ISSN 1813-5099

The Dhaka University Studies
Part- F

Dhaka University Law Journal

University of Dhaka
Bangladesh

Volume 22 Number 1 June 2011

Dhaka University Law Journal

(The Dhaka University Studies Part-F)
Volume 22 Issue No. 1
June 2011

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Volume 22 **Issue No. 1** **June 2011**

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

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

Thesis

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

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Published in July 2013 by the Registrar, University of Dhaka, Composed by Tamjida Ahmad, Former Lecturer, State University of Bangladesh and printed by Trayee, 15 Nilkhet, Dhaka-1205

Subscriptions

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

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Turkish Political and Constitutional Reforms: From Orthodoxy and Ultra-Nationalistic Indoctrination to Liberalization and Moderation

Dr. Md. Maimul Ahsan Khan*

Introduction

Up to the World War I, Turks could boost of their Ottoman empire, which had been regarded as the symbol of united global Muslim polity for the entire Muslim *ummah*. It was a great coincidence that the founder of the Ottoman Sultanate, Osman Bey, was born almost at the same time when the Arab-centric Islamic Caliphate based in Baghdad witnessed its complete destruction in the hands of Mongols invaders in 1258.[1] From Osman Bey[2] to the Sultan Abdul Hamid II (1842-1918)[3] Ottoman constitutional reforms went through a precarious history with a very complicated path and also with much turmoil of wars with other nations. The domestic scenario of political history created by the Ottoman rules during its six centuries' existence was no less complex. The success stories of the Ottomans in building a legalist and pluralistic society had been well recorded in the Muslim history as they spearheaded many improvements of the *Madhhabi*-based legalism left behind by Arab ruling elite. However, Persian Muslims had never been happy with the upper hands of the Ottomans over the jurisprudential legacy of the Arab empires.

Arab and Indian Muslims took with great pride in the pluralistic jurisprudential legacies created by Sunni Schools of Law. Initially along the Ottomans, the Persians were also quite happy with the *Hanafi*

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1 Baghdad was the central seat (capital) for the Abbasid Caliphs, who were regarded as the standard bearers of Islamic civilization up to their final fall in 1258 in the hands of the Hulagu Khan. From 750 up the early decades of thirteen century Baghdad had been thriving under the leadership of the Abbasid caliphs, who remained unchallenged leaders of the Muslim World. Hulagu Khan with the assistance of his Vice-Commander Guo Kan (a Chinese military General with a strong contingent of Chinese soldiers) in November of 1257 invaded Baghdad and completed its full occupation with a great deal of destruction February 10, 1258.

2 Osman Bay was born around 1258. He was a son of Ertugrul Gazi, a tribal leader in the town of Busra. In 1284 the Anatolian Seldjuk Sultan recognized Osman Bey as chief of the tribe.

3 "Abdul Hamid devised his own political agenda. Through the teachings of Jamal Uddin Al Afghani (a Muslim ideologue) and his direct tutelage, he emphasized the importance of Islam as a cohesive force which was destined to amalgamate the empire's mostly Muslim peoples. Abdul Hamid intended to recreate a strong central government. This could only be achieved by the unification of the ethnically diverse yet religiously homogeneous Muslim population of the empire. The sultan's contention was that if he could accumulate this religious power in his hands, he would be able to restore his political authority as well." In:

http://www.armenian-history.com/Nyuter/ HISTORY/G Moumdjian/kurd_4.htm

jurisprudence and its application in the system of governance and judiciary. Unlike in the Indian subcontinent, in Turkey *Hanafi* School of Law had played quite progressive role for establishing predictable and stable system of governance, rules of law, and justice. By using many *Hanafi* interpretations of Islamic Law, Indian official *ulema* made Islamic religious scriptures too rigid to resolve many mundane problems that deserve immediate attention and resolution. [4]

However, Istanbul-based Muslim Sultanate had always been with an uneasy harness with Persian facets of legalism based on innovative paradigms sprung out from the basic Principles of Islamic Jurisprudence. Many disagreements over different legal and moral issues between the Ottomans and Persians served as one of the strongest causes leading to the gradual conversion of the Persians from *Sunnism* into *Shiism* during the period between fifteenth to eighteenth centuries. [5]

Along with the Ottomans, the Indian Muslims by and large also followed the *Hanafi* School of Jurisprudence. Still overwhelming majority of the *Sunni* Muslims claim that they follow the *Hanafi* school of law in resolving their family matters and give a great deal of importance when they exercise their State powers or try to lead a pious life as a Muslim. However, in reality for many Muslims with substantial amount of wealth and power like other Schools of Islamic Law, Hanafi school of Jurisprudence just serves some self-serving agenda in the hand of ruling elite.

> [D]istinction should be made between those [Islamic] which are applicable to a particular structure of society in a particular epoch and in a particular region...[A] serious defect of the Hanafi law is the unjust and inequitable rule that a court decree awarding maintenance to a wife is enforceable [with many unfairness]...The progressive reinterpretation of the traditional Hanafi law by the courts has conferred on Hanafi wives a very important right which was unjustly denied to them by Hanafi jurists but always enjoyed by women of other Sunni schools.[6]

This is the historical and intellectual background that had prompted serious crisis in the constitutional development and system of governance in the Muslim world. Traditional Muslim way of governance was in already

4 "*Ijtihad* is the capacity of a jurist for making decisions in matters of law to which no express text or a rule already determined by *jima* is applicable. It is an academic research and intellectual effort which makes the legal system of Islam dynamic and its development and evolution in the changing circumstances possible." In: Serajuddin, Alamgir Muhammad *Muslim Family Law, Secular Courts and Muslim Women of South Asia: A study in Judicial Activism,* Oxford University Press, 1st edition 2011, p. 115.

5 Massive conversion of the Persian Muslims from *Sunnism* to *Shiism* had occurred during sixteenth and seventieth centuries.

6 Serajuddin, Alamgir Muhammad *Muslim Family Law, Secular Courts and Muslim Women of South Asia: A study in Judicial Activism,* Oxford University Press, 1st edition 2011, pp.120, 219,223.

deep crisis before the year of 1789 that was a landmark of modern history because of the events of the French Revolution. Exactly in the same year Tipu Sultan of Mysore (India) desperately needed Ottoman help to resist the mercenary armed forces of the East India Company to resist total English colonial occupation and subjugation. In the name of English King and Royal Army, the East India Company maintained the private armies to kill the innocent people of India, especially the Muslims.[7]

By that time Persians were completely secluded from the mainstream of the Muslims and the Ottomans were unable to help Tipu Sultan.[8] The era of Muslim constitutionalism in India had ended about which we cannot go for any further discussion here. Paradoxically it had ended at the time when the French Revolution had ignited the power of freedom for all men and women in the Continental Europe.

Despite the overall declining positions of the Muslim nations, the Ottoman armies had been engaged in wars in Russian and Austrian fronts. On the other hand domestically Istanbul-based Caliphate was keen for constitutional reforms challenging the demands of rapid industrialization and transformations it needed throughout the empire. It would not be an exaggeration to claim that in the backdrop of a splendid isolation of the Persia from the rest of the Muslim world and ongoing English colonization of the Muslim India, Ottomans were in somehow in complete disarray about the ways of constitutional reforms they should be adopting.[9] Since then all major powers of the Muslim world were in decline and in

7 From within, the Mughals lost territory to the Sikhs and the Hindus. Externally, the Mughal rulers faced challenges from the King of Persia and the Afghan Rohillas. The Mughal Empire continued to decline and break up until it was replaced by a Western power in the form of the British Raj in the course of eighteen and nineteenth centuries." In: Saeed, Abdullah, *Interpreting the Quran: Towards a Contemporary Approach*, Routledge, 2006, p. 10.

8 There were number of British military assaults over the regions Hyderabad and Mysore. It was quite difficult for the Muslims of Mysore to resist the English military force under the command of the British East India Company, which had already neutralized the Nizam of Hyderabad and the so-called Maratha Empire. During 1789- 92 in the battles of the **Third Anglo-Mysore War** English soldiers failed to occupy the Sultanate of Mysore, which still hoped for Ottoman military help. In fact, Sultan Tipu's resistance against English soldiers had surprised many quarters because of his innovative use of one of the first powerful rocket launcher in the world. However, in the fourth Anglo-Mysore War Tipu was defeated and was killed on 4 May 1799 near the fort of Seringapatam at the age of 48.

9 During the period between the French Revolution and the final fall of the Caucasus and Balkan regions in 1878. However, Ottomans fought many wars against Russians during the period between 1556 and 1696. By the end of seventeenth century Russian Ruler Peter I had proved that there were no points for the Ottomans to go for wars against Russian army, which had been maintaining close relationship with London to divide Central and South Asian Muslim regions between the two empires. In 1850 the Ottomans had already fully realized that unfolding events, but still fought the last Russo-Turkish *War* (1877-78) and then signed a peace treaty just after the war.

bewilderment in many mundane affairs Muslims needed appropriate resolutions. During the French Revolution, French army was interested in helping Tipu Sultan, who on his part built a church for French Christians. Indian Muslim ruling elite in pre-British India had been showing their deep interest to develop a kind of legal pluralism to be implemented through state mechanism.

> We get an inkling of this law of nature, or the lawlessness of nature, by observing the behavior of states; "there is no altruism among nations," for there can be law and morality only where there is an accepted organization, a common and recognized authority. The "rights" of states are now what the "rights" of individuals used to be (and still often are), that is, they are mights, and leading states, by some forgetful honest of diplomats, are very properly called the "Great Powers."....Men are not by nature, however, equipped for the mutual forbearance of social order; but danger begets association, which gradually nourishes and strengthens the social instincts:....Most men are at heart individualistic rebels against law or custom: the social instinct are later and weaken than the individualistic, and need reinforcement; ....Conscience, however, is not innate, but acquired; and varies with geography.[10]

Islam is not a territorially-bounded or culturally-confined religion; its universality is well known and widely accepted by many nationalities and ethnic groups around the world. However, none of the Muslim nations could retain universal character of Islamic heritage for long. Like their Arab and Persian counterparts, Turks had also lost many vital universal aspects of Islamic worldviews and multiculturalism and that gradually gave rise to the nationalistic feelings of Mala-Turks aspiring for a nation-state instead of following the path of Ottomanism, which was a kind of reminiscence of early Caliphates established initially by the Arabs up to 750 C.A. and later on along with the Persians up to 1258.

In this article we will be discussing the domestic transformation of the Turkish nation-state and its overall ramifications for the domestic and foreign policies and affairs of the country. We will examine how "foreign factors" and situation in the neighboring countries and "Big Games" of international politics directly and indirectly had been playing decisive role in the political, social, and economic transformation of Turkey that on their part play instrumental role for constitutional reforms in Turkey.

[10] Durant, Will, *The Story of Philosophy: The Lives and Opinions of the Greater Philosophers,* 1933, pp. 190-1.

Russian Revolution of 1905 and Rise of Mala-Turks

The Russo-Japanese War (8 February 1904–5 September 1905) was ended with the humiliating defeat of the Russians, who had established the second largest empire the human history has have ever recorded so far. The imperial ambition of the Japanese had yet to be recognized fully by the Europeans in general and the Russians in particular. This thesis is equally applicable to the Germans as an aspiring nation to build their own empire. The uneven competition in building and expanding empire was nothing new by then.

However, both the Germans and the Japanese emperors had proved to be the latecomer in the race of empire-building ambitions and endeavors of modern history. On the other hand, none of the older empires such as the Ottoman, English, and Russian could imagine fully that their days were numbers to put to an end of their respective efforts to expand their imperial territorial boundaries.

Unlike other empires, the Ottoman had been facing serious domestic turmoil leading to the disintegration of the last Muslim Sultanate. Since the early decades of the nineteenth century in terms of system of governance and rule of law, the Ottomans were obviously in the paths of decadence rather than any shift toward progress. On the other hand, European colonial forces had been occupying more foreign territories mainly at the expense of the Muslim nations throughout the world.

> Negative forces, thereby, continued to gain strength until they reached a climax in the seventeenth century after the unsuccessful Siege of Vienna, in 1683, under Mehmed IV (1648-89). Furthermore, an overburdened rural economy was incapable of supporting the military superiority as well as the economic and technological advances that were necessary to face the challenge from the West. The Ottomans did not even have adequate resources to improve the technology and professionalism of their armed forces in which the West was rapidly advancing. The price for this neglect was paid through a number of defeats starting with Russia on the Danube in 1770....In spite of several efforts to initiate reforms and improve the situation, conditions did not improve significantly and Turkey descended from a position of 'magnificence' to that of 'the sick man of Europe'. By the time of the First World war, Turkey was exhausted economically as well as militarily.[11]

However, deep crisis in the Ottoman Empire during the early days of the twentieth century made its collapse inevitable as it was the case with the Russian empire. The 1917 Bolshevik Revolution has saved the Russians from losing any of their major important colonial territories and put the

[11] Chapra, M. Umer, *Muslim Civilization: The causes of Decline and the Need for Reform,* second impression, 2008, pp. 91-2.

stage to build another empire commonly known as Soviet States or Empire. On the other hand, ultra-nationalist Turks opted to get hold of their State sovereignty under a nation-state system and abandoned all ambitions to have any kind of empirical power of their own. Main concern of the Turks was how to keep the heartland of Turks under the control of their nationalist leaders instead allowing foreign powers, especially English and Russian armies to occupy Istanbul or any other traditional Turkish cities that were built under the Ottoman Sultanate.

Russians by abandoning ultra-nationalist ideologies and sentiment had adopted Socialist Constitutionalism and Communist economic system as a state ideology, while Mala-Turks rejecting the principles of Islamic system of governance and multiculturalism or Internationalism opted for a kind of extreme form of chauvinistic nationalism and anti-Islamic secularism as their state-ideology.

Rivalry between the Russians and Turks had been intensified before and during the entire period of Cold War. But both the countries fostered and nurtured all kinds of anti-Islamism up to the final collapse of the Soviet Union. The softening process of anti-Islamism in Turkey has gradually started after the death of the Kemal Ataturk in 1938. But anti-Islamism along with ultra-nationalism had been protected as the State ideology and constitutionalism by the direct involvement of the military in the national political system.

Turkish Domestic and Foreign Policy Predicaments between World War I and II

The Ottoman Turks fought many unnecessary wars with many of its neighbors and European Powers. Rivalry with the Russians caused the Turks many losses in terms of territories and manpower. Moreover, London continuously made Istanbul a target of attack in so many ways that history yet could not record all the episodes in details and with full accuracy. Despite many destructive and unwise domestic policies, Turkey as nation-state came to realize that it could not effort to make any more strategic blander in its foreign relations.

> The state-centric understanding of Islam among Gulen's followers is the outcome of the culture of insecurity in Anatolia that evolved from the legacy of the disintegrated Ottoman Empire. Nursi and his first generation of followers witnessed the elimination of Muslim hegemony in the Balkans and the Caucasus and the partition of Anatolia by the Sevres Peace Treaty of 1920.[12]

Turkey could not repair its relations with the Russians, who had been seeking everything through their experiments with historical materialism

[12] Yavuz, M. Hakan, "The Gulen Movement: The Turkish Puritans", In: Yavuz, M. Hakan and Esposito, John L., *Turkish Islam and the Secular State: The Gulen Movement,* Suracuse University Press, 2003, p. 22.

and Marxist ideology.[13] Rivalry between secular and anti-Islamic Turkey and communist Russia had been fueled by "great powers" of world politics. Turkey and Germany decided to maintain their friendly relations at very highly tested and trusted grounds. Ankara did not indulge in any warfare during World War II. That strategy was a beginning of the shift of Turkish foreign policy toward peaceful co-existence with foreign powers and countries. Western powers feared that Turkey might have become friendly with the Soviet Union as well. That was why in 1952 Turkey was made a member of NATO and led Turkish nation to be a closest ally of the State of Israel at the cost of friendly relations with many Muslim countries.

One of the main features of post-Ataturk Turkey was that Ankara had started looking for realistic foreign policy as Moscow had soften its anti-religious ideological stands. But unlike Turks, Russian leaders under the Soviet Constitutionalism consistently had been cultivating close relationship with a good number of Arab and Muslim countries after the World War II. Turkey apparently neither needed nor afforded to get hold of any high moral grounds in its foreign policies, which were by and large disconnected to the domestic predicaments of the Turkish people at the time. Moreover, any shift of Turkish foreign and domestic policies demanded a sort of re-Islamization process of Turkish politics that was under full control of military intelligence with close collaboration of Israel and its only unwavering friend, the US.

Thus Turkey was caught by a military triangle of the armies of its own State, Israel, and the US from the very beginning of the Cold War era. It could not even become the member of EU, which gave Turkey an Associate Membership in 1964. That was a kind of blessing of the Cold War for Turkey; otherwise Ankara might not get even that symbolic gesture of the EU aspiring to create a kind of Super-State in the region albeit limited to the European continent.

Turkey as a Muslim Member of NATO

Anti-communist and anti-Islamic policies of Turkey gave it prominence at regional and international arenas. Without any reservation, like Iran led by Shah, military led Turkey was very eager to have cozy relationship with Israel. Iran was not given any opportunity to think even to become a NATO

[13] Max Weber did extensive studies about these issues, which were ignored by both Moscow and Istanbul. Germany had begun the quest of right kind of foreign policies long before the beginning of the World War I. However, the race for having and building bigger empires between the European powers could not be stopped in any way. Moreover, Washington had joined in that destructive European race in a different way. "Long decades of peace for Germany, from 1870-1914, coupled with general prosperity, had entirely changed the conditions of German scholarship. The petty bourgeois professor, harried by money matters, had been replaced by an upper-class academician with a large home and a mind. This change facilitated the establishment of an intellectual salon. It is from this position that Weber saw the residences of American university professors." In: Gerth, H. H., and Mills, C. Wright, *From Max Weber: Essays in Sociology*, A Galaxy Book, NY, 1958, p. 24.

member as that could break or weaken the triangle created by the US, Israel, and Turkey. Becoming the only Muslim member of NATO in 1952, Secular and anti-Islamic Turkey had started to pursue anti-Soviet, anti-Arab, and anti- Iranian policies more aggressively than ever before.

The legacy of Kemal Ataturk had been regarded sacred and constitutionally protected. Any criticism of Kemalism had been regarded as a kind of blasphemy and unpatriotic tantamount to treason leading to life imprisonment or death sentence. A God-less Turkey with all kinds of its anti-Islamic attire had become a symbol of modernity and progress. It did maintain many repressive policies against regular Muslim masses within Turkey and practically millions of Turks had escaped from Turkey during the Cold War era. Though its foreign policy implications were known to the outsiders, but its domestic ramifications were either ignored and had been treated as trivial domestic affairs of Turkey.

> Particularly between 1945 and 1989, many cases of sanctions arose in the context of the East-West conflict and thus took on the character of a conflict between NATO and the Warsaw Pact. In this situation, the United States in its role as the leader of the NATO alliance faced high incentives to take the lead in confronting Moscow. Having the highest level of military commitment to NATO, low levels of trade with the Soviet bloc, and a unique position within cold war institution such as NATO, Washington had little choice but to respond to perceived Soviet provocations.[14]

The founding members of NATO had little trust in the UN and might have expected its UN) incapacitated position similar to that of the League of Nations, which had utterly failed to prevent or stop wars between the European nations. But establishing NATO the US successfully brought Turkey within the fold of anti-Soviet Bloc and put Ankara again on war footing. Both sides of the Cold War simply used the UN as a tool to justify respective Big Players' policy implementations at the world stage. For the Western powers and capitalist bloc main policy imperative was to resist the Soviet or Chinese communist movements across the world.

Ultimately NATO had not been needed to fight against the Soviets or Chinese, but imposed wars on many Muslim countries. That is why Turkey has not been comfortable with the Western NATO members over a number of issues including UK-USA-led war in Afghanistan, Iraq, and many other countries. On the other hand, as one of the winners of the Cold War era against the Soviets, Ankara could not find its share or dividend during post-Cold War period. Still Turkey has kept its alliance with other NATO members, especially with the USA for changing its domestic and foreign policies with much trouble from outsides. All that did

[14] Martin, Lisa L., "Credibility, Costs, and Institutions: Cooperation on Economic Sanctions." In: Martin Lisa L., (ed), *International Institutions in the New Global Economy*, An Elgar Reference Collection, 2005, pp. 129-130

not help Turkey to become a member of the EU for which Turks have been trying for last three decades.

Arch rivalry between the USA and USSR and the formation of NATO and Warsaw Pact were the outcome of the initial stage of the Cold War that sharply divided the Muslim World as well. However, the most dangerous ramification of the Cold War for the Muslim world was either Afghan or Somalia syndrome. All Muslim countries were united to resist Soviet military aggression in Afghanistan at any cost, but all credits for the collapse of the Soviet Union acclaimed by the London or Washington.

In contrast to the Afghan scenario, by supplying arms to Somalia, Pakistan, Iraq, Egypt, Algeria, Libya and many other Muslim countries, Western powers have been claiming that democratic reforms had to began such violent ways in the Muslim world otherwise the so-called Islamic fundamentalists might have captured state-powers either by popular mandate or uprising. In the middle of all these military adventures perpetrated by the Western arms and ammunitions, Turkey wanted to demilitarize its politics.

The EU wanted to demilitarize the Turkish politics for the successful implementation of legal reforms for which Ankara has been committed for sometime. However, along with Washington, many European capitals have been showing their eagerness to impose democracy in many Muslim countries, which are now in continuous inferno that nobody can put off. This is the double standard of the Western policy and democracy Muslims have been talking about for many decades now, but that rational Muslim voice has been taken over by the Islamophobia, the strongest anti-Islamic voice overwhelmed by both electronic and print media.

General Yirmibesoglu who served under the Ozal Presidency has raised serious questions about the military expenditure of Turkey because of its involvement with NATO activities. Being a former military General he could not possibly dare to criticize NATO so openly without active support of civil administration and military elite. The following questions came out very loudly in public directly from the mouth of the General Yirmibesoglu.

