In a case outside the Federal Territory, *Piah v Che Lah,*[71] the wife was shown to be a *Nashuza* women. The *Sharia* court in Penang held that, the wife was entitled to *Mataa* but not Nafaqa *in 'Iddat.* Hence, being a *Nashiza* woman did not affect the right of a divorced woman to the payment of *Mataa* or consolatory gift.

In another case, *Rokiah v Mohd Idris.*[72] The Qadi or the judge calculated the amount of *Mataa* based on the daily rate of RM 1 for 35 years, 3 months and 5 days of the marriage. The total amount of *Mataa* for the divorced wife was RM 12,695. The husband appealed and the Kuala Lumpur *Sharia* Appeal Committee allowed the appeal only on matters in relation to the amount of *Mataa.* The Committee argued that there were no juristic basis on the assessment rate for *Mataa* and this is against the principle of *Mataa* which is to solve the tribulations of the wife being divorced. Therefore the Appeal Committee decided to award *Mataa* of RM 6,500 to the divorced wife.

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68 1983, 4 JH, p. 270.

69 Ibrahim, Ahmad 1987. 'Ancillary Orders on Divorce in the Shariah Courts of Malaysia'. *Journal of Islamic Comparative Law Quarterly*, Vol. vii, No. 3.

70 1983, 3 JH, p.125.

71 1983, 3 JH, 220.

72 1989, 2 MLJ.

Similarly in *Siti Aishah v Abdul Majid*,[73] in the state of Negeri Sembilan, *Sharia* Court of Appeal, dismissed the wife's claims of *Mataa* based on the daily rate of RM 10 for 4 years amounting to RM 14,000. The Appeal court referred to previous *Rokiah v Mohd Idris* [74] case and held that the RM 320 as *Mataa* to the divorced wife is reasonable considering the socio-economic position of the parties. The Appeal Court held that *Mataa* should not be calculated based on the duration of the marriage, but should be determined based on the parties' financial and social background.

Those ancillary orders provided for under the 1984 Act are based upon provisions in classical *Shafie* law. In Malaysia, the *Islamic Family Law* has guaranteed the right of a divorced wife to *Mataa*. The only debatable question is on the issue of a reasonable amount that can be regarded as a *Mataa*. So far in Malaysia, although the divorced wife has the right to claim for *Mataa*, the amount however is not substantial. The possible reason for the relatively low amount of *Mataa* is due the existence of *Harta Sepencarian* or jointly acquired property.[75] The 1984 Act also provides for another assistance which is basically customary. The provision is called jointly acquired property or *Harta Sepencarian*. Under the 1984 Act the right to the jointly acquired property is defined as a division between the parties at any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale. The claim of jointly acquired property can be made either through the High court or the *Sharia* court. An early case, *Roberts vs. Umi Kalthum*,[76] the court has decided and confirmed that jointly acquired property was a matter of Malay custom.[77]

Application of the Legislation Relating to Maintenance by the Courts in Malaysia

The reforms of the *Sharia* have been in place now for more than 20 years and appear to be well established with fairly deep roots. A survey of the academic literature shows that the legislation is widely accepted and hardly questioned. The main public concern remains its implementation, which has created confusion and resentment towards the *Sharia* Court.[78]

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73 1995, 10 JH 27.

74 1989, 2 MLJ.

75 Nik Noriani Nik, Badlishah. 1998. *Marriage and Divorce under Islamic Law*. Kuala Lumpur.

76 1966, 1 MLJ 163.

77 Ibrahim, Ahmad. 1984. *Family Law in Malaysia and Singapore*. 2nd edition, Singapore.

78 Abdullah, Raihanah and Soraya Khairuddin. 2009. "The Malaysian Sharia Courts: Polygamy, Divorce and the Administration of Justice". Vol. 25 (1): 32 *Asian Women*.

Even though the wife is entitled under the law to receive maintenance, however several problems arose due to the claims for maintenance in the court whether the claim is for her or for the children. These problems arose as in most cases; the person responsible breached his duty of paying the maintenance whether to the wife or the children. This occurs when the husband encounters problem such as leaving the house, not having a job, involved in drug abuse and also have another wife in a polygamous marriage. In such situations, even though the wife is entitled to maintenance, either for her or for the children and an order has been issued, but the husband or father still persists in not performing his responsibility. The wife or ex-wife does not submit any claim to the court as sometimes the amount fixed is not equivalent to the cost that the wife had to bear when she brings the case to the court.

Studies conducted on *Sharia* Court cases for the year 1973-1977 in the district of Petaling in the state of Selangor, shows that the amount of maintenance is less than RM 50 per month.[79] This rate indicates that the parties involved in divorce consist of the lower income group.

This section apparently provides matters that arise during divorce by way of *Talaq*. However, if Sections 49, 50 and 52 of the *Federal Territory Act* of 1984 is carefully studied, there are no provisions pertaining to matters that arise from divorce that may be claimed all at once when the divorce order is made. This means that, as for wives who are divorced by way of *Talaq, Faskh and Khul*, they have to submit separate claims for *Iddat* maintenance or even child maintenance. It is most certain that when a separate claim is submitted, the wife or wives will have to go through a new process.

This occurs as the wife have no knowledge or information pertaining to her rights or due to her placing divorce as the main matter compared to making efforts to obtain maintenance. In addition, the wife had to undergo a long process to obtain divorce. When the husband agrees to a divorce, the husband will make an offer that the wife withdraws all her rights if she wants a divorce in a short period of time. A matter such as this is an injustice towards the wife. However, if the wife agrees to withdraw her rights for maintenance voluntarily, hence in this situation, the question of injustice does not occur. For example, divorce occurs due to the failure on the part of the husband to provide maintenance for the wife. In this situation, application for *Iddat* maintenance will be deemed negative or useless since during their marriage term, the husband failed and neglected to provide maintenance.

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[79] Kassim, Azizah. 1984. "Women and Divorce among the Urban Malays". *Hing Ai Yun, Nik Safiah Karim and Rokiah Talib* (eds). Selangor, p. 102.

Agreement on the part of the wife to drop matters arising from the divorce such as, *Mataa* maintenance during the *Iddat* period and jointly acquired properties should actually not involve child maintenance and also *Hadanah* (custody).

This means that, even though an agreement with the consent of both parties has been made during the occurrence of divorce involving *Hadanah* (custody) and child maintenance, the law seemed to provide surety to the said child to vary the order duly made for the purpose of ensuring the welfare of the said child. This is because the life of a husband and wife in matters pertaining to the provision of maintenance has no receipt. Hence, when the wife makes a divorce claim by way of *Talaq* or even *Faskh* on the grounds that the husband did not provide maintenance, she will need to provide sufficient proof such as the presence of a witness who is aware and saw such negligence on the part of the husband or had left the matrimonial home within the period stipulated.

Even though the court had issued an order of maintenance to the wife and children; however it is seen as ineffective if the said order is not observed. The husband/father is negligent or refused to observe the said order and avoid fulfilling his duties. This is prejudicial to the wife who is divorced and the children due to the non-fulfillment of their basic needs such as the need for education, health and their daily living requirements. As such, the government through the Department of *Sharia* Judiciary Malaysia has established the Family Support Division on 24 October 2008. This division is intended to assist in the performance of the execution order and enforcement of the judgment pertaining to maintenance by the *Sharia* Court. It is also to ensure that judgment debtors observe the order of the *Sharia* Court. This division received the financial co-operation from *Baitul Mal* as well as from the government in particular on the provision of monthly finance to the wife and children. Currently this division is only applicable to Muslims.

Presently, it is too early to comment on the effectiveness of this division. As trial, early operations has been done at the *Sharia* Court, Federal Territories. The officer in charge interviews the wife who has been divorced and their children. The officers found that many husbands refused and are negligent in paying maintenance even though a court order has been issued. Tracing the husband who is self-employed or does not have employer is rather difficult. This is because in the case where the husband has an employer, normally salary deduction will be done based on the maintenance enforcement laws.

Conclusion:

It is clear from the above discussion that *Shariah* has provided comprehensive provisions on maintenance for wife and divorced wife during their period of '*Iddat*. However, in practice this does not mean

that the wives particularly divorced women, are protected and secured by the so-called Islamic society in which they live. Law enforcement has to be strengthened to ensure that such protection which was guaranteed by the religious law is honoured by the society. By looking to the practice of family law in the majority Muslim countries like Bangladesh and Malaysia, this phenomenon could be seen clearly.

The family courts of Bangladesh have now become the main repository of family law issues as very few cases come up to the higher courts. It was projected from the reported and unreported cases whether modern Bangladeshi family law has benefited from judicial activism by protecting the interests of women and whether there is a need for more systematic activation of the judiciary and better sensitization of all judicial personnel for the needs of women.

The present paper has shown in various ways that women in Bangladesh are denied their Islamic right of maintenance. It is suggested that reforms should be made in the Family Courts Ordinance, 1985 to make this statutory right more effectively enforced.

Court activity and the involvement of sensitized judges may help to establish that institutions like the family courts as the right platform to protect women from economic deprivation and that a better sensitized judiciary could empower and protect women by providing an effective support mechanism by the enlightened judicial pronouncements.

While the *Islamic Family Law* Enactments in Malaysia on the law of maintenance follows directly the *Shafie* doctrines. The law has imposed an obligation upon a husband to provide maintenance to a wife. Not only that, husband who failed to comply with a maintenance order is punishable under the law. The *Sharia* court has to ensure that any order of maintenance, custody of a dependent children, maintenance and accommodation during the period of *Iddat* the deferred *Mahr*, the payment of *Mataa* or consolatory gift and the division of jointly acquired property are all made before any attempt of divorce registration. All these ancillary orders are beneficial to a divorced woman to continue their lives after divorce especially to those who are destitute or discarded. Recent development that will benefit the economic need of divorced women can be seen when the Government has introduced the Family Support Division. The purpose of this Division is to solve the legal enforcement issues. By having this Family Support Division in the Islamic Judiciary system in Malaysia, is by no means assisting divorced Muslim women to continue their lives without economic deprivation.

Intellectual Property Rights Enforcement in Bangladesh: An Overview and Determination of the Extent of Its Becoming TRIPS-Compliant

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Farhana Helal Mehtab[**]

Introduction

Twenty first century can be considered as the century of information technology and genetic science. Advancement in nanotechnology, information technology and clean energy promotes economic growth and improves living standards worldwide. An increasing share of global economic output is generated by services, many of which depend on new and evolving technologies. Inventers, creators, entrepreneurs', firms and other risk-takers play the key role in the progress of science and technology, which later on contributes to the economic development. Protection of intellectual property rights is necessary to ensure that the technological advances and economic development resulted out of the efforts of the creative people should be rewarded and valued.

Counterfeit products-counterfeit medicines, toothpaste or auto parts-may put the lives of consumers at risk. Intellectual Property Rights (IPRs) are legal mechanisms to protect the rights of inventors, and the interest of consumers. IPRs not only protect the rights of the creative people and big firms, local entrepreneurs' and artists also enjoy the advantage of protection. A strong system of IP protection can establish an environment where innovative industries thrive to promote economic development. It also ensures that consumers are getting genuine goods and services.

Though the multinational corporations and industrialized countries were active behind the negotiation of the Agreement of Trade Related Aspects of Intellectual Rights (TRIPS), but developing countries started to realize the importance of modern intellectual property (IP) policy and laws when they have become manufacturer of IP products and export those to the whole of the world. As a member of the World Trade Organization (WTO) Bangladesh has to make its intellectual property (IP) regime TRIPS-compliant by 2013. Government has enacted new laws and taken a number of steps to make its IP regime TRIPS-compliant.

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Bangladesh has enacted the Copyright Act in 2000, and the Trademarks Act in 2009 but has failed to enforce these laws effectively. Patents and designs are still regulated by the Patents and Designs Act, 1911. Bangladesh has no specialized courts to deal with disputes relating to intellectual property. The judges and lawyers are not well equipped with the knowledge of intellectual property issues. Police and other local government agencies are not either enough in number or sufficiently conscious of their big responsibility to protect IPRs. In order to exploit its potentials in the field of science and technology, Bangladesh has to formulate modern IP policy and laws. For that purpose it has to develop highest level of expertise to use the TRIPS flexibilities.

In this paper a brief overview of the TRIPS Agreement has been made. How the developing countries are making their IP-regime modern *vis-a-vis* TRIPS-complaint that has been briefly discussed here. Secondly, the paper sketches how the intellectual property rights are enforced in Bangladesh with reference to the Copyright Act, 2000, the Trademarks Act, 2009, and the Patents and Designs Act, 1911. Thirdly, the paper has examined to what extent the IPRs enforcement mechanism in Bangladesh is TRIPS-compliant. Finally, the paper has put some recommendations as to how Bangladesh can fulfill its WTO obligations by utilizing the TRIPS flexibilities.

Background of the TRIPS Agreement

After attaining a higher level of technological and industrial capability, the industrialized countries incorporated higher standards of IPRs enforcement into their legislation. They, then, pressurized the developing countries to accept and universalized the higher standards of IPRs protection through the successful negotiation of the TRIPS Agreement. During the 1980s technological leadership of the US firms was eroded due to the catching-up process of Japan and Asian Tigers which also caused huge US trade deficit. The overseas piracy and counterfeiting activities were conceived to be the major cause of declining American competitiveness.[1]

The TRIPS Agreement is alleged to be an instrument of "technological protectionism", which has made an international division of labor where the developed countries generate and control technology and the developing countries are markets for the goods and services manufactured by their technology.[2]

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1 Correa, Carlos M. 2000. *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options,* London and New York: Zed Books Ltd., at pp. 1-6.

2 *Ibid.*

In spite of the above mentioned reality it is forcefully argued that industries require IPRs protection to keep their commercial interest and to continue the process of further innovations. It is further submitted that any country, developed, developing or least developed, having creative human capital can produce IP products and export the products to the whole of the world.[3] Countries having creative human capital must have a modern IP regime to promote technological development and innovations. In the negotiating stage the developing countries strongly resisted the inclusion of the TRIPS Agreement into the WTO package. But when some developing countries, particularly China and India, became producer and exporter of IP products, they also realized the importance of the enforcement and protection of IPRs.

Brief Overview of the TRIPS Agreement

The TRIPS Agreement, together with the SPS Agreement[4] and the TBT Agreement[5], are considered to go far beyond the trade liberalization rules. These agreements endeavor to harmonize national regulations. These are the reasons for which they have ignited more controversy and incurred more implementation problems than other WTO Agreements. On the basis of the previous conventions, the TRIPS Agreement provides for mandatory minimum standards for intellectual property protection and enforcement.[6]

According to the Preamble, the TRIPS Agreement aims-"to reduce distortions and impediments to international trade... taking into account the need to promote effective and adequate protection of intellectual property rights..." The TRIPS Agreement has tried to keep a balance between the interest of the IP right-holders and public interest.[7] The objectives of the TRIPS Agreement are to "contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social, economic welfare, and to a balance of rights and obligations."[8]

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3 Bhala, Raj. 2008. *International Trade Law: Interdisciplinary Theory and Practice,* Newark: LexisNexis, at p. 1623.

4 Agreement on the Application of Sanitary and Phytosanitary Measures, it is commonly known as the SPS Agreement of the WTO.

5 Agreement on Technical Barriers to Trade, it is commonly known as the TBT Agreement of the WTO.

6 Bossche, Peter V. D. 2008. *The Law and Policy of the World Trade Organization: Text, Cases and Materials,* Cambridge: Cambridge University Press, at pp. 741, 750

7 *Ibid.*, at pp. 743, 744.

8 Article 7, the TRIPS Agreement.

The Agreement is not simply about the IP protection, rather it tries to keep a balance between IP protection and the dissemination of knowledge in the developing countries to ensure technological development and economic growth.[9] Articles 3 and 4 situate at the centre of the TRIPS Agreement. Article 3 provides for national treatment for intellectual protection. A most favored nation (MFN) obligation has been created for such protection under Article 4. MFN obligation means every WTO member is bound to enlarge the most favored nation treatment immediately and unconditionally to all other members. But national treatment and MFN obligation have little value if such treatment affords weak protection. Before the TRIPS Agreement there were many international conventions in the field of cross-border intellectual property protection. The TRIPS Agreement therefore tries to harmonize the international IP protection and strengthens the earlier multilateral accords.[10]

If procedural rules, which are required for effective IPRs enforcement, are absent, substantive norms providing minimum standards of protection will be of little utility. One of the inadequacies of the WIPO conventions is the lack of such procedural enforcement obligations. Enforcement of the IP rights is a special feature of the TRIPS Agreement which complements the WIPO conventions and put in place a minimum procedural mechanism to protect IPRs. Part III of the TRIPS Agreement contains the rules on enforcement.[11] The Appellate Body has noted the broad coverage of Part III in *US-Section 211 Appropriation Act.*[12]

Article 41 of the TRIPS Agreement has provided for the general obligation with regard to IPRs enforcement. Article 41.1 makes an obligation for the members to incorporate the enforcement procedures into their legal systems to prevent the infringement of the IP rights protected by the TRIPS Agreement. The enforcement procedures, as required by Article 41.1 of the TRIPS Agreement, need to be applied in a way that cannot create any barrier to legitimate trade and also provide safeguard against the abuse of the IP rights. Article 41.2 to 41.4 of the Agreement provides for usual due process requirements.[13]

The enforcement part of the TRIPS Agreement is meticulous and has sensibly recognized the reality of the least developed countries as governments of these countries encounter difficult situation to allocate

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9 See above note 3, at p. 1623.

10 *Ibid.*

11 See above note 6, at p. 793.

12 WT/DS 176/AB/R, DSR 2002:II

13 See above note 6, at p. 794.

their scarce resources for law enforcement and other public spending. Article 41.5 of the TRIPS Agreement reads-

> *It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.*[14]

Flexibilities and Public Interest Consideration of the TRIPS Agreement

Part I of the TRIPS Agreement contains general provisions and basic principles applicable to all WTO Members. Under Article 1.1 of the TRIPS Agreement the members are obliged to "give effect" to its provisions and are "free to determine the appropriate method" of implementing their obligations within their own legal systems. The members are also not obliged to establish more extensive protection than that provided for in the TRIPS Agreement. In spite of well-reasoned criticisms and limitations of the TRIPS Agreement, these flexibilities of the WTO Agreement are spectacular. As the TRIPS Agreement has provided freedom to the WTO Members in respect of how they will give effect to their TRIPS obligations, they can utilize the flexibilities as important tools to balance the competing public policy goals.[15]

Articles 7 and 8 of the TRIPS Agreement are very basic to the interpretation and implementation of IPRs. The objective, according to Article 7 of the TRIPS Agreement, of the IPRs protection is not only to promote "technological innovation", but also the "transfer and dissemination" of technology, which the developing countries consider themselves to be very important for their technological development.[16]

According to Article 8.1, "Members may, in formulating or amending their national laws and regulations, adopt measures necessary... to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement". Though Article 8.1 requires the members to adhere to a "consistency test", but any WTO Member can take into its account its public interest when making IP legislation. From general provisions and basic principles as stated in

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14 World Trade Organization. 2008. *The Legal Texts.* Cambridge: Cambridge University Press, at p. 340.

15 See above note 6, at p. 750.

16 See above note 1, at pp. 6, 7.

Part-I of the TRIPS Agreement it is clear that the Agreement has provided certain flexibilities for the developing country members. They could use these flexibilities when making new IP laws which would suit their economic and technological policies and their level of development.[17]

Enforcement of IPRs in Developing Countries

Intellectual property rights are private rights, nonetheless governments play important role in the enforcement of IPRs. Governments require resources and expertise for enforcement actions. Courts, the law enforcers, the customs and other competent authorities need to be staffed and trained in order to fight IPRs violations.[18]

IPRs violation has been extended from traditional industries to high-tech sectors due to the development of digitization and abundance of used manufacturing equipments.[19] Criminal law context of IPRs violation defines counterfeit and piracy as prohibited or contraband activities surrounding illegal production and sale of goods. Possession, importation and exportation of contraband goods are therefore criminal offence.[20] Crooked traders counterfeit products to make huge profit by free-riding on the creative efforts and investment of others. Existence of counterfeit products' trade also depends on consumer demand and people's understanding as they think counterfeiting and piracy are innocent infractions. The public authorities and commercial organizations fail to make the people understand about the danger of using counterfeit products and its harmful effects on social welfare.[21]

At national level governments take care of intellectual property regime, which requires the governments: (1) to set a national public policy framework to guide IP laws; (2) to enact and administer IP laws; (3) to adjudicate IP disputes; (4) to raise public awareness for IPRs protection; (5) to carry out international IP obligations; (6) to participate in multilateral, regional and bilateral IP negotiations and organizations; and (7) to negotiate technical assistance, training and capacity-building. Among developing countries, Brazil has taken modern IP policy to ensure economic growth and industrial advancement, whereas India has

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17 *Ibid.*, at pp. 7, 8.

18 Fink, Carsten, Mondiale, Group d' Economie and Paris, Sciences Po. 2008. "Enforcing Intellectual Property Rights: An Economic Perspective", *ICTSD Programme on Intellectual Property Rights and Sustainable Development.*

19 *Ibid.*, at p. 7.

20 Blakeney, Michael. 2003. *Guidebook on Enforcement of Intellectual Property Right.* London: University of London, Queen Mary Intellectual Property Research Institute, at pp. 5, 6.

21 *Ibid.*, at p. 6.

adopted modern IP Policy to promote the development of science and technology.[22]

In the area of IPRs enforcement, a government has to play proactive role. Indonesia established a National Task Force in 2006 to prevent IPRs infringement. The Task Force has been established for: (1) formulation of a national policy to obviate IPRs infringement; (2) reviewing measures to solve strategic problems relating to IP violation; (3) equipping government officials and institutions with specialized training and educating the social people about the value of IPRs protection; (4) developing bilateral, regional, and multilateral cooperation to obviate IPRs infractions. Brazil established an Inter-ministerial Committee Against Piracy in 2001 to coordinate anti-piracy strategies.[23]

The government of Philippines has established a strong arrangement for IPRs enforcement. The National Committee for Intellectual Property comprises of the Philippine National Police, National Bureau of Investigation, Optical Media Board, Bureau of Customs, Department of Justice and IP Philippines. Their collaboration has come up with a Web-based IP Case Database. The Philippines, in addition to it, has developed the Public-Private Partnership Council for Intellectual Property Rights (P3CIPR). Peru established a High Level Multi-Sectoral Commission Against Contraband and Piracy which has private sector representatives.[24]

In most developing countries public consultation on IP issues, and local expert and business community engagement are either absent or underdeveloped. Only a handful of developing countries like India, Brazil and the Philippines have established formal mechanism for public consultation and expert involvement in their IP decision-making. Many developing countries have failed to develop formal mechanism for public and private sector consultations, but there have been frequent consultations with the external donors.[25]

Recent research and policy studies reveal that developing countries encounter challenges to protect IPRs for weak institutional, technical and financial capacity. IP policies and laws need to be designed and executed to reinforce development in the areas of innovation, public health,

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22 Deere, Carolyn. 2009. "The Politics of Reform in Developing Countries", in Melendez-Ortiz, Ricardo and Roffe, Pedro (eds.), *Intellectual Property and Sustainable Development: Development Agendas in a Changing World.* Cheltenham: Edward Elgar Publishing Ltd., at pp. 21-23.

23 *Ibid.*, at p. 26.

24 *Ibid.*, at p. 27.

25 *Ib.*

education and technology. Coordination among different government agencies and public-private partnership are *sine qua non* to achieve the goals. But developing country governments have failed to develop systematic coordination, engage legislative branches effectively in IP decision-making, and provide stakeholders and experts with efficacious mechanism of consultation.[26]

IPRs Enforcement System in Bangladesh

In Bangladesh the Department of Patents, Designs, and Trademarks (DPDT) under the Ministry of Industries administers patents, designs, and trademarks and the Ministry of Cultural Affairs administers copyright. The DPDT is a quasi-judicial body and the Registrar of the department acts as tribunal. If any person is aggrieved, s/he can file an appeal to the High Court Division against the decision of the Registrar.[27]

The Trademarks Act, 2009, the Copyright Act, 2000, and the Patents and Designs Act, 1911 have given certain IPRs to trademark and copyright holder and patentee. If the right-holder seeks civil remedy, s/he has to institute a case in any court not inferior to a Court of District Judge. The above mentioned laws have defined some violations of the rights as crime. Bangladesh Penal Code, 1860, and the Customs Act, 1969 also have declared certain activities as criminal offence.

Any right-holder can institute a criminal case in a Court of Metropolitan Magistrate or Magistrate of the First Class. Any appeal against the order of the Magistrate will lie to the Court of Sessions Judge. In criminal cases police investigates the case and then it will be tried by a criminal court having jurisdiction. Police officers have the authority to launch raids against counterfeit and pirated goods and seize the same. The customs officers also have to ensure that counterfeit and pirated goods are not imported into Bangladesh. IPRs violating goods must be detained, confiscated, destroyed or disposed of in the manner as specified in the law.

Bangladesh has updated its trademark and copyright laws. Though the updated laws have put stronger enforcement mechanism in place, but there are difficulties to enforce the intellectual property rights in reality. As a member of the WTO Bangladesh is under an obligation to make its IP laws TRIPS-compliant within 2013. The WTO[28] asked Bangladesh to

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[26] *Ibid.*, at pp. 30, 31.

[27] Rahman, M. Mahbubur. 2011. "Intellectual Property Protection in Bangladesh: An Overview", available at: <http://www.unescap.org/tid/mtg/ip_bang.pdf> last accessed on 9 January, 2011.

[28] According to the Report of the WTO Secretariat, successive governments have taken initiatives to make IP laws compliant with the TRIPS agreement. The government of

explain the state of current IP laws and enforcement mechanism. The written submission of government has elaborated the civil, administrative/border, criminal, and provisional remedies available in the laws.[29]

In case of copyright infringement, the right-holder can file civil suits where s/he can seek injunction and compensation. Existing patent and trademark laws have given power to the court to determine the type and extent of compensatory damages.[30] If there is importation of infringing copies into Bangladesh, the right-holder can move to the Registrar of the copyright to ban the importation of the product. When the infringement is proved by a court of law, the police or customs authority can destroy the counterfeit/pirated goods.