> We have placed emphasis upon NATO interests rather than our own national interests. A number of European states have reduced their defense expenses by relying on the protection provided by NATO, whereas Turkey has expanded its defense budget as if it will prevent a probable World War III all by itself, and prioritized its consideration of NATO requests. The most visible example of this is the Cyprus issues, as well as relations with Greece. Germany and Japan have made miraculous progress since the end of World War II by reducing their military expenses. We have not....For how long

will we serve US national interests rather than paying attention to our own national priorities?[15]

As a member of NATO Turkey has been trying to make a balance of being an Western Ally in the war fronts over Syrian Arab Syndrome that we have witnessed in Somalia, Lybiya and many other Muslim countries. Many quarters believe that over the issues of Syria, Turkish foreign policies have been failing as it could not involve the UN as a decisive player in the region. However, in the face of Russian resistance and Iranian involvement in the Syrian affairs, Ankara hardly can think of any remarkable success in mitigating disputes over Syrian issues.

Experiment of Bicameral Parliament and the Constitutional Court of Turkey

In 1961 Turkey wanted to resolve some of its constitutional problem through a referendum, which for the first time clearly demonstrated that Turkish public opinion was not in consensus in Kemalist ideals of brutal secularism. Creation of National Unity Committee (NUC) headed by General Cemel Gursel was an utter failure to create an atmosphere of unity in Turkey. As a compromise formula two university professors were assigned to write a new constitution. They created a bicameral legislature.

It appears that newly established constitutional arrangement under 1961 Constitution wanted to have an upper chamber of the parliament by naming them Senators. Constitutionally they were supposed to be elected for six years. But practically for many Senators it was a life-long lawmaking job.

Compare to 1924 constitution, constitution written by two professors in 1961was comparatively a progressive one in the sense that it recognized the freedom of thought, expression and association. Such a literal constitutional assertion in reality meant very little for religious rights or freedom of association to criticize governmental policies.

Leaving aside the imperatives of Kurds and predicaments with Armenian issues, Turkey is quite a homogeneous country ethnically. In the past, ethnic configuration of Anatolian region and its surroundings up to the Easter regions of Turkey was very different as we find it today. During Ottoman time, Turkey was a very multi-cultural and ethnically diverse country. Since its emergence as a Nation-State after the World War I, it could become a successful Federation based on territorial or administrative divisions of the country.

The name of the Turkish parliament is Grand National Assembly. Without creating a federation or making a federal legislative organ for the government, Turkish ruling elite wanted to have a bicameral parliament. In 1961 with more than 600 members the Grand National Assembly as a

[15] Mercan, Faruk, "The Authenticity of ant-Americanism in the Turkish Military and its Reasons", In: *Turkish Review*, Vol 1, Issue, 1, Istanbul, 2010, p. 31.

bicameral parliament had started its unsuccessful journey to make it more representative for Turkish voters. Soon it had been proved that neither the bicameral parliament nor the numbers of seats there was a fundamental issue to create a check and balance in the governmental mechanism of modern Turkey. Since 1961 number of parliament members has never been dropped below 450, and since in 1998 it became 550. But two-house parliamentary system did not work for Turkey.

Turkish constitutional court was and still remains a very strong and influential legislative organ. Unlike many other countries where constitutional court are in place, the Turkish constitutional court acted more arbitrarily and arrogantly leading to frequent amendments of the constitutional provisions. However, the positive affect of the Turkish constitutional court is that the regular courts could remain a little bit less politicized.

> Turkey has so far not been able to shake off the inherited notion and institution of the authoritarian state and transmitted undemocratic and non-egalitarian habits of its military-bureaucratic reformers, a new modern elite has emerged in the Turkish Republic. Based on a cartel of interest and legitimized with the Kemalist ideology, this elite controls the resources of the modern sectors of Turkish society.[16]

This is an outdated stereotype analysis about Turkish reform movements of 1990s. During 1980s a wider spectrum of Turkish elite made it clear that Ankara did not want to follow the suit of Tehran in transforming Turkey into a modern and de-militarized democratic society. However, Turkish reformist movements found that Western powers and "Great Players" of international politics can easily make Turkey another Algeria, if reformist forces took over powers through election.

After the World War II, we have witnessed numerous attempts in the Arab world to create a united political and diplomatic forum based on Arab nationalism and/or Pan-Islamism. Many Arabs might have thought that if Turkish and Iranian nationalist forces could triumph in those respective countries, Arab nationalism also should be working for the benefits of Arab-States.

Nationalism may serve very well during the period of colonial occupation and foreign military invasion, but for national building efforts it may become the source of many ideological and religious tensions as well. Turkish nationalism was neither free from any political tension nor stigma of its own for its ultra-secular nor religious identities. In this regard, Arab or Iranian nationalisms were not that different from Turkish secularly based and constitutionally stipulated nationalist policies.

16 Hale, William, "Turkey's Domestic Political Landscape: A Glance at the Past and the Future". Cited in: Cetin, Muhammed, *The Gulen Movement: Civic Service Without Borders*, New York, 2011, p. 102.

Major Features of 1982 Constitution of Turkey

1961 Constitution of Turkey was practically an outcome of 1960 military coup. Military leaders and even the top-ranking bureaucratic leadership had no serious problem with Kemalism, anti-Islamic Secularism and ultra-nationalist features of constitutional arrangement under which Turkey was ruled. However, being a non-communist country why Turkey still could be governed by one part-rule was a major dilemma for many regular Turkish voters.

It took about two decades to find some kind of resolution to this fundamental constitutional dilemma of Turkey. But it was not an easy fight for the diverse political forces in Turkey. In September 1980 many influential political leaders, about 100 parliamentarians, and even the than Prime Minister of the country were arrested.

By 1983, it was found that more than two thousand prisoners had been facing death penalty for political reasons, especially for their involvement in religious or communist activities. As a result of adoption of 1982 Constitution aspiring for liberalization ultimately led most of those political prisoners to get life imprisonment. Still about fifty or even more prisoners of conscious were executed. For the European capitals willing to keep Turks under strong capitalist sphere of influence that political scenario of Turkey and its excessive politicized judicial system had appeared to be unbearable.

In 1981 Military generals had directly nominated the members of Constitutional Consultative Assembly and they were appointed by the NSC to draft a new constitution. Thus nothing really changed in the system of governance and method of drafting the constitution. However, political polarization was just under the surface of the fragmented "Turkish State Ideology" no more to be contented with Kemalism and brutal secularism fighting the shadows of "Turkish Souls" of all kinds raising the voices against visible suppression and oppression.

1981 was marked as one hundred years of birth of Kemal Ataturk. State-sponsored centenary anniversary of the founding father of so-called modern Turkey apparently was very colorful and successful. However, there was no enthusiasm in proclaiming success stories of Turkey. All educational institutions, including Turkish universities also had celebrated the founding leader's birthday and volumes of compilation had been published on him. But the number of universities and their quality that time caught the imagination of the divided Turkish Soul, which had been looking for political liberation, religious freedom, intellectual enlightenment, and of course, economic emancipation. To meet this challenge of time, Turkey had created Council of Higher Education aimed to the improvement of university education and backward nation-building process. This was the background of the adoption of 1982 Constitution of Turkey and establishment of the constitutional provision of forming only secular political parties.

With the newly arrival of opportunity Turgut Ozal founded his Motherland Party. Why not Fatherland Party? Countries like Russia and Germany like to call their countries as Motherlands. Turks are no different either. Why then Ozal named his party in the line of Mother rather than Father. Muslims by that time had already earned enough bad images for being unjust and oppressive against their own women folks. In reality Kemalite Turkey oppressed their women from different direction than the so-called Wahhabite Kingdom of Saudi Arabia. All the miseries Muslim women endured in modern Turkey or any typical tribal Arab, Pakistani, Afghan, and many other Muslim communities were the outcome of many sociopolitical and economic dynamics rather than influence of religious factors. Otherwise how a "Modern Turk" and a "Tribal Arab or Afghan" would behave in a similar fashion when it come to the issues of constitutional and human rights?

1982 constitution of Turkey did not change many things in the constitutional rights of Turkish voters, who got only three different option of voting in three different political parties: National Democratic Party (NDP), Populist Party (PP), and Motherland Party (MP). Who could have thought that MP would get 45 percent leading to an absolute majority in the Parliament under the Majoritarian system, while military backed NDP would finish in third place with few members in the Parliament? Fortunately by that time the system of Upper Chamber in the parliament was abolished and Election Commission (Supreme Election Council) and Council of Ministers had started to exercise their power without too much of intimidation of the NSC.

However, constitutional position of NSE had been reiterated in the preamble of 1982 constitution. It clearly states that the 1982 constitution was written by a Consultative Assembly and ultimately that had been approved by the Council of National Security (CNS), which still remained its upper hand in exercising the State-powers at the highest levels of governance. Without prior approval of the CNS Turkey hardly could go for any constitutional or judicial reforms. Gradually the electorate system underwent some reform with a substantial empowerment of the Election Commission without which no creditable election was possible. As a constitutional body the composition and status of Supreme Election Council was determined by the laws rather than any bureaucratic interventions. Article 79 of 1982 constitution stipulates:

> The Supreme Election Council shall be composed of seven regular members and four substitutes. Six of the members shall be elected by the Plenary Assembly of the High Court of Appeals, and five members shall be elected by the Plenary Assembly of the Council of State from amongst its own members, by secret ballot and by an absolute majority of the total number of members. These members shall elect a Chairman and a Vice-Chairman from amongst themselves, by absolute majority and secret ballot.

President of the Turkish Republic still remained a weak constitutional institution. Moreover to keep an watchful eye on the activities of the Head of the State two different offices were formed under the names of General Secretariat of the President of the Republic (Article 107) and State Supervisory Council (Article 108) both of which practically made the post of country's president helpless in exercising any power of his own.

Moreover Article 118 kept the NSC[17] as strong as before that could bring military in the civil administration at any time it wanted. However, in reality NSC had been losing its grip over the expanding civil administration at various levels of the administration. Still every Turk used to know the pulse of NSC at any given national and economic policies adopted by the government.

Influence of Neighboring Countries on Constitutional Changes in Turkey

The ultra-secularist Turkey could not support the Russian invasion into Afghanistan in 1979 and was very fearful of the Islamic revolution of Iran at the same time. From 1789 to 1979 Turks as a nation was in great confusion about what to do with the rise and fall of Islamic forces and diverse Muslim culture within the country. The general impression was that Turkey as a nation-state could not be the Second Iran in terms of Islamic revival; Turks could not ignore Islamic and European factors at the same time.

Like the 1979 Islamic Revolution of Iran, last three decades of Turkish transformation and reforms have remained mostly ignored by the serious academic circles around the world. Moreover, many observers thought that ultra-secularist and militarized Turks were the final destiny for the post-modern Turkey as well. Such an assumption had appeared to be incorrect and, in political and constitutional terms, Turkey has been undergoing unprecedentedly peaceful dramatic changes.

Neither the Iranian nor the Pakistani Muslims took any serious lessons from the political landscape of the Russian or Turkish history. Pakistan had emerged as a nation-state in a similar fashion that had been followed in the case of Israel. Thus the division of Pakistan in 1971 was inevitable outsiders was hardly ready to accept the revolutionary events of Iran in 1979.

However, 1979 Islamic Revolution of Iran has influenced directly or indirectly the political landscape in a number of Muslim countries. Assassination of the Egyptian President Anwar Sadat in 1981 pushed most of the Arab countries backward in their own quest for constitutional reforms. Post-revolutionary Iran has witnessed many dramatic political

[17] "The National Security Council shall be composed of the Prime Minister, the Chief of the General Staff, the Ministers of National Defence, Internal Affairs, and Foreign Affairs, the Commanders of the Army, Navy, and the Air Force, and the General Commander of the Gendarmerie, under the Chairmanship of the President of the Republic." (Article 118)

and constitutional changes that have overshadowed the political and economic reforms undertaken by the reformist-minded Turkish leaders.

One may compare the NSC of Turkey with the Guardian of Council (GoC) of Islamic Iran. NSC could bar anything to any Turkish national institution and body if the concerned act or decision may appear pro-religious and anti-secular. The Iranian case in regard to the powers and functions of GoC may sound diametrically opposite to the Turkish constitutional arrangement. Both these neighboring Muslim countries with their contrasting Shiia-Sunni orientation and dynamics knew very well that in real political life and constitutional arrangement they cannot afford to move their respective countries diametrically opposite direction at a time when

Prime Minister Erbakan-led Turkey faced many challenges and stood at the cross-fire of the reformist forces and the military backed government under the controlled of the National Security Council (NSC). A 'post-modern coup' in 1997 compelled Erbakan to agree to an eighteen-point well-planned strategy to curb the influence of Islamic factors in Turkish political affairs. That strategy saved Turkey from an Algerian-type civil war, but could not make Turkey isolated from the neighboring countries, including Iran, Iraq, and Russia.

In 1998, the constitutional Court of Turkey banned the Welfare Party, which was a very popular among the Turkish voters who brought its leader Erbakan to the helm of Turkish power struggle and made him the Prime Minister in 1996. Neither the Welfare Party nor its leader Erbakan was incidental outcome of Turkish reformist movements.

In 1994 results of municipal elections in Turkey had given a very clear mandate the reformist minded Turkish political and religious forces to take charge of Turkish wellbeing at all local and municipal levels that brought Welfare Party led by Erbakan to the power. Maybe the biggest rhetorical mistake Erbakan had committed when he announced that he would not tolerate any interference of NATO into the Turkish domestic affairs and promised to his constituencies that if it would be necessary then Turkey was already in a position to create an "Islamic NATO".

Such political rhetoric apparently was a great setback for the "Muslim Revival" in Turkey in late years of the twentieth century, but it had played its positive role to rethink Muslim nation to follow blindly the orders coming from foreign leaders with their own political vendetta and/or economic vested interests. However, realistically it was an impossible task for Ankara to create another NATO-type military alliance while the Pack like WARSAW could not successfully resist NATO's objectives anywhere in the world.

National Security Council: Basic Structure of Turkish Constitution

Neither the Grand National Assembly nor the Constitutional Court of Turkey could have last words to the reformative policies of any Turkish

government. It is the NSC (National Security Council) could determine the fate of any government. It was the NSC that did not allow President Demirel to serve as a president for the second time. But that was not still a big political shock for Turkish voters. Outright denial of European leaders in 1997 to allow Turkey to acquire a full membership of EU shocked the entire Turkish nation aspirating for at least some formal recognition of dignity at European levels after so many decades.

Despite its bad name acquired even before the dismantlement of the Ottoman Sultanate, the Turks were determined not to lose their last stronghold in their own homeland. Involvement of the Turks in the World War I made the collapse of the Istanbul-based Sultanate inevitable, still millions of supporters of the Ottomans wanted to keep Istanbul as a symbol of unity for all Muslim nations in the planet.

On behalf of the Indian Muslims and Hindus, Mahatma Gandhi joined very actively to a popular movement in India called Caliphate Movement to save the Ottoman State during the World War I. Gandhi's argument in favor of the Ottomans was very clear and loud. He predicted the severe consequences of the division of the Ottomans, Arabs, and Indians and warned that so many unsustainable states to be controlled by the former colonial powers would make human civilization a vulnerable one.

Unlike the English, French, and Russian colonialists, Mala-Turks abandoned all kinds of imperial ambitions and wanted to have their own Nation-State based on strong Turkish nationalist ideals. However, the emergence of the USSR and the rise of communist forces in the Near East made the founders of the modern Turkey unnerved and pushed them to an ultra-secularist and even anti-Islamic tendencies making the regime hostile to other Muslim nations and also a pro-Israeli entity.

Turkey joined NATO in 1952 as the lone Muslim country to escape any kind of pressure from the Communist Russia and made Turkish military available to be an active party to Cold War on the behalf of the Western and European countries. Now after half a century NSC by claiming itself as the basic structure of the constitution and the most powerful constitutional institution could not deliver any goods to the ambitious generation of Turkish people.

Post-Ozal Turkey (1993-) is no more a typical Kemalist and anti-Islamic Turkey. Instead of an anti-secular and ultra-nationalist Turkey we have been witnessing a sensible, rational, and moderate emergence of new enlightenment of Turkish political and constitutional landscape. With the new constitution approved by referendum in 1982 and subsequently Turgut Ozal's moderate leadership had made a substantial change in the political and constitutional climate of Turkey. For new emerging Turkish technocrats and elite anti-Islamism was no more have been treated as a sign of modernism in the age of post-modernism. Still a huge number of secular Turkish voters were scared about Islamic mannerism or any kind of Muslim cultural attire or symbols.

> Islam must be confined to the private domain. Since for them 'modern civilization' is at stake, any form of public visibility for Islam is perceived as a direct threat to, and loss of, the constitutive public sphere and system, and as a rebellious attack on Ataturk's reforms and secular regime he established. More objective commentators have argued, however, that it would be rash and senseless to assert that all women who adopt the headscarf or the new, urban Islamic dress in the city are supporters of the Islamic party or to associate it with politicized Islam in Turkey.[18]

Algerian failure of democratization process during the early days of 1990s through the Islamic avenues made the Islamic groups in Turkey unnerved. They could neither follow the Iranian revolutionary process nor did dare to go for any confrontation with any secular and military forces within the country. Power sharing through elections was the best option for the revival of Islamic values in Turkey.

Despite the fact that the 1979 Islamic Revolution of Iran has influenced directly or indirectly the political landscape in a number of Muslim countries, including Turkey. Assassination of the Egyptian President Anwar Sadat in 1981 pushed most of the Arab countries backward in their own quest for constitutional reforms. Post-revolutionary Iran has witnessed many dramatic political and constitutional changes that have overshadowed the political and economic reforms undertaken by the reformist-minded Turkish leaders.

Prime Minister Erbakan-led Turkey faced many challenges and stood at the cross-fire of the reformist forces and the military backed government under the controlled of the National Security Council (NSC). A 'post-modern coup' in 1997 compelled Erbakan to agree to an eighteen-point well-planned strategy to curb the influence of Islamic factors in Turkish political affairs. That strategy saved Turkey from an Algerian-type civil war, but could not make Turkey isolated from the neighboring countries, including Iran, Iraq, and Russia.

The Recent Transformation Process

The transformation process from the Ottoman state into a nation-state left the Turks the so-called sick men of Europe. The Ottoman state as an empire had fought many external battles against a number of European imperial and colonial powers. However, until World War I the Turks were always more than a nation thanks to their historical, religious and cultural identity and heritage. The direct involvement of the Turks in World War I not only made them a nation in a more typical sense of the term, it also isolated them from the rest of the world. Philosophically, the emergence of a new nation-state indicates that its national interests are unique and

[18] Cetin, Muhammed, *The Gulen Movement: Civic Service Without Borders,* New York, 2011, p. 44.

those interests might be in frequent conflict with the economic interests and political strategies of other nation-states.

Turkey, as a nation state, from its inception took secularism and nationalism very seriously and made those ideological doctrines as its constitutional principles to be followed at all levels of governance and cultural activity, under a one-party dictatorship. From this perspective, state-secularism in Turkey under the rule of Mustafa Kemal Atatürk – and even afterwards – appeared to be anti-Islamic, very similar to USSR under the Stalinist regime.

However, being a Muslim country, Turkey could not follow suit in terms of the Soviet atheist system. Unlike socialist Russia, most Western European nation-states did not accept atheism as a state ideology. Secularism up to the beginning of the Cold War, both in Turkey and the USSR, was practically based on atheist interpretations of science, system of governance, societal issues and family affairs.

During the height of the Cold War between the US and the USSR, both sides had to soften their anti-religious strategies and stances. Turkey being the only Muslim member of NATO had been adhering to the US paradigms of state-building and governance, and as a result had partially been alienated from the typical welfare-oriented European civility and totally isolated from the process of revitalization of traditional Muslim values at the state level.

It has been proved again and again that the state institutions of Turkey felt more comfortable with US and Israeli strategies than the pragmatic state policies pursued by many Western European states. However, for many obvious reasons, Turkey also maintained very close and comprehensive bilateral relations with Germany.

With the demise of the Cold War and the collapse of the USSR and the Berlin Wall, Ankara became very enthusiastic about integration into the European Union. In its efforts to be a member of the EU, Ankara found itself quite unsuccessful under the ultra-nationalist and overtly anti-Islamic regime, ruled with a militarized form of governance. On the other hand, the list of pre-conditions prescribed by the EU for accession seems to continue to grow ever longer. Thus Turkey's becoming a full member of the EU has become a complicated political, diplomatic and cultural game, with frequent changes to the rules of engagement.

The direct involvement of the military elites in formulating state policy proved detrimental to many Turkish interests at home and abroad in terms of generating international support for ongoing democratic reforms in the country. Similarly, without showing appropriate respect for many religious and Turkish traditions, the new generation of Turkish leadership could not generate active support for the much-discussed and needed political, educational and social reforms regular Turkish people had been yearning for so long.

Against this backdrop, so-called Islamic forces and factors have started to play more visible and stronger role in formulating new strategies and policies that were prudent, beneficial and attractive to wider segments of the Turkish population. However, apprehension has grown that Turkey might follow in the footsteps of revolutionary Iran or the Western-backed militarism of Algeria or Pakistan.

It is now just over a year (early 2011) that the Arab world has been shaken by the tides of popular uprising to topple the autocratic regimes in a number of Arab and African countries. In a number of countries the initial stage of overthrowing of the dictatorial leaders has been successful. However, fear of political instability and civil war still has been hunting these countries. In a country like Libya, it appears that the political uncertainty and tribal feuds has been becoming a phenomenon rather than a short period of transition to an elected government. One can only hope a better scenario for the unfolding events in Bahrain.

The Tunisian and Egyptian transition process toward elected government is quite different than that of Libya or Bahrain. Many analysts believe that some Arab countries, especially countries in the Maghreb, have been looking for a model of transformation similar to that of preset-day Turkey, which has been going through a peaceful stage of whole-scale reforms including a quest for a more democratic constitutional legal framework with a wide range of expansion of constitutional, religious, and human rights. We need to examine how far some Arab countries have been taking serious interests in the lessons of Turkish model of transformation.

Justice and Development Party: A New Player with Farsighted Strategies

The leadership of the Justice and Development Party (AK Party) has been showing serious sensitivity to the issues of secularism, religious beliefs and traditions, and factors related to Europeanization and globalization. The AK Party has been demonstrating that Turkey will not imitate Western or European policies without first performing serious scrutiny of its own.

In the changed political landscape in Europe and Asia, Turkey has been looking for economic opportunities to make its people independent and prosperous. In doing so, the leadership of the AK Party was no longer hesitant to use "Islamic and Muslim factors" for the benefit of the Turkish masses in general and the traditional segments of the population in particular.

The AK Party's economic policies have addressed the entire nation rather than a particular segment of the population. The economic dividends of a Turkish independent foreign policy were substantial and apparent to the vast majority of regular Turks, who ultimately started to rally round the policies of the newly emerging political forces.

Opponents of the AK Party have been trying to portray the party as religiously unacceptable to secular Turkey, and it has often been termed a

fundamentalist Islamic party. Such an assault on religiously biased political force is not something new for the ultra-secularist and corrupt nationalist forces. For the AK Party, the main challenge is not its Islamic or secular image; the fundamental challenge is how to keep its own leaders away from the economic corruption that was for a long time the norm for all kinds of Turkish political parties and leaders.

The image of Turkey as a moderate Muslim state has gradually become a reality for all the parties involved. Anti-religious and ultra-secularists parties have been increasingly discredited by their corrupt practices, based on group or class interests. This challenge has been taken seriously by the AK Party, under which the judicial environment has also been improved significantly.

A substantial intellectual, professional and cultural transformation of secular Turkey has taken place within all professional groups, including business circles, which have increasingly become capable of creating jobs of all kinds. This phenomenon has created a sense of Turkish pride within the country, and for its part, the AK Party has been making sure this message is heard loud and clear around the world.

The foreign policy of any state is essentially an extension of its major domestic ideological and political strategies. However, until very recently neither the AK Party nor the government led by it could successfully demonstrate what exactly it meant by a major shift in foreign policy. What the leadership could make clear, however, is that it took the altered political and ideological scenario seriously in terms of Turkish issues and was very keen to use the newly arrived opportunity for Turkish policy applications both at home and abroad.

Thus some constitutional changes are needed to reflect the newly created and/or accepted factors, and to make Turkey a strong state again. Here both Turkish credibility and acceptability has been under serious scrutiny, at both regional and international levels. After AK party's decisive victory in the parliamentary elections of 2002, there was a wide speculation that Turkish military might took powers from the civil administration of the country.

In May 2003 there was an attempt by the then-Chief of General Staff General Ozkok to stage a military coup against the AK party government. However, the staged military coup against the government has been aborted by the civil and military establishment jointly. Since then there is a strong belief that the ongoing democratic process in Turkey is safe under the leadership of AK Party, which enjoyed a wider support from the cross-boarder sections of people.

Politicization of Islam vis-à-vis Islamization of Politics

Strictly speaking, the AK Party is a modern political party that is only a decade own and which has its own structure. But ideologically speaking, it is a newly emerging moderate political force with a history stretching back more than 20 years. In fact, since the early years of the Cold War era and

the introduction of the multi-party system to Turkish politics in 1950, many Turks were wondering about their religious identity and traditional legacy. From a structural viewpoint, the AK Party is an offshoot of other religiously inclined political parties, such as the Welfare Party (RP) and Wisdom Party (FP), which surfaced after the dramatic political changes of 1980 and beyond.

During the early days of the 21th century, it was clear that the AK Party had come to stay and to play an important role in the intellectual and constitutional transformation already touching every walk of Turkish life. Opponents of the AK Party fought hard to prove that leaders like Abdullah Gül and Recep Tayyip Erdoğan were a new brand of fundamentalist that should be completely banned from engaging in politics. As a result, Erdoğan was banned from politics and imprisoned on the basis of a poem he recited during a trip to southeastern Turkey while mayor of Istanbul.

The Turkish public was outraged and threw its support behind the AK Party and its leadership, bringing its victory in the parliamentary elections. This overwhelming popular mandate for the AK Party and its progressive leadership changed the entire political and religious landscape of the country.

The AK Party came to power in 2002 and implemented a good number of pro-people measures to increase its popularity and acceptability to all walks of life. However, until the general election held in July 2007, it was not clear how popular the policies of the AK Party would be, given the looming global economic crisis. The AK Party won 341 seats out of 550, and in the ensuing local elections in 2009 it was victorious in almost 50% of the 3000 municipalities across the country.

The political adversaries of the AK Party believed that the global economic crisis and failure to become a full member of the EU would lead to an early collapse of the party's government. However, the prudent economic policies and rational political behavior of the AK Party leaders made them more popular with the Turkish population both at home and abroad.

Turkey is now a quite strong member of the G20, with an annual per capita income of more than $12,000. It now has an economy worth more than $1 trillion. Other Muslim G20 members, such as Indonesia and Saudi Arabia, have already tacitly accepted the Turkish leadership in operation and are bargaining with Western dominating powers to make the global economic system more pro-poor and pro-people. The time has come for Turkish people to play a strong role in mitigating disputes between Muslim powers, at both regional and international levels and wish to make their country a three-trillion dollars economy by 2022.

Turkey as a nation state used to suffer from an identity crisis that almost prevented Ankara from cooperating and collaborating with neighboring countries, irrespective of their national, ideological and ethnic identities. It appears that as a party the AK Party has fully appreciated that neither

ultra-nationalism nor any kind of anti-religious ideology will help the Turks become an independent and prosperous nation once more.

In the past Turkish nationalist and ultra-secularist political parties and forces had been practically begging for equal treatment by their European and US counterparts, for whom Turks were no more than a strategic ally throughout the Cold War period. The AK Party also showed its interest in becoming a full member of the EU, but its approach was different than that of previous regimes in Ankara.

Making their economic, political and diplomatic positions stronger than before, the Turkish masses under the leadership of the AK Party stated to prove that Turkey's living standards and worldview have already become richer than a number of its European allies in Central and Eastern Europe, for whom being a full member of the EU and NATO is just a fashionable issue rather than something from which they reap any genuine economic benefit.

While both NATO and the EU have acted largely from the vantage points of military partnership, in which Turkey was a strong player that for a long time gained few economic benefits for its own people. Unlike its neighboring oil-rich states and many Arab countries with huge reserves of black gold, Turkey has practically no oil of its own. However, the diplomacy of the AK Party has now put Turkey in a position such that it is traversed by many oil pipelines, strengthening its hand to an extent that was once inconceivable. Here is the great success by the AK Party that is appreciated widely by a vast majority of Turkish voters.

It is no longer a question of whether the EU wishes to have Turkey as a full member; it will soon be a question of whether Turkey really had anything to lose by not becoming a full member of the EU. Even NATO membership is becoming increasingly irrelevant for the Turkish causes it once stood for. Thus, for Turkish interests, neighboring countries have become increasingly important, and this was recently candidly articulated by Turkish President Gül in an interview with the BBC's "Hardtalk" show in September, 2010. At present general public sentiment in Turkey is such that it says Turkey is no more interested to become "a small America or Europe."

> Making Turkey a small America" was a motto first introduced by Nihat Erim, former People's Republic Party (CHP) prime minister. Right-wing political parties and administrations were accused of "making Turkey a small America." However, the Turkish military has been a small America since the 1950s.[19]

Anti-American policies of the revolutionary Iran have many ramifications for the Turkish domestic transformations including constitutional reforms. Iran and Turkey are now two Muslim neighbors striving for good economic

[19] Mercan, Faruk, "The Authenticity of ant-Americanism in the Turkish Military and its Reasons", In: *Turkish Review*, Vol 1, Issue, 1, Istanbul, 2010, p. 31.

relations for their mutual benefits. Turkey is neither an enemy nor a tested friend of revolutionary Iran. Syrian crisis over the removal of Bashar al-Asad put the Turkish foreign policy on alert. It is surprising to see that revolutionary Iran sided with Asad regime a reminiscent of Mubarak regime in Egypt and the regimes of Shahs in Iran. As a NATO member, Turkey has been cooperating with its Western allies over Syrian issues that did not made it a hostile country to Islamic Iran over which an Israeli military assault still being looming on the horizon. In a word, Turkish domestic and foreign predicaments have increasingly becoming complicated and Turkish role in the region has become vital than ever before.

Challenges the Ruling Party Has Been Facing in Turkish Political Pluralism

Because of its comprehensive approach to many complicated issues and problems the country's people have been facing for many decades, the AK Party caused many kinds of nationalists and secularists with hunger for power to unite against it. This is both the strongest and the weakest character of the AK Party in terms of current Turkish politics.

Constitutionally the AK Party and other big political parties in Turkey have a great advantage in the outcome of parliamentary elections because of the 10 percent threshold. This constitutional provision has so far played a very generous role for the AK Party in national elections. But a coalition of all the major opposition parties against the AK Party could put the latter in a very difficult situation in the Parliamentary elections of June 12, 2011. The AK party comfortably won a simple majority in Parliament. Of course, a wholesale united front against the AK Party had never been a realistic project, given the differences between the opposition parties in ideological, political and economic policy. That has been proved in the outcome of the parliamentary elections of 2011. Before the newly formed parliament President Gul states:

> After the 1921 and 1924 Constitutions, which were initiated under the personal leadership of Gazi Mustafa Kemal, the subsequent constitutions were unfortunately the product of interim periods in which democracy and consequently the people's will were suspended. The 1982 Constitution currently in force is thus the product of such an era and despite comprehensive reforms implemented in recent years, it has lost its internal systematic, becoming too narrow to accommodate the level of democratic and economic sophistication our nation has reached. As a nation, our dynamic population has surpassed the 70 million mark and in about 10 years, we will be celebrating the Centennial Anniversary of our Republic. In almost a half-century from today, we will commemorate our presence in these lands for a millennium. It is natural then that as a country and a nation, we look with hope towards a brighter and better future. This is why, we must conduct

> the process for a new constitution with composure, self-confidence and determination and without sacrificing the process to mistakes in method and discourse. [20]

President Abdullah Gul's pragmatic policies are now quite appreciated within the country and camps of Turkish friends and foes. In fact because of Turkish pragmatic policies, Ankara has been holding a number of good balance sheets with US and Iran both of which are in loggerheads for more than three decades. The assertion that Iranians are neighbors for the Turks in territorial terms and Turks cannot afford to have animosity with the Iranian as Americans cannot have bad neighborly relations with the Mexicans came from the top levels of modern Turkish polity unknown to Turks before. This foreign policy of mutual understanding has some ramifications for the Turkish domestic policies and reforms as well.

Kurdish Issue and Turkish Multiculturalism

In the past there was a tendency in the Turkish media to trivialize the problems of the prolonged suppression and oppression of Kurds by Turkish ultra-secularists, who did not know how to handle the conflicts between Turks and Kurdish Muslims. Many Turkish elite believed that the conflicting issues between these two Muslim nations are of imaginary character or just concocted by the enemies of Turks. One may find a disproportionate level of accusations against the Turks in their handing of Turkish nationalists or PKK.

However, to compare the Kudish predicaments in Turkey or Iraq with the Armenian uprising and subsequent massacre of some Armenian population has very little to do with the Kurdish issues in Turkey. Turks could be better off with a comprehensive rapprochement with the Armenian and Kurdish issue. The secular and nationalist forces in Turkey have never given adequate attention to the problems of Kurdish people, who might have contributed immensely to make Turkey a pluralistic society.

Until the rise of Islamic forces to the highest level of powers in Turkey the principle of pragmatism had never been used in addressing the traumatized relations between Turks and Kurds. The so-called Islamists in Turkey made a clarion call to stop bloodshed between these two Muslim people. The AK Party claimed that it can resolve all nationalist and ethnic conflicts in Turkey through dialogues and negotiations. The ruling party's claim that the Kurdish issue can be resolved without resorting to military means is in itself. Giving appropriate recognition to the Kurdish language and allowing its widespread use in a special state-run TV channel (TRT 6)

[20] Address by His Excellency Abdullah Gül, President Of The Republic Of Turkey, To The Turkish Grand National Assembly On The Occasion Of The New Legislative Year (The Turkish Grand National Assembly, October 1, 2011) In: http://www.tccb.gov.tr/speeches-statements/344/80885/addreb-by-his-excellency-abdullah-gul-president-of-the-republic-of-turkey-to-the-turkish-grand-natio.html

and on several private channels made many Kurds living in Turkey happy and keener to be almost fully integrated into the general Turkish society.

Until the formal dismantlement of the Ottoman state in 1923, Turks had played a very interesting and comprehensive role to make their society multicultural. With the rise of the Young Turks, Turkish multiculturalism came to a halt for around a century. But the rise of present-day civil society organizations, like the Gülen Movement, is reminiscent of the deep-rooted tradition of Ottomanism, based on Islam's ideal of universalism.

The results of 2007 parliamentary elections have been demonstrated that AK Party was there to win the majority seats in the parliamentary elections of 2011. However, like other political parties AK Party was also worried to find 20 MPs in the parliament solely representing the Kurdish voters. For a long time the Ottomans did integrated Armenians as full citizens of their Statehood. But just before its final collapse the Ottomans as an empire Turks could not handle the Armenian issues well. Similarly coming to the power the Young Turks had failed to appreciate that they need to address the Kurdish issues prudently.

However, to say that the AK Party has been practicing an ideology similar to that of Ottomanism would be a great exaggeration or over-simplification of a long historical phenomenon of Islamic internationalism. The correct evaluation of the AK Party would be its unwillingness to use religious issues aggressively and excessively for partisan gains in a multi-party electioneering system. However, the AK Party does not shy away from religious and cultural traditions.

Under the system of Turkish pluralism and multiculturalism there exists a fringe group of extremists with a militarism that can only be defeated with the help of the universal and spiritual prospects of progressive Islamism, the kind which can be found and nurtured within the ideological framework of the AK Party. We should not forget that the AK Party as a political and cultural force has already become synonymous with the moderation and stability without which Turkey might have been trapped in the state of political anarchy and economic stagnation characteristic of the pre-AK Party decade and prevalent in many Muslim countries around the world.

Kurdish problems in Turkey are yet to be resolved for the benefits of Kurds and Turks simultaneously. It is one OF the big challenges for achieving solid and long-lasting political stability, ethnic harmony, and religious tranquillity in the constitutional and political system of Turkey. Just by putting political ban on Kurdish activities, Turkish government no more interested in seeking national solidarity. PKK has already been discredited up to the extent that Kurdish population in Turkey in general no more subscribe the idea that an armed resistance is required to achieve a kind of provincial or ethnic authority for the Kurds in Turkey.

In 2002 when AK party won the parliamentary elections and from the government, like others, Kurdish voters in Turkey were in hesitation to

cooperate and collaborate wholeheartedly with the sitting government. Hardly anybody believed that rise of the AK Party in power was a great signal that majority Turkish voters wanted a stable government with the help of Islamic political forces with stronger sensitivity to all important challenges, including the rightful accommodation and rehabilitation of Kurds in Turkey.

> In the Kurdish regions of Turkey the Peace and Democracy Party (BDP), has the majority of the Kurdish vote. The Rights and Freedom Party (HAK-PAR) and the Participatory Democracy Party (KADEP) come second and third... The AKP also announced the "democratic initiation program" to solve Kurdish issues and has had secret talks with the Kurdistan Workers Party (PKK), but over the past two years it has also started arresting Kurdish activists and BDP leaders under the pretext of ties with the PKK.[21]

Religious Factors in Turkish Politics

It is a conventional belief that the traditional religious forces have already been wiped from the Turkish political landscape and voting map. The marginalized orthodoxy cannot re-enter the political arena, provided the extreme secularist and nationalist forces do not attack the historical and cultural legacy of which the vast majority of Turks are very proud. After almost a century, the Turks as a nation have regained their national, religious and cultural pride through education and spiritual enlightenment; this rediscovered pride can be threatened only by extremist forces based on fanatical anti-Islamism.

Islam is a very practical religion aspiring for a normal mundane life for all irrespective of ethnic, religious and cultural identities. Gender related issues have also been looked as in the line of deen-al-fitrah (natural way of life). Anti-Islamism had become as the bedrock of Turkish ultra-nationalism for quite sometime. Kemalism had replaced the ethos of Islamism.

> From the 1930s onward, the state emulated the Soviet mentality of destroying churches and installing personalities as goods to worship. The Turkish state applied a similar method, distancing itself from the Anatolian conservatives and forcing each village to install a statue of Ataturk. Instead of burning churches, they put Ataturk on a pedestal and turned his cult into a semi-religion. They wanted people to become modern by negating their Muslim roots and they needed to replace the void with something else to worship.[22]

21 Khoshnaw, Hemin, "Majority of Kurds in Turkey Support a Kurdish Entity", In: http://www.rudaw.net/english/news/turkey/4793.html (last visited June 3, 2012.)

22 Pope, Nicole "If you start from zero, things can only get better," in *Turkish Review*, Vol. 1, Issue 3, March-April 2011, Istanbul, p. 60.

After the tragic incidents of 9/11 (2001) and U.S.-led war in many Muslim countries particularly in Iraq and Afghanistan gave an impression that Islamofobia is a creation of anti-Islamism in the West. However, the study of the Turkish history of twentieth century has revealed that Islamofobia was a concocted ideal to be pursued in secular Turkey up to the final decade of the past century.

On the other hand, we may consider Islamophobia as a reaction to the so-called Jihadist movements that practically non-existent in mainstream Turkish Islamic and Muslim practices in the twentieth-first century. The ugly assault of the right-wing Germans against the Turkish diaspora in Germany is one of the consequences of anti-Islamic sentiments in Europe. Turkish diaspora is no longer limited to Germany; it is growing in many countries, including Iraq, the US, Russia and many Commonwealth of Independent States (CIS) members.

It appears that within the Turkish communities living outside Turkey, Islamic factors have increasingly become a unifying force to celebrate Turkish identity and the Ottoman legacy. Too much pride in the Ottoman legacy in Turkish communities may provoke fears about Jihadist ideas among the secularists, nationalists, Westerners and even some segments of the Muslim communities. Here, Turkish politicians with stronger Islamic values and Muslim traditions need to discover the fine lines they must follow to unify the Turks both within Turkey and beyond.

Dilemma with many fundamental rights including civil and religious rights protected by any constitutional system initially tends to build a "high-Wall" between religion and secularism. However, a reconciliation process between the two is necessary to have a solid constitutional legal framework for all citizens of all colors and religions.

> Conflicts in constitutional politics over religious freedom, however, involve not only deciding between and applying the nonpreferentialist or accommodationalist approach versus the high-wall theory of separation of government and religion. In the contemporary administrative state, laws and exemptions from laws may be challenged for violating either the establishment clause or the free exercise clause. There is an essential tension between these two guarantees. Exemption from the draft for conscientious (religious) objection to killing and war, for instance, may be defended by claiming the free exercise clause, but attacked under the establishment clause for aiding religion. Scholarships, grants, tax credits, or reimbursements have, likewise, been viewed as infringing on, alternatively, one or the other religion clauses. [23]

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[23] O'Brien, David M., *CONSTITUTIONAL LAW AND POLITICS* : Civil Rights and Civil Liberties, Vol. Two, Sixth Edition, 2005, pp. 694-5.

Conflicts between different types of rights and their realization know many historical, economic, and cultural facets and dichotomies. On the other hand, the role of civil and military bureaucracy in running the State and public affairs has been shaping and reshaping in the context of globalization as well as intensive economic regionalization. Since the last decade of the twentieth century, Turkey has been caught by the dynamics of global economy and trade on the one hand and regional liberalization on the other.

At the initial period of the post-Cold War era, Turkish domestic policies were not at all helpful to address the underlying problems Turks had been facing at different stages of global trade and international politics. In this backdrop, Turkey has been desperately trying to bring about some significant constitutional and judicial reforms.

Rewriting the Constitution and the Attempt of Adopting a New Constitution

Rewriting the Constitution and the attempt of adopting a new constitution during last ninety years, Turkey has rewritten its constitution many times. Changes did occur with some limited successes toward democratization of Turkey. Usually we criticize Turkish constitutional system for its overly institutionalized dominance of military forces over civilian governance and administration of the country. Not many analysts see the intertwined militarism and secularism in the constitutionalism of Turkey until the triumph of AK party in help of political powers in the twenty-first century.

In the West democratic institutionalization goes hand in hand with the secularization of the society. In the East, the democratic process has been renamed as authoritarian form of electorate system with Asian values. Turkey is at the cross-borders of European and Asian continents not only in terms of its territorial disposition, but also in many other considerations such its ambition to be integrated fully with the Europeans. In terms of Turkish secular and military development, Turkey was closer to a Soviet system rather than a European pattern of democratic rule that exited in the twentieth century.

However, "Soviet character" of the Turkish constitutionalism remained unnoticed because of Turkish alliance with the West European Nations and USA. Turkish military elite and ultra-secularist politicians might have thought that Turkish economic integration with the Western countries in general and European countries in particular would follow a pattern similar to the Turkish integration in the NATO system.

Since 2003 Turkey's cooperation with the Western nations, particularly with the USA, has become rather strategic than ideological. Turkish political orientation and military involvement with Western countries came under closer scrutiny of its constituencies within the country and its Muslim friends and foes abroad. The denial of Turkish parliament to allow NATO forces to use Turkish territories and airspace in the process of USA-UK-led military occupation of Iraq had surprised the entire world.

Within the political spectrum of Turkey, for the first time, nationalist forces found common ground with the so-called Islamic forces, which were on the rise. Ultra-secularist forces and military elite has become unnerved up to the point that they tried to orchestrate military coup against civilian-led government and wanted to curtail the powers and function of the Turkish parliament.