Criminal remedies include the imprisonment of infringer, imposition of fine or both, and seizure of infringing goods, products or copies. Right-holders can take resort to criminal proceedings to call the violators to account. If a written complaint is lodged in case of a willful trademark counterfeit or copyright piracy, a case can be initiated by a competent court. There is no specialized enforcement unit to investigate into the violation of IPRs. The police are enjoined to investigate the IPRs violations, but they cannot give sufficient time as they are overburdened. Moreover, they do not have specialized knowledge on IP law.[31]

Enforcement Mechanism under the Trademarks Act, 2009

The Trademarks Act, 2009 provides for civil remedies in case any person has violated the right of a trademark-holder. A suit cannot be filed to any court inferior to a court of District Judge in case: (1) any registered trademark is violated; (2) it involves any right or amended right related to the registered trademark; and (3) any similar or deceptively similar trademark, whether it is registered or not, is used.[32] In such a suit the court can order for injunction, and compensation or part of profit according to the intention of the right-holder. The court can also order to destroy, or wipe away, or eliminate the label and marks.[33]

Bangladesh noted that, "Considering the extended transition period to implement TRIPS Agreement until 1 July 2013, the Government of Bangladesh is examining the whole gamut of issues relating to patent, trademark, and copyright protection".

29 Azam, Monirul. 2008. *Intellectual Property, WTO and Bangladesh,* Dhaka: New Warsi Book Corporation, at p. 184.

30 See World Trade Organization, Trade Policy Review Body, 13 and 15 September, 2006, WT/TPR/M//168/Add.1 (Published on 10 November, 2006).

31 See above note 29, at pp. 186, 187.

32 Section 96, the Trademarks Act, 2009.

33 Section 97, *Ibid.*

The Trademarks Act has elaborated different types of trademark violation. If any person- (a) has falsified any trademark; (b) has falsely used any trademark for any good and service; (c) makes, transfers, uses or takes hold of any bloc, machine, plate, instrument, or structure to falsify any trademark; (d) uses false trade description in goods or services; (e) uses name of country or location other than the country or location where the good has been made or uses false identity, name, and address of the producer or of the person for whom the good has been made; or (f) changes, disfigures, or wipes away any original mark or indication relating to the production of any good, that person is said to have violated the right of the trademark holder.[34]

The Trademarks Act, 2009 has provided for criminal remedies for trademark violation. If any person infringes the right of the trademark-holder, that person shall be punished with imprisonment which shall not be more than 2 years but not less than 6 months or with fine which shall not be more than BDT 2 lakh (US$ 2866.56)[35] but not less than BDT 50 thousand (US$ 716.64) or with both. If that person shall be liable for the same offence for second or third time, s/he shall be punished with imprisonment which shall not be more than 3 years but not less than 1 year or with fine of not more than BDT 3 lakh (US$ 4299.84) but not less than BDT 1 lakh (US$ 1433.28) or with both.[36]

If any person does not use the name of the production institution, or country, or place, or keeps the good open for sale, or takes hold of good for production or trade, that person shall be punished with imprisonment which shall not be more than 2 years but not less than 6 months or with fine which shall not be more than BDT 2 lakh (US$ 2866.56) but not less than BDT 50 thousand (US$ 716.64) or with both. If that person shall be liable for the same offence for second or third time, s/he shall be punished with imprisonment for not more than 3 years but not less than 1 year or with fine of not more than BDT 3 lakh (US$ 4299.84) but not less than BDT 1 lakh (US$ 1433.28) or with both.[37]

The Penal Code, 1860 also provides for punishments for violation of the IPRs of the trademark-holder. Confiding the court for determining the term of imprisonment and amount of fine, the Code provides for: (1) imprisonment of either description for a term which may extend to one year or with fine or with both for using a false trademark; (2)

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34 Section 73, the Trademarks Act, 2009.

35 Currently 1 USD equals to BDT 69.77. On the basis of this conversion rate the amount of fine in BDT has been converted into US dollar.

36 See above note 34.

37 Section 74, *Ibid.*

imprisonment of either description for a term which may extend to two years or fine or with both for counterfeiting of a trademark.[38]

Enforcement Mechanism under the Copyright Act, 2000

Owner of copyright has exclusive right over his/her work. Copyright in a work is deemed to be infringed when any person, without a license from the copyright owner or the Registrar of the copyright or any other competent authority, exercises the exclusive right of the copyright owner or permits any place to be used by the public for profit and such communication constitutes an infringement of the copyright.[39] A person is said to have violated the copyright, if that person: (1) sales or hires; or causes to sale or hire; or exhibits commercially; or proposes to sale or hire the infringing copies of the work; (2) distributes, either for the purpose of trade or to such an extent as to affect prejudicially the owner of copyright, any infringing copies of the work; (3) exhibits commercially in public the infringing copies; (4) imports any infringing copy into Bangladesh.[40]If any person uses the copyrighted works for educational or research purposes or in furtherance of knowledge-generation that cannot be considered as infringement of copyright.[41]

Three types of remedies are available if any copyright is violated. A civil suit can be filed in the court of a District Judge within whose jurisdiction the plaintiff resides or carries on business or where the cause of action arose irrespective of the place of residence or place of business of the defendant. Copyright-holder can seek compensation, or search warrant, or injunction, or accounts in case of copyright violation. Anton Pillar Order[42] or Search Order is a unique instrument in the hands of the court to help the copyright-holder as there is possibility that the infringer can destroy the evidence of infringement and defeat the ends of justice.[43]

The copyright-holder can seek criminal remedies. If any person has violated copyright, s/he shall be punished with imprisonment for a period which may extend from 6 months to 4 years and fine which may range from BDT 50 thousand to 2 lakh (US$ 716.64--2866.56). The plaintiff is entitled to get order for seizure of infringing copies or confiscation of duplicating equipments. In case of piracy in computer

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38 See above note 27, at p. 8.

39 Section 71, the Copyright Act, 2000.

40 *Ibid.*

41 See above note 29, at pp. 208, 209.

42 Under the Anton Pillar Order plaintiff can approach court in camera to issue search order without giving any notice to the defendant to enable the plaintiff to search defendant's premises or infringing copies.

43 See above note 29, at pp. 210, 211.

programs, the fine shall range from BDT 1-4 lakh (US$ 1433.28-5733.12). In addition to the civil and criminal remedies, the Copyright Act provides for administrative remedies. If infringing copies are imported into Bangladesh, one has to go to the Registrar of Copyright to stop such importation.

Enforcement Mechanism under the Patents and Designs Act, 1911

The Patents and Designs Act, 1911 has provided the procedure to enforce the rights of the patentee. According to the said Act, a patentee may institute a suit in the District Court to try the suit against any person who makes, sells, or uses the invention without his license, or counterfeits it, or imitates it. Where a counter claim for revocation of the patent is made by the defendant, the suit, along with the counter claim, shall be transferred to the High Court Division for decision.[44] In a suit for infringement of a patent, the Court may, on the application of either party, make such order for an injunction, inspection, or account, and impose such terms and give such directions respecting the same and the proceedings thereon, as the Court may see fit.[45]

In case of piracy of registered design, the pirate has to pay to the registered proprietor of a design a sum not exceeding BDT 5 hundred (US$ 7.16) recoverable as a contract debt for every such contravention.[46] If any person uses on his place of business, or on any document the words "Department of Patent, Design and the Trade Marks" (DPDT) or any other words suggesting that his place of business is officially connected with the DPDT, s/he shall be punished with fine which may extend to BDT 2 hundred (US$ 2.86), and in the case of a continuing offence, with further fine of BDT 20 for each day.[47]

Intellectual Property Rights Enforcement in Bangladesh: To What Extent Is It TRIPS-Compliant?

The Government of Bangladesh (GOB) has taken a number of steps to protect IPRs and fulfill its obligations under the TRIPS Agreement. First, Bangladesh government has enacted the Copyright Act, 2000, which replaced the Copyright Ordinance, 1962. It is an attempt to fulfill its obligation under the TRIPS Agreement. An amendment has been incorporated into this law by the Copyright (Amendment) Act, 2005 to extend the scope of computer programs and to enhance the penalty and compensation for the infringement of copyright in computer programs.

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44 Section 29, the Patent and Designs Act, 1911.

45 Section 31, *Ibid.*

46 Section 53, *Ibid.*

47 Section 78, *Ibid.*

Secondly, in 2003 the GOB has merged the Patent Office and Trade Marks Registry Office and established the Department of Patents, Designs and Trade Marks (DPDT). Earlier the two above mentioned offices were separate and independent. With the establishment of a single department the GOB has also strengthened it in terms of organizational capacity, manpower, and equipment. Now the Department of Patents, Designs and Trade Marks has 4 wings, those are: (1) Patents and Designs Wing; (2) Trademarks Wing; (3) WTO and International Affairs Wing; and (4) Administration and Finance Wing.[48] Thirdly, the government enacted the Trademarks Ordinance, 2008, which was later replaced by the Trademarks Act, 2009.

Fourthly, though Bangladesh is still regulated by the Patents and Designs Act, 1911, but the Law Commission of Bangladesh has already prepared a draft law on patents in 2001. Fifthly, separate draft laws on design, geographical indication and utility model have either been finalized or under the process of finalization. Sixthly, the DPDT has recently recruited 50 people to strengthen its workability. Software from WIPO will be customized for automation of the whole process of registration.[49]

One very important feature of the Copyright Act, 2000 is that it is a law which is fully compatible with the provisions of the Berne Convention and TRIPS Agreement. The enactment of the recent copyright law has elevated the status of Bangladesh as a country having modern copyright protection system.[50]

In the field of patent and design still Bangladesh is regulated by the Patents and Designs Act, 1911. It provides for both civil and criminal remedies. It is interesting to mention that the patent law was enacted in 1911 and it provides for fine of BDT 2-5 hundred. If we convert the amount of BDT into US dollar the amount will be US$ 2.86-7.16. This ridiculous amount of fine cannot keep the interest of the domestic firms and local patent-holders, not to speak of multinational companies. Patent right is so important for the multinationals and reputed foreign firms that without their patent protection they will not be interested to invest in Bangladesh.[51]

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[48] The Department of Patents, Designs, and Trademarks, see <http://www.dpdt.gov.bd/>, last accessed on 18 February, 2011.

[49] Hoque, Md. Enamul. 2010. "Milestones of Intellectual Property Rights Administration in Bangladesh", A *Souvenir* published by the Department of Patents, Designs, and Trademarks, Dhaka Chamber of Commerce and Industry and Intellectual Property Association of Bangladesh. Dhaka: DPDT, at pp. 19-21.

[50] See above note 29, at pp. 212, 213.

[51] Developing and least developed countries are obliged to higher their IP standards and IPRs enforcement to that of the TRIPS Agreement. Multinational firms and developed countries were behind the negotiation of the TRIPS Agreement. Despite

In 2001 the Law Commission of Bangladesh prepared a draft law on patent to make it compatible with the TRIPS Agreement. Under the patent law of 1911, the letters patent is initially given for a period of 4 years, which can be extended for another 12 years. The draft law on patent proposes that every patent shall be granted for 20 years from the date of filing an application for patent. This proposal has been made in accordance with Article 33 of the TRIPS Agreement.[52]

Some researchers nonetheless consider that the draft law on patent is flawed as the Law Commission has not taken into its account the developmental stage, and socio-economic reality of Bangladesh, instead it copied the patent laws of some neighboring countries. Another major defect of this law is that it failed to incorporate into it the TRIPS flexibilities and utility model certificate, which is very useful for less inventive products like handicrafts. It is also useful for small cottage industries, and small investors.[53]

In case of IPRs violation, the TRIPS Agreement asks the WTO members to provide civil and criminal remedies and interim and border measures. When ensuring remedies fair and equitable procedures need to be ensured.[54] Civil remedies include injunctions, damages, and other remedies[55] to prevent the infringement of IPRs. Criminal remedies include imprisonment and/or monetary fines, seizure, forfeiture, and destruction of the infringing goods and of any materials and implement the predominant use of which has been in the commission of the offence.[56]

The judicial authorities shall have jurisdiction to order prompt and effective provisional measures to prevent IPRs infringement. If any delay has the possibility to cause irreparable harm to the right-holder, the court has the authority to adopt provisional measures *inaudita altera parte.*[57] The TRIPS Agreement requires the members to enable a right-holder to file an application for the suspension by the customs

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this reality a least developed country can think of developing a modern IP regime like Singapore to attract foreign investment. If multinational firms will come, Bangladesh has the possibility to be benefitted by foreign investment and technology transfer.

52 See above note 27, at pp. 3-4.

53 See above note 29, at pp. 180, 181.

54 See above note 14, at pp. 339-347.

55 Articles 44, 45, and 46, the TRIPS Agreement.

56 Article 61, *Ibid.*

57 Article 50, *Ibid.*

authorities of the release into free circulation of counterfeit trademark or pirated copyright goods.[58]

Updated IP laws of Bangladesh have ensured the civil and criminal remedies and interim measures against IPRs violation which the TRIPS Agreement requires the WTO Members to put in place. All the steps so far have been taken by the GOB to make its IP regime TRIPS-compliant can be considered a good gesture to fulfill its WTO commitment. Provisions of existing laws, except patent and some old laws, seem to be satisfactory to prevent IPRs violations. But main problem lies in the enforcement system of Bangladesh as it is not strong. Moreover, a number of difficulties exit in the effective IPRs enforcement in Bangladesh.

First, most of the procedural laws in Bangladesh were enacted during the colonial period by the British rulers. Those laws have not been updated and are not suitable to address very nuanced problems of different types of intellectual properties in Bangladesh. For example, the Code of Criminal Procedure was enacted in 1898, and the Code of Civil Procedure in 1908. How can the laws which were enacted almost 1 hundred years back address very complicated problems of ever-changing IP matters?

Secondly, the enforcing officers, namely the police and customs officials, do not have sufficient expertise on intellectual property laws. Thirdly, Bangladesh does not have strong infrastructure and sufficient resources to ensure effective IPRs enforcement. Fourthly, consumers and general people do not have sufficient consciousness about how IP infringement can harm the continuing flow of inventions, and advancement of science and technology and how it can jeopardize the growth and development of a country. Fifthly, protracted civil and criminal adjudications and cost of litigations discourage the affected people to come to the court for effective remedy.

Sixthly, Bangladesh government has enacted information technology law in 2006 to prevent software piracy. But the police and customs officials do not have sufficient technological knowledge to prevent internet piracy, so the law becomes useless and enforcement mechanism remains ineffective. Seventhly, the border measures of Bangladesh are either corrupted or weak to prevent piracy and counterfeiting in intellectual property. Eighthly, there is no national body to coordinate the activities of the police, customs, and IP officials. Lack of coordination helps pirates and counterfeiters immune from the legal procedure. Last and most importantly, there is no study as to how modern IP policy and laws can promote domestic scientific and technological development. In the

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[58] Article 51, *Ibid.*

absence of this study, there is also no policy priority in the IP sector, indicating grave inadequacy in IP regime of Bangladesh.

It is widely admitted that IPRs enforcement is a multi-layered concept. Only the police, customs, and IP courts cannot enforce intellectual property rights. Without policy-priority, appropriate legal framework, consistent and IP-friendly judicial activism, there cannot be any effective IPRs enforcement.[59]

Recommendations to Establish a TRIPS-compliant IP Regime with Strong Enforcement Mechanism in Bangladesh

As a WTO Member Bangladesh has to make its IP regime TRIPS-compliant by 2013. In the light of the above discussion it is expected and advisable to take the following steps to strengthen the IPRs enforcement mechanism and to make the IP regime TRIPS-compliant:

i. Bangladesh needs a study to determine whether its IP-regime is suitable to exploit its potentialities in the field of science and technology. Bangladesh has to adopt such an IP Policy and to enact/update/modify such IP laws which will keep the national interest on the one hand, and will fulfil its WTO obligations on the other.
ii. Bangladesh has to update its laws on patent, design, geographical indication, utility model etc. in line with the TRIPS Agreement. When updating the laws the flexibilities as enunciated in Articles 1, 7, and 8 of the TRIPS Agreement should be used by the policy makers to keep a balance between the interest of the right-holders and that of the people at large. The TRIPS flexibilities should be utilized to balance the competing public policy goals.
iii. Bangladesh has to determine strategies, and equip government institutions and officials to fight IPRs violations.
iv. Bangladesh needs to establish specialized IP courts for satisfactory and prompt disposal of the intellectual property disputes.
v. The judges of the District Court and Supreme Court must be trained about multi-faceted IP issues, ever-developing IP laws and their enforcement mechanism.
vi. The Department of Patents, Designs, and Trademarks must be strengthened and equipped so that it can promote domestic development in scientific and technological field.
vii. The government has to take proper measures to enhance the negotiating capacity of the DPDT.

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[59] Azam, Monirul and Chowdhury, A. Hamid. 2008. "IP Enforcement Mechanisms to Combat Piracy: The Context of Software Piracy", Vol. 3, Issue 1-2, *Asian Journal of International Law*, at pp. 117, 118.

viii. A Public-Private Partnership Council should be established for awareness of the people about the importance and enforcement of intellectual property rights.

ix. GOB can take initiative to collect fund for IPRs enforcement from domestic firms and industries. It can also seek assistance from the developed country members of the WTO as they are obliged under Article 67 of the TRIPS Agreement to provide technical and financial cooperation to developing and least developed country members. It can also seek assistance from the WIPO Advisory Committee on Enforcement. Bangladesh government can judiciously utilize the assistance of the WTO and WIPO for making its IP laws TRIPS-compliant as well as establishing an effective IPRs enforcement system.

x. The IP regime of Bangladesh should be consistent with broader public policy goals.

xi. Bangladesh has to establish a National Task Force or National Committee for Intellectual Property comprising of the representatives from the judicial department, IP experts, the police, the customs, the business community, and media. The tasks of the Task Force or National Committee will be to take care of IP issues, obviate IPRs infringements, and take care of innovations in the field of science and technology as a whole.

Conclusion

In the age of economic globalization, the enforcement of intellectual property rights has ignited huge controversy. It is said to be a strong instrument at the hands of the developed countries and the big multinationals to multiply their huge profit and obstruct technological and economic development of the developing nations. There are, at the same time, strong arguments for IPRs enforcement as it is necessary for economic growth and technological development of any country when it becomes manufacturer of IP products. According to studies, protection of IPRs promotes innovations in developed countries. Particularly, pharmaceutical, chemical, and petroleum industries, bio-technology, software, and ICT industries require and are benefitted by the IPRs protection.

In developing countries the experience is mixed. According to some studies, IPRs protection has little impact on the inventions and technological advancement of developing and least developed countries. Some studies have found that IPRs protection in developing countries can push their technological capacity towards further innovations. This will in turn promote scientific and technological development, ensuring economic growth and poverty reduction.[60] According to other studies,

[60] Wunsch-Vincent, Sacha. 2009. "The Economic Argument for a Patent System: A Modern Development Perspective", Issue 3, *Quarterly Economic Viewpoint Publication*, at p. 3.

IPRs enforcement may protect local commercial and industrial innovation as well as encourages technology transfer and foreign investment. IPRs enforcement therefore may be a developing and least developed country tool for technological and economic development, if that country has the capacity to absorb, reproduce and exploit modern technology.

Though Bangladesh is a least developed country (LDC), among LDCs it has huge potentiality to become a middle income country within a couple of years. The World Bank in its report predicted that Bangladesh could reach Middle Income Country status (defined as US$ per capita of US$ 875) by 2016 if it grows 7.5 per cent per year. Considering its developing economy in pharmaceuticals, ready-made garments (RMG), leather industry, and in some other businesses and services, Bangladesh has to protect the rights of the intellectual property holders.

Bangladesh has its domestic IP regime with IP laws enacted almost 1 hundred years back. But it has already taken initiatives to make its IP regime compatible with the TRIPS Agreement. The enactment of the Trademarks Act, 2009, and the Copyright Act, 2000 are the steps to fulfil its obligation under the WTO Agreement. Government has also taken initiative to make new laws on patent, design, geographical indication, utility model etc. and established the Department of Patents, Designs, and Trademarks. But the government measures seem not to be satisfactory if we take the examples of the IP policy and laws of some developing countries, namely India, Brazil, Philippines, and Indonesia. Moreover, Bangladesh has not yet designed any IP policy to promote its scientific, technological, and economic development. It does not have policy priority, infrastructure, and resources to make an effective enforcement system.

Given the national reality and its WTO commitment, policy-makers of Bangladesh should judiciously envisage some policy issues. First, as a WTO member Bangladesh is obliged to make its IP regime TRIPS-compliant by 2013. Secondly, if Bangladesh wants to exploit its economic potentials in scientific and technological field it will require modern IP policy and laws. Thirdly, in spite of severe criticism of the TRIPS Agreement it has flexibilities. Bangladesh government should endeavor to achieve highest level of expertise to exploit the TRIPS flexibilities to make a balance between IPRs and broader public policy goals. Fourthly, policy-priority, proactive police and customs officials, and IP-promoting judicial activism will be *sine qua non* for establishing an effective IPRs enforcement mechanism.

Legitimacy of Mediators' Power and Techniques of Intervention in Out-of-Court Family Mediation: An Empirical Observation Using the Riskin's Grid on Mediation

Dr. Jamila A. Chowdhury*

Introduction

The existence of informal justice system in Bangladesh is perpetual. It is said that 'village self-government in the sub-continent is as old as the villages themselves'.[1] From time immemorial, various forms of informal justice systems were related to village administration and have been governed by the religious and cultural norms of the society.[2] Informal mechanisms of resolving local disputes were popularly known as *panchayet* or *shalish*, though the term varies in different localities.[3] This paper looks at the historical roots of the community dispute resolution system in Bangladesh and its link with the current practice of out-of-court family mediation in Bangladesh. It is argued that while the tradition of an informal justice system in the form of *panchayet/shalish* has a long history, it has gone through major changes over the years and has become corrupt, inequitable and unprincipled, suppressing the poor and disadvantaged, especially the women in society. To highlight these changes, this paper first details how informal justice operated in different historical periods and how the rulers at different times tried to change this informal justice system.

It then considers the current situation including the development of out-of-court mediation in the resolution of family disputes in Bangladesh. Since contemporary literatures do not describe the mode of mediation being practised in out-of-court mediations in Bangladesh, the nature of the mediation process is observed using the Riskin's grid on mediation.[4]

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1 Siddiqui, Kamal. 2005. *Local Government in Bangladesh.* Dhaka: The University Press Limited, at p. 29.

2 *Ibid.*, at p. 30. See further, Chief Justice Kamal, Mustafa. 2002. "Introducing ADR in Bangladesh: Practical Model", paper presented at the *Seminar on Alternative Dispute Resolution: In Quest of a New Dimension in Civil Justice System in Bangladesh.* Dhaka.

3 *Ibid.*, at p. 31.

4 Riskin, Leonard L. 1996. "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed", Vol. 1, No. 7 *Harvard Negotiation Law Review,* pp. 7-51, at p. 40.

Based on the observation of mediation sessions and interviews with mediators, this paper confirms the use of law to legitimize mediators' power in mediation and demonstrates that *evaluative* mediation with the directive intervention of mediators informed by law is currently practiced in Bangladesh. At the end, it will be argued that because of its nature and its reliance on law, *evaluative* mediation has the potential to attain fair outcomes for women despite the existence of gendered power disparity and family violence in the society. However, a detailed analysis of the impact of power disparity, family violence and how mediators attempt to minimize these impacts to ensure fair outcomes are out of the purview of this paper.

The History of Out-of-Court Mediation in Bangladesh – An Archaic Glory of Our Past

As mentioned earlier, the informal justice system—*panchayet/shalish* has prevailed in the Indian sub-continent for almost as far back as history is known. In the absence of any historical evidence, it is difficult to pinpoint when the concept of different traditional modes of informal justice, such as village *panchayet/shalish*, were first initiated in the region. Rig Vedas, the oldest Hindu religious script, dating from 1200 BC, mentions the existence of village self-governance in India.[5] Some historical basis for the resolution of disputes by the heads of neighbourhoods is also found in the work of Sen who claims the existence of dispute resolution at the village level during the period of the *Dharmashastra*.[6]

It is generally assumed that this kind of local government was the basic form of government until the 6th century BC when large kingdoms began to emerge and the role of local government become subject to the central authority.[7] During the period 1500 BC to 1206 AD, when Hindu rulers governed the sub-continent, the king was considered the *'fountain of justice'* and was the highest authority in the Court of Appeal in the state.[8] Government officials ran other courts and tribunals to administer justice under the authority of a king.[9] But the central authority left local people to resolve civil and petty criminal matters by their local village

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5 Siddiqi, Dina. 2006. *Shalish and the Quest for Gender Justice: An Assessment of Strategic Interventions in Bangladesh.* Dhaka: Research Initiative Bangladesh, at p. 12.

6 Sen, Amartya K. 1984. *Resources, Values and Development.* Oxford: Basil Blackwell, at p. 346.

7 See Siddiqui, above note 1, at p. 29.

8 Halim, Mohammad A. 2008. *The Legal System of Bangladesh.* 3rd edn. Dhaka: CCB Foundation, at p. 34.

9 *Ibid.*

council i.e. *panchayet.*[10] Later, Muslim rulers began to expand their kingdoms in the sub-continent. Muslim rule in the sub-continent can be broadly divided into two parts: the *Saltanate* period (1206-1526 AD) and the *Mughal* period (1526-1757 AD). During the *Saltanate* period, the *Sultans* (Kings) of Delhi maintained the *panchayet* system as the lowest tier of adjudication. Though *Kazi's* courts, a part of the state's court formed to decide on civil and criminal cases, were interspersed throughout the sub-continent during the *Mughal* rule from 1526 to 1757, the number of cases brought before *Kazi's* courts was low as village *panchayets* settled most of the disputes.[11] Considering their deep-rooted nature in their respective locality, throughout Muslim rule, the central administration usually did not interfere with the decisions of the village administration.[12]

Village *panchayets* were made up of a council of village headmen; the composition varying depending on the economic and social structure of the villages being governed. As noted by Siddiqui,[13] *panchayets* resolved different forms of disputes. Sometimes they were formed to ensure that the members of a caste adhere to the religious and social norms of their caste and to settle disputes among members. *Panchayets* also maintained public order and inter-caste relationships among the villagers. Additionally, *panchayets* served to resolve labour disputes such as those among servants and farmers or among the servants of different farmers. Village *panchayets* were also responsible for resolving civil disputes within the area.[14] According to Islam, 'the *panchayet* served civil and policing functions, coordinating rent given etc., while the *shalish* was a village *Sabha* or council that was called on to settle moral and ethical issues'. Therefore, *shalish* can be perceived as a variation of *panchayet* that resolved civil issues among local habitants. The term *shalish* is derived from the Arabic word *'shalish'* meaning 'three'. It conveys the sense 'middle' – middle man – the third party helper in a conflict resolution. In traditional villages, *shalish* was generally conducted by a group of the persons of the village, including village headmen and other local elites. The central government body did not interfere with the decisions even when they contravened the central administrative laws,

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10 See Siddiqui, above note 1, at p. 38.

11 Jain, Mahabir P. 1999. *Outline of Indian Legal History*. Bombay: Tripathy, at p. 31.

12 See Siddiqi, above note 5, at p. 12.

13 See Siddiqui, above note 1, at pp. 31-2.

14 Rahman, Gazi S. 1997. *Bangladesher Ainer Itihash* [Legal History of Bangladesh]. Dhaka, at p. 47. See further, Ameen, Nusrat. 2005. "Dispensing Justice to the Poor: The Village Court, Arbitration council *vis-à-vis* NGO", Vol. 16, No. 2 *The Dhaka University Studies Part F,* pp. 103-22, at p. 110.

and no appeal could be preferred against the decision of the *panchayets/shalishs*.

As *panchayets* were the local bodies for resolving disputes among people in a locality, justice administered by this indigenous system was very much influenced by the custom and religion of that locality.

As Siddiqui observed:

> *Custom and religion made the panchayets so important that they often had an almost sacred status—although they could hardly be described as unbiased and objective. The panchayets never made their decisions by voting, but by consensuses arrived at by the upper caste members of the panchayet, and this was generally accepted by the lower castes. This method well suited the purpose of the conservative village leadership, which wanted to maintain the status quo in society.*[15]

As observed by Jain:

> *These panchayets fulfilled the judicial functions very effectively and it is only rarely that their decisions gave dissatisfaction to the village people. The members of the panchayets were deterred from committing an injustice by fear of public opinion in whose midst they lived.*[16]

The system of *panchayet* to administer justice, however, was drastically curtailed by the advent of the British in the sub-continent. The East India Company started to intervene in the administration of justice in British India under a Royal Charter in 1726.[17] Later, with the decline in *Mughal* rule (1526 to 1757), the East India Company controlled the administration of Bengal province. Initially, the company adopted a new *Zamindari* system to administer justice by curbing the authority of the deep-rooted indigenous *panchayet* system.[18] However, the *Zamindari* system proved inefficient as the *Zamindars* (landlords) were usually biased, oppressive and concerned with profit.[19] Realizing the importance of the long adopted *panchayet* system, the British revived this indigenous system of administering justice by promulgating the *Chowkidari Act 1870*.

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15 See Siddiqui, above note 1, at p. 33.

16 See Jain, above note 11, at p. 61.

17 See Halim, above note 8.

18 See Siddiqui, above note 1, p. 39.

19 See Jain, above note 11, p. 31.

This Act provided for the appointment by the District Magistrate of a village *panchayet* consisting of five members. This body was created to maintain law and order in the village with the help of *Chowkidars* (village guards) employed by the nominated *panchayet.* This constituted the first formal local body to administer justice in the sub-continent. However, the enactment of this formal authority failed to restore the essence of *panchayet* governed *shalish* that general people enjoyed in the pre-British era as *Zamindars* and their nominees continued to influence local *shalish.* The influence of *Zamindars* evaporated gradually with the enactment of the *East Bengal State Acquisition and Tenancy Act 1950* (Act XXVIII of 1951), under which every family or body was restricted to hold a title of land up to a pre-determined maximum limit of 33 acres.[20]

Even after the collapse of the British regime (1757-1947) in the sub-continent, the local justice system of *shalish* continued throughout the Pakistan era (1947-1971). However, as the institutionalization of the local justice system continued during the Pakistan era, local *shalish* gradually came under the influence of narrow political interest of sitting governments and failed to provide justice in an unbiased manner.[21] After the independence war of Bangladesh in 1971, this system of local justice was institutionalized again by enacting the *Village Court Ordinance 1976* (Ordinance LXI of 1976). This law conferred adjudicative power on a local body to administer local disputes. However, the traditional administration of *shalish* by older and respected leaders changed, as younger people and those interested in using *shalish* for political ends came to power.[22] Therefore, changes occurred in the composition of the people administering *shalish* and its probable outcome. Because of their strong political ties, along with the influence of their money and political affiliation, newly emerged leaders superseded the traditional respect towards the age, reputation and lineage of the elderly leaders who prefer to uphold moral conduct than narrow political and personal interests.[23]

Under the changed structure of *shalish*, it can be easily presumed that women will be the most vulnerable of all. As most of the different political leaders' allies are men, women have few ties with politics compared to their male counterparts and are subject to many vagaries in traditional *shalish* conducted by the new politically motivated leaders. As expressed by a local woman in a study workshop conducted by Siddiqi:

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20 Islam, Sirajul (ed.). 2003. *Banglapedia: National Encyclopedia of Bangladesh.* Dhaka: Asiatic Society Bangladesh.

21 See Siddiqui, above note 1, at p. 292.

22 See Siddiqi, above note 5.

23 *Ibid.*, at p. 15.

> *A pre-Independence shalish (before 1971) consisted of 7 or 8 Matobbors [lit. village heads] getting together to ensure that there would be a just solution. The number has gone up to at least 11 or 12 now. The general consensus was that there had been a serious erosion of the social situation since 1971 and that ordinary people were much better off in the past. Matobbors rarely delivered justice these days and were far removed from the law.*[24]

A new dimension of women's deprivation through *shalish* began in the rural areas of Bangladesh in the 1980s when, with the absence of any political activity, the then military regime decided to capitalize on people's religious sentiment to cope with their legitimacy crisis.[25] Rural elites increased the use of *fatwa* (religious edicts) on different issues to promote their interests over the locality.

In Islamic law, *fatwa* is a legal opinion to be issued by Islamic scholars who have proficiency in interpreting the *Quran* and *Hadith* and interpret the Islamic provisions under changing realities of the society through *Ijma* and *Qiyas*.[26] The traditional-minded, less educated but locally recognized religious priests, however, did not have that level of wisdom and started to give conservative interpretations of Islamic views in the name of *fatwa*. Thus, it came to mean the narrow and incomplete interpretation of Islamic views through the pronouncement of humiliating punishments of flogging, stoning, shaving of heads, wearing the garland of shoes etc. imposed discriminatorily upon the women (particularly in the rural areas) by the *mullah* (Muslim religious clergy) at the village *shalish*.[27] Consequently, 'the rural *mullas*, guided by their patriarchal beliefs and attitudes, went on prescribing a gender-segregated, strictly subordinate role for women'.[28] Due to such a gender-biased role of the *shalishkars*, especially *mullahs* who conduct local *shalish*, women and other marginalized sections of the society lost their confidence in locally administered *shalish*.

However, High Court Division (HCD) of the Supreme Court issued a *suo moto* rule on 2 December 2000 about a news item published in the Daily Newspaper, and finally banned the verdict of *fatwa* issued by *mullah* on 1 January 2001. The Divisional Bench held that:

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[24] See Siddiqi, above note 5, at p. 30.

[25] Ahmed, Dalia. 2004. *The Dispensation of Fatwa and Women's Progress in Bangladesh.* Dhaka: Bangladesh Freedom Foundation, at p. 8.

[26] *Ibid.*

[27] Chowdhury, Jamila A. 2005. *Women's Access to Fair Justice in Bangladesh: Is Family Mediation a Virtue or a Vice?*, Sydney: University of Sydney. (Unpublished PhD thesis), at p. 137.

[28] See Ahmed, above note 25, at p. 8.

> *Any fatwa including the instant one is unauthorised and illegal ... Giving a fatwa by unauthorised person or persons [including mullah] must be made a punishable offence by the Parliament immediately, even if it is not executed ... Before parting with this matter, we find it necessary to answer a question as to why a particular group of men, upon either getting education from madrassa [religious school] or forming a religious group, are becoming fanatics with wrong views. There must be defect in their education and their attitude (Writ Petition no. 1587 of 2000).*[29]

The landmark ruling is a glaring example where HCD from its own initiative applied its judicial activism to voice against patriarchal practice and protect fundamental rights of the citizen. Following this ruling, fatwa reduced significantly,[30] but gender-bias attitudes still pervaded local *shalish* and they became ineffective as a means to provide fair outcomes to women.[31]

NGO Mediation in Bangladesh- A Revitalization of *Shalish* under the Shadow of Law

To fill the vacuum of fair justice through traditional out-of-court mediation or *shalish*, some Non-Government Organization (NGOs) in Bangladesh initiated their operation in the field of human rights, specifically with the objective of enhancing access to justice for the poor by introducing NGO *shalish* (out-of-court mediation conducted by NGOs). This form of mediation was popularized in Bangladesh to complement other forms of non-functioning or gender biased out-of-court mediation (e.g. traditional *shalish)* as mentioned earlier. Leading NGOs providing mediation services to local people include *Madaripur* Legal Aid Association (MLAA), *Ain-o-Shalish Kendra* (ASK), Bangladesh National Women Lawyers' Association (BNWLA), Bangladesh Legal Aid and Services Trust (BLAST) and some others.[32]

According to the contemporary literatures, while traditional *shalish* is biased against the poor, NGOs are now providing pro-women out-of-court mediation services to millions of women in Bangladesh. As observed by Khair:

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29 High Court Division of the Supreme Court of Bangladesh, *Writ Petition no. 1587 of 2000.*

30 See Chowdhury, above note 27, at p. 138.

31 Khair, Sumaiya. 2004. "Alternative Dispute Resolution: How It Works in Bangladesh", Vol. 15, No. 1 *The Dhaka University Studies, Part F,* pp. 59-75, at p. 59.

32 See Chowdhury, above note 27, at p. 138.

> *[T]he traditional shalish is composed exclusively of male members and as such, engenders an environment that discriminates against women disputants instead of playing a judicious role.*[33]

Unlike traditional *shalish*, NGO *shalish* is ensuring the greater participation of women in *shalish* and ensuring their voice in the society.[34] Further, unlike NGO *shalish*, traditional *shalish* turns private issues into public ones as its legitimacy depends upon social acceptance and consent.[35] Due to its strict adherence to patriarchal social norms, this local *shalish* has not rendered justice for women.[36]

Gender Equity in Out-of-court NGO Mediation- A Concern for Fair Justice

Though it is mentioned in literature that out-of-court family mediation in Bangladesh provides a possibility for quick resolution of disputes, quick realisation of post-separation entitlements, and enhancement of women voice in mediation,[37] it is widely argued by scholars from Western democratic countries that family mediation may not ensure fair outcomes for women in the presence of considerable gendered power disparity and family violence.[38] *Facilitative* mediation, which is the style of mediation

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33 See Khair, above note 31, at p. 63.

34 Casper, Karen L. and Kamal, Sultana. 1995. *Evaluation Report: Community Legal Services Conducted by Family Planning NGOs.* Dhaka: The Asia Foundation, at p. 35. See further, Golub, Stephen. 2000. "From the Village to the University: Legal Activism in Bangladesh", in McClymont, M. and S. Golub (eds.): *Many Roads to Justice: The Law-related Work of Ford Foundation Grantees around the World.* New York: Ford Foundation, at p. 139. The Asia Foundation, 2002a. *Access to Justice: Best Practices under the Democracy Partnership.* Dhaka: The Asia Foundation, at p. 21. Siddiqi, above note 5, at pp. 48-50.

35 See Siddiqi, above note 5, at pp. 15-6.

36 See Khair, above note 30, at p. 63.

37 The Asia Foundation. 2002a. *Access to Justice: Best Practices under the Democracy Partnership.* Dhaka: The Asia Foundation. See further, The Asia Foundation. 2002b. *In Search of Justice: Women's Encounters with Alternative Dispute Resolution.* Dhaka: The Asia Foundation; Chowdhury, above note 27, at p. 141; Chowdhury, Jamila A. 2005. *Women's Access to Justice in Bangladesh through ADR in Family Disputes: Present Limitations and Remedial Measures with Some Lessons from Egypt.* Monsoura: Modern Book Shop, at pp. 41-3.

38 Bryan, Penelope E. 1992. "Killing us Softly: Divorce Mediation and the Politics of Power", Vol. 40, No. 2 *Buffalo Law Review,* pp. 441-523, at 441. See further, Cobb, Sara. 1993. "Empowerment and Mediation: A Narrative Perspective", Vol. 9, No. 3 *Negotiation Journal,* pp. 245-55 at 247; Field, Rachael M. 1996. "Mediation and the Art of Power (Im) balancing", Vol. 12 *Queensland University Technology Law Journal,* pp. 264-73, at 265; Astor, Hilary and Christine M. Chinkin. 2002. *Dispute Resolution in Australia.* 2nd edn. Sydney: Butterworths, at 102; Astor, Hilary. 2007. "Mediator's Neutrality: Making Sense of Theory and Practice", Vol. 16, No. 2 *Social & Legal Studies,* pp. 221-39, at 225.

most used in Western liberal democratic states, restricts the role of mediators 'to improve communication between the parties and to help them making their own decisions'.[39] However, there is another type of mediation — *evaluative* mediation— where the role of the mediator is not *facilitative* but to guide parties 'to an appropriate settlement based on law, industry practice of other professional standards'.[40]

As discussed in contemporary literatures, considerable gendered power disparity and family violence is present in Bangladesh.[41] Therefore, quick resolution of disputes through facilitative out-of-court mediation may not ensure that women are also getting fair outcomes through mediation, if it allows legal norms to be ignored. Nevertheless, there is a possibility that practices of *evaluative* mediation could provide fair outcomes to women.[42] However, existing literatures on the family mediation of Bangladesh did not indicate what style of mediation is practised in out-of-court NGO mediation.

Presumably, mediation carried out by out-of-court NGO mediators follows the evaluative pattern; and thus women benefit from such mediation. The history of *panchayet/shalish* demonstrates that the practice of evaluation in dispute resolution is not a recent phenomenon in Bangladeshi culture, rather a customary practice of the informal justice system that has a history of more than thousand years. Thus, it

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39 Spencer, David and Michael Brogan. 2006. *Mediation Law and* Practice. Cambridge: Oxford University Press, at p. 177.

40 *Ibid.*

41 Akter, Sabiha. 2000. "Changing Role and Status of Working Women in Urban Bangladesh: A Study of Dhaka City", Vol. 17, No. 1 *Social Science Review,* pp. 233-52, at p. 235. See further, Sultana, Nasrin. 2004. "Polygamy and Divorce in Rural Bangladesh" Vol. 11 *Empowerment,* pp. 75-81, at p. 77; Ansari, S F. 2005. "Violence against Women: Law, Implementation and Reform", in W Rahman & M Shahabuddin (eds.): *Judicial Training in the New Millennium: An Anatomy of BILIA Judicial Training with Difference.* Dhaka: Bangladesh Institute of Law and International Affairs (BILIA); Begum, Hamida A. 2005. "Combating Domestic Violence through Changing Knowledge and Attitude of Males: An Experimental Study in Three Villages of Bangladesh", Vol. 12 *Empowerment,* pp. 53-70, at p. 53; Blunch, Niels H. and Maitreyi B. Das. 2008. *Changing Norms about Gender Inequality in Education: Evidence from Bangladesh.* Washington DC: The World Bank. at pp. 7-9; Khair, Sumaiya. 2008. *Legal Empowerment for the Poor and the Disadvantaged: Strategies Achievements and Challenges: Experiences from Bangladesh.* Dhaka: Canadian International Development Agency, at p. 39.

42 Marthaler, Dennis. 1989. "Successful Mediation with Abusive Couples", Vol. 23 *Mediation Quarterly,* pp. 53-66, at 53, 61. See further, Wade, John. 1997. "Four Evaluative studies of Family Mediation Services in Australia", Vol. 11, No. 3 *Australian Journal of Family Law,* pp. 343-48, at pp. 343, 347; Bagshaw, Dale. 2001. "The Three M's-Mediation, Postmodernism, and the New Millennium" Vol. 18, No. 3 *Mediation Quarterly,* pp. 205-20, at pp. 205, 217-18.

is not unlikely that the evaluative nature of traditional dispute resolution system might have some influence on our current-day practice of mediation. However, the existing literatures on family mediation in Bangladesh have not addressed this issue. Further, question remains on what gives NGO mediators a legitimacy to use their evaluative power in mediation.

Therefore, an empirical study was conducted to discover more about out-of-court mediation in Bangladesh. Before discussing about the empirical findings, the next section will make a brief discussion about some major providers of NGO mediation services in Bangladesh and their visions to ensure gender equity in mediations.

Vision towards Gender Equity under the Shadow of Law: NGO Experiences in Out-of-court Mediation

Madaripur Legal Aid Association (MLLA) is the pioneer among the out-of-court mediation providers in Bangladesh.[43] MLLA, established in 1978, is considered to be the pioneer in the introduction of NGO-based out-of-court mediation in Bangladesh. To provide mediation services, MLLA formed a mediation committee with the Chairman and members of the Union *Parishad* (Council) and also included other local elites such as teachers of the primary school, *madrasa* (religious school), and other influential local leaders to form a mediation body that could ensure more equitable justice.[44] Trained paralegals from MLAA also attended mediation sessions as watch-dogs to monitor women's effective participation in mediation. Since its establishment in 1978, MLAA is not only resolving local disputes through mediation, it also giving training to the local leaders and elites to change their knowledge and attitude towards the use of law whilst conducting *shalish* at the local level.[45]

Like MLLA, *Bachte Sekha*, another NGO established in 1982 and working in the *Jessore* and *Khulna* districts of Bangladesh, practices another variation of traditional *shalish* that gives maximum emphasis on strengthening the voice of women during the *shalish* process. To ensure this, *Bachte Sekha* forms an 11 member village mediation committee out of which seven of the appointees are women.[46] Legitimacy of mediation

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43 See Chowdhury, above note 27, at p. 139; See further, Chowdhury (2005), above note 37, at p. 22.

44 Rojdeiczer, Lukasz and Alejandro A. de la Campa. 2006. *Alternative Dispute Resolution Manual: Implementing Commercial Mediation.* Washington DC: International Finance Corporation, The World Bank, at p. 103.

45 See The Asia Foundation (2002a), above note 37, at p. 18. See further, MLAA. 2008. *Mediation Manual.* Madaripur: MLAA, at p. x.

46 *Ibid.*

from MLLA and *Bachte Sekha* therefore depends on the legitimacy of the village committee formed to conduct mediation.

Another human rights NGO, *Ain- o- Shalish Kendro* (ASK), is not only providing the service of mediation but also, through its 'Gender and Social Justice Project', is sensitizing the local government bodies and law enforcement officials to the violation of women rights. It also strengthens the ties among local people, including journalists and lawyers, to monitor human rights enforcement mechanisms. Therefore, ASK is working towards changing the knowledge of the society so that women may get more benefit from the implementation of law as time goes on.

Bangladesh Legal Aid and Services Trust (BLAST) started its operation in 1993 and now has a network covering all 19 greater districts of Bangladesh. BLAST is running legal awareness programs and public interest litigation to establish rights in various sectors including labour law, family law and state abuse of prisoners. One of the popular services of BLAST is to provide a legal aid and advocacy service to its clients if their mediation effort to resolve a dispute fails. 'BLAST utilizes a people-oriented model for mediation which also adheres to the jurisprudence principles of the country'.[47] It seems that BLAST conducts its mediation under the shadow of law and uses law to legitimise its mediation efforts.

As most of the major NGO mediation providers conduct mediations under the shadow of law, it can be reasonably hypothesized at this point that, use of law might legitimize mediator's intervention and opens up the way towards fair justice and gender equity in mediation. However, the next section will examine this hypothesis detailing data and methodology used to observe out-of-court NGO mediations conducted at different BLAST offices and to interview BLAST mediators in three districts of Bangladesh.

Understanding Mediators' Role: An Empirical Observation

Since one of the purposes of this study was to explore the method of intervention applied by out-of-court family mediators in Bangladesh, observation of mediation sessions was considered to be the best methodology to satisfy such objective. However, besides observation, semi-structured interviews were also conducted among BLAST mediators. Twelve out-of-court mediators were selected randomly from the list of mediators provided by BLAST from *Dhaka, Mymensingh,* and *Narayanganj* districts. Though the interview schedules included open-ended questions, the interviews were focused in nature. The main purpose of the interview was to corroborate data already observed in

[47] *Ibid.*, at p. 26.

mediation sessions, and to get a profound insight on mediators' ideology towards intervention in mediation.

It is already indicated that mediation sessions were observed at different BLAST offices in Bangladesh. To represent any variation of mediation practiced in urban, rural and suburban areas, BLAST offices at three different rural, urban and sub-urban districts were chosen for this study. The feature of urbanization used to choose these three districts was the percentage of total female population living in rural, urban and suburban areas according to the latest Population Census Report in 2007. These districts were chosen in such a way that any difference between rural and urban women could easily be understood from the sample. For example, in aggregate, 77.33 per cent of all women in Bangladesh live in rural areas, whereas 9.35, 44.62 and 85.58 per cent women lived in rural areas in *Dhaka, Mymensingh and Narayanganj* districts respectively. The choice of sample on the basis of rural, urban and suburban variation of the districts also reflects the difference in the literacy rate of adult women and women's participation in economic activity. For example, among the three districts chosen, the percentage of literate adult women in *Dhaka* (urban) district was 60.74 per cent, compared with 48.10 per cent in *Narayanganj* (suburban) and 34.84 per cant in *Mymensingh* (rural) districts. Likewise, regarding the economic participation of women, the rate within *Dhaka, Mymensingh, and Narayanganj districts was 16 per cent, 8.69 per cent and 7.77 per cent* respectively.[48]

An observation schedule was prepared with the objective of collecting three different types of information. Firstly, general information including age, sex, and nature of dispute was collected about the mediation session and the parties concerned. Secondly, the nature of mediation conducted by the mediators was observed. Using Riskin model[49], the level of mediator intervention was observed looking especially at:

- whether the mediators proposed an agreement to the parties or helped parties to develop their own proposals
- whether mediators predicted likely court outcomes for the parties or asked parties about what consequences they were expecting if no settlement was reached in mediation
- whether mediators assessed the strengths and weaknesses of the parties' cases or helped parties to understand their interests and
- how legal provisions were used by the parties and mediators during this process.

Thirdly, while preparing the observation schedule, importance was placed on how mediators tried to redress power disparity in mediation and how they dealt with the issue of family violence in mediation.

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[48] BBS. 2007. *Population Census Report*. Dhaka: BBS, at pp. 12-5, 123-37.

[49] See Riskin, above note 4, at p. 25.

Using this schedule, 18 mediation sessions were attended to fulfil the three objectives of the observation schedule mentioned earlier. Mediation sessions were chosen randomly using the lists of on-going mediations collected from the registries of BLAST offices visited in three districts.

However, it was possible that participants would modify their behaviour, words and conduct as a reaction to the presence of a researcher. The problem of reactivity arises when the presence of a researcher affects the natural behaviour of a participant.[50] However, the reactivity of participants to my presence in the mediation sessions was controlled throughout the observations of mediation sessions. To control reactivity of participants from the very beginning, during this introduction phase, both the parties were assured that I would not, in any way, interfere in the mediation process, and the mediator assured them that my presence would not influence the outcome of the session. Moreover, I observed the mediation sessions from a distant corner of the room and took a position so that I could be hardly seen by the mediator and not at all by the parties. To control reactivity of the participants about my presence at the mediation session, I remained silent during the entire mediation session and did not provide any participation that may distort the outcome.

Since no tape recorder was used, during the mediation sessions I was busy with intensive note taking so it was not always possible for me to look at the visual expressions of the parties. Rather, I recorded the mediation session based on the conversation between the mediators and parties. I tried hard to avoid subjectivity in my note taking, and tried to capture the mediation sessions in as much depth as possible. Note taking was done on the basis of criteria derived from Riskin model[51] to ensure that consistent data on pre-determined criteria were obtained from all mediation sessions observed. As observed by Yin, results of a study could be biased if the 'investigator seeks [to] substantiate a preconceived position. One test of this possible bias is the degree to which [an] investigator is open to contrary findings'.[52] Therefore, although my hypothesis was that mediators used *evaluative* mediation, I included corresponding points of *facilitative* mediation in my observation checklist, along with the points that could capture the practice of *evaluative* mediation by the mediators.

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50 Participants may remain hesitant to negotiate or to share their grievances if they realize that somebody is observing their performance. It is generally argued that the higher the degree of participation of a researcher into a mediation session, the more the reactivity of clients towards a researcher's presence in mediation. See further, Rarkhuff, Robert R and Bernard G. Berenson. 1976. *Beyond Counseling and Therapy*. New York: Holt Rinehart Winston, at p. 265.

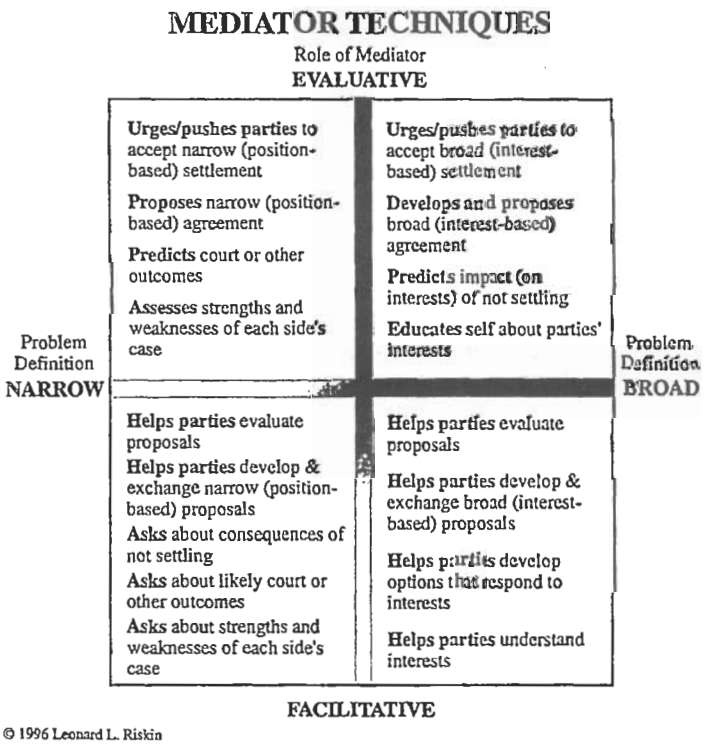
51 See Riskin, above note 4.