In fact, in the twenty-first century, Islamically oriented political forces in Turkey found many reasons why they should be cooperating and collaborating with others, including moderate secularist and patriotic nationalists, to have and protect a democratic system based on fair and free electorate system of their own. For a wider segment of Turkish population, democracy and Islamism were no more contradictory to each other. Anti-Islamic Secularism and ultra-nationalism protected by Turkish military elite has received a dubious character and in many ways unacceptable to the regular working Turkish population because of overly hostile nature of state-sponsored ideological showdown against all kinds of political adversaries.

Since the early days of the twenty-first century, Turkish parliament and election commission have been playing their active role in strengthening the democratization process in Turkey. Judiciary process and police surveillance and investigation process of crime has become more transparent than ever before. Under popular pressure military intervention in political affairs has been decreasing both in terms of intensity and frequency and politicians appears to be less corruptive in an effort to make them acceptable to the wider segments of voters.

A cleaner image of political process in Turkey has paved the way for the moderate Islamic forces to become victorious in the parliamentary elections repeatedly. The victory of the AK party in the parliamentary elections of 1911 was marked as a shift of power of balance in Turkey in favor of moderation in exercising State powers in all important national issues of the country.

Turkish constitutional system is a rigid one. AK party holds only a simple majority in the parliament. Why, then, party in power has been pushing for rapid and comprehensive constitutional reforms? How the ruling-party MPs wish to achieve their goals of rewriting the entire constitution? In fact, AK party made it very clear that it wish to adopt a new and dynamic constitution in view of the changed political landscape of the country.

It appears that AK party wishes to create political consensus over some important constitutional issues. In its efforts AK is keen to take the necessary help from other political parties and forces based on dialogues and political discourses. Instead of waiting for winning more parliamentary seats required to adopt constitutional amendments or to go for a new constitution, politicians of the ruling party decided to put the agenda in front of public and media.

It is very clear that the ruling party wishes for a swiping and dramatic change of the constitutional system of Turkey. Some are voicing for the abolishment of the Constitutional Courts and the National Security Council all together. Some politicians and reformists, including the sitting Prime Minister, Recep Tayyip Erdogan, time and again have been sending signals that they would be willing to change their existing parliamentary system into presidential form of government.

In fact, with few exceptions such as Malaysia, in the Muslim world parliamentary democracy did not bring much stability to the political atmosphere of any country. Overcoming a lot of hurdles, moderate Islamic forces in Turkey succeeded to bring political stability in the country. There is a growing fear that a united front against AK party may destroy the gained political stability during last few decades. The policymakers of the AK party appear to be conscious about their own religious lenience and the challenges they have been facing in a country where the voters are now extremely polarized.

There is no reason to assume that Turkish voters support the AK party candidates simply because of some religious and cultural reasons. Many voters simply vote for AK Party because of its better performance in formulating and executing economic policies that bring direct or indirect economic dividend to wider segments of population. Moreover, at the leadership levels the AK Party and in its running the state affairs public eyes can easily observe a cohesive governmental policy admired by non-religious forces.

It has been proven time and again that the core support basis of the AK party comes from the religiously lenient political forces or people with strong appetite for Muslim way of life with Turkish facets. But a major reason of the steady increase in popularity of AK Party is its honest patriotic character with moderate Islamic behavior. When it comes to the issues of electoral reforms, almost all political parties wish to put forward some ulterior motives of their own.

"Opposition parties complain about the flawed legislation, but never make any reference to these flaws once they come to power. Sadly, the AK Party is no exception." [24] The issues of writing a brand new constitution for Turkey are almost inseparable from the overhauling the electorate system of Turkey. At present the issues of the constitutional and judicial reforms in the political landscape are open ended. However, until recently the basic structure of the constitution and the present parliamentary form of government were not under any serious review.

[24] Korucu, Bulent, "Turkey's Election Law falls Short of the Mark", *In: Turkish Review*, Vol. 1. Issue 3, Istanbul, 2011, p. 21.

Conclusion:

During the nineteenth century, Turks could not achieve any breakthrough in establishing a constitutional framework of their own. During the second half of the nineteenth century, a number of attempts had been made to reform other branches of legislation, including, Muslim personal law. However, the importance of constitutional law had been ignored and thus Turkey remained without any constitutional rule up to 1921. After that prolonged unfortunate scenario, Turkish constitutions had been adopted based on the instructions of some military leaders.

Modern Turkey has been experiencing many contradictory courses of changes in its constitutional development. Prior to the rise of Young Turks in 1908, more than three decades there was practically no constitutional rule in Ottoman Turkey. In fact, from the mid of nineteenth century up to the official dismantlement of the Ottoman Empire in 1924, Turk politicians had ignored the importance of having some visible and strong legal framework for achieving a system of good governance and rule of law in the country.

With the rise of Turkish nationalism during the early decades of the nineteenth century, Turks as a Muslim nation had become an isolated nation like the Persians and Indians Muslims. However, unlike the Indian Muslims, neither the Persians nor the Turks could be brought under any direct colonial occupation. From its inception as a nation-state in 1924, Turkey has taken secularism and nationalism very seriously, making these ideological doctrines into constitutional principles to be followed at all levels of governance almost in a similar fashion that of the Russians.

Under one-party rule Russia and Turkey took the course of anti-Islamism as their state ideology respectively. Russian atheism and anti-Islamism had been regarded as the integral part of Communist or Marxist ideology and anti-Islamism was regarded necessary in Turkey for the successful triumph of Secularism. In both cases history went wrong serious in both the countries in regard to religious and individual freedom and political liberty.

The constitution adopted in 1924 was a reactionary legal document based on anti-Islamic and ultra-secularist and chauvinistic nationalist principles. The ideological basis of the first secular constitution had been regarded as Kemalism, which had been proved to be inadequate and even destructive for the smooth development of any decent constitutionalism in Turkey. After the death of Kemal Attatuk in 1938, his cronies were determined to keep Turkey in an old fashioned anti-Islamic and anti-Arab course of development.

During the Cold War Ear, some visible changes did occur without any cohesive development in constitutional rule of the country. Military dominance in the system of governance of Turkey remained fashionable until the final collapse of the USSR in 1989. During 1990s a number of attempts had been made to make constitutional development pro-people

But in terms of trials and errors it had undergone and clear-cut division between the civil and military administrations it had achieved can be regarded as a remarkable achievement by any standard. At present there exists no serious military threat to civil administration of the country.

However, attempts to being a presidential system of government to replace the preset parliamentary system might destabilize the existing system of governance. The apparent complication with existing parliamentary democracy is that corporate entities have been increasingly becoming the power-brokers and active players in the electorate system, which may have become corrupted quickly. Moreover, Turkish Parliament has been acting very slowly to resolve the issues related to Kurdish predicaments, secular and nationalistic chauvinism.

Division of powers and functions between Head of the State and head of the Government under present-day Turkish constitutional arrangement knows very little controversy. However, both of these institutions until now have of facing a kind of vulnerability in the face of competing military and civil administration and lengthy process of *modus oparendi* when government needs to take prudent and decisive actions to resolve big national disputes and conflicts. However, any undesired attempt to change this ongoing parliamentary system into presidential system may destabilize the overall political landscape of Turkey, which needs political stability and comprehensive legal and judicial reform to prepare the country to be competitive in the regional and global economic groupings.

Secular Turkey of twentieth century hardly can be proud of any achievement it gained under ultra-nationalism and anti-Islamism. Since the adoption of 1982 constitution of Turkey, Turks have been trying hard to overcome its image of *Sick Man* of Europe and to make itself a full member of EU from its observer status.[26] Turkey has failed to become a member of EU and that failure has turned into many success stories in economic and political fronts within its territorial boundaries.

> As the single Muslim member of NATO, Turkey had served as a balancing power in the European continent and beyond. Turkey's relationship with Israel recently soured, and that made Prime Minister Recep Tayyip Erdogan a unique hero for the entire Muslim world....Turkey is now an example of how pro-Islamic forces can draw huge number of moderate secularists and nationalists into the fold of the positive reformists, ensuring more

[26] Turkey got an Associate Membership of the EEC (present-day EU) in 1964. Turkish governments have been yearning a full membership of EU since then. Ankara has been aspiring to be a member of Euro-zone as well. At present many Turkish political and religious circles believe that with a membership of Euro-zone Turkey could caught up with a Greek or Spanish syndrome of failed economy, if not failed State again. This syndrome of unrest over austerely measures in Europe would continue to intensify and engulf other Euro-zone members, who might not be seriously interested in further integration of EU members.

personal liberty and religious freedom...It is now more than a decade since the pro-Islamic political forces in Turkey ushered in a solid hope that under religiously motivated leadership a smooth and peaceful transfer of power from one government to another is quite possible. Accordingly, similar political forces with moderate views of Islam in other Muslim countries can also safeguard the much-needed constitutional system of transfer of power at the highest levels of governance.[27]

[27] Khan, Maimul Ahsan, "Egyptian and Turkish Constitutional Reform", In: *Turkish Review,* Vol. 2/4. Istanbul, 2012, pp. 68, 69.

TRIPS Agreement and Plant Genetic Resources: Implications and Challenges for Food Security in Least Developed Countries like Bangladesh

Dr. Mohammad Towhidul Islam*

Introduction

The World Trade Organization (WTO) *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS)[1] establishes intellectual property rights (IPRs)[2] in plant genetic resources (PGRs), especially in plant varieties and biotechnology, by way of patents, plant varieties protection (PVP) and the likes. This holds a one-size-fits-all approach for all countries irrespective of their standing in terms of making economic development and meeting basic needs including food security. In fact, developed countries have gradually increasing technology that helps them genetically modifying PGRs. Such use of technology often brings in better yields and ensures food security. Moreover, rents made out of the trade of PGRs-based products also encourage further research and development (R&D) for improving PGRs. This means with IPRs in PGRs, there will be more appropriable yields ensuring more security for food. However, least developed countries (LDCs) like Bangladesh lag behind R&D and often can not afford importing technology that helps genetic modification of PGRs. They are rather used to the free use of PGRs at all levels. Such free use helps farmers producing crops at low costs and thus helps meeting food security. Again, better yields with the use of genetic technology in their small pieces of land are proven to be helpful for LDCs like Bangladesh in meeting food security. However, the use of technology with rents usually increases the costs of food production which then jeopardises food security.

With the arrival of the TRIPS, two previously less related domains, intellectual property and international trade are now connected. This makes PGRs commodities of trade since it obliges member states to offer IPRs including patents or sui generis (of its own kind) protection over

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1 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 ILM 1197 [hereinafter TRIPS Agreement].

2 It was customary to refer to industrial and intellectual property rights. The term 'industrial' was used to cover technology-based subject areas like patents, designs and trade marks. 'Intellectual property' was used to refer to copyright. The modern convention is to use 'intellectual property' to refer to both industrial and intellectual property. The TRIPS Agreement translates IPRs into trade-related intellectual property rights in order to commercialise the inventions and simultaneously stop others from doing so unless rents are paid on licensing; for details, see M Rafiqul Islam, *International Trade Law of the WTO* (2006) 379–380.

microorganisms, microbiological processes and non-biological processes used for the production of plants and animals, and plant varieties. This also forbids countries using IPRs goods without rents. Such obligations are found to restrict access to PGRs which were once free to all. This contention is compounded by another fact that the TRIPS is not primarily an agreement about food and agriculture, and hence, it does not refer to any notion of food security.

With such TRIPS mandate in view, Bangladesh prepares a draft Patent Law 2007 paving the straight way for patenting PGRs. In addition, bilateral investment treaties, namely, the *United States-Bangladesh Bilateral Investment Treaty 1986* and the *European Union-Bangladesh Cooperation Agreement on Partnership and Development 1999* require it to enter into consultation and joining negotiations with the *International Convention for the Protection of New Varieties of Plants* (known as UPOV after its French acronym) containing a sui generis protection.[3] Accordingly, it gets the draft *Plant Variety and Farmers' Rights Protection Act* (draft Plant Variety Act) ready containing a UPOV style sui generis protection system as required by the TRIPS. In addition, being a party[4] to the *Convention on Biological Diversity* (CBD),[5] and the *International Treaty on Plant Genetic Resources for Food and Agriculture* (ITPGRFA)[6], and being persuaded by the local and international entrepreneurs, the country drafts the *Biodiversity and Community Knowledge Protection Act* (draft Biodiversity Act) containing access to and benefit sharing of PGRs.[7]

However, the UPOV based draft laws sparks extensive debate in Bangladesh between and amongst policy makers and the civil society. Elemental to their discussions is the issue of striking a balance between the rights of commercial breeders and the traditional rights of farmers and communities to save, use, sow, re-sow, exchange and sell seeds. In fact, making a right balance between the rights of breeders and farmers can

3 *International Convention for the Protection of New Varieties of Plants* was adopted on 2 December 1961, by a Diplomatic Conference held in Paris. It was revised in 1978 and 1991 [hereinafter UPOV Convention].

4 Bangladesh signed and ratified the *Convention on Biological Diversity* in 1992 and 1995 respectively [hereinafter CBD]. Bangladesh *International Treaty on Plant Genetic Resources for Food and Agriculture* signed on 17 October 2002 and ratified on 14 November 2003 [hereinafter ITPGRFA].

5 CBD, done at Rio de Janeiro, 5 June 1992 (entered into force 29 December 1993) 31 ILM 822.

6 ITPGRFA, adopted by the Food and Agriculture Organization (FAO) Conference on 3 November 2001 (entered into force on 29 June 2004) <http://www.fao.org/ag/cgrfa/IU.htmdocuments> 23 March 2010 [hereinafter ITPGRFA].

7 Several drafts on *Plant Variety and Farmers' Rights Protection Act* were made in 2001, 2002, 2003, 2007, and 2009 [hereinafter draft Plant Variety Act]. In addition, two drafts on *Biodiversity and Community Knowledge Protection Act* were made in the names of *Biodiversity Act* and *Biodiversity and Community Knowledge Protection Act* [hereinafter draft Biodiversity Act].

establish a regime that may help food production in a densely populated country sufficiently and at a low cost and can cause food access secured.

Revisiting the relationship between the TRIPS and PGRs and its major implications and challenges regarding food security for LDCs, particularly Bangladesh, this paper examines the issue of IPRs regimes that have most relevance to PGRs. It then focuses on the existing Bangladeshi laws that have relevance to PGRs—and the draft laws proposing plant variety protection that Bangladesh needs to undertake as part of the TRIPS compliance. During the analysis, this paper attempts to summarise the progress to date in establishing IPRs in PGRs in Bangladesh. Based on these observations, recommendations for the design and operation of an intellectual property system respecting PGRs and food security for Bangladesh are offered.

Relationship between IPRs in PGRs and Food Security

Innovations in PGRs including seeds, plants, and plant parts often involve plant breeding and agro-biotechnology products. Such innovations are not made in isolation but are derived from existing PGRs, often freely available in the public domain and are protected by IPRs.[8] This protection of IPRs in PGRs-cum-public goods holds significant elements of controversy over food security between plant breeding industries and farmers based in developing and least developed countries.

The TRIPS mandated IPRs in PGRs is supported by plant breeding industries with the view that protection of plant genetic inventions in the name of PVP is taken to secure incentives for plant breeding, and to boost agricultural products that improve food security.[9] In reality, this view can be rebutted with the contention that the conferral of IPRs in genetic innovations essentially results in a monopoly of genetic resources found in the public domain and provides unilateral benefits for a number of biotechnology rich developed countries, thus causing price-hikes of agricultural products and risking food security.[10] The contention also maintains that the breeder-cum-seller incentivising innovation system often ignores farmers based in developing countries and LDCs, although they possess unique local knowledge about their food needs and the technical capacity for follow-on innovations that meet those needs.[11] Such contention is further supported by the fact that with the patronage of the

8 Rahul Goel, 'Protection and Conservation—TRIPs and CBD: A Way Forward' (2008) 3(5) *Journal of Intellectual Property Law & Practice* 334.

9 Anitha Ramanna, 'Intellectual Property Rights in South Asia: Opportunities and Constraints for Technology Transfer' in Suresh Chandra Babu and Asok Gulati (eds), *Economic Reforms and Food Security: The Impact of Trade and Technology in South Asia* (2005) 187–209.

10 Sarah Wright, 'Globalising Governance: The Case of Intellectual Property Rights in the Philippines' (2008) 27 *Political Geography* 721, 722.

11 Keith Aoki, 'Free Seeds, Not Free Beer: Participatory Plant Breeding, Open Source Seeds, and Acknowledging User Innovation in Agriculture' (2009) 77 *Fordham Law Review* 2275.

TRIPS, multinational companies (MNCs) make use of herbicide-tolerant, insect-resistant and genetic restriction technologies.[12] Such uses are found to affect traditional saving of seeds, conservation of agricultural biodiversity and other agrarian means of living in developing and least developed countries. This impinges on farmers' comparative advantage in using and reusing PGRs and thus creates challenges on achieving food security.[13] In addition, MNCs focus only on the handful of crops with high appropriable value, including maize, cotton, soybeans and canola. Such selective production of crops often does not help meeting food security for three-fourths population of the world since they are dependent on cereal crops like rice, wheat and others. [14]

Further, the TRIPS mandated IPRs in PGRs is supported with the view that any increase in cereal yields made out of IPRs initiated reward is crucial for meeting food security. In addition, the fact as the TRIPS claims, higher yields come out of genetically modified PGRs appears to be the most welcome initiative in achieving food security for the mass people in South Asia and sub-Saharan Africa due to the limited amount of cultivatable land therein. So, to meet this demand of food security, growing crops by using bio-technology is a reality as is the acceptance of breeders' dominance. This acceptance means compliance with the TRIPS endorsed PVP and IPRs rules in the name of patents and sui generis protection and boosting agricultural products that improve food security.

As a sui generis protection of PGRs and also as an exception to patents, plant breeders' rights (PBRs) appear in Europe under the UPOV. However, the TRIPS does not have any reference to PBRs. Instead, it designs 'farmers' privileges' as exceptions to patents. Developing countries and least developing countries accept the TRIPS exception of 'farmers' privileges' in the name of 'farmers' rights'. However, the farmers' rights that counterclaim PBRs require not only protection for traditional agrarian practices but also recognition of farmers as breeders.[15] It creates an opportunity for developing and least developed countries to establish a unique system that serves both ends.[16] It obliges them to enhance IPRs as required by the TRIPS while protecting genetic resources to promote innovation in PGRs in line with the UPOV meaning boosting agricultural

[12] B Wright, 'Agricultural Innovation after the Diffusion of Intellectual Property Protection' in Jay P Kesan (ed), *Agricultural Biotechnology and Intellectual Property: Seeds of Change* (2007) 13.

[13] Jagjit Kaur Plahe, 'The Implications of India's Amended Patent Regime: Stripping away Food Security and Farmers' Rights?' (2009) 30(6) *Third World Quarterly* 1197.

[14] B Wright, 'Agricultural Innovation after the Diffusion of Intellectual Property Protection' in Jay P Kesan (ed), *Agricultural Biotechnology and Intellectual Property: Seeds of Change* (2007) 13.

[15] Anitha Ramanna and Melinda Smale, 'Rights and Access to Plant Genetic Resources under India's New Law' (2004) 22(4) *Development Policy Review* 423.

[16] Ibid, 424.

products that improve food security.[17] It also encourages them to uphold the rights of farmers in line with the CBD,[18] the ITPGRFA[19] and other non-binding obligations including the *International Undertaking on Plant Genetic Resources for Food and Agriculture* (IUPGRFA)[20] that recognise farmers' unique local knowledge about their food security and the technical capacity to make follow-on innovations that meet those needs.[21] Such efforts are likely to extend the concept of PBRs to include not only new varieties developed by breeders, particularly MNCs, but also varieties developed by farmers or nongovernmental organizations (NGOs).[22] It also aims to ensure that bio-piracy (utilisation of resources in developing countries by developed countries to create profitable products without compensation) does not occur.[23]

In Bangladesh, intellectual property laws arriving via colonial means or on the basis of the defunct rule of continuity after decolonisation did not have specific reference to PGRs and food security.[24] However, it is accepted that IPRs in PGRs came to Bangladesh with the British accession to the *Paris Convention for the Protection of Industrial Property 1883* (Paris Convention)[25]. IPRs in PGRs are made into application through the *Patents and Designs Act, 1911* (Patents and Designs Act)[26] and the *Trade Marks Act, 1940*, currently substituted by the *Trade Marks Act, 2009* (Trade

17 *International Convention for the Protection of New Varieties of Plants* was adopted on 2 December 1961, by a Diplomatic Conference held in Paris. It was revised in 1978 and 1991 [hereinafter UPOV Convention].

18 *Convention on Biological Diversity*, done at Rio de Janeiro, 5 June 1992 (entered into force 29 December 1993) 31 ILM 822 [hereinafter CBD].

19 *International Treaty on Plant Genetic Resources for Food and Agriculture*, adopted by the Food and Agriculture Organization (FAO) Conference on 3 November 2001 (entered into force on 29 June 2004) <http://www.fao.org/ag/cgrfa/IU.htmdocuments> 23 March 2010 [hereinafter ITPGRFA].

20 Report of the Conference of FAO, Rome, 22d Session, UN Doc. (1983) C/83/REP.

21 Susan K Sell, 'Corporations, Seeds, and Intellectual Property Rights Governance' in Jennifer Clapp and Doris Fuchs (eds), *Corporate Power in Global Agrifood Governance* (2009) 187–215.

22 Ronald J Herring and Milind Kandlikar, 'Illicit Seeds: Intellectual Property and the Underground Proliferation of Agricultural Biotechnologies' in Sebastian Haunss and Kenneth C Shadlen (eds), *Politics of Intellectual Property: Contestation over the Ownership, Use, and Control of Knowledge and Information* (2009) 66–68.

23 Ramanna, above n 9, 187–189.

24 Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works* (1987) 797–807.

25 *Paris Convention for the Protection of Industrial Property 1883*, signed 20 March 1883, 828 UNTS 305 [hereinafter Paris Convention].