52 Yin, Richard K. 1990. *Case Study Research*. 2nd edn. California: Sage Publications, at p. 65.

Use of Law to Legitimize Mediators' Power - Techniques of Intervention Used in NGO Mediation

As all of the major providers of NGO mediation discussed earlier in section 3.2 have an objective to use law to promote justice, it can be presumed that NGO mediators' intervention under the shadow of law might protect women rights in mediation. However, as mentioned earlier, the style of out-of-court NGO mediation is not clearly delineated in any contemporary literature in Bangladesh. It was therefore necessary to follow a model during the empirical survey to confirm which style of mediation is practised in Bangladesh. The Riskin's grid on 'Mediator Techniques' that classifies the *facilitative* and *evaluative* roles of mediators was used for this purpose.[53]

Figure 1 Riskin's Grid on Mediation



Source: Riskin 1996, p.25.

According to Riskin's grid as shown in Figure 1, mediation can be conducted broadly in two modes (1) *facilitative* and (2) *evaluative*. Both

[53] See Riskin, above note 4.

modes of mediation can be used with a broader party interests-based approach, or a narrow rights-based approach.[54] In a rights-based approach, a resolution of dispute is sought only on the basis of the rights of the parties, for example rights that are given in law. In an interest-based approach, a dispute is resolved with the aim of maximizing party welfare. But, in reality, a solution may be sought with a trade-off between these two continuums. As observed by Riskin:

> *At one end of this continuum sit narrow problems, such as how much one party should pay the other. At the other end, lie very broad problems, such as how to improve the conditions in a given community or industry. In the middle of this continuum are problems of intermediate breadth, such as how to address the interests of the parties or how to transform the parties involved in the dispute.*[55]

Criteria for broader *facilitative* mediation are placed in the lower right quadrant of the grid (Figure 1). In broader *facilitative* mediation, mediators emphasize party interests that increase their welfare. On the other hand, criteria set on the lower left quadrant indicate narrower *facilitative* mediation, where mediators emphasize a narrower right-based approach, such as the rights of parties given in law. Criteria for broader *evaluative* mediation is set on the upper right quadrant where mediators make evaluations about the content and outcome of a dispute and help parties to settle their dispute based on their best interests. The upper left quadrant shows the criteria for a narrow *evaluative* mediation where parties settle their disputes based on their rights, for example, those given in law. However, though mediators may have some preference towards an individual grid, they may not strictly adhere to that particular grid in every situation. As observed by Riskin:

> *[T]he grid can help us envision an ideal mediator for any individual case. [Mediators] would be sufficiently flexible to employ the most appropriate orientation, strategies, and techniques as the participants' needs present themselves.*[56]

Riskin's grid not only helps us to identify whether mediation is *facilitative* or *evaluative* but also to understand whether mediation is being conducted by strictly adhering to the provisions of law or

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54 *Ibid.*

55 *Id.*, at p. 17.

56 *Id.*, at pp. 40-1.

considering party interests. As existing literatures do not provide any indication of whether *facilitative* or *evaluative* mediation is being conducted in Bangladesh, the observations of the features of the out-of-court mediation process discussed in the next section, together with Riskin's grid which is designed to identify a mediator's procedural orientation, assisted us to reveal the style in mediation being practiced in Bangladesh.

Style of Out-of-court NGO Mediation: An Empirical Evaluation

Though Riskin's grid is related especially with the nature of interventions made by mediators during mediation sessions, this section delineates how BLAST mediators try to attain equitable outcome for women at different stages of mediation. As observed in mediation sessions conducted at BLAST offices, on the day of out-of-court mediation, a staff lawyer from BLAST usually acts as a mediator, presides over the session and maintains the following steps while conducting mediation:

Initiation with Ground Rules: All of the mediation sessions that were attended in various BLAST offices started with the mediator outlining the ground-rules:

- that both husband and wife have equal right to participate in the mediation session
- that both will be heard equally
- that one party should not talk while the other is expressing his/her view
- that sufficient time will be given to the other when one has finished his/her part, and
- that friends, relatives, neighbours and others attending mediation are also called on not to interrupt the parties to express their own grievances.

As was shared by the mediators during interviews and also observed while attending mediation sessions, after stating the ground rules, mediators try to create an informal, congenial and non-confrontational environment so that both parties, especially women, can feel relaxed and express their grievances freely. As was observed in Bangladesh, at the beginning of the session, the mediators clarify that BLAST is not a court, and so parties can express their own choices according to their convenience. As was expressed by all of the BLAST mediators interviewed for this purpose, in order to make the environment friendly for women, BLAST encourages greater participation of women in their *shalish* as well as includes women lawyers as mediators.

Gathering Information on the Issue of the Dispute

BLAST mediators usually ask the women to share the facts of their dispute first, then the other parties. Such a strategy is beneficial for women because, as identified by Cobb, the first speaker has an

opportunity to tell the story from a positive perspective.[57] Those who speak first in mediation can explain their own position positively and put a positive light on the facts.[58] Establishing a positive light at the beginning is important because 'once imprisoned in a negative position, few persons are able to construct alternative positive positions for themselves'.[59] All of the BLAST mediators interviewed give women an opportunity to share their grievances freely with them when they first come to a BLAST office to file their complaint. The mediators also stated that about 80 to 90 per cent of women speak freely about their claims in mediation.

Mediators' Intervention on the Content of Dispute

In all mediations at BLAST offices, it was observed that mediators challenge the statements made by a husband or any other accompanied members from his friends and family. For example, in one mediation session observed at the BLAST office, *Dhaka*, a husband was claiming reconciliation with his wife. Addressing the mediator, the maternal uncle of the husband who was also present at the mediation session said:

Uncle of husband: *When she (wife) went to my residence with a complaint against her husband, I asked her (wife) whether your husband tortures you; but she replied "No". If so, why she is not returning to her husband?*

Mediator: *She might say 'No' in your house out of fear; but now she is saying that her husband tortured her and has not paid proper maintenance. Moreover, they made a love marriage. So, if still there is love and affection and the husband provides proper maintenance why she will not return?'*

[Assessed the weakness of the claim made from husband's side: Narrow evaluative]

In another BLAST mediation at *Mymensingh* district, the wife demanded her full amount of dower written in the marriage contract, while the husband was claiming that he had already paid dower to his wife:

Husband: (to mediators) *I have already paid her dower through ornaments and other valuables during marriage.*

Wife: *those were my marriage gifts.*

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57 See Cobb, above note 38, at p. 245.

58 Astor, Hilary. 2005. "Some Contemporary Theories of Power in Mediation: A Primer for the Puzzled Practitioner", Vol. 16, No. 1 *Australian Dispute Resolution Journal,* pp. 30-9, *at* pp. 30, 36.

59 See Cobb, above note 38, at p. 253.

Mediator: (to the husband) *On your marriage contract have you mentioned about the valuables you are claiming now?*

Husband: *No.*

Mediator: *Though it is generally believed that anything paid to bride during marriage will be treated as dower, to claim it legally, one need to mention it in the marriage contract. Otherwise, it will be considered as marriage gift, even if you go for litigation.*

[Predicted court outcomes: Narrow Evaluative]

Therefore, if we fit mediator's role, in the situation mentioned above, with Riskin's grid, it can be said that mediator at BLAST used a narrow evaluative role to assess the weakness of the claim made by a husband and predicted court outcomes that may promote women's right. Similarly, in another BLAST mediation session observed in *Mymensingh*, a husband claimed that he would not provide maintenance to his wife because the wife did not carry out his orders. The mediator made an evaluation of the wife's right to maintenance as follows:

Husband: *I will not provide maintenance to her because I forbid her to go to my neighbour's house, but she does not care.*

Wife: *I need to go there to fetch water. How can I run my daily works without water? Why doesn't he (husband) bring water from other places, if he does not want me to go there?*

Mediator: (to the husband) *Why do not you bring water for your wife?*

Husband: *I have to leave home in the early morning. So, I do not have much time to fetch water for her.*

Mediator: *You should make an alternative source of water available, if you do not want your wife to go to your neighbour's house. To get maintenance is her legal right. You cannot stop her maintenance. If your wife claims her right to maintenance in the court, your defence to deny her right to maintenance on this ground will be rejected in court too.*

[Predicted court outcomes: Narrow Evaluative]

Here also the role of the mediator resembles to a narrow evaluative mediation through prediction of court outcome on wife's claim for maintenance from her husband. Therefore, as observed during mediation sessions at BLAST, mediators protected women's rights by emphasizing their legal rights while evaluating the content of a dispute.

Assisted Bargaining for Outcomes under the Shadow of Law

A rather narrow based evaluative mediation as indicated in Riskin's grid is practiced at this stage, while mediators help women to negotiate for a

better outcome, they advise what women might get if they do not settle in mediation and opt for litigation. However, mediators do not propose any specific outcome for the parties. At all BLAST mediations attended, I observed BLAST mediators using different provisions of law to protect the rights of women. For example, while observing the process in a BLAST mediation I attended in *Dhaka* district, a mediator assisted negotiation under the shadow of law on polygamy to protect the rights of the woman.

Mediator: *Now what do you want to do?*

[Helped parties to develop and exchange broad (interest based) proposals: Broad Facilitative]

Wife: *I want to live with my husband, but not with that second wife.*

Husband: *I want to live with them both [first and second wives].*

Father of the wife: *He has made his second marriage without taking any permission from my daughter. Now we will sue him.*

Mediator: (to the husband) *Haven't you taken permission from your wife?*

[Educated self about parties' interests: Broad Evaluative]

Husband: *No.*

Mediator: (to the *husband*) *The law is now very* strict *in this regard and you might get imprisoned if they sue.*

[Predicted impact of not settling: Broad Evaluative]

Mediator: *(to the husband again) What you would do now? According to law, you may pay dower money to one of them and get divorced from her.*

[Proposed narrow (law/position-based) agreement: Narrow Evaluative]

Husband: *(thinking)*

Mediator: (to the wife) *What is the amount of your dower?*

[Educated self about parties' interest: Broad Evaluative]

Wife: *Tk.50, 000 (US$642)*

Mediator: *Would you consider getting divorced from your husband after getting Tk.50, 000 (US$642) or do you like to continue with him?*
[Proposed narrow (law-position based) proposals: Narrow Evaluative]

Wife: *I do not want money; I want to get back my husband. (Wife's strong desire towards restitution)*

Mediator: (to the husband) *What do you think now? You have already heard what your wife said. (Though indirectly, mediator is giving emphasis to the proposals made earlier under the shadow of law).*

[Helped parties to evaluate proposals: Narrow Facilitative]

Husband: (after a discussion with his parents and relatives) *I will divorce my second wife.*

An examination of the interventions made by mediators at various stages of mediation, discussed so far, indicates that mediators follow a narrow evaluative role while intervening on the content of a dispute. However, while deciding about the outcome in a mediation session, mediators start with a broad facilitative role; then switch into a broad evaluative role, and finally end-up with a narrow evaluative role. Despite their evaluative role, instead of urging/pushing parties to accept a settlement, mediators rather help parties to choose from the narrow (position based outcomes) proposals under the shadow of law. Further, while protecting the right of one woman in mediation, mediators were observed to be conscious about the non-infringement of any third party interest, especially the interest of any other women who are not attending the mediation session but whose interest will be affected by the outcome. For example, in the same mediation session mentioned earlier, the mediator used his narrow evaluative role by using legal provisions to protect the right of the second wife. When the husband decided to divorce his second wife and live with the first one, the mediator replied:

Mediator: (to the husband) *Well, you have decided to divorce your second wife and live with the first one; but in that case you have to wait for a few months. As I have been informed by your father, your second wife is now expecting. According to law, you cannot divorce your wife during her pregnancy.*

[Predicted court outcome: Narrow Evaluative]

Mediator: (to the husband again) *Moreover, you have to pay her unpaid dower, maintenance for three months iddat period and periodic maintenance to any child born*

[Predicted court outcome: Narrow Evaluative]

Mediator: (to the wife) *When claimed, you should not restrain your husband from paying the periodic child maintenance. If the child is a boy, maintenance should be paid until his maturity at 18, and if the girl is a child, until her marriage.*

[Predicted court outcome: Narrow Evaluative]

Mediator: (to the wife again) *Do you agree?*

Wife: *Yes, I do.*

Mediator: *Fine, now we may proceed to draft the mediation agreement between you.*

The example mentioned above indicates that though the divorcee wife and children, the mediator tried to frame a solution under the shadow of law and protected the mediator let parties make their own decisions, by reminding the husband of his legal obligations to pay dower and maintenance to his rights of third parties.

An examination of mediators' role as revealed through the observation and their corresponding linkage with the Riskin grid demonstrated in Figure 1 indicates that BLAST mediators generally practice evaluative mediation to challenge the discourses made by husband and their accompanied person to legitimize the position of women and give them more voice in mediation. However, mediators provide more emphasis on 'party self determination' while settling the outcome of mediation. Mediators do not provide any strong evaluation towards the outcome of disputes rather help parties to develop their own outcomes under the shadow of law. The following section summarizes how BLAST mediators ensure equitable outcomes during mediation.

6.5 Attaining Fair Outcomes for Women

When the facts of a dispute and the position of both parties in attaining a solution are clear to mediators, they ask parties to express their desired solution. Women and their guardians are usually given the first chance to share their views. Generally, as observed in BLAST mediations, the outcome is reached as follows:

- After hearing from both the parties, BLAST mediators initially asked parties about any possibility of reconciliation. However, mediators did not encourage or force parties to reconcile; rather they ensure that any agreed reconciliation was made with the wife's free consent by asking the wife whether she agreed voluntarily or not. Mediators also stressed the point that the wife is not bound to accept the proposal of reconciliation by the husband and she has complete right to refuse her husband's proposal. In such a case, BLAST mediators helped women to get a fair share of their post separation entitlements.

- In the case of attaining an outcome for dower and maintenance, they tried to ensure that the woman's dower and maintenance as stated in their marriage contract, is recovered in the shortest possible time. However, as observed during the mediation sessions and confirmed by the mediators during interviews for this purpose, BLAST mediators did not pressure parties to accept a particular amount of dower or maintenance as outcome; rather they tried to ensure fair outcomes for women.

- As well as recovery of dower and maintenance, according to the mediators interviewed, the other objective of a mediator regarding mediated outcomes varied depending on the issue of a dispute. In the case of custody of children, however, the prime objective is to ensure the welfare of the children. This motive of emphasizing child welfare while determining custody of children corresponds with the legal provision set in the *Guardianship and Wards Act 1890*. It indicates that during mediation, the issue of child custody is also determined in the shadow of law.

Agreement Writing and Closure

Finally, an attempt is made to resolve the differences between the two sides with terms and conditions which are acceptable to both parties. A mediator summarizes the terms and conditions, under which the two parties decide to settle the dispute, and writes down those points in a prescribed form. The written agreement is then read to the parties and signed by the mediator/s as representatives of BLAST, both the parties and one guardian as witness from each side. While compiling the agreement, BLAST mediators have a final look at the equity of the agreement reached. If any one or more of the conditions seem/s inequitable for the woman, the mediator explains to the parties its negative consequences and asks the parties to consider revising the terms. According to all of the BLAST mediators interviewed, their objective is to ensure that women will get fair outcomes in comparison to what that may get though litigation.

Conclusion

As observed in out-of-court NGO mediation in Bangladesh, mediators do not use facilitative style of mediation. Rather, they use evaluative style of mediation to help parties, especially women, to express their opinions; challenge the dominant social discourse that husbands might use to subjugate the position of women in mediation; educate parties about the probable outcome of the dispute if settled in litigation; and warn them about the extra cost and money that they may require to settle the dispute through litigation. All these criteria observed during mediation sessions in Bangladesh, when matched with Riskin's criteria set out above, demonstrate that mediators in Bangladesh generally use narrow *evaluative* mediation to intervene in the content of a dispute. However, 'shadow of law' has a strong impact on the outcome of mediation. While settling outcome, though mediators help parties to evaluate proposals, or help parties to develop their proposals under the shadow of law, they do not decide the outcomes of a dispute and do not dictate to parties what outcome they may demand. Thus, the narrow facilitative style of mediation practiced at the end opens up the possibility that mediation may provide fair outcomes for women, based on legal principles, and also promote 'party self determination' in mediation.

In Bangladesh, family law is evolving gradually to be more protective of women's rights. Since the law embodies equality, and if it is the touchstone for standards in mediation, this is more likely to uphold women's rights and women's equality than is recourse to community values. Therefore, at this point we can at least propose that as the most reliable protections of women's rights are in law, the dominance of the values of law in mediation means that a practice of *evaluative* mediation, as observed at BLAST, has a greater capacity to promote party self determination and protect women's legal rights to provide fair outcomes for women in mediation.

Further, unlike traditional *shalish*, NGO administered mediation or NGO *shalish*, as it is conducted at BLAST, is preferable for women because it ensures the availability of legal advice to them. Furthermore, unlike traditional *shalish*, a written and signed agreement in NGO *shalish* usually stimulates the opposite party to abide by the terms of agreements settled through mediation.[60] As these rule-based NGOs provide low-cost informal justice, 'poor people, particularly women feel

[60] UNDP. 2002. *Human Security in Bangladesh: In Search of Justice and Dignity.* Dhaka: UNDP, at p. 93.

comfortable and pleased about the easy access to local dispute resolution mechanisms'.[61] Therefore, there appears to be a broad consensus in Bangladesh that the '[NGO] *shalish* as a dispute resolution mechanism has tremendous potential for making justice more accessible to marginalized individuals and groups', especially for women.[62]

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61 *Ibid.*

62 See Siddiqi, above note 5, at p. 15.

Laws in Relation to Consent and Punishment for Adultery: A Critique on the Treatment of Men and Women in Trial

Md. Abdur Rahim Mia[*]

Introduction

Almost every religion condemns 'adultery' and treats it as an unpardonable sin,[1] so does the society. The religious and social temperament has not been entirely reflected in the penal laws of Bangladesh. In Bangladesh, the offence of adultery is punishable crime under section 497 of the *Penal Code*, 1860. This section makes only men having sexual intercourse with the wives of other men without the consent of their husbands punishable and women cannot be punished even as abettor. It seems to be a gendered section in favour of women. This section violates the principle of equality under the provision of Articles 27 and 28(2) of the Constitution of Bangladesh. Marriage, as a man-woman relationship, has evolved from a socially useful and effective institution into a free-floating, personal relationship.[2] The principle of equality before the law requires the revision of the existing law on adultery by including both partners within its scope. The bonds of marriage have a religious, social and legal sanction in Bangladesh. Any sexual liaison that defies this bond spells noncompliance with social norms.[3] It is a violation of the sacred marriage vows religiously and morally held to be sacrosanct and is punishable under the laws of the land.[4] Whether the woman is a victim of adultery or is herself an adulteress, she is completely free of being penalized for her misdemeanour under Bangladeshi Law. This paper attempts to focus on the weaknesses of section 497 of *Penal Code* (PC) in the light of

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1 Vibhute, K.I. 2001. "Adultery' in the Indian Penal Code: Need for a Gender Equality Perspective", available at <*http://www.ebc-india.com/lawyer/articles/2001v6a3.htm*>, last accessed on 15 March 2011; Some of the ideas have been developed in this article from the article of Vibhute, K.I. (2001).

2 Shams, Shamsuddin. (ed.). 1991. *Women Law and Social Change*, New Delhi, Ashish Publishing House, at p. 293.

3 'The Price of Adultery', available at <*http://www.tribuneindia.com/2007/20070120/saturday/main1.htm*>, last accessed on 25 December 2010.

4 *Ibid.*

Bangladesh Constitution and the different aspects of inequality in case of adultery under Bangladeshi laws. This article is analytical in nature. As there is no case law in regard to adultery in Bangladesh, some cases of India have been discussed here.

Concept of Adultery

Adultery[5] is a form of extramarital sex. It is sexual infidelity to one's spouse. It originally referred only to sex between a woman who was married and a person other than her spouse.[6] Adultery is illegal in some countries. The interaction between laws on adultery with those on rape has and does pose particular problems in societies that are especially sensitive to sexual relations by a married woman and man.[7] The difference between the offences is that adultery is voluntary, while rape is not. The term adultery has an Abrahamic origin, though the concept predates Judaism and is found in many other societies. Though the definition and consequences vary between religions, cultures, and legal jurisprudence, the concept is similar in Judaism, Christianity, and Islam. Hinduism also has a similar concept.[8] In the traditional English common law, adultery was a felony. Although the legal definition of "adultery" differs in nearly every legal system, the common theme is sexual relations outside of marriage, in one form or another. Fornication and adultery are both included in the Arabic word '*zina*'. *Zina* indicates any *haram* (prohibited) act, whether the act was sexual intercourse or a look, talk, touch, or desire that is related or may lead to elicit sexual relations. *Zina*, as a legal term, has a more specific meaning because there are legal implications related to it. In its legal meaning *zina* is 'the voluntary sexual intercourse outside marriage. Thus, any sexual relationship, which fits this definition, is legally *zina* and deserves the application of a major legal penalty. According to Bangladeshi Law, if a man makes sexual intercourse with a woman and he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the

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5 'adultery', *Encyclopaedia Britannica Online*, available at <*http://www.britannica.com/EBchecked/topic/6618/adultery*>, last browsed on 27 December 2008, as said: 'Whoever as sexual intercourse with a person who is and whom he knows or has a reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punished as an abettor'.

6 'Definition of Adultery', available at <*http://dictionary.reference.com/browse/adultery*>, last retrieved on 20 December 2010.

7 For example, Pakistan and Saudi Arabia.

8 See above note 5.

offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punished as an abettor.[9] The object of the law is to inflict punishment on those who interferes with the sacred relation of marriage, and the legislature as well considers it to be an offence for one who interferes in the sacred matrimonial home.[10] It is commonly accepted that it is the man who is the seducer and not the woman, and it is considered as an anti-social and illegal act by any peace loving and citizen of good morals, who would like any one to be indulged in such acts before their nose.[11]

Analysis of 'Adultery' under Bangladeshi Laws

Complainant

The sexual intercourse between a man and an unmarried woman or a divorcee or a widow, does not come within the definition of 'adultery'. Adultery is restricted here to a particular type of sexual intercourse. It also holds the man and not the adulteress wife of another man, who has been unfaithful to her husband, solely responsible for the sexual liaison.[12] Under the PC, adultery is an offence committed by a third person against a husband in respect of his wife and of which a man can alone be held liable for the offence.[13] Thus the husband of adulteress wife along is competent to file the complaint for a charge under section 497 and it is only when he is absent that the persons who is in care of the women may file such complaint on behalf of the husband with leave of the court.[14]This assumes that no married woman is capable of taking charge of her own life and taking care of herself. Granted that this may

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9 Section 497, *The Penal Code*, 1860.

10 Bag, Amartya. 2010. 'Adultery and the Indian Penal Code: Analysing the Gender Neutrality of the Law', available at <*http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1627649*>, last accessed on 25 March 2011; *V. Revathi v Union of India,* AIR 1988 SC 835; See also, Ministry of Home Affairs, Government of India, Committee on Reforms of Criminal Justice System 190 (2003) available at <http://www.mumbaipolice.org/%5Carchives_report%5Cmalimath%20committee%20report.pdf>, accessed on 9 September 2009.

11 *Ibid*; *V. Revathi v Union of India,* AIR 1988 SC 835; See also, *Hatim Khan v State,* AIR 1963 J&K 56.

12 See above note 1.

13 *Gansapalli Appalamma v Gantappali Yeliayya,* (1897) ILR 20 Mad 470; see above note 10.

14 Section 199, *The Code of Criminal Procedure,* 1898; Section 498, *The Penal Code,* 1860.

have been true in 1898[15] but it is certainly not true in 2011. If adultery is committed, the husband cannot prosecute his unfaithful wife but can only prosecute her adulterer.[16] However, since the offence of adultery can be committed by a man with a married woman only, the wife of the man having sexual intercourse with other unmarried women cannot prosecute either her husband or his adulteress.[17] The greatest injustice is done when a woman finds herself totally helpless in either prosecuting her husband or the other woman. Neither the aggrieved husband nor wife may initiate proceedings against their irresponsible spouses.[18]

Punishment

According to the PC, adultery is an act of which only a man be guilty of. What is interesting here is that the section itself expressly states that the unfaithful wife cannot be punished even as an abettor to the crime.[19] This provision shows that a married wife cannot commit adultery. The offence of adultery therefore is an offence committed against the husband of the adulteress and not against the wife of the adulterer.[20]The cognizance of the offence under section 497 is limited to an adultery committed with a married woman, and the man alone had been made liable to punishment. It focuses the *prima facie* unequal treatment between men and women. The adulteress man and woman, both are equally liable for committing adultery, but law penalises the man but exempts the woman from criminal responsibility. It appears discriminatory that for the same act the man becomes the manifestation of evil but the woman still is considered to retain her virtues.[21] The responsibility of upholding the purity of the matrimonial home lies on both the spouses rather than an outsider for involving in an extra marital

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15 In 1898, *The Code of Criminal Procedure* was enacted.

16 Basu, N.D. 1951. *The Indian Penal Code*, Fifth Addition, Calcutta, S.C. Sarker and Sons Ltd, at p. 772.

17 See above note 2, p. 290; See also, *'A Provision Redundant in Penal Law in* Changed Legal and Social Context', available at <*http://www.legalserviceindia.com/article/l291-Adultery.html*>, last accessed on 15 March 2011.

18 See, 'The Antiquated Shackles of Adultery' available at <*http://www.legalserviceindia.com/article/l17-Adultery.html*>, last accessed on 15 March 2011.

19 *'A Provision Redundant in Penal Law in* Changed Legal and Social Context', available at <*http://www.legalserviceindia.com/article/l291-Adultery.html*>, last accessed on 15 March 2011.

20 *Ibid.*

21 *Ibid.*; See also *Encyclopedia Dictionary of Religion* (The Sisters of St. Joseph of Philadelphia, 1979).

affair. When a woman makes an illicit relationship, denying this responsibility, she is equally responsible for breaking the matrimonial alliance and commits an equal offence to that the man who entices her. Breaking a matrimonial home is not less serious a crime than breaking open a house'.[22] No adultery can be committed without the consent of women. But according to section 497, only a man can be an outsider, who has potential to invade the peace and privacy of the matrimonial unit and to poison the relationship between the unfaithful wife and her husband, therefore, seems to be, with due respect, less convincing and unrealistic.[23] An outsider woman can, like "an outsider man", be equally capable of invading the matrimonial peace and privacy as well as of poisoning the relationship of not only her own matrimonial home but also that of her paramour.[24] Thus she should be treated as an abettor under section 497 of the PC.

Victim

According to section 497 of the PC, there is no criminal responsibility of adulteress wife for committing adultery and a wife of adulterer has no right to file any case against her husband or adulteress wife. It assumes that the wife is a hapless victim of adultery and not either a perpetrator or an accomplice thereof.[25] Adultery, as viewed under PC, is thus an offence against the husband of the adulteress wife and, thereby, an offence relating to marriage.[26]It is laid down in section 198 of the *Code of Criminal Procedure* (Cr.PC), 1898 that no court shall take cognizance of an offence under section 497 of PC except upon a complaint made by the husband of the adulteress wife. If husband of adulteress wife is treated as a 'victim' or 'aggrieved person' according to section 198 of Cr.PC, why the wife of the adulterer cannot be treated as a victim? If a man has more than one sexual relations during his married life, the wife has to do nothing but to tolerate her husband's behaviour.[27] She becomes the silent receiver of the incident for patriarchal social system. If the fact of the husband's adultery becomes public it is the woman who is blamed by others who allege that she is not capable of tightly binding the husband under her feminine control.[28] Again, the trauma and emotional damage

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22 See above note 10; See also Constituent Assembly Debates of India. Vol. VII at p. 655.

23 See above note 1.

24 *Ibid.*

25 *Id.*

26 *Id.*

27 Ali, Salma. (ed.). 2002. *Violence against Women in Bangladesh, 2001*, Dhaka, BNWLA, p. 29.

28 *Ibid.*

suffered by the wife of an adulterous male is equal to that of the husband of an adulterous woman, yet while the husband has been given the right to bring action upon the man breaking the purity of his home, the wife is denied such a right.[29] Section 497 of the PC read with section 199 of the Cr.PC, thus signifies the unequal status of husband and wife in Bangladesh. The offence of adultery did not punish women but still existed in the Code because at the time the law was enacted, polygamy was deep rooted in the society and women shared the attention of their husbands with several other wives and extramarital relations.[30] Women were treated as victims of the offence of adultery as they were often starved of love and affection from their husbands and could easily give into any person who offered it or even offered to offer it.[31] The provision was therefore made to restrict men from having sexual relations with the wives of other men and at the same time to restrict their extra marital relations to unmarried women alone.[32] At present, this concept is not applicable for provision of *the Muslim Family Laws Ordinance*, 1961, which has strongly restricted polygamy.[33]Provision of polygamy is now prone to be abused, while monogamy has become prevalent.[34]

Consent

The phrase 'without the consent or connivance of that man' mentioned in section 497 which clearly indicates that adultery is not an offence per se but is an offence only when the husband of the adulterer did not consent to it and also that the consent of the wife of person convicted of adultery is not considered in deciding whether her husband has committed adultery or not.[35] This once again discriminates between the two sexes by not considering the consent of the wife of the person convicted of adultery in deciding whether her husband who had sexual relations outside marriage is guilty of the offence of adultery or not.[36] To sustain a

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29 See, 'The Antiquated Shackles of Adultery', available at <*http://www.legalserviceindia.com/article/l17-Adultery.html*>, last accessed on 20 March 2011.

30 See, '*A Provision Redundant in Penal Law in* Changed Legal and Social Context', available at <*http://www.legalserviceindia.com/article/l291-Adultery.html*>, last accessed on 15 March 2011.

31 *Ibid.*

32 *Id.*

33 Section 6, *The Muslim Family Laws Ordinance,* 1961.

34 Islam, Zahidul. "Restricting Polygamy in Bangladesh", *The Daily Star*, 28 April 2007, p. 22.

35 Khare, Nidhi. 2010. 'Gender Biasness in the Law of Adultery in India', available at <*http://www.legalserviceindia,com*>, last accessed on 28 March 2011.

36 *Ibid.*

conviction under this section the complainant must not only prove that the accused had sexual intercourse with his wife but also the fact that the act was done without his consent and connivance.[37] To convict a man, adultery is not sufficient to prove that he was found at a place where adultery might have been committed and that he was inclined to commit it. Where the husband surprised the woman in a room with the accused before he could have sexual intercourse, it assumes that the act was not sufficiently approximate to the commission of the offence to constitute an offence. Section 497 draws a distinction between consent given by a married woman without her husband's consent and a consent given by an unmarried woman.[38] It does not penalize the sexual intercourse of a married man with an unmarried woman or a widow or even a married woman when her husband consents to it.[39] Though the section burdens man alone for the offence, but it is true that adultery cannot be committed without a woman's consent. The reasons for this may be justifiable, the wife of the adulterer here is always treated as a victim of the offence.[40] Hence, this section does not contemplate a situation where the same married woman has sexual intercourse with more than one person other than her husband without her husband's consent.[41] It is highly implausible that even in such a situation the woman would always be the victim and not the person who provokes the offender for the crime.[42] Section 497 of the PC perceives a consensual sexual intercourse between a man, married or unmarried, and a married woman without the consent or connivance of her husband as an offence of adultery. If husband gives consent, then it cannot be treated as 'adultery' according to this section. A man who has sexual intercourse with an unmarried woman, or with a widow, or divorced woman or even with a married woman whose husband consent to it does not commit adultery. It results that husbands have, as it were, a free license under the law to have extramarital sexual relationship.[43] It reflects that

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37 The term "connivance" implies knowledge of, and acquiescence in the act. Toleration of the extramarital relation of his wife by the husband also amounts to connivance. It is not merely negligence or inattention but a voluntary blindness to the intimacy. Connivance of the husband is made necessary, for the offence of adultery is intended to preserve his bed unsullied, and if he elected otherwise, the law cannot help him against himself. See *In re C.S. Subramaniam*, AIR 1953 Mad 422.

38 '*A Provision Redundant in Penal Law in* Changed Legal and Social Context', available at <*http://www.legalserviceindia.com/article/l291-Adultery.html*>, last accessed on 15 March 2011.

39 *Ibid.*

40 *Id.*

41 *Id.*

42 *Id.*

43 See above note 10.

Bangladeshi law encourages prostitution. If husband gives consent, prostitution is allowed. It creates a tendency of the husbands that they think 'wife' as a source of income. Therefore, many married women are forced to make sexual intercourse with different persons for money. Women are victimized for this situation.

Equality under Constitutional Provisions

According to Bangladesh Constitution, there could be no question of law operating unequally. The mischief aimed at under section 497 is only against men and not against women. Again the law has so provided that for the purpose of this section the wife shall not be deemed to be an abettor at all. In the definition of who is an abettor an exception is carved out and that exception is in favour of women. So, it has contended that the section contravenes article 27 and 28(2) of the Constitution of Bangladesh. Article 27 provides that all citizens are equal before law and are entitled to equal protection of law, and Article 28(2) provides that women shall have equal rights with men in all spheres of the state and of public life. These Articles, in substance, mean that every law that the state passes shall operate equally upon all persons, and the question is whether section 497 does not operate equally upon all persons. After the commencement of the Constitution of Bangladesh, section 497 of the PC goes against the spirit of equality embodied in the Constitution. In contravention to Articles 27 and 28(1) of the Constitution, section 497 operates unequally between a man and a woman by making only the former responsible for adultery. This section is gender biased mainly on the grounds that it does not allow the wife to prosecute the woman with whom her husband has adultered though it allows the husband to prosecute the man who has adultery with his wife. The law has considered woman to be a victim not as author of the crime.[44] It, thereby, argued, discriminates in favour of women and against men only on the ground of sex.[45] Furthermore, there is no provision in the Cr.PC for hearing the wife for an offence under section 497 of PC. This absence of statutory provision is also premised on gender discrimination in contravention of the gender equality guaranteed in the Constitution.

Positive Discrimination

Bangladesh Constitution guarantees positive discrimination in favour of women. Article 28(4) states that nothing in this Article shall prevent the state from making special provision in favour of women or children or for the advancement of any backward section of citizens. Recalling the

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[44] Shams, Shamsuddin. (ed.). 1991. *Women Law and Social Change*, New Delhi, Ashish Publishing House, at p. 291; AIR 1985 SC at 1621; See above note 10.

[45] See above note 1.

historical background of Section 497 of the PC, the High Court of Bombay upheld the constitutional validity of the provision. In 1954, Chagla, C.J., observed:[46]

> *What led to this discrimination in this country is not the fact that women had a sex different from that of men, but that women in this country were so situated that special legislation was required in order to protect them, and it was from this point of view that one finds in section 497, a position in law which takes a sympathetic and charitable view of the weakness of women in this country. The Court also opined that the alleged discrimination in favour of women was saved by the provisions of Article 15(3) of the Constitution which permits the State to make "any special provision for women and children.*

The discriminations are in favour of particular classes of our society which, owing to an unfortunate legacy of the past, suffer from disabilities or handicaps.[47] Those may require special treatment; and if they do require it, they should be permitted special facilities for some time so that real equality of citizens may be established.[48] It is only intended to safeguard, protect or lead to their betterment in general; so that long-range interests of the country may not suffer.[49] In the Judgment of a case in 1985, Indian Supreme Court said:[50]

> *The special treatment given to women under the Constitution should be restricted to such cases which must be related to some features or disability which are so peculiar that it differentiate women from men as a class. The intention of the framer of the Constitution is clear that they included this clause to safeguard, protect or lead to the betterment of women in general; they have not intended to keep it to give a licence for abetting or committing an offence. An argument like making both man and woman liable for adultery is not permissible as this is a policy of law.*

Upholding the constitutionality of section 497 of the PC and Section 199 of the Cr.PC, which according to the Court "go hand in hand and constitute a legislative packet" to deal with "an outsider" to the

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46 *Yusuf Aziz v. State of Bombay* AIR 1954 SC 472; see above note 1.

47 Bag, Amartya. 'Adultery and the Indian Penal Code: Analyzing the Gender Neutrality of the Law', *available at* <*http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1627649*>, last accessed on 25 March 2011; see also Constituent Assembly Debates of India. Vol. VII at 655.

48 *Ibid.*

49 *Id.*

50 *Sowmithri Vishnu* v *Union of India,* AIR 1985 SC at 1620.

matrimonial unit who invades the peace and privacy of the matrimonial unit, in 1988, Thakkar, J. of the Supreme Court observed:

> *The community punishes the 'outsider' who breaks into the matrimonial home and occasions the violation of sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses subject to the rider that the erring 'man' alone can be punished and not the erring woman. There is thus reverse discrimination in 'favour' of the woman rather than 'against' her. The law does not envisage the punishment of any of the spouses at the instance of each other. Thus there is no discrimination against the woman insofar as she is not permitted to prosecute her husband. A husband is not permitted because the wife is not treated as an offender in the eye of law. The wife is not permitted as section 199(1) read with section 199(2) of the Cr.PC does not permit her to do so. In the ultimate analysis the law has meted out even-handed justice to both of them in the matter of prosecuting each other or securing the incarceration of each other.*[51]

To date the Supreme Court of India has upheld section 497 of PC inspite the fact that 150 years has passed from the date of the enactment of the PC of it. In the present context of social development the policy of law must be changed. The reason of not penalising an adulteress woman under section 497 is no more valid and satisfactory today. The underlying law at the present situation considers only men as offender, as a class. Both the sexes are on an equal footing in committing the offence of adultery, this kind of legislation are discriminatory and arbitrarily protect women. Section 497 of PC is nothing but violative of the equality clause under Bangladesh Constitution. When a wife is caught committing adultery, the community responds harshly; the women's neighbours gossip about her, men make indecent proposals to her, family members refuse to socialize with her, and she is treated badly by everyone. The community generally stands by as the husband tortures and sometimes even murders the wife.[52] The husband, in almost all cases physically tortures her and abandons her by way of *talaq*.[53]

Inversely the society is very harsh upon the adulteress woman. Furthermore, adultery is a flagrant violation of women's dignity. The legal provisions and the social attitudes reinforce her subordinate status in society. She is the property of her husband and cannot even fight

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51 *V. Revathi v Union of India* AIR 1988 SC 835; see above note 1.

52 Ali, Salma. (ed.). 2003. *Violence against Women in Bangladesh, 2002*, Dhaka, BNWLA, p. 19.

53 *Ibid.*

independently to regain her lost prestige. It is also premised on a few outdated and moot assumptions of sexuality, sexual agency and unequal mutual marital rights and obligations of the spouses. It, in ultimate analysis, unmistakably intends to protect the rights of the husband and not of the wife[54]. It is also bridled with deep-rooted obsolete assumptions predominantly premised on gender discrimination and the wife's sexuality.[55] Such a law undoubtedly seems to be inconsistent with the modern notions of the status of women and the constitutional spirit of gender equality in Bangladesh.

Suggestions

It is clear that only man is presumed by the law to have a *mens rea* while no such presumption is attributed in reference to the woman for the same wrongful act.[56] According to the Constitution, all persons and things similarly circumstanced should be treated alike in both the privileges conferred and liabilities imposed. But in case of adultery, law achieves is only placing a deterrent on the man while the other party to the affair is not brought within the legal restrictions.[57]The arguments for leaving adulteress wife beyond punishment are many. According to the light of Islamic law, both, men and women are punished for adultery.[58] Islamic law established culpability equally to both sexes; one must answer a very basic question about the resulting punishment. If adultery is seen as a crime, the provision of one hundred lashes to both the adulterer and adulteress is ostensibly fair. Furthermore the wife of the adulterer man cannot use section 497 to bring an action against either her unfaithful husband or the women involved with her husband, while the husband of an adulteress wife can bring an action against the man

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54 *See* generally, Kapur, Ratna. and Cossman, Branda. 1996. *Subversive Sites: Feminist Engagements with Law in India,* New Delhi, Sage Publication; Ursula, Vagel. 1992. "Whose Property? The Double Standards of Adultery in the Nineteenth Century Law", in Carol Smart (ed.): *Regulating Womanhood: Historical Essays in Marriage, Motherhood and Sexuality,* Routledge, London; and Sathe, S.P. 1996. *Towards Gender Justice,* Bombay, SNDT Women's University; also see *Alamgir* v *State of Bihar*, AIR 1959 SC 436 (439).

55 Bhatnagar, J.P. 1998. *Law Relating to Women and Their Rights*, New Delhi, Ashoka Law House, p.184-196; also see above note 1.

56 'The Antiquated Shackles of Adultery', available at <*http://www.legalserviceindia.com/article/l17-Adultery.html*>, last accessed on 20 March 2011.

57 *Ibid.*

58 Hadith *Malik, 493:1528;* Surah 17 Verse 32, Al Quran; Surah 24, Verse 30, Al Quran; *Al Quran*, 24:2; *Al Quran,* 4:15; *Al Quran,* 4:16; *Sahih Muslim* Chapters 623, 680, 682 and *Hadith Malik,* 493:1520; *Hadith* Muslim, *680; Hadith* Muslim, *682;Hadith* Malik, *493:1520; Hadith* Malik,*493:1524 ; Hadith* Malik, *493:1530; Sahih Bukhari*, 11:2073.

involved in the affair.[59]Adultery is a ground for divorce under *the Hindu Marriage Act,*[60] *the Special Marriage Act,*[61] *the Parsi Marriage and Divorce Act,*[62] and under *the Indian Divorce Act.*[63] So, according to these acts, the spouse who engages in extra-marital intercourse is guilty of adultery. Under the *Dissolution of Muslim Marriages Act,* 1939, adultery as such is not a ground for divorce, but if the husband "associates with women of evil repute or leads an infamous life," it amounts to cruelty to wife and she can sue for divorce on that ground.[64] This seems sometimes akin to living in adultery. But none of these enactments, except the *Parsi Marriage and Divorce Act,*[65] confers any such corresponding right on the husband to dissolution of marriage for extra-marital sexual relations maintained by the wife. According to above discussions, the provision of adultery should be amended to enable the wife to file a suit against the adulteress husband. Section 198 of the Cr.PC should be amended in order to allow women to file complaints against unfaithful husbands and prosecute them for their promiscuous behaviour. Any kind of sexual intercourse between man and woman should be prohibited. The exemption of the wife from punishment for committing adultery should be removed. It is also felt that an imprisonment for a term up to five years is "unreal and not called for in any circumstances".[66] This punishment should be increased as exemplary punishment. Section 497 should read as follows:[67]

> *Whoever has sexual intercourse with a person who is, and whom he or she knows or has reason to believe to be the wife or husband as the case may be, of another person, without the consent or connivance of that other person, such sexual intercourse by the man not amounting to the offence of rape, commits adultery, and shall be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.*

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59 See above note 56.

60 Section 13(1)(i), *The Hindu Marriage Act,* 1955.

61 Section 16 and 17, *The Special Marriage Act,* 1872.

62 Section 32 (d), *The Parsi Marriage and Divorce Act,* 1936.

63 Section 10, *The Indian Divorce Act,* 1869.

64 Section 2 (9) (b), *The Dissolution of Muslim Marriage Act,* 1939.

65 Section 32 (d), *The Parsi Marriage and Divorce Act,* 1936.

66 See above note 1.

67 Inspired by the spirit of equality, the Fifth Law Commission and the Joint Select Committee have thus shown their inclination to the equality of the sexes by recommending equal culpability for the "man" as well as the "woman" for committing adultery. (See, Committee Chaired by Justice V.S. Malimath; *"The Report of the Committee on Criminal Justice Reforms",* 2002, Delhi, India, Para 117).

Conclusion

Adultery is basically an act of having sexual relations outside marriage and section 497 of PC has showed that it is not gender neutral.[68] The sexual intercourse between a man and an unmarried woman or a divorcee or a widow, does not come within the definition of 'adultery'. The husband of adulteress wife along is competent to file the complaint for a charge under the section 497 of PC, but the wife of adulterer husband has no right to file a case for the same charge against her husband or against the adulteress wife. Therefore adultery is an offence committed against the husband of the adulteress and not against the wife of the adulterer. If husband of adulteress wife is treated as a 'victim' or 'aggrieved person' according to section 198 of Cr.PC, the wife of the adulterer should be treated as a victim. On the other hand, the husband cannot prosecute his unfaithful wife but can only prosecute her adulterer under section 497 of PC. According to this section, an unfaithful wife cannot be punished even as an abettor to the crime. It shows that a married wife cannot commit adultery. The phrase 'without the consent or connivance of that man' mentioned in section 497 of PC discriminates between the two sexes by not considering the consent of the wife of the person convicted of adultery. A man who has sexual intercourse with a married woman whose husband consent to it does not commit adultery. It encourages prostitution in Bangladesh. Adultery should be treated as a crime for all and the discrepancies should be amended. The law as it stands today violates the Constitution that includes equal status for every citizen and would not discriminate on the ground of sex. The 'positive discrimination' clause for women under Article 28(4) of Bangladeshi constitution cannot be extended so as to create arbitrary discretion for such discrimination by the legislature, as in the case of adultery. Section 497 of PC had been drafted in a time and era where conservatism was the norm. It belongs to a past that laid great stress on morals and where sex in itself was a taboo. In that era an illicit relationship could not have been imagined about and hence it was befitting that adultery with the given definition in section 497 of PC was a crime. Today the changed views of the society have started raising questions on the law of adultery. When section 497 of PC was enacted there were no codified personal and matrimonial laws like today, moreover those were treated as unequal and inoperative.[69] Today the

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[68] Khare, Nidhi. 2010. 'Gender Biasness in the Law of Adultery in India', available at <*http://www.legalserviceindia,com*>, accessed on 28 March 2011; see also *M. Alavi v T.V. Safia*, AIR 1993 Ker 21.

[69] *'A Provision Redundant in Penal Law in Changed Legal and Social Context'*, available at<*http://www.legalserviceindia.com/article/l291-Adultery.html*>, last accessed on 15 March 2011.

personal laws are equal, operative, effective and efficient. The definition of adultery in matrimonial laws is much wider in scope than the definition of adultery as a crime.[70]In the light of the above reasons it is lucent that there is a need for amendments in the law and it needs to be reconsidered. Women should also be made liable for the offence and the law should be made sterner. According to the light of Bangladesh Constitution, women should be punishable with men and should have the right to file a case for adultery in order to ensure equality.

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70 *Ibid.*

Access to State-led Rural Justice in Bangladesh: The Kansat Experience

*Zahidul Islam Biswas**

Introduction

Bangladesh has two state-led rural justice systems, namely the Village Court System and the Arbitration Council System, to provide access to justice for the rural population of the country. The Village Court System deals with some specified civil and criminal cases, while the Arbitration Council System deals with some specific family affairs. The systems were introduced to provide the rural people with the alternatives to the traditional informal and court-based formal justice systems, which were proved unable to render justice to the large number of rural people due to various reasons including the delay in disposal of cases and the huge transaction cost in formal courts.[1] The Arbitration Council System has been working for almost six decades, and the Village Court System for three decades.[2] However, none of the rural justice systems has achieved a considerable success until now, let alone gaining popularity. I have not found any specific research on the Arbitration Council System. However, the few researches on the Village Court System that I found and reviewed present a very frustrating map of the success of the system. A United Nations Development Programme (UNDP) report reveals that while still two third of the rural disputes do not enter the formal court process[3] the

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1 On the one hand, there were claims that the traditional *shalish* systems were largely unfair, biased and anti-poor. On the other hand, majority of village people were averse to formal courts of law. This aversion was a cumulative effect of various issues such as mistrust of the law, fear, unfamiliarity of formal procedures and court atmosphere, low legal literacy, unequal power relations, physical and financial inaccessibility, culturally 'uncomfortable', corruption within formal court system, delay in disposal, and huge transaction costs. For details, see: Khair, Sumaiya et al. 2002. Access *to Justice: Best Practices under the Democracy Partnership*. Dhaka: The Asia Foundation; Huq, Fazlul. 1998. "Towards a Local Justice System for the Poor", Vol.4, no.1 (1998) *Grameen Poverty Research,* at pp.7-8; Wojkowska, Ewa. 2006. *Doing Justice: How Informal Justice Systems Can Contribute*. UNDP: Oslo Governance Centre.

2 The Arbitration Council has been functioning since 1961 and the Village Court since 1976.

3 United Nations Development Programme. 2002. "Informal Systems and Village Courts: Poor People's Preference" in *Human Security in Bangladesh: In search of Justice and Dignity*. Dhaka: UNDP Bangladesh, pp. 91-100, at p. 91.

traditional *shalish* system is used to resolve 60-70 percent of local disputes.[4] The same report shows that only one person out of 47 randomly selected village people, i.e., only two percent, referred to the Village Court System as the justice mechanism of their first preference.[5] Other researches suggest that the performance of the Arbitration Council System and the Village Court System is very poor and unsatisfactory.[6] Why have the systems failed to be the better alternatives to others? What is the scope for the access to justice under the existing legal and institutional arrangements for the state-led rural justice systems? This article seeks to answer these questions by analysing the legal and institutional arrangements for the state-led justice systems from the 'access to justice' perspective. Based on a case study, the article then depicts the access to justice scenario in a Union.[7]

Conceptual Framework

Before entering into the main discussion, it is necessary to clarify the conceptual framework of 'access to justice.' The notion 'access to justice' refers to and incorporates into it two broader concepts: the concepts of 'accessibility' and 'justice.' These two constituent concepts are the two dynamics which make the concept of access to justice a dynamic one, easy to understand but tough to define. They encapsulate a broad rage of conceptions, issues and concerns. The concept of 'access' invokes a constant debate about access to where, how, and for whom and how much. Similarly, the concept of 'justice' invokes the debate about how much and what kind of justice should result.[8] On the one hand, the

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4 *Ibid.*, at 92.

5 *Id.*

6 See, for instance, (i) Qader, Md. Abdul. 1995. *The Functioning of Village Courts in Bangladesh*. Comilla: Bangladesh Academy for Rural Development; (ii) Khan, Md. Aftabuddin. 1992. *Working of the Village Courts in Four Union Parishad in Bangladesh – A Case Study*. Dhaka: National Institute of Local Government; and (iii) UNDP. 2002. "Informal Systems and Village Courts: Poor People's Preference" in *Human Security in Bangladesh: In search of Justice and Dignity*. Dhaka: UNDP Bangladesh, pp. 91-100; UNDP. 2011. *Baseline Survey Report on Village Courts in Bangladesh*. Dhaka: UNDP Bangladesh.

7 A 'Union' is a rural administrative unit. A union incorporates fifteen to twenty villages on an average under its territorial jurisdiction and covers average 30 sq. km. land area. The average population under a Union is about 30,000 (source: The Population Statistics, 2007, available at Bangladesh Bureau of Statistics). The geographical area of a union is determined by a Deputy Commissioner in a district as the law. The present law that governs the Union-related issues is the Local Government (*Union Parishads*) Act, 2009.

8 Cappelletti, M. and Garth, B. 1979. "Access to Justice and Welfare State: An Introduction", in *Access to Justice and the Welfare State*, Leiden: BRILL, pp. 1-24, M. Cappelletti. (ed.). at 2.

continuous access to justice movement across the world is giving birth to new techniques or modifying old techniques of access. On the other hand, new conceptions[9] of justice are evolving. As a result various conceptions of 'access' and 'justice' are developing, making the concept of 'access to justice' dynamic and indefinable. However, the definition of 'access to justice' by UNDP is widely accepted and used in the discourse of access to justice of the day. UNDP defines it as: '[t]he ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards'[10]. However, when we speak about ensuring access to justice, we generally mean to access to a legal process that 'enables people to claim and obtain justice remedies, whenever conflicts of interests or particular grievances put their well-being at risk.'[11]

Access to justice is also seen as a process. The access to justice process can be divided into different stages, starting from the moment a grievance occurs or a dispute arises to the moment the grievance is redressed, or the dispute is settled or resolved. These different stages involve a variety of strengths or capacities the people needs as a justice seeker and the system as justice provider. The UNDP has divided the process into five stages. These are: (1) legal protection, (2) legal awareness, (3) legal aid and counsel, (4) adjudication, and (5) enforcement and oversight.

Legal protection means the provision of legal standing in formal or in traditional law, or both. It ensures that people's rights are recognized within the scope of justice systems, thus giving entitlement to remedies either through formal or traditional mechanisms. Legal protection determines the legal basis for all other stages in the access to the justice process. Legal awareness refers to the degree of people's knowledge of the possibility of seeking redress through the justice system, whom to demand it from, and how to start a formal or traditional justice process. After legal protection, it is most crucial, because even if there is legal protection and people do not know about it, it is useless.