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

Marks Act)[27]. However, Bangladesh did not frequently experience private rights of IPRs in PGRs. This is because the majority of PGRs research was conducted by the public sector which did not bother IPRs in PGRs. In addition, previously private sector did not have much concentration in this field.[28] However, the TRIPS provisions covering PGRs as IPRs protectable subject matter has changed the scenario. Private sector companies are now in the field to make R&D for high yielding crops and to secure their investment, they are concentrating on IPRs in PGRs. Such establishment of IPRs in PGRs is taken to have relations with food security.

IPRs Relevant to PGRs

Over the past few decades the issue concerning IPRs in PGRs has evolved significantly. However, until the last century PGRs which were in common heritage did not qualify as inventions.[29] In the course of the 20th century, human intervention supersedes the common heritage treatment, leading to the creation of new plant varieties from the heritage and endowing the varieties with patents or other forms of exclusive IPRs such as PBRs, trademarks, geographical indications (GIs) and trade secrets..[30]

General use restriction technologies (GURT) and bag-label contracts are also relevant. In Bangladesh, certain IPRs are considered to be relevant to PGRs. These are patents, trademarks, GIs and trade-secrets. The most relevant IPRs in PGRs are considered below.

(I) Patents

Patents act as the most important IPRs today for PGRs since they provide the strongest protection to investments made in agricultural R&D to improve productivity and attract further capital. When the TRIPS comes in, it lays down the general principle with regard to patentability. In maintaining the line, Article 27.1 of the TRIPS stipulates that patents shall be available for any inventions in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. However, Article 27.3(b) contains exclusion to this wide principle in the field of life sciences, biotechnology and genetic engineering. It states that members may exclude from patentability plants and animals other than microorganisms and essentially biological

27 *Trade Marks Act, 2009* (ACT NO. XIX of 2009) *Bangladesh Gazette Extra* published 31 August 2010 <http://www.wipo.int/wipolex/en/text.jsp?file_id=197266> 10 December 210 (hereinafter Trade Marks Act).

28 Savita Mullapudi Narasimhan, 'Towards A Balanced 'Sui Generis' Plant Variety Regime: Guidelines to Establish a National PVP Law and an Understanding of TRIPS-plus Aspects of Plant Rights' (Bureau for Development Policy, United Nations Development Programme, New York, 2008) <http:content.undp.org/go/cms-service/download/asset/?asset_id=1943122> 15 December 2009.

29 Kal Raustiala and David G Victor, 'The Regime Complex for Plant Genetic Resources' (2004) 58 *International Organization* 277.

30 S Verma and M S Sidhu, 'Impact of Intellectual Property Rights on the Indian Seed Industry' (2009) Man & *Development* 67, 67–68.

processes for the production of plants or animals other than non-biological and microbiological processes. However, Article 27 is flexible in its protection of plant varieties since it allows member countries to adopt patents or other means.[31]

In Bangladesh, the provisions of the Patents and Designs Act refer patentable invention to 'any manner of new manufacture and includes an improvement and an alleged invention'.[32] In that sense, PGRs-derived products and processes qualify as inventions and hence, are patentable. Plants or plant varieties that are new and derived from earlier varieties can also be taken as patentable since they meet the requirements of invention. This definition is broad since it covers seeds that are new and of industrial application as patentable. In line with this definition, PGRs are included within the definition of patentable invention.[33]

(II) PBRs

Along with patents, new plant varieties are protected by a special sui generis PVP system popularly known as PBRs. This permits developers of new plant varieties to control their marketing and use.[34] Such rights operate like patents with the exception that the right holders can only prevent third parties from commercially exploiting the protected materials.

In fact, when the TRIPS comes into force the only pre-existing sui generis plant variety protection is provided in the UPOV Convention. This makes many countries ratify the UPOV Convention upon the ratification of the TRIPS. Technically, such a sui generis system could form a part of other IPRs laws, such as the patent law. This approach exists in principle in the US and Australia.[35] Alternatively, it could be included in a separate law for its entirety and endorsement in the TRIPS as India and Thailand have chosen.[36]

In Bangladesh, the TRIPS acceptance has brought IPRs in PGRs into the forefront, especially PBRs. At the moment, its IPRs laws do not have provisions as regards PBRs. To fill the vacuum, its draft Plant Variety Act finds PBRs relatively better as an alternative to patents in the circumstances when operating on the basis of the free sharing of

31 Jayashree Watal, 'Intellectual Property and Biotechnology: Trade Interests of Developing Countries'(2000) 2(1-3) *International Journal of Biotechnology* 44.

32 Patents and Designs Act Section 2(8). It says: 'invention' means any manner of new manufacture and includes an improvement and an alleged invention.

33 Syeda Rizwana Hasan and Tanim Ahmed, 'Hybrid in Bangladesh: Concerns of Farmers' (Briefing Paper, No. 4, Bangladesh Environmental Lawyers' Association, Dhaka, 2005).

34 UPOV Convention Articles 3 & 19.

35 Dan Leskien and Michael Flitner, 'Intellectual Property Rights and Plant Genetic Resources: Options for a Sui Generis System' (Issues in Genetic Resources No. 6, IPGRI, Rome, June 1997).

36 Robert E Evenson, 'Intellectual Property Rights and Asian Agriculture' (2004) 1(1) *Asian Journal of Agriculture and Development* 15, 15–18.

knowledge in the pre-TRIPS era.[37] In addition, Bangladesh takes up PBRs for a number of reasons. In the first place, compared with patents, PBRs appear less monopolistic to most agriculture-prone developing and least developed countries. Since agriculture is a sector of primary importance in Bangladesh, selecting PBRs in the draft Act is a smarter choice for the purposes of protecting farmers' rights. Further, subsistence agriculture forms a large part of Bangladesh's agricultural activities. This implies a close link between agriculture and the fulfilment of the food needs of all individuals. Since the PBRs bear flexibilities to reflect countries' specific agro-economic conditions, the draft Plant Variety Act is expected to constitute an appropriate response to the country's subsistence agriculture and the fulfilment of its food security.[38]

(III) Trademarks

Trademarks can be applied to PGRs-based products or services. For instance, trademarks are used to market seeds or spraying services. Trademarks are also important in most food markets. Marks help identify brand names and prevent other companies from benefiting from brand loyalty.[39] The TRIPS provides for the registration of agricultural products (e.g. seeds, fertilisers) with trademarks.[40]

In Bangladesh, under the provisions of the Trade Marks Act, trademarks can be applied to goods and services.[41] In that sense, trademarks can be used to market agricultural products, especially seeds, foods or spraying services. They distinguish brand names of PGRs based products and prevent other companies from benefiting from brand loyalty.

(IV) GIs

GIs, including appellations of origin, are an important form of IPRs of interest to PGRs. For the most part, GIs relate to PGRs-based products—or items derived from the same, as in the case of wines and spirits—having originated in a particular region, locality or country, where reputation or some quality characteristic of the goods is essentially attributable to that origin. Plant varieties developed with traditional knowledge (TK) and associated with a particular region can also be protected as GIs. The advantage of such protection is that it is not time-bound, unlike plant patents or PBRs. Many see this as a mechanism for raising incomes in agriculturally based developing economies, although the major users at present are European nations.[42]

37 Phillipe Cullet, 'Plant Variety Protection in Africa: Towards Compliance with the TRIPS Agreement' (2001) 45(1) *Journal of African Law* 97, 117–122.

38 Ibid.

39 Watal, above n 31, 34.

40 TRIPS Agreement Article 15.

41 Trade Marks Act Section 2(8).

42 Watal, above n 31, 44.

For GIs, the TRIPS maintains a dual structure of protection. In the first place, it obliges countries to use legal means to prevent the identification or presentation of a product that would mislead consumers as to its true geographical origin and to prevent acts of unfair competition in this regard. The TRIPS also calls for a higher level of protection for GIs only in wines and spirits. To accommodate other products including PGRs, the TRIPS Council is holding negotiations.[43]

In Bangladesh, the Trade Marks Act does not follow the TRIPS mandate for GIs since it does not allow the registration of a product with GI.[44] However, it is possible to use the common law tort of 'passing-off'[45] to protect GIs in the country.

(V) Trade Secrets

Trade secrets provide protection for any information (whether patentable or not) that has economic value and is prevented from disclosure by firms through reasonable efforts. Trade secrets may be critical for biological materials that are not sold, but rather used in production. Examples include a microorganism used to make a drug or a parent line used to make a hybrid. The commercial advantage of trade secrets in these cases is that the inventor is not required to publish the protected information. Trade secret protection can be used by the agricultural sector to protect, for instance, hybrid plant varieties. Trade secrets can be protected against third party misappropriation through laws relating to unfair competition or to restrictive trade practices or to contract law.[46]

The TRIPS requires countries to set out laws defining the nature of unfair competition in this area, with the intention of raising the costs of learning technical business secrets through permissible reverse-engineering and encouraging labour mobility.[47]

In Bangladesh, trade secret protection is available under common law. However, it has never been tested. This is also the case with the protection of undisclosed test data submitted for obtaining marketing approval for new agricultural chemicals.

(VI) Other Instruments Asserting IPRs in PGRs

In addition to common IPRs, plant innovators rely on a few other means to assert their IPRs. The GURT is one of them. It uses the terminator genes

43 Keith E Maskus, 'Intellectual Property Rights in Agriculture and the Interests of Asian-Pacific Economies' (2006) 29(6) *World Economy* 715.

44 Trade Marks Act Section 6.1(d).

45 In the common law, a person who gains a reputation in connection with the use of a particular mark is entitled to prevent another from passing off goods or services as being those of the owner of the mark if the work of the latter is likely to injure the former's reputation. See Kok Keng Lau, 'Passing off of Well-Known Trade Marks' (2010) 22 *Singapore Academy of Law Journal* 426

46 Watal, above n 31, 44.

47 Maskus, above n 43, 715.

which run counter to the traditional right of farmers to save seeds.[48] To get rid of such technology seeds that get in the way of farmers' rights, the *Cartegena Protocol on Biosafety*[49] appears as a milestone. It tends to manage such risks of technology and ensure traditional practices of seed saving.[50] There are certain specific contractual arrangements, such as the bag-label contracts that control access to genetic resources and the use of hybrids, which ensures the protection of parent lines.[51]

In Bangladesh, with the use of the Seeds Ordinance and the Seeds Rules 1998,[52] even the private sector can import and market any non-notified seeds.[53] As a result, the importing and marketing of terminator or GURT seeds is also allowed under Section 17(3). Farmers' rights groups in Bangladesh vehemently oppose such technology seeds. They are trying to make people aware of the effects of the terminator technology and pressing the government to adopt a bio-safety regulation in line with the *Cartegena Protocol on Biosafety*.[54]

In addition, Bangladesh does not make any condition for (i) bag label contracts, which restrict the use of the materials by farmers and others; for (ii) material transfer agreements (MTAs), which define the rights and obligations of users dealing with patented materials; or for (iii) technology use agreements (TUAs) restricting the use of plant genetic material by farmers.[55]

Thus, it appears that the beginning of IPRs in PGRs took place in agriculture-prone countries either via the existing IPRs framework or by making necessary amendments to the framework. For Bangladesh, the Patents and Designs Act and the Trade Marks Act already provide for IPRs in PGRs in the name of patents or trademarks. However, plant breeders' and farmers' rights did not enjoy their subsistence until the arrival of the TRIPS.

48 Joseph Gopo and Patricia Kameri-Mbote, 'Biotechnolgy: A Turning point in Development or an Opportunity that Will Be Missed' in Ricardo Melendiz-Ortiz and Vicente Sanchez (eds), *Trading in Genes: Development Perspectives on Biotechnology, Trade and Sustainability* (2005) 36-51.

49 *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, 29 January 2000, 39 ILM 1027.

50 Gopo and Kameri-Mbote, above n 48, 47.

51 Geertrui Van Overwalle, 'Patent Protection for Plants: A Comparison of American and European Approaches' (1999) 39 *IDEA: Journal of Law & Technology* 143.

52 'The Seed Rules, 1998' <http://www.sca.gov.bd/seedrul.html> 10 July 2010.

53 M B Dastagiri, 'The Seed Laws of Asian Countries under the WTO and IPR Regime: A Paradigm Shift' (2008) 37(4) *Outlook on Agriculture* 297.

54 See Farhad Mazhar, 'Genetic Resources Conservation and & Utilization: The Role of the Farming Communities' (Presented at the National Workshop on Plant Genetic Resources organised by National Committee on Plant Genetic Resources, BARC, Bangladesh, 26–29 August 1997).

55 Ibid.

TRIPS Agreement and PGRs: Implications and Challenges for Food Security

Intellectual property rights in PGRs have taken on extensive implications for food security, with the linkage between intellectual property and tradable biological resources in the 1980s and with the subsequent institutionalisation of IPRs protection in the TRIPS. In a crucial and controversial provision in the TRIPS, signatory countries become obliged to extend IPRs protection to plant varieties. This brings the obligation to grant state-supported monopolies over the commercial distribution of scientifically engineered seeds. For the biotech industry, the institution of such protection through PBRs holds the prospect of high yields and encourages commercial breeders, who had usurped seed innovation from farmer's decades earlier, to make more investments in this sector.[56] However, for many farmers in developing and least developed countries, the expansion of IPRs to include plant varieties marks a departure from the traditional practices of reusing and trading seeds collected from their own fields, strips off their comparative advantage in reproducing seeds and thus poses a threat to their traditional way of life: traditional varieties are pushed aside in favour of the purchasing of new seeds for every crop.[57] Many are also concerned about the implications arising from shifting agricultural research from public to private funding, which is often dominated by MNCs.[58]

A. TRIPS Agreement and PGRs: Fostering Commercialisation

The TRIPS generally fosters commercialisation of PGRs, causing displacement of traditional agriculture-based products by laboratory-produced substitutes. For the TRIPS proponents, commercialisation of PGRs is needed to secure investments so that more companies get involved in agricultural research and develop technologies specifically designed to enhance food security through higher yields, better disease resistance and greater drought tolerance, making the seeds market competitive in price.[59] However, this argument runs counter to the fact that the commercialisation of a number of major agricultural inputs including seeds and herbicides results in the destabilisation of local food economies, with far-reaching effects on food security in developing and least developed countries.[60]

56 Vandana Shiva, *Biopiracy: The Plunder of Nature and Knowledge* (1997) 1–6.

57 Philip M Nicols, 'Trade without Values' (1996) 90 *Northwestern University Law Review* 658.

58 Craig Borowiak, 'Farmers' Rights: Intellectual Property Regimes and the Struggle over Seeds'(2004) 32(4) *Politics Society* 511, 512.

59 P O Goldsmith, D K Nauriyal and W Peng, 'Seed Biotechnology, Intellectual Property and Agricultural Competitiveness' in Jay P Kesan (ed), *Agricultural Biotechnology and Intellectual Property: Seeds of Change* (2007) 31.

60 Fred Magdoff and Brian Tokar, 'Agriculture and Food in Crisis: An Overview 61(3) *Monthly Review* (July 2009) <http://www.monthlyreview.org/090701magdoff-tokar.php> 25 March 2010.

Indeed, the commercialisation of PGRs contributes to a shift away from local farmer-centred agricultural practices to ones that are mediated heavily by corporate (often foreign) profiteering interests. The corporate control in farm-saved seeds has implications for local food access and this has led many to link farmers' rights with broader human rights issues, including 'food sovereignty rights', and the 'right to food'.[61] This is because the autonomy of individual farmers, the health of communities and the very operation of the seed distribution system and the conservation it enables, are all tied to farm-saved seeds. From these perspectives, private rights in PGRs, which shift farmer-centred agricultural practices to those that serve corporate interests, are seen to raise the price of patented seeds compared to other seeds, thus impacting food security.[62]

B. TRIPS Agreement and PGRs: Stripping off Comparative Advantage

In comparison with most fields of industrial innovation, innovation in plant breeding results in a self-reproducing organism. For this biological factor, imitation of the agricultural product is relatively easy, and comparatively advantageous to incorporate into farming operations. With the use of self-reproducing organisms and biotechnology, both industrialised and developing countries (e.g. the US, Europe, China, India, Brazil, Thailand and others) dramatically increase agricultural production of cash crops such as soybeans, peas, cereals and corn.[63] In addition, developing and least developed countries use such agricultural comparative advantage freely in order to reduce staple food prices.[64] IPRs that are introduced in PGRs through the TRIPS is likely to dismantle the comparative advantage and force farmers to repurchase seeds every year by enforcing contracts with farmers, many of which prohibit them from saving seeds and selling them to other producers.[65]

In Bangladesh, the PVP, as projected in the draft Plant Variety Act, is supposed to ensure PBRs by removing farmers' comparative advantage in exchanging or selling seeds and requiring royalty payments each time seeds are planted. In addition, it requires the Patents and Designs Act to incorporate the patenting of biotechnological products or processes. This is expected to result in high prices in foods, seeds, agricultural chemicals,

61 Hans Morten Haugen, Manuel Ruiz Muller and Savita Mullapudi Narasimhan, 'Food Security and Itellectual Property Rights: Finding the Linkages' in Tzen Wong and Graham Dutfield (eds), *Intellectual Property and Human Development: Current Trends and Future Scenerarios* (2011) 123-124.

62 Borowiak, above n 58, 522–530.

63 Carl E Pray and Anwar Naseem, 'Supplying Crop Biotechnology to the Poor: Opportunities and Constraints' (2007) 43(1) *Journal of Development Studies* 192.

64 Ryan Cardwell and William A Kerr, 'Protecting Biotechnology IPRs in Developing Countries: Simple Analytics of a Levy Solution' (2008) 59(2) *Journal of Agricultural Economics* 217.

65 David Lea, 'The Expansion and Restructuring of Intellectual Property and Its Implications for the Developing World' (2008) 11(1) *Ethical Theory and Moral Practice* 37.

herbicides and other agro-products made of patented biotechnology, as is the case in developing countries such as India and Thailand that are already the TRIPS compliant.[66]

C. TRIPS Agreement and PGRs: Creation of Private Monopoly Rights

By applying IPRs in PGRs, the TRIPS protects the interests of private capital. However, this turns genetic resources into private property leading to monopolies. Such privatisation of PGRs produces environmental and social consequences including insecurity of food because the process of commercialisation affects and undermines other forms of use and alternative ways of shaping the societal relationships with nature.[67] In addition, private property rights and the following privatisation and monopolisation of genetic resources threaten the principle of free exchange of seeds, which is essential for the development of agriculture and the creation of plant genetic diversity. This process is often criticised as bio-piracy, which not only signifies a problem of illegal appropriation but also of the monopolisation of resources through IPRs protection.[68]

With the Patents and Designs Act in force in Bangladesh, biotechnological products or processes receive coverage for patent protection, since they fall within the broad definition of invention. In addition, in the draft Plant Variety Act, the PVP is in line with the UPOV, as affected by the US-Bangladesh and the EU-Bangladesh bilateral treaties. All such requirements are heading towards making genetic resources private properties in Bangladesh, which means that food-stuffs, seeds, agricultural chemicals, herbicides and other agro-products made of biotechnology, are likely to be in private hands, especially in MNCs through patents or other IPRs. This would encourage MNCs to take the opportunity to monopolise market with higher prices for vital products including food stuffs.[69]

D. TRIPS Agreement and PGRs: Shifting Public Funded Research to Private Fund

Before the TRIPS, most new plant varieties in openly pollinated plants were developed by publicly funded research programs or institutes, commercialised on a concessionary basis and often given to farmers at

66 U K Deb, M J H Jabed, and M A Razzaque, 'Plant Genetic Resources and Farmers' Rights: The Case of Bangladesh' in Ratnakar Adhikari and Kamalesh Adhikari (eds), *Farmers' Rights to Livelihood in the Hindu Kush-Himalayas* (2003) 68–83.

67 Plahe, above n 13, 1197–1198.

68 Christoph Görg and Ulrich Brand, 'Contested Regimes in the International Political Economy: Global Regulation of Genetic Resources and the Internationalization of the State' (2006) 6(4) *Global Environmental Politics* 101, 110.

69 See Farhad Mazhar, 'Nayakrishi Experience: Addressing Food Crisis through Biodiversity-based Ecological Production Systems' (Presented at Policy Dialogue Series organised by UNDP, Dhaka, 8 July 2008).

nominal or no charge.[70] At that time, it was believed that private firms could not capture sufficient returns on investments in R&D in this area and as such, governments intervened to fund research to correct this market failure by different forms of government subsidy and support.[71] Under the TRIPS, the government's role of promoting agricultural research and supplying seeds at nominal costs is being scaled back.[72] Now, agriculture in developing and least developed countries loses government subsidies or other benefits directly paid to the farmers. In addition, those government agencies involved with agricultural research concentrate on biotechnology and are now in the process of patenting plant genetic materials as well as seeds. Such cutting of subsidies and patenting of PGRs are likely to have adverse effects on food security.[73]

Furthermore, the concentration on the biotech industry appears as a serious competition issue.[74] This is because food security falls at risk due to the fact that the technologies are overpriced to the exclusion of small farmers and there is no alternative source of new technologies, particularly from the public sector.[75] In Bangladesh, agriculture has remained a key source of livelihood for the farmers for centuries. Hence, in common with other LDCs, Bangladesh concentrates on agriculture and offers agricultural subsidies, even from the foreign aid that forms a substantial part of the national budget.[76] However, currently the donors do not encourage the country to spend money in agriculture, which is likely to implicate food security.

E. TRIPS Agreement and PGRs: Misbalancing Bio-diversity

In order to maximise profits, the TRIPS also patrons seed companies to develop bio-engineered varieties dependent upon agrochemicals, including fertilisers, herbicides and insecticides and induces farmers to buy such inputs and pay heavy royalties to MNCs and various taxes include value added tax (VAT) to the government.[77] In addition, in order to secure private rights, the TRIPS encourages monocropping, which creates the possibility of epidemics, because genetically uniform crops are very vulnerable to diseases. Perhaps the most striking example is the corn blight which

70 Carl E Pray and Umali-Deininger, 'The Private Sector in Agricultural Research Systems: Will It Fill the Gap?' (1998) 26(6) *World Development* 1127.

71 James D Gaisford, Jill E Hobbs and William A Kerr, 'Will the TRIPS Agreement Foster Appropriate Biotechnologies for Developing Countries?' (2007) 58(2) *Journal of Agricultural Economics* 199.

72 Cullet, above n 37, 97.

73 Ibid.

74 Ibid.

75 Ibid.

76 Kanchana Kariyawasam, 'Access to Biological Resources and Benefit Sharing: Exploring a Regional Mechanism to Implement the Convention on Biological Diversity in SAARC Countries' (2007) *European Intellectual Property Review* 325.

77 Lea, above n 65, 37.

struck the US in 1970; similar epidemics continue to occur in developing countries.[78] In addition, the increasing dependence of small farmers on the biotechnology industry, which the TRIPS fosters, raises fears that in the future, small farmers might have a low number of patent-free seed cultivars at their disposal, which will prove less efficient than patented seeds and produce smaller yields.[79]

Furthermore, with the sector shifting in agricultural biotechnology research, and the rise and expansion of IPRs in PGRs, there has been a redirection of research. This redirection of agricultural R&D has focused on crops that will earn high profits, with concomitant neglect of unprofitable subsistence crops.[80] Further, the shift from agricultural to industry research edges out increasing numbers of subsistence farmers, who had relied on seed-saving and maintained and developed farmer landraces. This results in the rapid disappearance of in-situ genetic conservation methods and related farming knowledge.[81]

F. TRIPS Agreement and PGRs: Access to and Benefit Sharing of PGRs

The recognition of farmers' rights in different international instruments including CBD has formed the basis of the efforts to facilitate farmers' access to and benefit sharing PGRs as monetary and non-monetary benefits in the ways of access fees, up-front payments, royalties, licence fees etc. However, the TRIPS though adopted later does not make any reference to the CBD. Agriculture-prone developing countries have started inserting the access to benefit sharing provision in most biodiversity legislations. In Bangladesh, the access to benefit sharing is proposed in the draft Plant Variety Act and the draft Biodiversity Act.[82]

New Strategies Needed

In the development of national and international frameworks for plant variety innovations, policy-makers need to be aware of the diverse perspectives that surround the use and breeding of plants.[83] With this background in mind, a better framework in the context of LDCs such as Bangladesh requires (A) reasonable national regulatory systems, and (B) affiliation with international coalition to exert pressure to ensure that

78 R Kennedy, 'International Conflicts over Plant Genetic Resources: Future Developments' (2006) 20(1) *Tulane Environmental Law Journal* 1, 2–5.

79 Christoph Baumgartner, 'Exclusion by Inclusion? On Difficulties with Regard to an Effective Ethical Assessment of Patenting in the Field of Agricultural Bio-Technology' (2006) 19 *Journal of Agricultural and Environmental Ethics* 521, 528–530.

80 Pray and Naseem, above n 63, 192.

81 Maskus, above n 43, 715.

82 Draft Biodiversity Act Section 4 and 18; Draft Plant Variety Act Section 10, 11 and 22.

83 Daniel Robinson, 'Sui Generis Plant Variety Protection Systems: Liability Rules and Non-UPOV Systems of Protection' (2008) 3(10) *Journal of Intellectual Property Law & Practice* 659, 664–665.

international agreements, including those concerned with trade, are made responsive to food security.

A. Framing National Regulatory Systems

As part of the formation of national regulatory systems, an LDC like Bangladesh is obliged to either introduce patents for new plant varieties or have an effective sui generis law to protect IPRs in PGRs by 1 July 2013. By that date Bangladesh must also bring the protection of trademarks, GIs and trade secrets up to the standards required by the TRIPS.

(I) Introducing Patents for New Plant Varieties with Redefining 'Invention'

To introduce patents for new plant varieties, the definition of the term 'invention' acts as a yardstick for identifying patentable products or processes. The TRIPS does not define the term 'invention' and leaves definition up to member countries. From such a standpoint, the term 'invention' must be of a technical character to the extent that it must relate to a technical field, concern a technical problem and possess technical features in terms of the matter for which invention is sought.[84] This interpretation is confirmed in jurisprudence with the comment that an invention must have a technical character, provide a technical contribution to the art and solve a technical problem.[85] The same approach is taken in legal doctrine throughout the western world; such doctrine states that inventions are creations in the technical field containing a technical teaching.[86] Therefore, in the context of a patentable invention, knowledge is mainly considered to be technical knowledge.[87]

Despite such instances and discretions, the Patents and Designs Act in Bangladesh gives a broad and vague definition of the term 'invention' meaning any manner of new manufacture and includes an improvement and an alleged invention.[88] By such definition, new plants or plant varieties are patentable inventions.

In order to get rid of the TRIPS implications, as Bangladesh is a least developed, agriculture-prone country, it has the first option to exclude plant varieties from patentable inventions and switch to sui generis PVP. As another option, Bangladesh can redefine 'invention'.

[84] Uwe Fitzner, 'Laws and Regulations for the Protection of Biotechnological Inventions' in Jose Luis Barredo (ed), *Microbial Processes and Products* (2005) 465–494.

[85] Van Overwalle, above n 51, 585.

[86] Ibid.

[87] Ibid, 587.

[88] Patents and Designs Act Section 2(8).

Currently, the draft *Patent Law 2007* (draft Patent Act)[89] of Bangladesh is in much discussion. It does not exclude plant varieties from patentability but tries to redefine 'invention'. It defines the term 'invention' in imprecise and large words. It means and includes any new, sufficiently inventive and useful art, process, method or manner of manufacture, machine, apparatus or other article or substance produced by manufacture and including any new, sufficiently inventive and useful improvement of any of them, and an alleged invention.[90] However, the wording 'sufficiently inventive and useful improvement' is still capable of patenting all substances that exist in nature, with mere discovery or bio-prospecting.

(II) GIs

In Bangladesh there are many agricultural products and species with GIs. The products include plant varieties, medicinal plants or traditional knowledge (TK).[91] IPRs protection in the name of GIs can be claimed for such agricultural products under the common law tort of passing-off. However, this common law tort is not used widely in Bangladesh and hence requires legislation or an amendment to Section 6.1(d) of its Trade Marks Act, which can offer GI protection to its own GIs or those of trading partners on the basis of reciprocity. It may also be possible for the holders of TK in goods produced and sold using GIs to register and protect their TK under such law. India enacts such an Act in the name of the *Geographical Indication of Goods (Registration and Protection) Act, 1999* in order to give the higher level of absolute protection to GIs irrespective of origin.[92]

(III) Trade Secrets

Trade secret protection is available in Bangladesh under the common law tort of passing off. However, due to its non-popularity and rigidity in proving the claim, Bangladesh needs to introduce the legal basis to extend such protection to cover third parties who directly or indirectly induce the breach of trade secrets. Bangladesh would also need legislation to protect undisclosed test data submitted to the DPDT for obtaining marketing approvals for new agricultural chemicals, fertilisers, herbicides, and pesticides.

(IV) PVP (PBRs)

IPRs regimes such as PVP are established to help achieving societal goals. Policymakers in LDCs like Bangladesh should therefore view PVP as a tool

89 Patent Law, 2007 (Department of Patents, Designs and Trademarks, Ministry of Industries, Government of the People's Republic of Bangladesh 10 January 2007) [hereinafter draft Patent Act 2007].

90 Draft Patent Act 2007 Section 2(14).

91 Mahfuz Ullah, *Intellectual Property Rights and Bangladesh* (2002) 61–62.

92 Siriginidi Subba Rao, 'Indigenous Knowledge Organization: An Indian Scenario' (2006) 26 *International Journal of Information Management* 224.

to be adapted and used for achieving national agricultural development goals rather than an obligation imposed by industrialised countries.[93]

In view of such understanding, LDCs such as Bangladesh can find a solution proposed in the context of the interpretative resolutions to the IUPGRFA, by recognising concurrently and equally the rights of farmers and the rights of commercial breeders.[94] Indeed, the TRIPS allows developing nations to construe such an option with the use of the term sui generis, since it gives them the discretion to determine the type and design of plant protection regime. Such a construction of the term sui generis enables developing countries to promote innovative plant breeding while preserving national objectives like protecting biodiversity, traditional farming, and food security.

However, the draft Plant Variety Act of Bangladesh that strengthens PBRs and thus expects to promote trade in Bangladesh does not define farmers as breeders. The sidelining of farmers through over-protection would affect trade and could lead to food security issues in Bangladesh. Therefore, while strengthening PBRs, the incorporation of farmers as breeders would recognise farmers' preservation of traditional farming practices, farmers' innovations by selecting and maintaining of seeds, farmers' traditional conservation of biodiversity and farmers' access to benefit sharing, thus meeting national priorities in agriculture-prone Bangladesh. This would also balance the interests of the variety of actors (especially commercial breeders and farmers) involved in agricultural trade. For example, such strategy brings harmony with the interests of commercial breeders and farmers in India and Thailand, as they start promoting the seed industry by encouraging seed trade, boosting exports and protecting seed quality.[95]

In order to benefit from defining farmers as breeders in Bangladesh, a review of the existing Seeds Ordinance, the Seeds Rules and the Seeds Policy[96] is necessary, with insertion of provisions therein to regulate the sale, import and export of seeds, as the TRIPS does not require governments to regulate seed trade. However, in making the review, the existing seeds framework needs to be harmonised with the draft Plant Variety Act and the Biodiversity Act. This will stop any compromise in the rights of farmers to save, re-sow or exchange seeds. This will also stop the registration and sale of an existing variety or a farmers' variety, or the authority to issue compulsory licensing to control price and regulate supply of seeds under public interest conditions.

93 Robert Tripp, Niels Louwaars and Derek Eaton, 'Plant Variety Protection in Developing Countries: A Report from the Field' (2007) 32 *Food Policy* 354.

94 Cullet, above n 37, 117–122.

95 See Srividhya Ragavan and Jamie Mayer O'shields, 'Genetic Use Restriction Technologies: Do the Potential Environmental Harms Outweigh the Economic Benefits?' (2007) 20 *Georgetown International Environmental Law Review* 97.

96 'The National Seed Policy' <http://www.sca.gov.bd/seedpol.html> 10 July 2010.

(V) Limiting Patents and PBRs through Compulsory Licensing

Limiting patents and PBRs can act as an element to reduce and minimise food and livelihood security concerns in an LDC like Bangladesh. The limitation on patents and PBRs can be imposed through compulsory licensing. The draft can introduce opportunities for compulsory licensing of patents and PBRs protected products: (a) where circumstances of national security concerns exist, (b) where such are required for the maintenance of nutritional stability and prevention of monopoly, (c) where purposes of other public interests subsist, and (d) where there has been no sale of the propagating material of the new plant variety or the sale thereof is of an insufficient quantity for the needs of the people within the country or the sale thereof is overpriced.

(VI) Access to and Benefit Sharing of PGRs

Access to and benefit sharing of PGRs are the key elements in meeting major food and livelihood security concerns in an LDC like Bangladesh. To this end, farmers should be allowed to choose from and have access to a wide range of germplasm and samples that would be best suited to their present needs. They should also have the right to use their own seeds. They should be free to improve germplasm (varieties and breeds) by using their own materials and those introduced from other sources. Farming communities should be free to sell the harvested commodity, to save seed (on non-commercial basis) for replanting and to share and exchange seeds. Farmer-to-farmer seed exchange and the sale of seed by farmers should be allowed. However a farmer should not be entitled to such rights in cases where the sale is for the purpose of reproduction under a commercial marketing arrangement. There should also be a broad access framework that could either prevent the PGRs from bio-piracy or removal from the country by local agents in the name of local access, or prevent privatisation by foreigners for profiteering purposes. It could also allow dissemination at the lowest possible cost to all farmers if the bio-pirated variety is of a staple food crop.[97]

B. Ratchetting up International Coalition

A sui generis plant variety protection system, as set out in the TRIPS, should not be developed in isolation. Given that plant varieties are only a subset of biological resources, all countries that are members of the WTO and the CBD should stand together and aim at drafting a single all-encompassing law which takes into account the requirements of the CBD and the TRIPS that recognise farmers as breeders and ensure their rights.

Concluding Remarks

IPRs in PGRs transform agricultural goods or services from common heritage to private property on making their uses restrictive. As a consequence, in order to secure the investment of private individuals, IPRs in PGRs bring hardships to the masses in developing countries and LDCs by raising the prices of agricultural products in the guise of patent

[97] Nirmal Sengupta, 'Traditional Knowledge and Intellectual Property Right' in Paramita Dasgupta (ed), *The WTO at the Crossroads* (2009) 100–115.

monopoly, and pushing farmers into dependence on engineered seeds and other agricultural inputs. All of these instances are all the way linked to cause the access to food unsecured. Nevertheless, the TRIPS hold some exceptions and flexibilities to the general rule of trade. These include the discretion to redefine patentable inventions, to choose between patents and PBRs and to provide for compulsory licensing. This study recommends that Bangladesh stands in line with other LDCs with a view to making sure the TRIPS review favours the agricultural needs of LDCs. It also urges LDCs such as Bangladesh to take advantage of the TRIPS flexibilities in order to safeguard the food sector and to protect the rights of farmers. Such policy decisions not only affect economically poor farmers and the food sector in Bangladesh but also have the potential to influence IPRs policies in other LDCs. With this end in view, the study shows a clear need for public policy interventions to promote the utilisation and flow of PGRs. It also urges Bangladesh to frame legislation to suit the needs of development in agriculture, meet the TRIPS mandates and respect other commitments arising from the CBD and the ITPGRFA. This will promote farmers' rights, ultimately ensuring the access to food.

The Bangladesh Constitutional Framework and Human Rights

Dr. Muhammad Ekramul Haque*

Introduction

The Constitution of Bangladesh is the supreme law of the land, which contains provisions regarding human rights in different forms. The inclusion of human rights in the constitution of a country obviously bears special significance. Such constitutional inclusion provides human rights with a higher degree of protection. It keeps them beyond the reach of easier and frequent changes by the legislature. Constitutional inclusion of human rights standards also 'provides a focus for discussing those issues and their implications within the political system.'[1]

Incorporating certain provisions regarding human rights in the constitution has become an established norm of constitutionalism in the 20th century. Human rights have been incorporated in national constitutions both in justiciable and unjusticiable forms. The Constitution of Bangladesh was adopted in 1972, the middle of the latter half of the 20th century, when the International Bill of Rights has already been adorned by its three stage locket of the Universal Declaration of Human Rights, 1948 (UDHR),[2] International Covenant on Civil and Political Rights, 1966 (ICCPR)[3] and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR)[4]. At the time of adoption of the Constitution of Bangladesh, 'there was a marked global increase in awareness for the need to protect human rights and fundamental freedoms.'[5] Since the advent of the two Covenants in 1966, very few if any national constitutions have been adopted that have failed to include human rights provisions. The insertion of different human rights provisions into the Constitution of Bangladesh was not a unique event in the context of the development of human rights.

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1 David Feldman, 'Constitutionalism, Deliberative Democracy and Human Rights' in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, Transition, and Human Rights* (Oxford University Press, 2007) 443, 462.

2 GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) ('*UDHR*').

3 Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

4 Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').

5 Arjuna Naidu, 'The Protection of Human Rights in Srilanka: Some Lessons for South Africa' (1987) 3 *South African Journal on Human Rights* 52.

The Drafting of the Constitution of Bangladesh

The concept of human rights is deep-rooted in the history of Bangladesh. Bangladesh was born as an independent state through a historic liberation war conducted in exercise of the people's right to self-determination, an important human right recognized in international human rights law.[6] During the British colonial period in India, until 1947, the territory of Bangladesh was a part of the then British colony in the undivided India which was governed by the Government of India Act. In 1947, the British Parliament passed the Indian Independence Act which created 'two Dominions – India and Pakistan – and two Constituent Assemblies for the two Dominions.'[7] Thus, after gaining freedom from the colonial rule in 1947, British India was separated into India and Pakistan: Bangladesh, being a part of then Pakistan, was known as East Pakistan. The first decade of Pakistan (1947-58) was a period of 'change' and 'uncertainty' when 'many of Pakistan's integrating forces collapsed' and the democracy was a 'total failure.'[8] The period between 1958 to 1969 has been identified as a period of 'total political dispossession of East Pakistan and regionalism,'[9] which resulted into the demand for full autonomy of East Pakistan.[10] Due to continued economic and political oppression[11] by West Pakistan over East Pakistan, 'the autonomy movement took the shape of liberation struggles for complete independence.'[12]

Bangladesh declared its independence on 26 March, 1971.[13] The Constituent Assembly, which was composed of the members elected in elections held from 7 December 1970 to 17 January 1971 in the then East Pakistan, proclaimed the Proclamation of Independence on 10 April, 1971 and formed the Government of Bangladesh.[14] The Proclamation of Independence 1971 was the interim Constitution that was given retrospective effect from 26 March 1971 'in due fulfilment of the legitimate right to self-determination of the people of Bangladesh.'[15] While Bangladesh was not at that time a member of the United Nations (UN), the Constituent Assembly of the newly declared state affirmed in its interim Constitution that the state 'undertake[s] to observe and give effect to all

6 Md. Rafiqul Islam, *The Bangladesh Liberation Movement: Its International Legal Implications* (PhD thesis, Monash University, 1983) 48.

7 Mahmudul Islam, *Constitutional Law of Bangladesh* (Mullick Brothers, Dhaka, 2nd ed, 2003) 5.

8 Islam, *The Bangladesh Liberation Movement: Its International Legal Implications*, above n 6, 30.

9 Ibid, 31.

10 Ibid, ix.

11 Ibid, 45-46.

12 Ibid, 47.

13 *The Constitution of Bangladesh* Preamble.

14 *The Proclamation of Independence.*

15 *The Proclamation of Independence.*

duties and obligations that devolve upon' it 'as a member of the family of nations.'[16] It was categorically added in the Proclamation that the newly declared state would 'abide by the Charter of the United Nations.'[17] The provisions of the interim Constitution obliged the newly declared state to observe all of the Charter commitments, like a member of the UN, including the commitments regarding human rights.

The liberation war continued for nine months. At the end of the 'historic struggle for national liberation'[18] against Pakistan, Bangladesh achieved victory on 16 December 1971. The Provisional Constitution of Bangladesh Order, 1972 was issued on 11 January, 1972 introducing a parliamentary form of government replacing the existing presidential form and re-defining the Constituent Assembly.[19] In order to create a Constituent Assembly for the purpose of making a constitution for the newly born country, the "Bangladesh Constituent Assembly Order" (P.O. No. 22) was promulgated on March 23, 1972.[20] The first session of the Constituent Assembly was held on April 10, 1972.

The long history of exploitation and deprivation resulting in economic, social and political injustices during the period of British colonial rule and Pakistani rule motivated the people of Bangladesh towards the inclusion of all fundamental human rights and freedoms in the Constitution. The Constitution Drafting Committee, headed by the then Minister for Law and Parliamentary Affairs, was set up on 11 April 1972.[21] The Constitution Bill was introduced in the Constituent Assembly by the Chairman of the Drafting Committee on 12 October 1972.[22] The Constitution was adopted on 4 November 1972 in the Constituent Assembly and came into force on 16 December, 1972.[23]

Bangladesh became constitutionally obligated to secure all fundamental human rights and freedoms to its citizens. The aspirations of the people of Bangladesh are reflected in the preamble of the Constitution of Bangladesh. The preamble of the Constitution unequivocally affirmed the

16 *The Proclamation of Independence* para 20.

17 ibid.

18 *The Constitution of Bangladesh* Preamble.

19 Section 4 of the Provisional Constitution of Bangladesh Order, 1972 defines the Constituent Assembly as 'the body comprising of the elected representatives of the people of Bangladesh returned to the N.A. [National Assembly] and P.A. [Provincial Assembly] seats in the elections held in December, 1970, January, 1971 and March, 1971 not otherwise disqualified by or under any law.'

20 Abul Fazal Huq, 'Constitution-Making in Bangladesh' (1973) 46 (1) *Pacific Affairs* 59, 60.

21 Ibid.

22 Bangladesh, *Constituent Assembly Debates (GonoParishader Bitarka, Sarkari Biboroni)*, Constituent Assembly, 1972, vol.2, 23.

23 *The Constitution of Bangladesh* Article 153(1).

pledge that the establishment of a society where fundamental human rights and freedoms were secured for all citizens was 'a fundamental aim of the state'. Human rights have accordingly been incorporated into the Constitution in different chapters.

The Legal System of Bangladesh and the Constitutional Structure of the Government

Bangladesh is a common law country. It has a written constitution which is the supreme law of the land. The constitution of Bangladesh explicitly recognizes the supremacy of the Constitution, in contrast to parliamentary sovereignty. Parliament is a creation of the Constitution; it is unicameral and acts under the Constitution. The law making power of the parliament is restricted by the Constitution. The Parliament, known as the 'House of the Nation', has legislative power which is subject to the Constitution.[24] The parliament cannot pass any law, under any circumstance, which violates the basic structure of the Constitution.[25]

The Constitution of Bangladesh establishes a parliamentary form of Government, where the President is Head of the State, while the Prime Minister is the Head of the Executive. The Constitution of Bangladesh explicitly recognizes the principle of separation of power, with an independent judiciary. There are two sets of courts in Bangladesh, higher and lower. At the higher level, there is one court named 'the Supreme Court of Bangladesh.' It has two divisions, the High Court Division and the Appellate Division. The High Court Division has original jurisdiction regarding constitutional and certain other specific matters. The Appellate Division of the Supreme Court of Bangladesh stands at the top of the higher judiciary, with appellate authority. The judgments pronounced by either Division of the Supreme Court are binding on all lower courts. Judicial precedents are recognized by article 111 of the Constitution as good laws. The lower courts consist of separate civil and criminal courts with different tiers, which are accountable to the Supreme Court of Bangladesh. The Supreme Court of Bangladesh is treated as the guardian of the Constitution,[26] as it is the only body with authority to interpret and enforce the constitutional provisions.