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9 By concept, I mean 'a general idea' of something, and by conception 'a specific and defined idea' of something. For understanding a clearer difference between concept and conception, one can consult the work such as John Rawls. 1999. *A Theory of Justice* (Revised edition). Cambridge, Massachusetts: Belknap Press; Ronald Dworkin. 1988. *Law's Empire.* Cambridge: Harvard University Press; W. B. Gallie. 1956. *Essentially Contested Concepts*, 56 Proceedings of the Aristotelian Society 167 (1956).

10 United Nations Development Programme. 2005. *Programming for Justice: Access for All.* New York: UNDP, at 5 [hereinafter UNDP].

11 *Ibid.*

Legal aid and counsel includes capacities (from technical expertise to representation) that people need to initiate and pursue justice procedures. Legal aid and counsel can involve professional lawyers (such as in the case of public defence systems and pro bono layering), laypersons with legal knowledge, who are often members of the community they serve (paralegals) or both. Adjudication describes the process of determining the most adequate type of redress or compensation. Means of adjudication can be regulated by formal law, as in the case of courts and other quasi-judicial and administrative bodies, or by traditional legal systems. The process of adjudication may include a series of stages such as (i) investigation, (ii) prosecution, and (iii) decision.

Enforcement relates to the implementation of orders, decisions, and settlements emerging from formal or traditional adjudication. Enforcement systems are keys to ensure accountability and minimize impunity, thus preventing further injustices. Oversight includes watchdog and monitoring functions that ensure overall accountability within the systems.

The meaning of 'access to justice' for the purposes of the present study is the ability of the common people to demand justice, and the ability of state-led rural justice system to provide the same. Hence, to interrogate the scope for access to justice means to assess the capacities of both the system and the people. Accordingly, at first I examine the capacity of the state-led rural justice systems, i.e., the legal and institutional arrangements for the systems. Here I discuss three important aspects of access to justice in the light of the legal frameworks for the state-led rural justice systems. These three aspects are (a) the legal protection or legal remedies available through the systems, (b) the adjudication process, and (c) the arrangements for enforcement and oversight. In the later part, I make an endeavour to assess the capacities of the people, where I examine two things: first, whether those arrangements are adequate to meet the demand of justice in rural Bangladesh, and second, whether the common people are capable to utilize the existing systems.

Legal and Institutional Arrangements

Both the Village Court System and the Arbitration Council System function under the aegis of the Union Parishad, which is the lowest level of elected administrative body for rural 'administrative unit' called Union.[12] A union is divided in 9 wards; each of such wards may include one big or several small villages.[13] A Union Parishad is consisted of a Chairman and twelve members including three members elected for the

[12] Section 8 of the Local Government (*Union Parishads*) Act, 2009.

[13] Section 11, *Ibid*.

seats exclusively reserved for women. All of them are elected by direct election on the basis of adult franchise.[14] While the Chairman represents all the people of a Union, 9 members represent the people of 9 wards, and each women member in reserved seats represents the people of 3 wards.

As a local government administrative unit, a Union Parishad has numerous civic functions, police and defence functions, revenue and general administrative functions, and development functions.[15] Along with all these functions, the Union Parishads have been entrusted with the responsibilities to run the Village Courts and the Arbitration Councils by the Village Courts Act, 2006 and the Muslim Family Laws Ordinance, 1961 respectively. Following are the legal and institutional arrangements for the Village Court System and Arbitration Council System.

The Village Court System

The basic legal framework for the Village Court System is the Village Courts Act, 2006.[16] Up to 2006, the basic legal framework for these courts was the Village Courts Ordinance, 1976.[17] The Ordinance was repealed in 2006 to replace the Village Courts Act, 2006. However, the Village Courts Rule, 1976, which was made under the 1976 Ordinance, is still applicable to the Village Courts today.[18]

The legal arrangements for the Village Court System show that a Village Court is neither a formal nor an informal court. It has the characteristics of both the formal and informal courts. Hence, it can be called a semiformal court and a quasi-judicial body. Again, a Village Court is both a civil and criminal court as it can deal with both criminal cases and civil disputes. However, there is no permanent seat of a Village Court. Usually, a Village Court takes place in the Union Parishad Building or premises, but it can hold its sessions in any suitable places. Following are the access to justice provisions in the Village Court System.

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14 Section 10, *Ibid.*

15 See, the Schedules of the Local Government (*Union Parishads*) Act, 2009. The present legal framework replaces the earlier legal framework called Local Government (*Union Parishads*) Ordinance, 1983.

16 Act No. XIX of 2006.

17 Ordinance No. LXI of 1976.

18 The other legal frameworks include the Code of Criminal Procedure, 1898 (Act V of 1898), the Code of Civil Procedure, 1908 (Act V of 1908), the Evidence Act, 1872 (Act I of 1872), the Oaths Act, 1873 (Act X of 1873), the Cattle Trespass Act, 1871 (I of 1871), the Agricultural Labour (Minimum Wages) Ordinance, 1984 (XVII of 1984), and the Penal Code, 1860 (Act XLV of 1860).

Legal Remedies Available in the Village Court System

The Village Courts Act, 2006 contains a Schedule, two parts of which say about the cases and disputes in which legal remedies are available through a Village Court. Part I makes a list of the criminal cases and part II makes the same of the civil disputes. Accordingly, the offences that a Village Court can try are: the offences related to unlawful assembly, riot, voluntarily causing hurt, committing mischief, criminal trespass, committing an affray, voluntarily causing hurt on provocation, wrongful restraints and confinement, assault, criminal force, intentional insult with intent to provoke breach of the peace, criminal intimidation, insulting the modesty of a woman, misconduct in public by a drunken person, theft in different manner, misappropriation of property, criminal breach of trust, cheating, mischief by killing or maiming animal, and offences as to cattle trespass.[19]

The suits that a Village Court can entertain are the ones for the recovery of money due on contracts, receipts or other documents, for the recovery of movable property and possession of immovable property within one year of dispossession, for compensation for wrongfully taking or damaging movable property, for compensation for damage by cattle trespass, and for recovery of wages and compensation payable to an agricultural labourer.[20]All these suits are maintainable in the Village Court only when the amount claim or the price of the moveable property involved in a suit does not exceed twenty five thousand taka.[21]

It is to be noted that all these abovementioned cases and suits, with a few exceptions, are triable by only the Village Courts and no civil or criminal court shall have jurisdiction to try any such case or suit.[22]

The Arrangements for Adjudication

Adjudication process in the Village Court System is largely informal. The provisions, except a few, of the Evidence Act, the Code of Criminal Procedure, and the Code of Civil Procedure, do not apply to the

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19 Part I of the Schedule in fact does not make any list of criminal cases; rather it makes a list of some sections of the Penal Code and other laws, and tells that the offences under these sections will come under the jurisdiction of a Village Court. The list of offences given here is according to the analysis of the contents of the sections. All these offences are defined and explained with illustrations in the Penal Code of 1860, in the Cattle Trespass Act, 1871 (I of 1871), and in the Agricultural Labour (Minimum Wages) Ordinance, 1984 (Ordinance XVII of 1984).

20 As per Part II of the Schedule to the Village Court Act, 2006 [hereinafter VC Act].

21 *Ibid.*

22 Section 3, *Id.*

proceedings before any Village Court.[23] In addition, the engagement of any lawyer to conduct a case in the Village Court has been restricted in order to ensure informal atmosphere in the Village Courts proceedings.[24] However, a complete set of rules to guide the proceedings before the Village Courts has been laid down in the Village Courts Rules, 1976. Moreover, sections 8, 9, 10 and 11 of the Oaths Act, 1873[25] are applicable to all proceedings before the Village Courts.[26] These sections, which relate to a court's power to tender certain oaths and administration of oaths, are very much part of the adjudication in the formal courts.

The process of adjudication starts with the application by a petitioner to the Chairman of a Union Parishad for constitution of a Village Court. Like the court fees in formal courts, there is application fee for such an application. Application fee is Taka two for a criminal case and Taka four for a civil suit.[27] After receiving the application, the Chairman of the Union Parishad scrutinizes the application to see whether the case to be dealt with falls under the legal or financial jurisdiction of the Village Court. Then the Chairman accepts and registers the application if the case falls under the jurisdiction of the Village Court.

After registration of the application, a date and time is fixed and the respondent is summoned to be present on the specified day and time. With the summons, the parities are asked to nominate their representatives to constitute the Village Court. A Village Court consists of a Chairman and two Members to be nominated in the prescribed manner, by each of the parties to the dispute and amongst the two members to be nominated by each party, one should be a member of the concerned Union Parishad.

A properly constituted Village Court then issues summons to the concerned persons to appear and give evidence, or to produce or cause the production of necessary documents if any. Thus a Village Court tries the case on the day so fixed, hears both the parties, and may hold local inquiry if needed to dispose off the case.

After the hearing and examination of the case, the Chairman pronounces the decision in 'open court', and the decision of the Village Court is recorded by the Chairman of the Court in the register. This record should indicate whether such decision is unanimous, and if not, the ratio of the

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23 Section 13, subsection (1), *Id.*

24 Section 14, *Ibid.*.

25 Act X of 1873.

26 Section 13, subsection (2) of the VC Act, 2006.

27 Rule 3, sub-rule (3) of the VC Rules, 1976.

majority by which it has been arrived at. If the decision of a Village Court is unanimous or by a majority of four to one (4:1), or by a majority of three to one (3:1) in presence of four members, the decision becomes binding on the parties. And when the decision of a Village Court is taken by a majority of three to two (3:2) any party aggrieved may prefer an appeal.[28] Such an appeal should be made within thirty days of the decision. In civil matter, appeal goes to the Assistant Judge Court, and in criminal matters, appeal goes to the court of the first class Judicial Magistrate having jurisdiction to hear such cases.[29]

It is to be noted that a Village Court has power only to pass order to pay compensation of taka not exceeding twenty five thousand in respect of the criminal offences specified in Part I of the Schedule. Also, in a civil suit specified in Part II of the Schedule it has power to order payment of money up to an amount of twenty five thousand taka.[30]

There is also provision for transfer of certain cases and investigation of cases by police. To ensure the best public interest and the ends of justice, a case may be forward to Criminal Court from a Village Court, and vice versa, for trial and disposal.[31] Again, the police cannot be prevented form investigating a cognisable case by reason of the fact that the cases relates to an offence specified in Part I of the Schedule. However, if any such case is taken to a Criminal Court, such court may direct that it be referred to a Village Court.[32]

Enforcement and Oversight Mechanism

A Village Court may decide to award compensation to a person or to order the delivery of property or possession, and if any money is paid or any property or possession is delivered in the presence of the Village Court in satisfaction of the decree, it shall record the same in the specified register.[33] The unpaid decretal amount is also recoverable in the manner the arrear tax of the Union Parishad is recovered.[34] Where the satisfaction of a decree can be had otherwise than by payment of

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28 Section 8 of the VC Act, 2006.

29 Section 8 of the VC Act, 2006 says that in criminal cases an appeal will go to the Magistrate, first class having jurisdiction. However, the Code of Criminal Procedure, 1898 was amended in 2009 by the Code of Criminal Procedure (Amendment) Act, 2009, by which the magistrates are classified as judicial and executive magistrates. Hence, the said Magistrate, first class, should be a first class judicial magistrate.

30 Section 7 of the VC Act, 2006.

31 Section 16, subsection (2), *Ibid.*

32 Section 17, *Id.*

33 Section 9, *Id.*

34 Subsection (3), *Id.*.

compensation, the decree shall be executed by the Court of the Assistant Judge having jurisdiction as if it were a decree passed by it.[35]

A Village Court may also impose a fine for non-compliance with the summons and for its contempt. If such a fine is not immediately paid, it becomes recoverable by the Magistrate [which] having jurisdiction.[36] In such a case, the Village Court shall record an order stating the amount of fine imposed and the fact that it has not been paid, and shall forward the same to the Magistrate with the request for recovery. Upon receipt of the request, the Magistrate shall proceed to recover the same under the provision of the Code of Criminal Procedure as if such fine were imposed by him and in default of payment of such fine he may award sentence to the person concerned to imprisonment.[37]

About oversight and monitor, there is no specific provision in the Village Courts Act, 2006 or in the relevant frameworks. However, there is a Rule, which can be treated as part of monitoring mechanism. As the rule 30 suggests, the Chairman of the Union Parishad shall, before the first day of February and the first day of August in each year, send to the *Upazila Nirbahi Officer* (the chief executive officer for an Upazila/sub-district)[38] a return in a prescribed form of the work of the Village Courts during the preceding half-year ending on the 31st December and the 30th June, respectively. Thus, the *Upazila Nirbahi officer* can act as monitoring authority by asking regular return.

The Arbitration Council System

Like a Village Court, an Arbitration Council is also a semi-formal justice body, but unlike the Village Court, the Arbitration Council deals only with some specified family matters. An Arbitration Council, hence, resembles a Family Court. The basic legal frameworks for the Arbitration Council System are the Muslim Family Laws Ordinance, 1961, and the Rules[39] made under the Ordinance. Notably, the Ordinance is applicable only for the Muslim citizens of the country.[40] It, therefore, does not deal with these family affairs of the people from other religious communities like Hindus who are the second largest population in Bangladesh. It is,

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35 Subsection (4). *Ibid.*

36 Subsection (1) of Section 12, *Id.*

37 Subsection (2), *Id.*

38 In the VC Rules, 1976, the designation is mentioned as 'Sub-divisional Officer'. However, there is no position of 'Sub-divisional Officer' at present due to the changed administrative arrangements. The Chairman of Kansat Union clarified that presently the *Upazila Nirbahi Officer* performs the functions of the 'Sub-divisional Officer' in this regard.

39 The Muslim Family Laws Rules, 1976.

40 Subsection (2) of section 1 of the Muslim Family Laws Ordiance, 1961.

however, not like *Shariah* courts as found in some Muslim countries. The Arbitration Council System was introduced to achieve the goal of the Muslim Family Laws Ordinance, 1961, a body of special laws that addresses, among others, an unsatisfactory provision as to succession based on *Shariah* law[41] and the issues of polygamy[42] and 'triple talaq'[43]allegedly based on misconceptions about *Shariah* laws. The law was promulgated to give effect to certain recommendation of the Commission on Marriage and Family Laws formed in 1955.[44] Section 3 of the Ordinance clearly states that 'the provisions of this Ordinance shall effect notwithstanding any law, custom or usage.'

The Arbitration Council System functions both in urban and rural areas in Bangladesh. In rural areas, it functions under the aegis of the Union Parishads, and in urban areas under the *paurashavas* and city corporations. Now I will examine the legal and institutional arrangements for the Arbitration Councils System in rural Bangladesh.

Remedies Available in the Arbitration Council System

The Arbitration Council System can give legal protection in matters relating to (a) polygamy, (b) dissolution of marriage, (c) maintenance, and (d) dower. The legal provisions are as follows.

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41 According to the orthodox Islamic law of inheritance, in case of the death of any son or daughter of the *propositus* before the opening of succession, the children of such son or daughter do not inherit the property of the propositus, a provision that causes much suffering for the grandchildren of the propositus, and also nurtures a sense of deprivation. The MFLO 1961 addresses this issue. In section 4, it makes a provision that: 'In the event of the death of any son or daughter of the *propositus* before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stirpes receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive.'

42 Based on the widely accepted misconception that Islam has permitted to have more than one and upto four wives without reservation, there was, and is, a practice of polygamy among the Muslims in the Country. This law makes provisions to regulate the issue of polygamy and puts restriction on the practice of polygamy. See, the discourse on the polygamy in Islam available in: Abd al-Āti , Hammüdah. 2003. *Islam in Focus*, 4th Ed. Cairo: Al-Falah Foundation. pp. 321-350.

43 'Triple *Talaq*' refers to verbal pronouncement of *talaq* (divorce) three times at once. There is a conception that a Muslim male enjoys unrestricted power to divorce his wife, and if he pronounces the word '*talaq*' three times instantaneously, the divorce becomes effective. And this type of *talaq* was, and is, prevalent in Bangladesh. But the Islamic scholars say, 'Triple, instantaneous, verbal *talaq*, in any event, is repugnant to the spirit of Islam'. It has been called *talaq-e-bidat* which means '*talaq* of the wrong innovation.' See, a whole book devoted to the issue of 'triple talaq': Ahmad, Furqan. 1994. *Triple Talaq: An Analytical Study with Emphasis on Socio-Legal Aspects*. New Delhi: Regency Publications.

44 The Preamble of the MFLO 1961.

A Muslim man, according to section 6 of the Ordinance, may contract another marriage only with the permission of the Arbitration Council; otherwise, the man shall be punishable with imprisonment which may extend to one year, or with fine which may extend to ten thousand taka, or with both. In addition, he shall be liable to pay immediately the entire amount of the dower due to the existing wife or wives.[45]

In Bangladesh a Muslim marriage can be dissolved both by *talaq* and otherwise than *talaq*. In both cases, the right of a person to divorce his wife or her husband has to be exercised through the Arbitration Council System. Thus, it gives legal protection to the victims of 'triple *talaq*' among others. Any person who contravenes the provision shall be punishable with simple imprisonment of maximum one year, or with fine of maximum ten thousand taka or with both.[46]

An eligible wife can claim maintenance through the Arbitration Council System. The Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband.[47] Hence, an Arbitration Council can give legal remedies to the wives of polygamous man, or to the abandoned wives, among others.

The Arbitration Council System can also deal with the issue of dower. Dower is one of the basic legal rights of a Muslim wife. In Islamic law dower is a sum of money or other property to be paid to the wife in consideration of the marriage.[48] Dower may be either specified or unspecified. Usually an entry mentioning the amount and mode of payment of dower is made in the Register of marriage by the Nikah Registrar (Kazi).[49] The failure, however, to fix the amount before or during the marriage ceremony does no way relieve the husband from his obligation to pay dower. He remains liable for payment and if no amount is agreed upon by the parties, the Court will do the task.[50] In addition, where no details about the mode of payment of dower are specified in the *mikah nama*, or the marriage contract, the entire amount of the dower shall be prescribed to be payable on demand.[51] The Arbitration Council enjoys all discretionary powers to decide on the issue of dower in a case.

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45 Section 6, *Ibid.*

46 Section 7(1), *Id.*

47 Section 8 (1), *Id.*

48 To explain the nature of dower, David Pearl writes that though Muslim marriage is in the nature of a civil contract and dower is consideration on the part of the husband, it is not understood to mean the same thing as in the law of contract. Rather, it symbolizes husband's respect to the wife. See, Pearl, David. 1978. *A Textbook on Muslim Personal Law, 2nd Ed.* Kent: Croom Helm Ltd, pp. 60-68.

49 *Ibid.*

50 *Ibid.*

51 Section 10 of the MFLO 1961.

Arrangements for the Adjudication

The Arbitration Council enjoys the decision making power like a formal family court in the country, but the arrangements for adjudication in the Arbitration Council System are very informal. The law clearly directs that all proceedings before an Arbitration Council shall be held *in camera* unless the Chairman otherwise directs.[52] It also clarifies that the provisions of the Arbitration Act, 2001,[53] the Code of Civil Procedure, 1908 and any other law regulating the procedure of Courts shall not apply to any Arbitration Council.[54] The Arbitration Council System, however, is to comply with the provisions for adjudication given in the Muslim Family Laws Ordinance, 1961 and the Rules made under it.

Adjudication process in the Arbitration Council System starts with making an application or serving a notice regarding any of the above-mentioned family matters. In the case of permission for polygamy and maintenance, the application has to be made to the Chairman of the Union Parishad.[55] In case of a divorce, a written notice of such divorce has to be given to the Chairman and a copy of the notice to the concerned husband or wife.[56]

Within seven days of receiving of such an application seeking permission for polygamy or for maintenance or a notice of divorce, the Chairman shall call upon each of the parties to nominate his or her representative. After receiving the nomination of the representatives, the Chairman shall constitute the Arbitration Council and commence the proceedings as soon as possible.[57]

Parties in a case may reside in different Unions. In such a case the Arbitration Council of which union will deal a case has been clarified in section 3 of the Muslim Family Laws Rules, 1961. An application to form an Arbitration Council for permission for contracting another marriage

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52 Rule 17 of the Muslim Family Laws Rules, 1961.

53 Act I of 2001. In 2001, the law replaced the previous law named the Arbitration Act, 1940.

54 Section 3 of the MFLO 1961.

55 Sections 6 and 9, *Ibid.*

56 Subsection (1) of section 7, and section 8, *Id.*

57 The proceedings shall not be vitiated by reasons of vacancy in the Arbitration Council, whether because of failure of any person to nominate a representative or otherwise. Where a vacancy arises otherwise than through failure to make a nomination, the Chairman shall require a fresh nomination. In no way, a party to proceedings before an Arbitration Council shall be a member of the Arbitration Council. See, Rule 5 of the Muslim Family Laws Rules, 1961.

(polygamy) has to be made to the Chairman of the Union in which the existing wife resides.[58]

In case of a notice of divorce or *talaq* by the husband it shall be the Union Parishad, in which the wife to be divorced resides at the time of the pronouncement of the *talaq*.[59] It is, however, not clearly said that which union shall deal with a case of a divorce given by wife. However, section 8 provides that in exercise of the right to divorce by wife, the provisions of section 7 that deal with the divorce by husband shall be followed as much as possible. In the case of an application for maintenance, it shall be the Union, in which the wife is residing at the time of her making the application.

As to decision making, the law clearly says that all decisions of the Arbitration Council shall be taken by majority. However, where no decision can be so taken, the decision of the Chairman shall be the decision of the Arbitration Council.[60]

Along with this general procedure, there are specific procedures for permission for a polygamous marriage and dissolution of marriage. An application for permission to contract a polygamous marriage shall state the reasons for the proposed marriage. It shall also state whether the consent of the existing wife or wives has been obtained to the proposed marriage. Such an application shall be accompanied by a fee of Taka twenty-five.[61] The Arbitration Council after considering circumstances such as sterility, physical infirmity, and physical unfitness for the conjugal relation, willful avoidance of a decree for restitution of conjugal rights, or insanity, on the part of an existing wife shall decide whether the proposed marriage is necessary and just.[62]. Any party may prefer an application for revision of the decision to the Assistant District Judge whose decision shall be final.[63]

In the case of dissolution of marriage, the Chairman shall, within thirty days of the receipt of the notice of divorce or *talaq*, constitute an Arbitration Council to bring about reconciliation between the parties.[64] If the wife is pregnant at the time when the *talaq* is pronounced, *talaq* shall

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58 Rule 3, *Ibid.*

59 *Id.*

60 Sub-Rule 5, *Id.*

61 Rule 15, *Id.*

62 Rule 14, *Id.*

63 Subsection (4) of Section 6 of the MFLO, 1961.

64 Subsection (4) of Section 7, *Ibid.*

not be effective until the period of ninety days or the pregnancy, whichever is later, ends.[65]

Enforcement and Oversight Mechanisms

There is no specific mechanism for the enforcement of a decision by an Arbitration Council. However, if in a case of polygamy, divorce, or maintenance, the husband becomes liable for payment of certain amount of money to the wife or wives, and such an amount is not paid immediately, it shall be recoverable by the Union Parishad as arrears of land revenue. Hence, the Union Parishad acts as an enforcement agency for the Arbitration Council System. However, there is no specific body to monitor the functions of the Arbitration Council System.

Access to State-led Rural Justice: The Kansat Experience

In assessing the scope for access to state-led rural justice, I have mostly relied on the data obtained from a case study. The case study was carried out in the historic Kansat Union.[66] The Union was chosen for study after visiting several unions and talking to the people about the functioning of the state-led rural justice systems. In this preliminary inquiry, I found Kansat Union in a comparatively good position in terms of the functioning of the Village Court System. Kansat Union is situated in the Shibganj Upazilla under the District of Chapainawabganj, a northern district of Bangladesh. The Kansat Union, like any other local government administrative unit, is divided into 9 wards. These wards are not equal in geographical area. While some wards cover only a big village, other wards include four to six small villages. On an average, each ward covers three villages. The average population under a ward is around 5000.

For the assessment of the capacities of the state-led rural justice system, I examined the functioning of the Village Court and the Arbitration Council systems in the Union. In doing so, several methodologies were used. Eight sessions of the Village Court and the Arbitration Council were observed. Two in-depth interviews of the Secretary and the Chairman of the Union Parishad were taken. A group interview of all the male and female members as well as the secretary and Chairman of the union Parishad was taken. An opinion exchange meeting were arranged in the Union Parishad office, where all the members, the Chairman and other officials of the Union Parishad were present. Alongside, the records of the Village Court System were examined.

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65 Subsection (5) of Section 7, *Id.*

66 Kansat is a well known area in Bangladesh because of its connection with some historic movements, the latest being the *Kansat Bidyut Bidroho* (Kansat Electricity Movement: September 2005 - April 2006).

For the assessment of the people's ability to demand justice under the existing legal and institutional arrangements, eight focus group discussions (FGDs) were conducted. These eight FGDs were held in eight wards of the Union Parishad. Around 15 people participated in each FGD. They included cross section of people namely the peasants, the shopkeepers, the teachers, political leaders, *imams* (religious leaders), former members and Chairman of the Union Parishad, the businesspeople, and the people in disputes. The participants included both the male and female.

The study was carried out during February – April 2009. Expectedly, the study brought a clear picture of each of the different areas of access to state-led rural justice process, namely the state of legal awareness, legal protection, the adjudication, the enforcement and oversight, and the state of legal aid and counsel. Following are the access to justice scenarios in Kansat Union.

Legal Awareness

In assessing the level of awareness, people were not directly asked about the state-led rural justice systems. In the preliminary inquiry, it was clear that the phrase 'state-led rural justice system,' even the 'Village Court,' or the 'Arbitration Council' was not known to them. Therefore, in the focus group discussions people were invited to discuss the general rural justice scenario of the Union.

The participants discussed that when any crime occurs or any dispute arises the people first try to settle the matter through village *shalish*.[67] The majority of the village disputes, which the participants counted as 70–80 per cent of the total disputes, are settled through such village *shalish*. After the village *shalish*, the *shalish* by Union Parishad or by the Union Parishad Chairman is second popular forum, which settles the second largest part of the village disputes. Only a few numbers of cases go to the formal courts of law.

The participants were asked whether there is any state-led rural justice system for them where they can get easy access. They told that as per their knowledge, there is no state-led justice forum in the village level. Then they were asked directly whether they had heard about the Village Court or Arbitration Council. Almost all the participants responded in the chorus that they have heard about it, but they do not know clearly about it. They have seen the Chairman to arrange *shalish* in the Union Parishad to deal with different cases. In their words, 'sometimes we hear people to call this *shalish* system as the Village Court, but we have never

[67] *Shalish* is a practice of gathering village elders and concerned parties to settle any local or family disputes.

seen anything like the court in the Union Parishad.'[68] According to them, these Union Parishad conducted *shalish* system or Village Court does not have any power like the same of the formal courts.

It was explained to them that what they are calling '*shalish* in the Union Parishad' is actually the session of a Village Court or an Arbitration Council. The jurisdiction, power and adjudication process of the Village Court and the Arbitration Council were also explained. All the participants became very surprised at this. Because, they thought that the Village Court or the Arbitration Council is like an informal *shalish* occurred in the villages. Only difference is that the 'new mode of *shalish*' takes place in the Union Parishad premises.

Conversely, some former and the existing members of the Union Parishad informed that they know that there are some rules and regulations to deal with the cases in a Village Court and Arbitration Council. They, however, do not have clear idea about those rules and regulation. They have never felt it necessary to learn those rules and regulations. As they explained:

On the one hand, there is no monitoring or pressure from higher authority that those rules and regulations have to be conformed with; on the other hand, the people are ignorant about those rules and regulations. Hence, we [the Union Parishad members] do not feel any urge to apply those rules and regulations. We settle the disputes in the traditional way [i.e., through *shalish* system].[69]

About this ignorance of the existing members of the Union Parishad about the legal provisions as to the Village Court System and Arbitration Council System, the Chairman of Kansat Union Parishad observed that the situation is very natural. By law, the Union Parishad Chairman and members are the judges of the Village Courts and the arbitrators of the Arbitration Councils. They, however, have not been made well aware of their responsibility, let alone imparting any training on how to carry out the responsibility. Even the Chairman of the Union Parishad, who is the key person in both the Village Court System and the Arbitration Council System, is not given adequate training. After being elected, the Chairmen of the Union Parishads are given a three days training on the functions of the Union Parishad, where only a single session of half a day is allotted to train them about their responsibilities in connection with the Village Court System and the Arbitration Council System. This half-day training

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[68] This is English translation of the direct speech of a participant in a FGD in ward no. 3. However, in all the FGDs, participants told this way only.

[69] This is verbatim production of the speech by Mr. Kawser Alam, member of ward no.8. While he was speaking this, other members sitting beside him supported him by nodding their heads.

for the Chairmen is in no way adequate. The worse thing, however, is that there is no such arrangement for at least half day training for the members of the Union Parishads. Therefore, it is impractical to expect that the members and Chairman will work according to the rules and regulation.[70]

Then the Chairman pointed out to the fact that during conduction of the proceedings of the Village Courts and Arbitration Councils, they face many difficulties as to rules and process, but they do not get any legal guidelines in their need.[71] The Chairman explained that people's unawareness is a great problem in functioning of the Village Courts and the Arbitration Councils. As the people do not know about the legal provisions as to constitution of the court and the power of the court, after being directed by the Chairman, the parities in a case do not follow the rules and regulations. For example, some parties do not present themselves in the Village Court in due date and time, even after serving notice and summons. They absent themselves on due date and time, and later on show very trivial or lame excuses for their absence. They do not understand the legality and importance of such a notice or summons. They are not aware of the power of a Village Court that it can fine a party for dishonouring such a notice or summon. So, when the Chairman of the Union Parishad takes a legal action against them for their absence, they think that the Chairman is exercising undue power, or becoming harsh to the absentee party and favouring another party. Hence, the Chairman cannot take legal action for just absence. He has to fix new date and time again and again, which takes longer time to dispose of a case. Thus, it becomes very tough for the Chairman to follow the exact legal provisions in the different stage of proceedings of the Village Courts and the Arbitration Councils.

The concerned judicial bodies and law enforcing agencies are also found to be not much attentive to comply with the legal provisions given in the Village Courts Act, 2006. According to law, the Village Courts have, with few exceptions, exclusive jurisdiction to try the criminal cases and civil suits mentioned in the Schedule to the Act. It was, however, revealed in the FGDs and the group interviews with the members and the Chairman

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70 In an in-depth interview in the evening of 24th March 2009.

71 That the members and chairmen were not updated about the law was proved once earlier when this researcher discovered that even the Chairman of the Union Parishad was not aware of the fact that the legal framework for the Village Court has been changed in 2006. He was totally in the dark about the new legal framework namely the VC Act, 2006. He did not know that in 2006 the pecuniary jurisdiction of the Village Courts has been increased from 5,000 to 25,000 Taka. Until April 2008, when this researcher met the Chairman for the first time, he was refusing to entertain the case valued over Taka 5,000, as he knew that he had no such jurisdiction.

of the Kansat Union Parishad that this legal provision is not taken care of by the concerned civil and criminal courts. These courts entertain many cases and suits, which fall under the jurisdiction of the Village Courts. There is another example. Section 17 of the Act states that though a cognisable case falls under the jurisdiction of the Village Courts the police can investigate the case. However, if any such case is taken to a Criminal Court, the court may refer the case to a Village Court if it thinks fit. According to the Chairman and members of Kansat Union Parishad, there was no record in the recent past that the concerned criminal courts had referred any criminal case to the Village Court for trial, though there were many cases pending in those criminal courts, which should have come in the Village Courts.[72]

It is noteworthy that this case study did not cover the study of the roles of the *thana* administration and the formal civil and criminal courts regarding the Village Courts. Hence, it did not investigate any court or *thana* (police station) records to examine whether and how many cases and suits were there which fell under the jurisdiction of the Village Court or the Arbitration Council. It did not interview any concerned judge, or magistrate, or police officer for any explanation regarding this. For the above reasons, it was not clear whether this entertaining of cases and suits beyond their jurisdiction was because of the unawareness of the concerned civil and criminal courts and *thana* administration about the legal provisions, or because of negligence.

Legal Protection

To learn that whether the legal protections/remedies to be given by the state-led rural justice bodies are adequate, the participants in the FGDs were asked to mention the names of the offences and disputes that occur frequently in the locality. It revealed that most of the offences and disputes fall under the legal jurisdiction of either the Village Court System or the Arbitration Council System. However, the Chairman and the members of the Union Parishad opined that the legal protection is neither adequate nor inadequate. They explained that there are exceptional cases like murder, rape, acid throwing and eave teasing which neither the Village Courts or nor the Arbitration Councils can deal with. Again, the financial or pecuniary jurisdiction of the Village Courts, which is 25,000 Taka, is also not adequate. They face many cases, which are beyond the jurisdictions of the Village Courts or Arbitration Councils.

[72] In the focus group discussions (FGD) there were some participants who are involved in some criminal cases pending in the criminal courts. Some of these cases fall under the jurisdiction of the Village Courts. Also, in the group interviews the members and the Chairman confirmed that there are many such cases in the criminal courts which the Village Courts could try and there was no forwarding of any cases to the Village Court of the Union recently.

Consequently, they are to arrange the traditional *shalish* very often to meet people's demand.[73]

At this point, I referred to a finding from an earlier study.[74] The study found that public were confused as to giving more power to the Village Courts because they thought the members and Chairman of the Union Parishads would abuse this power through the Village Courts. In this regard, the Chairman of the Kansat Union Parishad opined that the fear and confusion is groundless. He explained that presently the Chairman and members are to deal with many cases beyond their jurisdiction. Hence, the scope for abuse is there at present. If, however, the Village Courts are given more power and more jurisdictions, they will have to work under the legal guidance. In that case, the scope for abuse will be slimmer than the existing one.[75]

The Chairman of the Union Parishad, therefore, suggested that if the government or the legislature is afraid of conferring more jurisdictions to the Village Courts, there should be a legal provision giving an extra-ordinary power to the Village Courts. Such a provision may provide that if the parties in a case or disputes voluntarily agree to try their case in a Village Court, or to settle their financial dispute involving an amount more than 25,000 Taka, the Village Court can deal with it.

Adjudication

Only the legal provisions as to fair and impartial decision making cannot make an adjudication process efficient and effective. The different actors involved in adjudication process need different legal, judicial, administrative, and technical and operational capacities and skills to make the adjudication system efficient and effective. In absence of these capacities and skills, the adjudication process is bound to suffer. In this regard, the Chairman of the Kansat Union Parishad opined that operational arrangements for the Village Court System and the Arbitration Council System are inadequate. He informed that until now only 20-25 per cent of the cases and disputes come to the Union Parishad to be tried in the Village Courts or to be settled in the Arbitration Councils. In every week 10 to 12 cases and disputes come to the Chairman, thus a Chairman has to deal with around 50 cases and disputes each month through the Village Courts and Arbitration Councils. Nevertheless, there is no clerk or administrative officer for the

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73 In an in-depth interview in the evening of 24 March 2009.

74 UNDP Bangladesh. 2002. "Informal Systems and Village Courts: Poor People's Preference" in *Human Security in Bangladesh: In search of Justice and Dignity.* Dhaka: UNDP Bangladesh, pp. 91-100.

75 See above note 73.

purpose of the Village Courts and Arbitration Councils. The Chairman himself is to do the documentation and clerical jobs like registering the cases, giving the number to cases, issuing notice and summons, recording the evidence, decisions, and the history of enforcement and sending reports to the higher authority. The Chairman of the Kansat Union said:

> *...dealing with the functions of the Village Courts and the Arbitration Councils is not the only duty of the Chairman... As the administrative head of the local government body, I am to perform and look after numerous civic functions, police and defence functions, revenue and general administrative functions, and development functions etc of Union Parishad. ...We are told to carry out 38 regular functions. After carrying out so many responsibilities, it is simply impossible for the Chairman to give time to conduct the functions of the Village Courts and Arbitration Councils efficiently.*[76]

At the time of the study, the sessions of the Village Courts and Arbitration Councils in Kansat Union Parishad used to hold on Sunday and Wednesday of every week. The secretary of the Union Parishad assisted the Chairman in conducting the sessions of the courts. The secretary is the only administrative officer appointed by the government for the purposes of the Union Parishad. However, according to the secretary of the Kansat Union Parishad, 'the Secretary of a Union Parishad is not responsible to work for the Village Courts or the Arbitration Councils.'[77]

A pertinent question here is how the Village Court System and the Arbitration Council System are running without any designated officer, when both of the systems have some documentation and managerial functions. In case of Kansat Union, the answer to the question is simple. As the Chairman and members of the Kansat Union estimated, usually 20-25 per cent of the total cases and disputes that occurred in the union came to the Village Courts and Arbitration Councils. In the last ten years, this percentage was more or less same. Therefore, they were somehow managing this amount of cases in the Village Courts and Arbitration Councils. But they opined that 'if government wants to activate the Village Court System and Arbitration Council System in full

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[76] I asked this question while the Chairman was conducting a session of the Village Court on 18 March 2009. Along with conducting the proceedings, he was taking notes and putting those on the specific register. Interested reader can see sections 30, 31, 32 and 33 of the Local Government (*Union Parishads*) Ordinance, 1983 to learn the functions of a Union Parishad.

[77] In an interview on 28 April 2009.

swing, then around 400 cases and disputes will come to the Union Parishad in each month. In that case, the state-led rural justice systems with the existing institutional arrangements and operational capacities will never be able function properly.'[78] The systems are also deficient in terms of financial capacity. There is no special allocation of budget for the running the Village Courts and Arbitration Councils. There is no legal provision that Union Parishad can appoint any person as part-timer on contractual arrangement to help the administrative functions of the Village Courts and Arbitration Councils.

An effective adjudication requires well-trained and educated human resources. It concerns different legal, judicial, technical, and operational trainings for the people who are concerned with the adjudication. However, as the members and the Chairman of Kansat Union informed, there are no institutional arrangements for training or other knowledge sharing programmes such as workshops and seminars to make them aware of law and relevant judicial decisions from the higher courts.

About the judicial arrangements, the Chairman opined that the legal frameworks for the Village Court System and Arbitration Council System provide enough safeguards against different biases based on gender, religion, or class. However, during the observation of the proceedings of the Village Courts and Arbitration Councils I noticed the clear presence of the gender preference, patriarchal domination, and religious malpractice. In almost 100 per cent cases, the five-member judge's panels of the Village Courts were composed of male only. The role of women members of the Union Parishad as adjudicators in the Village Courts or in the Arbitration Council was not noticeable. In a divorce case, the prohibited *'triple talaq'* was accepted by the parties. The Chairman repeatedly reminded them that the *'triple talaq'* is unlawful in Bangladesh. However, the senior male members did not listen to the Chairman. They were stubborn that they wanted to settle the case in accordance with the provisions of the *Quran and Sunnah.*

The independence of the adjudicative body from the executive lies at the heart of a well functioning adjudication system. The paradox in the state-led rural justice systems is that the decision-makers of the systems - the members and Chairman of the Union Parishad - themselves are executive officers of the local government and social actors in the area. Their actions, therefore, can be a reason for a case or dispute. One can

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[78] It was the opinion of the Chairman of the Kansat Union Parishad in the opinion exchange meeting in the Kansat Union Parishad office on 24 February 2009. I treated this as common opinion of all the members and Chairman because of two reasons. First, when the Chairman was expressing this opinion, other members were nodding their heads, a sign of their support to the chairman. Second, there was no counter opinion by any member present in the meeting.

argue that when an offender or disputant becomes a judge, justice can never be done.

The Chairman of the Kansat Union Parishad opined that this argument does not work very much in the case of the Village Courts or Arbitration Councils. As per legal provisions, both a Village Court and an Arbitration Council is consisted of a panel of judges, where a decision is taken by the majority of the judges. Hence, there remains little scope to take any arbitrary decision. Moreover, there are always options to change the biased or corrupt judges or representatives, to appeal against a decision of a Village Court, or to apply for revision of the decision of an Arbitration Council by the higher authorities. The Chairman, however, informed that there was no record of any appeal against any decision of the Village Courts or application for revision of an Arbitration Councils' decision in Kansat Union in the past ten years.

Regarding accessibility, the justice seekers opined that both the Village Courts System and the Arbitration Council System are geographically and financially accessible to the common people. Because, both the Village Court and the Arbitration Council usually take their seats in the Union Parishad, which is in term of distance nearer than any other formal courts. The court fees (application fees) are minimal. There is no need to appoint any lawyer to represent the case before the justice forums; parties themselves can present there case. However, they suggested that accessibility may be challenged by other phenomena such as weaker party may not take the case in the Village Court System against a stronger party, or a family may not willing to take their case in the Arbitration Council System in the name of maintaining privacy or family reputation or for any kind of pressure.

As to the level of transparency, the members and the Chairman of the Kansat Union claimed that their adjudication in the Village Courts and Arbitration Councils is 100 per cent transparent and unbiased.[79] They explained that though there is no formal investigation mechanism for the Village Courts and the Arbitration Councils, whenever they feel it necessary to investigate any incident or fact, they form an investigation committee. Such an investigation committee is constituted with the members of the Union Parishad as well as the respected locals. Such a committee has some unique informal techniques, which help them dig out the truth. Again, the parties can present their case in an informal way before the judges (decision-makers) of the Village Courts or Arbitration Councils. There is no rule of evidence. Parties can detail their story as it happened. The judges and the concerned people usually know

[79] A claim that came from all the members and Chairman with a bold voice in the opinion exchange meeting on 24 February 2009.

each other, a fact that prevents them form lying. Hence, the total adjudication environment becomes transparent, and parties can reach a decision by way of discussion and by consensus.

During my observation of the proceedings of the Village Courts and the Arbitration Councils in Kansat Union, I noticed that the whole proceedings of a case was like a discussion forum, where the parties were provided with enough scope to present their cases and related stories in detail. There were no legal guidelines. Some parties even took more than one hour to narrate their cases. The parties to the cases were also given adequate opportunity and time to refute the claims by the opposite parties and to defend their cases. The panel of the judges were always free to ask or interrogate any of the parties whenever they needed to make any point clear. Thus, after such discussion in one session or in several sessions, when the judges thought that the fact of the case was clear to them, then only they proceeded to take a decision. In case of taking decision, they did not consult any law[80], they used their existing knowledge on law and justice, and sometimes they prompted the parties to come to a decision by themselves only. In some monetary cases the parties were found to be engaged in bargaining also. After such a discussion or a bargain when the parties came to a decision by themselves, the judges of the Village Courts endorsed the decision. Otherwise, the judges of the Village Courts decided the issues for them.

It was noticeable that in most of the monetary cases, the aggrieved parties or the victims always got the less amounts than they claimed in the application to the Village Courts. While the offender parties always show some grounds defying or curtailing the claimed amount, the victim parties were made convinced to accept a compromised amount. In the majority cases, the victims were told that if he or she did not accept the compromised amount, then the Village Courts would not be able to take any decision, and in that cases the case would be dismissed or referred to the formal court, where she or he might get no remedy. In almost 100 per cent cases, the victim parties ultimately accepted the Village Courts' decisions.

I used to talk to the parities informally before as well as after the sessions of a Village Court or Arbitration Council proceedings. After finalisation of some decisions as to some offences and disputes, I asked the parties to express their feelings, whether they had been pressurised in any way, whether they were happy with the decision. No party complained of any influence, pressure, or bias. In commenting on their level of satisfaction with the decision, they were perfectly calculative.

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[80] That is, the laws of the country defining various offences and the punishments, the case laws, and the like.

After considering many negative and positive sides, they thought they were more or less satisfied.

The issue of salary or honorarium for the members and chairmen for their judicial service in the Village Courts and Arbitration Councils was also discussed with the members and Chairmen. They informed this researcher that there is no provision for any honorarium or salary for their service as adjudicators in the Village Courts and Arbitration Councils. Even the honorarium that they get as the members and chairmen of the Union Parishad is so small that they feel ashamed to mention that. They opined that it is too inconsistent with the responsibilities imposed on them. They expressed their grievances this way:

....you came here to see how we are running the Village Courts and the Arbitration Councils. Do you know how many responsibilities the members and chairmen of the Union Parishads are to perform? We do all the administrative and public services jobs. The people above our heads just dictate and want reports. What more the government wants from us? We dispose of 5 to 6 cases in each session of the Village Court a day. These are not some trivial cases. These are the similar cases what the magistrates and judges adjudicate. How many cases they dispose of in a day? How much salary they get? How much facilities they get? Compare their salaries and facilities and their performances with the same of ours. Then you ask for more from us. ...[81]

Later on, in an in-depth interview, the secretary of the Kansat Union Parishad informed me that the members and chairmen of the Union Parishads get a monthly honorarium, the amount of which is around Taka 1500 (fifteen hundred).[82]

Enforcement and Oversight

As to the enforcement of the decrees of the Village Courts, the Chairman and members of the Kansat Union Parishad said that they found no major problem in enforcing the decrees or decisions of the Village Courts. According to their explanation, the Village Court decides to give an award of compensation in most of the cases. Only in a small number of cases, the Village Court passes an order to deliver the property or possession of any property. Usually most of the decisions are reached by consensus

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[81] A group interview of the Chairman and members of the Kansat Union Parishad was taken on 24 March 2009 at the Kansat Union Parishad office. I can remember that when I asked them about their salary, they responded in chorus, 'please don't ask this thing'. Then a member started speaking about their situation and grievances and the others lent support to him.

[82] The interview was taken on 28 April 2009.

and the parties comply with the decisions of the Village Courts.[83] Moreover, the option for payment of compensation in installation comes to help when the amount of compensation money is big.

The Chairman of the Village Court of the Kansat Union, however, opined that the legal provision as to recovery of fine is not satisfactory. If a fine imposed by a Village Court for non-compliance with the summons or for contempt of court is not paid immediately, the Village Court has to forward the order of fine to the concerned Judicial Magistrate with the request for recovery. The Magistrate upon such request shall proceed to recover the fine in accordance with law. The Chairman said that it is seemingly a good provision but rarely implementable. He explained that the amount of such fine is only Taka 500. This is a very small amount today. A Chairman has to spend more amount of money than the amount of fine to present such a case of recovery of fine to the Magistrate. It is time consuming, and sometimes ridiculous. When a Magistrate deals with so many grave crimes, a case for recovery of Taka 500 will get little importance to him, and hence it will not be taken care of seriously. The Chairman, therefore, opined that the legal provision should be changed so that the Village Court itself can recover the fine easily. It may be recoverable by the Union Parishad as an arrear tax. In addition, the amount of fine should be increased. Nowadays, even the common people have the ability to pay 500 taka as fine. Such small amount of fine does not prevent the wicked parties to disobey the summons or orders of the Village Courts. However, in response the question that whether he had issued any contempt of Village Court notice, or fined anyone for that purpose, the Chairman said that he had not dealt with any such case in his time (of ten years).

When asked about the enforcement of the decision as to the polygamy, the Chairman said he had not dealt with any case seeking permission for polygamy in his ten years life as a Chairman of the Union Parishad. The Chairman, however, informed that the practice of polygamy is not very rare in the area. Some people have taken second wife without any permission from the Arbitration Council System. However, the trend of divorce and taking another wife after divorcing first wife is increasing. More than 50 per cent of the cases in the Arbitration Council of the Union involve divorce.

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[83] According to law, where the decretal amount is not paid within the prescribed time, the Union Parishad concerned can recover it in the same manner as arrear tax of the Union Parishad is collected. In case of a decree for delivery of possession, the Chairman may present the decree to the Court of the Assistant Judge having jurisdiction for execution. The Chairman of the Kansat Union Parishad did not take such a step so far against anyone.

In response to a query as to the oversight mechanism, the Chairman informed that virtually there is no monitoring or oversight authority to see whether the Village Courts or the Arbitration Councils are functioning impartially and lawfully. At this point, I mentioned section 16, subsection (1) of the Village Court Act 2006, which says that where the Chief Judicial Magistrate of the District[84] is of opinion that the circumstances of a case pending before a Village Court are such that the public interest and the ends of justice demand its trial in a Criminal Court he may withdraw the same from the Village Court and sent it to the Criminal Court for trial and disposal. I asked whether anything is done according this provision. The Chairman said that there is no requirement that the Village Court has to inform the said Magistrate about an ongoing criminal case in the Village Court. Then, '[h]ow does the Magistrate will understand that there is case pending before a Village Court which needs to be tried in the formal criminal court?'[85] This question of the Chairman exposes ineffectiveness of the legal provision as an oversight mechanism of the Village Courts System.

The Chairman of the Union Parishad, however, has to send two half yearly returns of the work of the Village Courts to the *Upazila Nirbahi Officer*.[86] About this return, the Chairman of Kansat Union Parishad told that the return is just a form where there are columns where the chairmen are to mention the numbers of the cases instituted, disposed of, pending and decided, and the fees realized, fine imposed and realized. After examining the form and discussing the related things with the Chairman, it seemed to me that this statistical accountability did not work as safeguard for the malpractice in the Village Courts or the Arbitration Councils, hence did not work as a monitoring system.

Legal Aid and the Right to Counsel

Legal aid and counsel is very crucial for the poor and disadvantaged to access to the formal justice system. In most of the cases, the poor people cannot afford the court fees, lawyer's fees, and other litigation. However, the court fees to take a case to the Village Courts are minimal. An application to the Chairman of the Union Parishad to form a Village Court is to accompanied by a fee of Taka two, if the case relates to Part I

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84 In the VC Act 2006, the nomenclature is 'District Magistrate'. However, the Code of Criminal Procedure, 1898 that provides for the constitution of criminal courts and offices has been amended by the Code of Criminal Procedure, 2009 (Act No. XXXII of 2009). It reconstituted the courts of the Magistrates, and classified the Magistrates as Executive and Judicial Magistrates. In this new system, the 'District Magistrate' for the present purpose should read as the 'Chief Judicial Magistrate.'

85 In an in-depth interview in the evening of 24th March 2009.

86 Rule 30 of the VC Rules, 1976.

and by a fee of Taka four if it relates to Part II of the Schedule.[87] There are no fees for dealing with a case in the Arbitration Council System, except in the case of application for permission for contracting another marriage, where the application should accompany a fee of Taka 25. In addition, for revision of a decision of an Arbitration Council, an application is required to accompany a fee of Taka 2. Moreover, both in the Village Courts and Arbitration Councils, there is no scope to present a case through a lawyer. Hence, except these fees there is no other litigation cost. Considering the small court fees (application fees) and other litigation cost, the union Parishad Chairman and members and the participants in the focus groups discussions were of the opinion that both of the Village Court and the Arbitration Council systems are financially accessible and that there is no need for any financial legal aid.

The participants in the FGDs, however, stressed on the necessity of providing free legal counsel to people in disputes so that they could successfully deal with their problems in the state-led rural justice systems. Almost hundred percent of the common villagers were unaware of the adjudication process in the Village Court and Arbitration Council systems. Nevertheless, there was no government arrangement to make them aware of the systems. There was no awareness programme in television, radio or in print media. There was no local initiative. In such a situation, some participants felt that if there were an office or a help desk in the Union Parishad to provide information about the Village Court and Arbitration Council systems that would be a great help.

Findings and a Brief Analysis

This examination of the scope for access to justice under the existing arrangements in the state-led rural justice systems reveals some of the grave incapacities and weaknesses that are plaguing the access to justice process in rural Bangladesh, but it also reveals some of the strengths that can be used to expedite the said process.

As the study reveals, the existing legal protection is not adequate. For the offences and crimes such as murder, rape, acid throwing, eave-teasing, dowry, and domestic violence, there is no remedy in the Village Court System or in the Arbitration Council System, when these are common in the rural areas. In addition, there is no such state-led justice body like the Arbitration Council for the people from non-Muslim communities, especially for Hindus who form second largest population in rural area.

The adjudication process of the Village Courts and Arbitration Councils has deficiency in certain areas such as lack in human resources and financial support, but has strengths in certain areas like the provisions for composition of the justice bodies and the decision-making, which can ensure impartiality and fairness in the process.

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87 Sub-rule (3) of Rule 3, *Ibid.*

The capacity of the systems as to enforcement of its decision is more or less strong, but the monitor and oversight mechanisms are miserably week. With no effective oversight mechanism, the systems are bound to collapse.

There is no legal aid and counselling arrangements in the Union Parishads level to help people access to the state-led rural justice systems. However, it seems that financial legal aid has little role to play in the access to justice through the state-led rural justice systems, but legal counsel for the victim is necessary.

Importantly, both the common people- the justice seekers- and the people with the systems – the justice providers- are not well aware of the scope for getting justice through the state-led rural justice system. As a result, people cannot utilise the systems largely.