The Constitution of Bangladesh in its Article 142[27] provided that the votes of at least two-thirds of the total number of members of parliament are

[24] Article 65(1) of the Constitution.

[25] Article 7B of the Constitution; *Anwar Hossain Chowdhury v Bangladesh* (1989) 41 DLR (AD) 165 ('*Constitution 8th Amendment Case*').

[26] Islam, *Constitutional Law of Bangladesh*, above n 7, 16.

[27] Article 142 of the Constitution is as follows:

' Notwithstanding anything contained in this Constitution—

(a) Any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of Parliament:

(i) no Bill for such amendment shall be allowed to proceed unless the long title thereof expressly states that it will amend a provision of the Constitution;

required for an amendment of any provision of the Constitution. However, new article 7B of the Constitution, inserted by the Constitution 15th Amendment in 2011, recognized the basic structures of the Constitution by declaring them as completely unamendable. It said:

Notwithstanding anything contained in article 142 of the Constitution, the preamble, all articles of Part I, all articles of Part II, all articles of Part III, subject to the provisions of the articles relating to the other basic structures of the Constitution including article 150 of Part XI shall not be amendable by way of insertion, modification, substitution, repeal or by any other means.

The concept of basic structure of the Constitution was first recognized by the *Constitution 8th Amendment case.*[28] In this case, the 8th Amendment of the Constitution, which created six permanent Benches of the High Court Division, was challenged as being unconstitutional. It was argued that the said amendment violated the unity of the High Court Division by creating different permanent benches. In this case, the unity of the High Court Division was considered as a 'basic structure' of the Constitution that was violated by the impugned amendment. The said amendment, in spite of its compliance with article 142, was declared to be *ultra vires* and invalid on the ground of its alleged violation of the 'basic structure' of the Constitution.[29] The concept of 'basic structure' was established in this case by the judiciary. This principle regarding unamendable nature of the basic structure of the Constitution was reaffirmed in the *Constitution 5th Amendment Case.*[30]

Human Rights Provisions in the Constitution of Bangladesh Influence of the International Bill of Rights

Though Bangladesh did not acquire membership of the UN until 1974,[31] both the UN Charter and the International Bill of Rights (comprising the UDHR, ICCPR and the ICESCR) deeply influenced the drafting of the Constitution of Bangladesh. Only a few constitutions in the world have

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(ii) no such Bill shall be presented to the President for assent unless it is passed by the votes of not less than two-thirds of the total number of members of Parliament;

(b) when a Bill passed as aforesaid is presented to the President for his assent he shall, within the period of seven days after the Bill is presented to him assent to the Bill, and if he fails so to do he shall be deemed to have assented to it on the expiration of that period.'

28 (1989) 41 DLR (AD) 165.

29 Ibid.

30 *Khondker Delwar Hossain v Bangladesh Italian Marble Works Ltd., Dhaka* [2010] SC (AD) Civil Petition for Leave to Appeal Nos. 1044 & 1045 OF 2009 (1 February 2010) ('*Constitution 5th Amendment Case*').

31 Bangladesh acquired UN membership on 17 September 1974. United Nations, <http://www.un.org/en/members/.>.

directly endorsed the UDHR[32] and the UN Charter.[33] The Constitution of Bangladesh does not explicitly mention the UDHR or the two covenants. But the Constitution has directly endorsed, under article 25, the principles enunciated in the UN Charter as the principles upon which Bangladesh must base its international relations. Furthermore, the Constitution substantially incorporated various provisions of the International Bill of Rights in different forms in different chapters.

Following the ICCPR and ICESCR model of splitting human rights provisions into two distinct groups, many of the constitutions adopted after 1966 inserted provisions regarding human rights in two distinct places of the constitution and likewise installed two different enforcement mechanisms. For example, it appears that splitting human rights by the UN into two covenants led the constitution-makers of Bangladesh to slot human rights into two different forms: civil and political (CP) rights are immediately realizable and judicially enforceable, while economic, social and cultural (ESC) rights are not judicially enforceable. The Constitution in its Part III on "fundamental rights" incorporated CP rights. ESC rights are incorporated as "fundamental principles of state policy" (FPSP) in Part II of the Constitution.

32 See, for example, the Constitution of the Republic of Ivory Coast of 1960 (Preamble), the Constitution of the Republic of Senegal of 1963, the Constitution of the Democratic Republic of Sao Tom' and Principe of 1975 (Article 17), the Constitution of Portuguese Republic of 1976 (Article 16), The Spanish Constitution of 1978 (Article 10), the Constitution of Somali Democratic Republic of 1979 (Article 19), the Constitution of the United Republic of Tanzania of 1984 (Article 9), the Political Constitution of the Republic of Nicaragua of 1987 (Article 46), the Constitution of the Republic of Haiti of 1987 (Preamble and Article 19), the Constitution of Afghanistan of 2004 (Preamble), the Constitution of the Republic of Benin of 1990 (Preamble), Fundamental Law of Equatorial Guinea of 1991 (Preamble), the Constitution of Romania of 1991 (Article 20), the Constitution of the Republic of Rwanda of 1991 (Preamble), the Constitution of the Gabonese Republic of 1991 (Preamble), the Constitution of Mali of 1992, the Constitution of Burkina Faso of 1991 (Preamble), the Constitution of the Republic of Burundi of 1992 (Preamble and article 10), the Constitution of the Federal Republic of Comoros of 1992 (Preamble), the Constitution of the Fourth Republic of Togo of 1992 (Preamble), the Constitution of Cambodia of 1993 (Article 31), the Constitution of the Republic of Moldova of 1994 (Article 4), the Constitution of the Republic of Niger of 1996 (Preamble), the Constitution of the Republic of Chad of 1996 (Preamble).

33 See, for example, the Constitution of Bangladesh of 1972 (Article 25), Constitutional Law of the People's Republic of Angola of 1975 (Article 31), the Constitution of the People's Democratic Republic of Algeria of 1989 (Article 28), the Constitution of the Republic of Benin of 1990 (Preamble), Fundamental Law of Equatorial Guinea of 1991 (Preamble), the Constitution of the Federal Republic of Comoros of 1992 (Preamble), the Constitution of the Republic of Ghana of 1992 (Article 40), the Constitution of the Fourth Republic of Togo of 1992 (Preamble), the Constitution of Cambodia of 1993 (Article 31), the Constitution of the Republic of Moldova of 1994 (Article 8), the Constitution of the Republic of Chad of 1996 (Preamble), the Constitution of Afghanistan of 2004 (Preamble).

However, the division into these two chapters is not fully identical with the two sets of human rights in the two covenants. With a few exceptions, the rights inserted in Part III were recognized by the ICCPR. Three provisions of the ICESCR have also been incorporated in that chapter of the Constitution. For example, article 29(1), which speaks for equality of opportunity in public employment, reflecting article 7(c) of the ICESCR, has been guaranteed as a fundamental right within the constitutional framework. On the other hand, the provision regarding participation of the people in the affairs of the Republic through their elected representatives, which has been inserted in the final half of article 11 of the Constitution as an FPSP, was recognized by the ICCPR in its article 25(a). The provision regarding people's right to self-determination recognized by both the ICCPR and ICESCR has been incorporated in the chapter on the FPSP in article 25(b) of the Constitution of Bangladesh.

An Analysis of the Provisions Regarding Human Rights in the Constitution of Bangladesh

The Constitution of Bangladesh contains provisions relating to human rights in three different parts including the preamble. The preamble asserts the pledge to secure fundamental human rights as an aim of the state. Specific human rights are listed in the Constitution either as fundamental rights or as FPSP. Human rights contained in the FPSP chapter (Part II) are not judicially enforceable, whereas the human rights contained in the chapter on fundamental rights (Part III) are judicially enforceable. As it has been mentioned earlier, according to the new article 7B of the Constitution all provisions of all of these three parts fall within the category of basic structures of the Constitution which are completely unamendable.

Provisions Regarding Human Rights in the Preamble: Constitutional Pledge

The preamble of the Constitution of Bangladesh makes a general pledge to establish a society where all fundamental human rights and freedom will be secured for all citizens. It declares:

We, the people of Bangladesh, ... Further pledging that it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation-a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens.

It has been noted that '[f]ew constitutions do have such a Preamble'.[34] In *Dr. Mohiuddin Farooque v Bangladesh* (*'Locus Standi Case'*),[35] this distinctiveness of the preamble was explained in the following words that focused on the pledge made therein:

[34] *Constitution 8th Amendment Case,* (1989) 41 DLR (AD) 165 , 197 (Chowdhury J).

[35] (1997) 49 DLR (AD) 1.

> The Preamble of our Constitution stands on a different footing from that of other Constitutions by the very fact of the essence of its birth which is different from others. It is in our Constitution a real and positive declaration of pledges, adopted, enacted and given to themselves by the people not by way of presentation from skilful draftsmen, but as reflecting the echoes of their historic war of independence.[36]

The pledge made in the preamble has been further avowed as one of the FPSP in Article 11 of the Constitution. It declared a constitutional guarantee of fundamental human rights: 'the Republic shall be a democracy in which fundamental human rights and freedoms ... shall be guaranteed'. Thus, the aim to secure human rights has not remained as a mere pledge in the preamble; it has been further imprinted in the Constitution in a way that imposes a duty on the state specifically to guarantee fundamental human rights.

The term 'fundamental human rights' is not further defined anywhere in the Constitution so as to distinguish a subset of human rights as 'fundamental'. The term 'fundamental human rights', long before its use in the Constitution of Bangladesh, appeared in the preambles of the UN Charter and the UDHR. The preamble to the UDHR says:

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, ... Now, therefore, The General Assembly, Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, ...

This particular recital of the term 'fundamental human rights' in the preamble of the UDHR implies that the rights subsequently included in it are in fact those 'fundamental human rights'. The rights inserted in the UDHR have been further elaborated in the two covenants, ICCPR and ICESCR. Thus it appears that the rights incorporated in the three components of the International Bill of Rights are 'fundamental human rights'. It is submitted that in the absence of any clear constitutional definition of the term 'fundamental human rights', the meaning of this term as has been determined above in the light of international human rights law can be considered to be the meaning of the same term in the preamble of the Constitution of Bangladesh. The preamble of the Constitution thus contain the pledge to establish a society where the fundamental human rights, that is all of the rights contained in the International Bill of Rights, will be secured for all citizens of the state.

Constitutional Status and Enforcement of the Preamble

The preamble of the Constitution of Bangladesh is not a mere introductory note to the Constitution. It is a part of the Constitution, the supreme law of the land. Chowdhury J said in the *Constitution 8th Amendment Case*[37]

[36] Ibid [42].

[37] (1989) 41 DLR (AD) 165, 197.

that there is no 'anxiety as to whether the Preamble is a part of the constitution or not as it has been the case in some other country.'[38] In the same case, Rahman J termed the preamble as 'the pole star of the Constitution.'[39] In this case, the majority judgment declared the impugned amendment to be void on the ground of violation of a basic structure of the Constitution.[40] Although the new article 7B declared the whole preamble as an unamendable basic structure of the Constitution, the *Constitution 8th Amendment Case* recognized certain parts of the preamble as unamendable basic structure of the Constitution 22 years ago in 1989. In this case, among the three concurring majority judges, Chowdhury J said that the impugned amendment was void for, inter alia, it destroyed the essential limb of the judiciary 'by setting up rival courts to the High Court Division in the name of Permanent Benches.'[41] However, Chowdhury J also considered the whole aim of the state, contained in the preamble, as a basic structure of the Constitution. Chowdhury J observed:

That Constitution promises 'economic and social justice' in a society in which 'the rule of law, fundamental human right and freedom, equality and justice' is assured and declares that as the fundamental aim of the State. Call it by any name- 'basic feature' or whatever, but this is the basic fabric of the Constitution which can not be dismantled by an authority created by the Constitution itself- namely, the Parliament.[42]

Shahabuddin Ahmed J, the second concurring judge, declared the amendment void on the ground of violation of the basic structure of 'oneness of the High Court Division.[43] He did not seem to base his judgment on the preamble.

The third concurring judge, Rahman J, declared the amendment void on the ground of violation of the basic structure of the 'rule of law' engraved in the preamble of the Constitution. He observed:

In this case we are concerned with only one basic feature, the rule of law, marked out as one of the fundamental aims of our society in the Preamble. The validity of the impugned amendment may be examined, with or without resorting to the doctrine of basic feature, on the touchstone of the Preamble itself.[44]

38 The status of the constitutional preamble is controversial in India. It was held in *Re Berubari Union & Exchange of Enclaves* ([1960] AIR SC 845), in India, that the preamble of the Constitution is not a part of the Constitution. Subsequently, the Indian Court changed its position and recognized the preamble as a part of the Constitution in *Kesavananda Bharati v State of Kerala* [1973] AIR SC 1461.

39 (1989) 41 DLR (AD) 165, 274.

40 A.T.M. Afzal J dissented.

41 (1989) 41 DLR (AD) 165, 232.

42 Ibid 221-22.

43 Ibid 264.

44 Ibid 272.

He found that the impugned amendment impaired the rule of law contained in the preamble:

The impugned amendment is to be examined in the light of the Preamble. I have indicated earlier that one of the fundamental aims of our society is to secure the rule of law for all citizens and in furtherance of that aim Part VI and other provisions were incorporated in the Constitution. Now by the impugned amendment that structure of the rule of law has been badly impaired, and as a result the high Court Division has fallen into sixes and sevens-six at the seats of the permanent Benches and the seven at the permanent seat of the Supreme Court.[45]

Thus, it appears that Rahman J treated the 'rule of law' contained in the preamble as a basic structure of the Constitution and declared the Amendment as void as it violated this basic structure. It is submitted that if one part of the preamble, for example, concerning the 'rule of law',[46] is a basic structure of the Constitution, then the concept of 'fundamental human rights and freedom' enshrined in the same manner in the same paragraph of the preamble also seems to be entitled to be another basic structure of the Constitution.

It is clear from the above discussion that two of the three concurring majority judges indicated that the preamble, or at least part of it, was part of the unamendable basic structure of the Constitution.

The preamble protected fundamental human rights as a constitutional pledge where the securing of all fundamental human rights has been set as an aim of the state. The *Constitution 8th Amendment Case* arguably elevated 'fundamental human rights' to a higher constitutional status. This part of the preamble is not only enforceable by law but constitutes an important basic structure of the Constitution of Bangladesh. It is now settled law in Bangladesh that according to new article 7B of the Constitution, the whole preamble is a basic structure of the Constitution. The pledge made in the preamble to secure fundamental human rights for all citizens is elaborated in two chapters, namely, the FPSP and the fundamental rights.[47]

Fundamental Rights (Part III of the Constitution)

The Constitution of Bangladesh in its part III contains a set of judicially enforceable fundamental rights, which include equality before law,

[45] Ibid 274.

[46] Ibid.

[47] However, in spite of the above observations from the Appellate Division in the *Constitution 8th Amendment* case, the High Court Division in a subsequent case of *Aftab Uddin v Bangladesh* made a negative comment regarding enforceability of the preamble. ((1996) 48 DLR 1). The Court said that '[i]t is true that the Preamble to the Constitution is not enforceable.'(Ibid 11). The High Court Division did not substantiate this sentence. It is submitted that this particular comment made by the High Court Division in disregard of the earlier Appellate Division Judgment does not have legal authority.

principles of non-discrimination, equality of opportunity, right to protection of law, protection of right to life and personal liberty, safeguards as to arrest and detention, prohibition of forced labour, protection in respect of trial and punishment, freedom of movement, freedom of assembly, freedom of association, freedom of thought and conscience, freedom of speech, freedom of profession or occupation, freedom of religion, rights to property, protection of home and correspondence and the right to enforce fundamental rights.

The chapter on fundamental rights basically includes the rights of CP nature. However, there are certain fundamental rights that fall within the category of ESC rights or fall within the both categories of human rights. The provisions regarding prohibition of forced labour (Article 34(1)), freedom of association (Article 38) including the right of forming trade unions, freedom of profession or occupation (Article 40) and rights to property (Article 42(1)) are rights with significant ESC aspects that have been incorporated as fundamental rights. In fact, human rights cannot be so easily divided into watertight compartments.

The rights in Part III are guaranteed either in absolute terms or subject to different restrictions. For example, 'equality before law' under article 27 of the Constitution is an absolute fundamental right, while 'freedom of movement' under article 36 has been granted '[s]ubject to any reasonable restrictions imposed by law in the public interest', and the rights to property under article 42 have been made '[s]ubject to any restrictions imposed by law.' Some fundamental rights belong to citizens only;[48] while certain others belong to citizens and non-citizens alike who reside within the territory of Bangladesh.[49]

Constitutional Status and Enforcement

Part III sets express restrictions on law-making power. Article 26 declares all existing laws inconsistent with any fundamental right to be void to the extent of inconsistency, and prohibits the state from making any law inconsistent with any provision of that part.[50] The use of the term 'state' instead of merely 'parliament' is significant as the term clearly includes the legislature, executive and all other statutory authorities.[51] Thus, it does

48 For example, freedom of assembly guaranteed under article 37 of the Constitution.

49 For example, right to protection of law guaranteed under article 31 of the Constitution.

50 Article 26 of the Constitution reads as follows: '(1) All existing law inconsistent with the provisions of this Part shall, to the extent of such inconsistency, become void on the commencement of this Constitution.

(2) The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent f such inconsistency, be void. ... '

51 Article 152 of the Constitution defines the term 'state' that includes 'Parliament, the Government and statutory public authorities'. The term 'statutory public authority' has been further defined to mean 'any authority, corporation or body the activities

not only restrict the lawmaking power of the legislature, but it imposes equal restriction on the executive and other statutory authorities.

The duties of the state regarding human rights recognized as fundamental rights are immediately enforceable by individuals. Articles 44(1) and 102(1) provide that an individual person who feels aggrieved can move to the High Court Division for enforcement of any of his or her fundamental rights guaranteed in the Constitution. Under article 102(1), the said rights can be enforced against any person including the persons who are 'performing any function in connection with the affairs of the republic'. The court is empowered to give any direction or order as it thinks 'appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution'.

The prerequisite for enforcing any fundamental right under article 102(1) is that the application has to be made by 'any person aggrieved'. The Supreme Court as early as in 1974, shortly after the adoption of the Constitution of Bangladesh, liberally interpreted the meaning of that phrase. The Court, in *Kazi Mukhlesur Rahman v Bangladesh*[52] expanded the scope of 'any person aggrieved'. In admitting the *locus standi* of the petitioner, the Court said:

If a fundamental right is involved, the impugned matter need not affect a purely personal right of the applicant touching him alone. It is enough if he shares that right in common with others.[53]

The judgment remained unnoticed until 1997 when the Appellate Division finally relied on it in *Locus Standi Case*.[54] In the words of Kamal J, a member of the Appellate Division:

What happened after Kazi Mukhlesur Rahman's case in Bangladesh was a long period of slumber and inertia owing not to a lack of public spirit on the part of the lawyers and the Bench but owing to frequent interruptions with the working of the Constitution and owing to intermittent de-clothing of the Constitutional jurisdiction of the superior Courts.[55]

In spite of the precedent of *Kazi Mukhlesur Rahman,* when the '*Locus Standi Case*' was heard first before the High Court Division, the High Court Division did not allow the *locus standi* and construed the literal construction and narrower meaning of the term 'aggrieved' to include only that person who was personally aggrieved. However, the Appellate Division granted the *locus standi* saying that the High Court Division was 'wrong' in not allowing the *locus standi,* and remitted the case back to the High

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of or the principal activities of which are authorised by any Act, ordinance, order or instrument having the force of law in Bangladesh'.

52 26 DLR (SC) 44.

53 Ibid, cited in *Locus Standi Case* (1997) 49 DLR (AD) 1, 11 [32] (Kamal J).

54 (1997) 49 DLR (AD) 1.

55 Ibid 12.

Court Division for hearing.[56] Thus, *Kazi Mukhlesur Rahman* was finally endorsed in *'Locus Standi Case'*. The eventual impact of the *'Locus Standi Case'* judgment is that it has accelerated public interest litigation in Bangladesh.[57] Public interest litigation (PIL) is 'a type of litigation where the interest of the public is given priority over all other interests with an aim to ensure social and collective justice, the court being ready to disregard the constraints of the adversary model litigation.'[58] The general rule of locus standi that a person must be personally aggrieved to file litigation is not applicable in PIL. It was established in *'Locus Standi Case'*[59] that in Bangladesh, PIL, which is about any public wrong or injury, can be filed by any person of the society on behalf of the public at large or a community, rather than only by a person who is personally aggrieved. PIL standing would be granted also in cases of 'breach of public duty or for violation of some provision of the Constitution or the law.'[60] It is worth mentioning here that the PIL is not only restricted to cases where violation of any fundamental right is found; PIL can be filed for violation of any constitutional provision.

During the time of emergency declared under article 141A, the right to enforce the fundamental rights in any court may be suspended under article 141C of the Constitution. Article 141C(1) says:

While a Proclamation of emergency is in operation, the President may, on the written advice of the Prime Minister, by order, declare that the right to move any court for the enforcement of such of the rights conferred by Part III of this Constitution as may be specified in the order, and all proceedings pending in any court for the enforcement of the right so specified, shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

It appears that the fundamental rights do not disappear even during the period of emergency. However, the right to move to the court for their enforcement can be removed for a limited period of time.

Human Rights as the FPSP (Part II of the Constitution)

ESC rights have been recognized as FPSP in Part II of the Constitution of Bangladesh. The Constitution incorporated these rights in the form of their corresponding duties on the state. That is, they are expressed in the language of State duties rather than in the form of individual human rights.