Under the above arrangements, as the study finds, only 20-25 per cent of the total offences and disputes come in the Village Court System and the Arbitration Council System, while more than 70 per cent of the offences and disputes are dealt with in the village *shalish*es. In other words, the state-led rural justice systems provide 'access' to justice only to the 20-25 per cent of the rural population in disputes in the Kansat Union.

Concluding Remarks

The article examined the scope for access to justice under the existing state-led rural justice systems, and portrayed the access to justice scenario of a union only. Though there are around 4,500 Unions in Bangladesh,[88] this scenario of a union should not be taken as a separate one or an unrepresentative of the overall access to rural justice scenario in Bangladesh. Because the state-led rural justice systems work under the same legal and institutional arrangements throughout the country and the rural communities of the country share more or less the same economic conditions and observe almost similar socio-cultural norms. As this study reveals, despite some plaguing incapacities, the state-led rural justice systems have much strength. A thoughtful and careful dealing with the weaknesses exposed in this study can strengthen the state-led rural justice systems, broaden the scope of justice for the poor and disadvantaged, and thus change the overall justice scenario of the country positively. Hence, an immediate state intervention in the field of rural justice is a crying need.

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[88] There were 4466 Unions according to Census 2001 (Source: Bangladesh Bureau of Statistics). However, according to a news report in the Daily Star, the number of unions at present (May 2010) are 4598 (source: 'Need for reactivating village court underscored', The Daily Star, 17 May 2010).

Sovereignty Redefined: Margins on the Unfettered State's Authority over Natural Resources

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Nahid Afreen[**]

Introduction

Since the early 1950s the principle of permanent sovereignty over natural resources (PSNR) became a central principle for the nationals fighting for decolonization and forms an integral part of the right of self-determination. The principle has been advocated as a means of securing for peoples living under colonial rule, the economic benefits derived from the natural resources within their territories and to give newly independent States the legal authority to combat and redress of their economic sovereignty arising from oppressive and inequitable contracts and other arrangements.[1] The Principle acknowledges that the right of permanent sovereignty of peoples and nations over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.[2] Literally, absolute sovereignty is not possible under international law. International law is nothing but some sets of rules which become binding upon a State only if the State freely accepts and submits its sovereignty under those rules.[3] Therefore, the concept of PSNR cannot be said untouchable, either in law or in practice, as a formal legal definition might imply. It is generally accepted that cultural, economic and environmental influence does not value any boundary and does not acknowledge the absolute dominance of any State. This article challenges the obdurate proposition of PSNR on several grounds and tries to

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1 Daes, Erica-Irene A. 2003. 'Indigenous peoples' permanent sovereignty over natural resources', available at:

<http://www.treatycouncil.org/section_2113151111422211111.htm> last accessed on 14 November 2010.

2 Article 1 of General Assembly resolution 1803 (XVII) 1962.

3 Perrez, Franz Xaver. 1996. "The Relationship between Permanent Sovereignty and the Obligation Not to Cause Transboundary Environmental Damage", Vol. 26, *Environmental Law*, at p. 1190.

establish the view that PSNR is not unconditional and it has certain boundaries in national as well as in international sphere.

Definition of Sovereignty and Natural Resources

The attempt to challenge the obdurate proposition of PSNR requires first the analysis of definitions given to sovereignty and natural resources.

Sovereignty

The term 'sovereignty' refers to the supreme, absolute, and uncontrollable power by which an independent state is governed and from which all specific political powers are derived; the intentional independence of a state, combined with the right and power of regulating its internal affairs without foreign interference.[4] One of the proponents of the concept Jean Bodin defined 'sovereignty' as the "supreme power over citizens and subjects, unrestrained by law."[5] Hugo Grotius defined it as the supreme political power vested in him whose acts are not subject to any other and whose will cannot be overridden."[6]

An important factor of sovereignty is its degree of absoluteness. A sovereign power has absolute sovereignty to control everything and every kind of activity in its territory. This means that it is not restricted by a constitution, by the laws of its predecessors, or by custom, and no areas of law or behavior are reserved as being outside its control. Theorists have diverged over the necessity or desirability of absoluteness.[7]

Natural Resources

Typically the phrase "natural resources" serves as a general descriptive phrase following a list of specific words in statute, such as air, water, land, and other natural resources or oil, natural gas, minerals and all

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4 Lehman, Jeffrey. and Phelps, Shirelle (eds.). 2008. *West's Encyclopaedia of American Law*, 2nd edn. Michigan: The Gale Group.

5 According to Jean Bodin the essential element of sovereignty is the law making power of the sovereign. Since the sovereign makes the law, he does not intend to bind himself by that law. He has tend to add that the sovereign is however bound by the Divine Law. Slowly and gradually the concept of sovereignty became distorted and it became synonymous with absolutism. For details see, Jean Bodin's*De* la *République*, 1576.

6 Kapur, A. C. 1999. *Principles of Political Science,* New Delhi: S. Chand and Company Ltd, at p. 184.

7 'Sovereignty', available at: <http://en.wikipedia.org/wiki/Sovereignty> last accessed on 17 October 2010.

other natural resources. *Black's Law Dictionary*[8]gives two wide definitions. First definition is that "any material from nature having potential economic value or providing for the sustenance of life, such as timber, minerals, oil, water and wildlife." The second definition is that the "environmental features that serve a community's well-being or recreational interests, such as parks."

Under international law, the term 'natural resources' has been defined variously in various UN resolutions. An analysis of relevant PSNR resolutions shows the range of recourses and activities covers within the ambit of natural resources. These includes natural resources and natural wealth and resources,[9] natural resources on land with their international boundaries as well as those in the sea bed, in the subsoil thereof within their national jurisdiction and superjacent water,[10] natural resources both terrestrial and marine and all economic activities for the exploitation for these resources,[11] all wealth, natural resources and economic activities.[12]

The United Nations has been the origin of the principle of PSNR and the main forum for its development and implementation. On December 21, 1952 the United Nations general Assembly issued Resolution No. 626(VII) which was the first General Assembly text in using the term "permanent sovereignty over natural resources" where it says that the right of peoples to exploit their natural resources as part of their sovereignty. Thereafter, the United Nations has adopted more than 80 resolutions[13] relating to the principle of PSNR. These resolutions were closely related to arrangements between States and foreign private companies for the exploitation of natural resources, particularly oil and minerals in developing countries. They address the need to balance the rights of the sovereign State over its resources with the desire of foreign companies to ensure legal stability of its investment.[14] But it was the General

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8 Garner, Bryan A. (eds.). 2004 *Black's Law Dictionary*,8th edn. USA: Thomson West, at p. 1056.

9 General Assembly Resolution 523 (1952).

10 General Assembly Resolution 3016 (1972).

11 UNIDO II, 1975.

12 General Assembly Resolution 3281(1974).

13 For example UN General Assembly Res. 523 (VI) (1950), UN General Assembly Res. 626(VII) (1952),UN General Assembly Res. 837(IX) (1954), UN General Assembly Res. 1314(XIII) (1958), UN General Assembly Res. 1515(XV) (1960).

14 Sands, Phelippe. 2003. *Principles of International Environmental Law*, 2nd edn. Cambridge: Cambridge University Press, at p. 236.

Assembly Resolution 1803 (XVII) in 1962 that gave the principle momentum under international law in the decolonization process.[15]

Resolution 1803 (XVII) proclaims that "the right of peoples and nations to permanent sovereignty over their natural wealth and resources."[16] At the same time, it states that "foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith." Moreover, in cases of nationalization, "the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law."[17]

Limitations of Sovereignty over Natural Resources

In the earlier century the term sovereignty referred to the supreme power within a State without any restriction whatsoever. Today, no sensible person would agree that this obsolete version of PSNR really exists. A multitude of treaties and customary international law norms impose international legal constraints that circumscribe extreme forms of arbitrary actions even against a sovereign's own citizens.[18]

A. Restriction under General Assembly Resolution 1803

By its wording, the Resolution imposes restriction mentioning that "the free and beneficial exercise of the sovereignty of peoples and nations over their national resources must be furthered by the mutual respect of States based on their sovereignty equality."[19] Violation of national sovereignty over natural resources is "contrary to the spirit and principles of the maintenance of peace."[20] Thus, Resolution 1803 (XVII) recognizes an important and basic limitation on the notion of relative sovereignty i.e. a state's sovereignty over its natural resources is subordinate to international law.[21]

Moreover, in case of foreign investment, the Resolution declares that the capital imported and the earnings on that capital shall be governed by

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15 Art. 1 of UN General Assembly Resolution 1803 (XVII)(1962).

16 *Ibid.*, Art. 8.

17 *Ibid.*, Art. 5.

18 Jackson, John H. 2003. "Sovereignty – Modern: A new Approach to an Outdated Concept", Vol. 97, No. 782 *The American Journal of International Law*, pp. 782-802, at p. 789.

19 Art. 5 of UN General Assembly Resolution 1803.

20 Art. 7, *Ibid.*

21 See above note 3, at p. 1190.

the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.[22] It was widely recognized that the importance of the resolution would lay not so much on the abstract assertions of sovereignty as in the concrete conditions laid down for the exercise of the sovereignty.[23]

A careful analysis of the Resolution points out that the resolution talks more on obligation of a State to handle its natural resources than on its exercising sovereign rights. Probably is this the reason why United States did not oppose to the resolution which it did in the previous resolution on the same context.[24] Developing countries, principally, have criticized the resolution as "conservative in character" and "not going far enough."[25]

In 1992 the then United Nations secretary-general Boutros Boutros-Ghali said in his report to the Security Council,

> *Respect for (the State's) fundamental sovereignty and integrity (is) crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality.*[26]

B. Restriction under International Environmental Laws

State sovereignty equated as it is with non-interference with domestic jurisdiction and discretion in the legal sphere has become increasingly qualifies. Legally our planet can be split up in to about 200 independent states but in practice the world is recognized as interdependent on many different levels.[27] For certain issues like economic and energy crisis, deforestation, acid rain, pollution of international water, the threat of

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22 Art. 3 of UN General Assembly Resolution 1803.

23 Schwebel, Stephen Myron. 1994. *Justice in International Law: Selected Writings of Stephen M. Schwebel,* Cambridge: Cambridge University Press, at p. 402.

24 General Assembly Resolution 626(VII) of December 21, 1952.

25 *Ibid.*

26 Boutros Boutros-Ghali, 1992 'An Agenda for Peace – Preventive Diplomacy, Peacemaking, and Peace-keeping`, UN Doc.A/47/277–S/24111, at para. 17.

27 Schrijver, Nico. 1997. *Sovereignty over Natural Resources: Balancing Rights and Duties* Cambridge: Cambridge University Press, at p. 2.

global warming, damage in the ozone layer and loss of biodiversity other issues States are interdependent with each other. In an age of globalization, issues like resource depletion and environmental degradation compels to think twice where 'permanent sovereignty' is. As already mentioned we can split the planet into too many independent States but we cannot split the nature. Only joint initiatives of States can insure protection of the eco-system around us.

The need to preserve the environment and to safeguard natural resources is now commonly accepted but is usually balanced against the aim of poverty eradication in developing countries. It is clear that PSNR has become encompassed with environmental concerns alone with issues of war and peace, safety and security for all of us.

In the post war era, PSNR evolves as a new principle of international economic law. Since the early 1950s this principle was advocated by the developing countries in an effort to secure, for those people still living under colonial rule, the benefits arising from exploitation within their territories and to provide newly independent State with a legal shield against infringement of their legal sovereignty as a result of property rights or contractual obligations claim by other States or foreign companies.[28] These objectives are set out in the Principe 21 of the Stockholm Declaration 1972, which provides:

> *States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction*

If we closely analyze at the Stockholm declaration, the Principle 21 has two diverging component i.e. State sovereignty over its natural resources and State responsibility. In fact, Stockholm Declaration is advocating strongly State's responsibility rather than State's right over the resources. While emphasizing on sustainable use of natural resources the Principle 2 of the Declaration proclaims that the natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning and management, as appropriate. In case of renewable resources it is argued in the Principle 3 that the vital 'renewable resources' must be

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[28] *Ibid*, at p. 4.

maintained, restored or improved. In case of 'non renewable resources' the Principle 5 utters that it must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that the benefits from such employment are shared by all mankind. About the wild life and habitat the Principle 4 announced that nature conservation, including wildlife, must receive importance in planning for economic development. This declaration also ensures state responsibility for any damage causes to the environment as the Principle 22 states that States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction. Thus, unlike early approaches which aimed at guaranteeing states full sovereignty over their resources, the developments in the various fields of international law, under the overarching concept of sustainable development, have resulted in an integrated eco-system approach concerning the utilization of natural resources.

The responsibility of States not to cause environmental damage in areas outside their jurisdiction predates the Stockholm Conference, and is related to the obligation of all states 'to protect within the territory the rights of other states, in particular their right to integrity and inviolability in peace and war. The obligation was elaborated in much cited *Trail Smelter case*,[29] which states that:

> *Under the principles of international law ....no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another of the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence*

In fact, the Principle 2 of the Rio Declaration, 1992 is almost the same as the Principle 21 of the Stockholm Declaration adding only two important words, "and development" in its second principle, giving greater liberty and freedom to the developing countries for their development. Thus even the RioDeclarationemphasizes on State responsibility. The Principle 21 of Stockholm and the Principle 2 of Rio Declaration is also conformed

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[29] *United States v. Canada*, (1938/*1941*) 3 R.I.A.A. 1905. The arbitral Tribunal decided that, first of all, Canada was required to take protective measures in order to reduce the air pollution in the Columbia River Valley caused by sulphur dioxide emitted by zinc and lead smelter plants in Canada, only seven miles from the Canadian-US border. Secondly, it held Canada liable for the damage caused to crops, trees, etc. in the state of Washington and fixed the amount of compensation to be paid.

by the ICJ's 1996 Advisory Opinion on *the Legality of the Threat or Use of Nuclear Weapons* [30]where it prohibits nuclear tests if the explosion would cause radioactive debris "to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted".

There are many other treaties and conventions besides the Rio Declaration and the Stockholm Declaration which also speak of State's responsibility in regard to environmental and issues.[31] The Article 3 of the *Convention on Biological Diversity*,[32] provides that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. So we can see the reference of PSNR in different instruments but everywhere it is in chain.

The Brundtland Commission[33] observed that 'legal regimes are being rapidly outdistanced by the accelerating pace and scale of impacts on the environmental base of development'.

C. The Limitation of Sovereignty by Contract

PSNR is one of the leading controversial issues in modern international law after the Second World War involving the issue of foreign investment. This is the period when decolonization took place and newly emerged States tried to build their position and hold strength in international arena by claiming sovereign power over their natural recourses. The principle of PSNR was introduced in UN debates in order to underscore the claim of colonial peoples and developing countries to the right to enjoy the benefits to resources exploitation and in order to allow 'inequitable legal arrangements, under which foreign investors had obtain title to exploit resources in the past to be altered or even to be annulled *ab initio*, because they conflict with the concept of permanent

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30 See above note 14, at p. 236.

31 Hossain, Md. Iqbal. 2004. *International Environmental Law Bangladesh Perspective,* Dhaka: Dhaka International University, at p. 31.

32 5 June 1992, entered into force Dec. 29, 1993.

33 World Commission on Environment and Development (WCED), 1983. The General Assembly Resolution 38/161.

sovereignty.[34] Developed countries opposed this by referring the principle of *pacta sunt servanda.*[35]

The first half of the 20th century saw the creation and then rapid growth of the international energy industry. Many governments granted generous concessions in the early years to multinational oil corporations in which title to the oil in place was conveyed to the companies, the concession covered large areas, the terms of the concessions were very long (*e.g.*, 60 years or more) and the royalties payable to the government were low.[36] So the developing nations soon decided to annul the conditions. Accordingly, the second half of the 20th century was characterized by the nationalization of the oil industry, the termination of those same concession agreements and the expropriation of the assets connected to the concessions. These have included sensitive nationalization cases, such as take over of Anglo Iranian Oil Company (1951), the United Fruit Company in Guatemala, (1953) the Suez Canal Company (1956), the Dutch property in Indonesia (1958), the Chilean Copper industry (1972) and the Libyan oil industry (1971-4).[37]

By the end of the 20th century, the pendulum had swung once again. The 1980s and 1990s were characterized by the growing interest of developing nations in receiving foreign investment by means of new projects or privatizations of already existing state-owned enterprises.[38] Added to this, many nations agreed to enter into bilateral investment treaties and multilateral agreements to promote themselves as investment-friendly countries. But the foreign investors were losing their interest for the insecurity of their investment and legal protection.

In 1980's, however developing nations attempted to make some compromise within the concept of PSNR and introduce changes into the legal principles of nationalization. In 1974, Resolution 3281[39] affirms that the right to nationalize foreign owned property required "appropriate compensation and added that, if compensation was not paid the

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34 See above note 25, at p. 1.

35 Latin word means "agreements must be kept".

36 Vielleville Daniel E. and Vasani, Baiju Simal.2008. "Sovereignty over Natural Resources versus rights under investment contracts: Which one prevails?" available at: <http://www.crowell.com/documents/Sovereignty-Over-Natural-Resources-Versus-Rights-Under-Investment-Contracts_Transnational-Dispute-Management.pdf>, last accessed on 21 December 2010.

37 *Ibid.*

38 *Ibid.*

39 General Assembly Resolution 3281(XXIX) (1974).

nationalizing State's international obligation would not have been fulfilled in 'good faith'. [40]

The term good faith was well defined in the case of *Tecmed v. Mexico*,[41] where the Arbitral Tribunal considers that in light of the good faith principle established by international law, requires the contracting parties to provide to international investments a treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved there under, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, *i.e.* without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.

For better security of investment, most foreign investors today are making demand for the inclusion of stabilization clause[42] in the agreement with the host State. In the case of *Government of the State of Kuwait v. American Independent Oil Co*[43] the tribunal rejected Kuwait's arguments that the stabilization clause was contrary to domestic and international law. The tribunal held that a State could agree not to nationalize specific foreign-owned property within a limited period of time. The tribunal, however, also implied that the stabilization clause would only apply in cases of a confiscatory measure taken by the State.[44]

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40 Article 4, General Assembly UN Res. 1803.

41 ICSID Case No.ARB (AF)/00/2, Final Award of May 29, 2003, at para 154.

42 Stabilization clauses in investment agreements serve the purpose of freezing the effects of changes adopted by a State in its national system of law as of the date of the contract.

43 Award of 24 May 1982.

44 See above note 33.

International tribunals have, over the last few decades, recognized that contracts between the host State and the investor itself (i.e., outside of any treaty regime), may place a limitation on the State's sovereignty over its natural resources.

D. State Sovereignty and Restriction by Treaties and Customary Laws

In the modern period there have been dramatic and substantial changes in the concept of sovereignty because of which it is not appropriate to state that States sovereignty is invincible and illimitable. In the present time, States have entered into many international treaties thereby surrendering a part of their sovereignty.[45] For example, the members of the United Nations have accepted many obligations under the Charter.[46] It is recognized in international law that a sovereign could be under the protection of another, greater sovereign without losing its own sovereignty.[47]

Sometime the principle of non-interference on the nation-state level is closely linked to sovereignty, yet today's globalize world flourishes in instances in which the actions of one nation (particularly an economically powerful nation) constrain and influence the internal affairs of other nations. For example, powerful nations have been known to influence the domestic elections of other nations and to link certain policies or advantages (such as aid) to domestic policies relating to subjects such as human rights.[48] Henry Schermers, rightly states:

> *... under international law the sovereignty of States must be reduced. International co-operation requires that all States be*

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45 In this regard Starke rightly marked that: "Sovereignty has a much restricted meaning today than in the 18th and 19th centuries, when with the emergence of powerful highly nationalized States, few limits on States' autonomy were acknowledged. At the present time there is hardly a State which in the interest of the international community has not accepted restrictions on its liberty of actions." For details see Starke, J. G. 1994 *Starke's International Law,* 12th Edn. London: Butterworth. In Union of *India v. Sukumar Sengupta,* Sabyasachi Mukharji, C.J. of the Supreme Court of India quoted with approval the above observation of Starke. His Lordship added, "Any State in the modern time has not acknowledge and accept customary restraints on its sovereignty in as much as no State can exist independently and without reference to other States. Under the general international law the concept of inter-dependence of States has come to be accepted."

46 Kapoor, S. K. 2003. *International Law and Human Rights*, 12th Edn. Allahabad: Central Law Agency, at pp. 49-50.

47 Vattel, Emmerich de. 1803 *The Law of Nations*, BK. Ch.1, at p. 60.

48 See above note 16, at p. 789.

> *bound by some minimum requirements of international law without being entitled to claim that their sovereignty allows them to reject basic international regulations. . . . we may conclude that the world community takes over sovereignty of territories where national governments completely fail and that therefore national sovereignty has disappeared in those territories. The world community by now has sufficient means to step in with the help of existing States and has therefore the obligation to rule those territories where the governments fail."*[49]

Although in earlier times States assumed 'full' and 'absolute' sovereignty to mean that they could freely use resources within their territories regardless of the impact this might have on neighbouring States, few would argue today that territorial sovereignty is an unlimited concept enabling a State to do whatever it likes.[50]In post-modern period it is a commonplace to observe that no State enjoys unfettered sovereignty, and all States are limited in their sovereignty by treaties and by customary international law.[51] The principle of territorial sovereignty is also limited when the question fingers upon the territorial sovereignty and integrity of another State. Furthermore, the scope for discretionary action arising from the principle of sovereignty is determined by principles like 'good neighbourliness' and *sic utere tuo ut alienum non laedas* (you should use your property in such a way as not to cause injury to your neighbour's). As Oppenheim rightly put in 1912:

> *A State, in spite of its territorial supremacy, is not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State—for instance to stop or to divert the flow of a river which runs from its own into neighbouring territory.*

In *The Island of Palmas Case* [52] the sole arbitrator Huber, who was then President of the Permanent Court of International Justice, declared:

> *Territorial sovereignty involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in*

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49 Schermers, Henry. 2002. "Different Aspects of Sovereignty," in Gerard Kreijen (ed.): State, Sovereignty, and International Governance. New York: Oxford University Press, at p. 192.

50 See above note 25, at p. 219.

51 *Ibid*, at p. 2.

52 *United States v The Netherlands*, award in 1928.

> *particular their right to integrity and inviolability in peace and war, together with the rights which each State may claim for its nationals in foreign territory.*[53]

It is also evident by various international agreements between States that provide for joint use of natural resources and address matters such as transboundary resource use, transboundary pollution, conservation and sustainable development.

Even within the territorial limit State must ensure safety knowingly its territory to be used for acts of other State. For example, in 1949, in the *Corfu Channel Case*[54]the International Court of Justice rendered a judgment, in fact in its very first case, on the responsibility of Albania for mines which exploded within Albanian waters which resulted in the loss of human life and damage to British naval vessels and on the question whether the United Kingdom had violated Albania's sovereignty. The Court came to the conclusion that the laying of the minefield in the waters in question could not have been accomplished without the knowledge of Albania. The Court held that the Corfu Channel is a strait used for international navigation and that previous authorization of a coastal State is not necessary for innocent passage. In view of the passage of foreign ships, the Court held therefore that it was Albania's obligation to notify, 'for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters' and to warn 'the approaching British warships of the imminent dangers to which the minefield exposed them'. Since Albania failed to do so on the day of the incident, the Court held Albania responsible for the damage to the warships and the loss of life of the British sailors and determined the amount of compensation to be paid. For our purposes it is relevant that the Court referred to:

> *...Every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.*[55]

E. Sovereignty and Extraterritoriality

The sovereign right to exploit natural resources includes the right to be free from external interference over their exploitation. But in case of shared natural resources, that are the resources which do not fall wholly within the exclusive control of one State, Article 3 of the *Charter of Economic Rights and Duties of States* decrees that:

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53 *Island of Palmas Case*, (1949) 2 RIAA 829.

54 *United Kingdom v. Albania*. 1949.

55 ICJ Reports 1949, at p. 22.

resources. Those decisions do not rest easily, however with a more modern conception of an ecologically interdependent world in which limits are placed on the exercise of sovereignty or sovereign rights.[61]In absence of generally accepted international standards of environmental protection and conservation, States with strict national environmental standards may seek to extend their application of activities carries out in areas beyond their territory, particularly where they believe that such activities cause significant environmental damage to share resources (such as migratory species, transboundary watercourses, or air quality and climate system) or affect vital economic interest.

The permissibility of extra-territorial application of national laws remains an open question in international law. The PCIJ[62] has stated that 'the first and foremost restriction imposed by international law upon a state is that- failing the existence of a permissive rule of the contrary –it may not exercise its power in any form in the territory of another state outside its territory except by virtue of a permissive rule derived from international custom or form a convention. [63] However in the same case the PCIJ went on to state that international law as it stands at presents does not contain a general prohibition to states to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory and that the territoriality of criminal law was 'not an absolute principle of international law and by no means coincides with territorial sovereignty'.[64]

Conclusion

To conclude, it can be said that the principle of PSNR, in contrast with other State practices (bilateral treaty agreement with foreign investors, environmental obligations, obligation of customary international laws, etc.) has brought to a situation in which it can only be presumed the existence of a very vague principle of PSNR.

It only gives the general right of a state to manage and control its natural resources and that it has the duty to make its people benefited from the exploitation of such resources. Then the obvious question comes why the principle was introduced and welcome by United Nations. The answer is probably, the term was introduced to persuade those tormenting nations under going the phase of decolonization to fight with their limited

61 See above note 14, at p. 238.

62 Permanent Court of International Justice.

63 Lotus case (*France v. Turkey*), PCIJ 1927.

64 See above note 14, at p. 239.

resources to cope up with world's advance economy. But, that era of decolonization is gone.

Moreover the concept is becoming shrinking due to the State interdependence with others for technological benefit, sharing common resources or for protecting the environment globally. It is also evident that, while in the past emphasis has been placed on the States rights aspect of PSNR, it is now time for a shift in focus to duties flowing from this right. The development of PSNR has trended to focus on the formulation of rights in the earlier periods, but balance with duties has been increasingly created by stipulating that PSNR be exercised for national development and well-being of the people. It is even addressed in the resolution of PSNR that the term 'sovereignty' refers not to the absolute sense of the term, but rather to governmental control and authority over the resources in the exercise of the well being of the people of the state concerned.[65] To wrap up, it can rightly be said that the concept of State oriented sovereignty is gradually transforming into mankind oriented sovereignty around the globe.

[65] Art. 1 of Resolution 1803.