56 Ibid 16.

57 Naim Ahmed, *Public Interest Litigation* (Bangladesh Legal Aid and Services Trust, Dhaka, 1999) 45.

58 Ibid 51.

59 (1997) 49 DLR (AD) 1.

60 Ibid 4 [8] (*Afzal CJ).*

Constitutional Status and Enforcement

The FPSP have a significant role to play in the making and interpretation of laws and the governance of the country, but they have not been made judicially enforceable.[61] The Constitution itself terms them as principles, though Article 7 declares the whole Constitution to be the supreme law of the land. However, the state is constitutionally obliged to implement the FPSP by following the directions given in the principles themselves. Generally speaking, the state cannot be held liable, on the application of aggrieved persons, for non-implementation of the FPSP, unlike the fundamental rights in Part III. Nevertheless, it has been observed by the highest judiciary that the lack of judicial enforceability does not mean that the state can ignore implementation of these FPSP for an indefinite period of time.[62]

International Human Rights Obligations and their Effect on Bangladeshi Law

Apart from its constitutional obligations regarding human rights, Bangladesh now incurs obligations under international human rights law with regard to human rights. It acceded to the ICCPR in 2000 and the ICESCR in 1998, and therefore it has obligations to implement the rights recognised in those treaties. Apart from treaties and conventions, customary international law also acts as a significant source for human rights obligations for Bangladesh.

Treaties are not self-executing in Bangladesh. Ratification or accession to international treaties is not sufficient to oblige the Government of Bangladesh under its domestic law to perform the obligations arising out of those treaties. Until they are incorporated into the domestic legal system of Bangladesh, the state remains responsible only under international law. The Constitution of Bangladesh makes no express commitment regarding application of international law (including international human rights law). However, the Proclamation of Independence of 1971, which was the interim Constitution of Bangladesh, explicitly affirmed the commitment to perform all obligations that Bangladesh incurred as a member of the international community. It declared:

We further resolve that we undertake to observe and give effect to all duties and obligations that devolve upon us as a member of the family of nations and to abide by the Charter of the United Nations.

The UN Charter contains some important provisions regarding human rights. Thus, the interim Constitution through the above declaration ultimately recognized those human rights along with a commitment to perform related obligations. Unfortunately, no such comparable provision

61 See *The Constitution of Bangladesh* art 8(2).

62 See *Masdar Hossain v Bangladesh* (1998) 18 BLD (HCD) 558 (Md. Mozammel Hoque J).

is found in the present Constitution of Bangladesh. However, 'respect for international law and the principles enunciated in the United Nations Charter' have been declared by the Constitution to be one of the principles on which the 'state [should] base its international relations' in Article 25. It appears that obligations under international law have been endorsed by the Constitution of Bangladesh only in the matters relating to Bangladesh's relationship with other states, not for any other matter.

Implementation of International Human Rights Law into the Domestic Law

There are two theories regarding the relationship between international law and national law: monism and dualism. According to the monist theory, international law and national law 'are concomitant aspects of the one general system—law in general',[63] and in case of a conflict between the two, 'international law is said to prevail'.[64] Dualism treats international law and national law as 'two entirely distinct legal systems'[65] that are applied by two different types of courts respectively, international and national courts.[66] The application of the latter theory may give rise to a situation where 'a government may be behaving perfectly lawfully within its own territory, even though its conduct may entail international responsibility.'[67]

Two other doctrines deal with the application of international law in the domestic legal sphere: 'incorporation' and 'transformation'.[68] The doctrine of incorporation implies 'automatic adoption' of international law by municipal law,[69] which suggests that 'a rule of international law becomes part of national law without the need for express adoption by the local courts or legislature'.[70] In contrast with this, the doctrine of transformation 'stipulates that rules of international law do not become part of national law until they have been expressly adopted by the state.'[71]

Article 152 of the Constitution gives the definition of "law" in Bangladesh, and it does not include international law. Nor does the Constitution of Bangladesh say anything about the methodology of incorporation of international law in the domestic jurisdiction. Neither monist nor dualist theories have been adopted explicitly in the Constitution. However, the

63 I. A. Shearer, *Starke's International Law* (Butterworths, 11th ed, 1994) 63-4.

64 Martin Dixon, *Textbook on International Law* (Oxford University Press, 6th ed, 2007) 88.

65 Shearer, above n 63, 64.

66 Dixon, above n 64, 90.

67 Ibid 89.

68 Ibid 94.

69 Ibid.

70 Ibid.

71 Ibid 95.

Constitution unequivocally declares itself to be the supreme law of the country,[72] and the Constitution vested the law making powers primarily in the parliament,[73] and partially in the President[74] and the Supreme Court of Bangladesh.[75] If the provisions regarding law-making are considered en bloc, it appears that unless a provision, whether international law or any other law or rule, becomes a law of the country by one of those three authorities, that provision does not acquire the status of law in Bangladesh. The approach of the Constitution of Bangladesh towards the relationship between international law and national law is therefore dualist. The Constitution of Bangladesh does not recognize international law as a part of national law, so international law, to be applied in the domestic legal sphere of Bangladesh, has to be transformed into the domestic legal system through one of the above mentioned three law making authorities. Thus, the possibility of application of international law in the national law of Bangladesh reflects the doctrine of transformation. Unless the provisions of international law are specifically adopted by the appropriate legislative authority or judicial process, they will not be binding in the domestic legal jurisdiction of Bangladesh. Similarly, the Constitution of Bangladesh has maintained a silence about the application of customary international law, so, customary international law also has to be transformed in the same way as the treaties in order to be applicable in the domestic legal jurisdiction of Bangladesh.[76]

All of the existing constitutional provisions regarding human rights were incorporated in the Constitution when it was first adopted in 1972, long before the accession of Bangladesh to the Covenants on human rights. Since the accession of Bangladesh to the ICCPR and the ICESCR, no provision in those treaties has been incorporated further in the constitutional law of Bangladesh. However, as has been already pointed out, the constitutional provisions regarding human rights at the time of adoption of the Constitution were made in line with the International Bill of Rights.

Ratification of an International Treaty: Power and Procedure

Articles 145 and 145A of the Constitution deal with the provisions regarding the making of contracts and deeds and the formalities regarding international treaties. Under article 145(1), the power to make any

72 *The Constitution of Bangladesh* Article 7(2).

73 Ibid art 65(1).

74 Ibid art 93.

75 Ibid art 111.

76 It can be argued that customary international law is applicable even in a dualist country irrespective of its incorporation into the municipal law. (See Scott L. Porter, 'The Universal Declaration of Human Rights: Does It Have Enough Force of Law to Hold States Party to the War in Bosnia-Herzegovina Legally Accountable in the International Court of Justice' (1995-1996) 3 *Tulsa Journal of Comparative & International Law* 141, 152-155.) However, this debate is beyond the scope of my thesis.

contract or deed on behalf of the state is vested in the executive authority of the state, and any such contract or deed 'shall be expressed to be made by the President' and 'shall be executed on behalf of the President by such person and in such manner as he may direct or authorise'.[77] However, this power lies ultimately in the hands of the Prime Minister, as the executive power under which such contract or deed can be made lies in the Prime Minister as article 55(2) clearly mentions that '[t]he executive power of the Republic shall, in accordance with this Constitution, be exercised by or on the authority of the Prime Minister'. Again, the President of Bangladesh has to act 'in accordance with the advice of the Prime Minister' in the exercise of all of his functions except the appointment of the Prime Minister and of the Chief Justice.[78]

Thus, an international treaty can be ratified in exercise of the executive power of the Prime Minister but that shall be expressed to be made in the name of the President. There is no legal requirement to discuss an international treaty in the Parliament before ratification. Nevertheless, there is a constitutional requirement under article 145A that, after ratification, an international treaty has to be submitted to the President and ultimately has to be laid before the Parliament.[79]

The requirement to place a treaty before the Parliament is a mere constitutional formality. The parliament does not have to discuss or to decide anything about any treaties laid before it. It is worth mentioning here that articles 145 and 145A deal with the procedural formalities regarding contracts, deeds and international treaties, but they are totally silent about the application of such treaties in domestic law.

Role of the Supreme Court in the Protection of Human Rights

The Supreme Court of Bangladesh is empowered to enforce human rights that are incorporated in Part III of the Constitution as fundamental rights. The court also can enforce the constitutional pledge relating to human rights that is embedded in the preamble. The court also has limited powers regarding the human rights incorporated in Part II of the Constitution.

Can the court judicially recognize or enforce international human rights law directly or indirectly? International human rights law may be divided in two to determine its relevance in the domestic legal system—the first category includes the conventions or treaties that have been ratified or acceded to by Bangladesh and the second category consists of all other international instruments to which Bangladesh has not yet become a

77 See *The Constitution of Bangladesh* art 145(1).

78 Ibid art 48(3).

79 About international treaties Article 145A of the Constitution of Bangladesh says: 'All treaties with foreign countries shall be submitted to the President, who shall cause them to be laid before Parliament: provided that any such treaty connected with national security shall be laid in a secret session of Parliament.'

party. The latter instruments do not give rise to any specific treaty obligations. But the first category of international instruments gives rise to specific treaty obligations under international law. However, there is no law in Bangladesh according to which the courts can enforce those obligations in the domestic jurisdiction. As explained above, international human rights law does not become strictly binding, and thus enforceable, by the courts of Bangladesh unless transformed into the domestic law.

Nevertheless, the courts in Bangladesh at different times have taken notice various provisions of international human rights law. While the Courts are not explicitly empowered to apply provisions of international law, they are not barred from applying the provisions of international law provided there is no conflict with domestic laws.[80]

The Constitution by its article 25 plainly endorsed the application of the principles of the UN Charter in matters relating to international relationships of Bangladesh. On the basis of this constitutional mandate, the courts tested the validity of certain governmental actions concerning international relations in light of the UN Charter. For example, in *M Saleem Ullah v Bangladesh,*[81] the court held that the decision of the Government of Bangladesh to send troops to the UN Mission in Haiti was in conformity with Chapter VII of the UN Charter.[82]

In *Locus Standi Case,*[83] Dr. Mohiuddin Farooque, the General Secretary of the Bangladesh Environmental Lawyers Association (BELA) appealed before the Appellate Division against the decision of the High Court Division to refuse him *locus standi* in the writ petition filed to declare 'all the activities and implementation of FAP-20 [Flood Action Plan-20]' as unlawful and 'to be of no legal effect'. The Appellate Division set aside the decision of the High Court Division and sent it back to the same court for hearing on merit. To grant the *locus standi* in favour of the General Secretary of BELA, ATM Afzal CJ in the Appellate Division relied on, *inter alia*, 'Principle 10' of 'the Rio Declaration on Environment and Development'. He observed that '[p]rinciple 10 ... seems to be the theoretical foundation for all that have been vindicated in the writ petition and also provides a ground for standing.'[84] Here, the Appellate Division

80 M. Shah Alam, 'Enforcement of International Human Rights Law by Domestic Courts: A Theoretical and Practical Study' (2006) *Netherlands International Law Review* 399, 425.

81 47 DLR (1995) 218.

82 Ibid 224

83 (1997) 49 DLR (AD) 1.

84 Ibid 6. 'Principle 10 of the Rio declaration says: 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. State shall facilitate and encourage public awareness and participation by making information widely

relied on a principle embodied in an international declaration as one of the grounds for the decision without even investigating the status of that declaration in the municipal law of Bangladesh. In fact, the declaration relied on has not been incorporated in the municipal law of Bangladesh.

In the same case, B. B. Roy Choudhury J, another member of the Appellate Division, in arriving at the same decision, described the nature of certain FPSP with reference to article 1 of the UDHR, using it as an aid to interpret the constitutional provisions in order to liberalize the *locus standi* for the institution of suits involving public welfare. He observed:

They firmly recognize human sensitivity for fellow-citizens and State human responsibility for protection of human rights enshrined in Article 1 of the Universal Declaration of Human Rights (to which Bangladesh is a signatory) that "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".[85]

It was held in this case that an organization that had been working for the protection of public interest regarding environment had *locus standi* to file a writ petition in the matters relating to environment, though the person concerned was not aggrieved directly. The Court relied on international declarations, namely the UDHR and the Rio Declaration, to reach this conclusion.

The High Court Division continued its venture of applying international law in *Professor Nurul Islam v Bangladesh,*[86] where it relied on resolutions adopted by the World Health Organization (WHO) regarding tobacco control. The petitioner sought enforcement of the existing laws regarding tobacco in order to prohibit advertisements regarding tobacco and tobacco related products. The Court ultimately decided the case on the basis of article 31 on the right to life and issued directions for banning the advertisements regarding tobacco and tobacco related products. In arriving at its final decision, the Court cited the WHO resolution in support of its stand taken against the advertisements of tobacco. The Court observed:

In view of the resolution of the World Health Organisation and admitted bad effects as aforesaid in the matter of advertisement, promotion of tobacco based products and the provision in Article 25 of our Constitution, we are of the view that the government should have taken appropriate steps for banning/restricting advertisement etc. as was provided by Ordinance No 26 of 1990.[87]

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available. Effective access to judicial and administrative proceeding, including redress and remedy, shall be provided

85 Ibid 24.

86 (2000) 52 DLR 413.

87 Ibid 421-22.

2. The local laws, *both constitutional and statutory*, are not always in consonance with the norms contained in the international human rights instruments. The national courts, should not, I feel, straightway ignore the international obligations, which a country undertakes. If the domestic laws are not clear enough or there is nothing therein the national courts should draw upon the principles incorporated in the international instruments.
3. But in the cases where the domestic laws are clear and inconsistent with the international obligation of the state concerned, the national courts will be obliged to respect the national laws, but shall draw attention of the lawmakers to such inconsistencies.
4. In the instant case the universal norms of freedom respecting rights of leaving the country and returning have been recognized in Article 36 of our Constitution. Therefore there is full application of article 13 of the Universal Declaration of Human Rights to the facts of this case.

Thus, he advocated application of international obligation in the domestic jurisdiction in two situations: first, where the domestic law is unclear or silent on a point, and secondly, if the domestic law is in consonance with international obligations. Application of international obligations is barred in only one situation: when domestic law is clear on a point but is inconsistent with international obligation, domestic law will be applied in disregard of international obligation. However, in such a case, the court is advised to draw the attention of the lawmakers to the said inconsistencies between domestic law and international obligation, with a view to prompting legislative change. This judgment is significant as it has, to a limited extent, created room for application of international obligation in the domestic jurisdiction.

One remarkable feature of the above obiter is that it recognized the use of international law in the interpretation of constitutional provisions of Bangladesh. Thus, it has created a scope for development of the constitutional law of Bangladesh in the light of international law.

In 2009, in *BNWLA v Bangladesh*,[96] the Court reiterated the view regarding the use of international law in interpreting municipal and even constitutional laws:

The international conventions and norms are to be read into the fundamental rights in the absence of any domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction to interpret municipal law in conformity with international law and conventions when there is no inconsistency between them or there is a void in the domestic law.[97]

96 (2009) 14 BLC 694.

97 Ibid 700-701

The above judicial observation made clear the following two principles. First, all municipal laws would be interpreted in conformity with international law and conventions if there is no inconsistency between international law and the domestic law. Secondly, if there is any lacuna in domestic law then that should be filled in by the provisions of international law.[98] The term 'municipal law' or 'domestic law' used above includes the Constitution of Bangladesh, thus endorsing the similar view from *Hussain Mohammad Ershad*. Therefore, these cases recognize the use of international law in the interpretation of constitutional provisions of Bangladesh. This view creates scope for development of the constitutional law of Bangladesh in the light of international law.

However, the idea of application of international law in the matters regarding constitutional law of a country is controversial in some countries.[99] For example, in Australia, Kirby J on its High Court supported the idea of using international law to interpret a constitutional provision,[100] while McHugh J, on the same Court, vigorously opposed it.[101] Indeed, Kirby J is the only Australian High Court judge to have adopted this approach so far.

Again, in the USA, though the Supreme Court has relied 'on international law as persuasive authority and use[d] it to support their conclusions'[102] in some cases,[103] the idea of using 'international law in interpreting the

98 See also *Bangladesh Environmental Lawyers Association (BELA), represented by its Director (Programs) Syeda Rizwana Hasan v Bangladesh, represented by the Secretary, Ministry of Shipping* (Writ petition No. 7260 of 2008, Judgment delivered on 05.03.2009 and 17.03.2009, unreported) is a recent case on environmental hazards in the matters regarding ship breaking in the territorial water of Bangladesh. The petitioner argued that since Bangladesh ratified the Basel Convention 1989 on 1 April 1993, it was 'bound to implement the provisions and safeguards contained therein.' The Court decided that the provisions of the Basel Convention were binding on the government authorities concerned, and ordered the Ministry of Environment 'to frame Rules and regulations for the proper handling and management of hazardous materials and wastes, keeping in view', inter alia, 'the Basel Convention, 1989.' It is arguable that the court adopted a monistic technique in applying international law in a dualistic country. For details of this technique, see Melissa A. Waters, 'Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 *Columbia Law Review* 628, 699-705.

99 Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A contemporary view* (Lawbook Co, 3rd ed, 2010) 51-56. See also Devika Hovell and George Williams, 'A Tale of two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa' (2005) 29 *Melbourne University Law Review* 95.

100 *Newcrest Mining (WA) v The Commonwealth* (1997) 190 CLR 513, 657-61; *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 417-18.

101 *Al kateb v Godwin* (2004) 208 ALR 124, 140.

102 Russell G. Murphy and Eric J. Carlson, '"Like Snow [Falling] on a Branch ": International Law Influences on Death Penalty Decisions and Debates in the United States' (2009-2010) 38 *Denver Journal of International Law and Policy* 115, 141.

103 Daniel Bodansky, 'The Use of International Sources in Constitutional Opinion' (2004) *Georgia Journal of International and Comparative Law* 421.

U.S. Constitution is arguably the most controversial jurisprudential issue in recent years.'[104] The US Supreme Court in its most recent authority recognized a limited applicability[105] of international law in interpreting constitutional provisions.[106]

However, this controversy is beyond the scope of my article, as this idea is not controversial in Bangladesh. It is submitted that one reason behind the willing acceptance in Bangladesh of the use of international law to interpret its Constitution is, in part, due to its later entry into the community of nations, compared to Australia or the US. Bangladesh expressly committed to international law from the moment of its birth as an independent state, which is evident from its declaration in the interim Constitution promulgated during the continuation of the liberation war in 1971.[107] International law was much developed in 1971 when Bangladesh was born. On the other hand, the domestic legal systems of both Australia and the US became highly developed independently without resort to international law, as extensive international law developments, particularly in the area of human rights, came many years after their Constitutions. It is submitted that Australian or US judges are less accustomed to going to international law in order to find a solution instead of justifying or analysing a given situation in the light of their country's own jurisprudence. In the context of their highly developed legal systems, in contrast to Bangladesh, they could afford to more readily ignore international law due to a greater wealth of precedent and pre-existing faith in their own legal doctrines. In contrast, the jurisprudence in Bangladesh has developed after the advent of human rights developments in international law, and Bangladeshi judges have always kept them in mind in developing their jurisprudence, including their constitutional jurisprudence.

Conclusion

The Constitution of Bangladesh created an extensive scope for the protection of human rights. The constitution makers accommodated different types of human rights within the constitutional framework with diversified apparatuses of protection. The human rights provisions of the Constitution of Bangladesh can be distinguished into two types—rights and principles. The rights (largely CP) have been made judicially

[104] Yitzchok Segal, 'The Death Penalty and the Debate Over the U.S. Supreme Court's Citation of Foreign and International Law' (2006) 33 *Fordham Urban law Journal* 142, 142.

[105] This is so when an international law is found to be supportive of the Court's independent rationale. See Chris Jenks, 'Introductory Note to the United States Supreme Court: Graham v. Florida & the federal Court Australia: Habib v. Australia' (2010) 49 *International Legal Materials*, 1029.

[106] *Terrance Jamar Graham v Florida,* [2010] U.S. LEXIS 3881.

[107] *The Proclamation of Independence* para 20.

enforceable, whereas the principles (largely ESC) are not enforceable by law. However, both impose significant constitutional obligations on the state. It is submitted that justiciability is not the sole criterion to assess the magnitude of a constitutional obligation. Non-justiciability of these rights does not automatically degrade their constitutional status so as to make the principles completely valueless.

The Constitution has no explicit provision endorsing the domestic applicability of international human rights law. Nevertheless, the judiciary has developed scope for the recognition of the provisions of international human rights law under certain circumstances. It is commendable that the Supreme Court of Bangladesh has been increasingly recognizing international human rights law. The growing tendency of the highest judiciary in Bangladesh is in favour of applying the norms of international law, evident from the cases cited above. The Supreme Court in the above cited cases has referred to international law to justify governmental action, to create awareness among the governmental authorities about important human rights and sometimes to strengthen its judicial reasoning and analysis. International law, including international human rights law, has in fact the potential to influence and guide the interpretation and proper evolution of different constitutional provisions.

The eventual impact of the judicial observations made by B. B. Roy Choudhury J, in *Hussain Muhammad Ershad,* is that international human rights law can be applied in three possible constitutional situations. The first situation is where a constitutional provision is found to be analogous to international human rights law. It appears that many constitutional provisions regarding human rights are analogous in substance to different provisions of the international bill of rights. Such analogies thus have created scope to apply international human rights law covered by the constitutional provisions. Secondly, if the constitutional law is silent on a point on which a solution has been provided by international human rights law, international human rights law can be applied there to fill that *lacuna*. Thus, constitutional law regarding human rights can be developed further by way of interpretation more in line with international human rights law. The third possible situation is when there is a conflict between municipal law and international law. In that case, though municipal law will be applied, the court will give directions to the legislative authority to remove such anomalies by bringing necessary changes to the municipal law. Such directions are on the judicial record, even if the government does not ultimately comply. Therefore, international human rights law cannot be ignored totally. The venture for incorporation and implementation of different norms of international law and international human rights law by the domestic judiciary can go ahead running on the pioneering wheels of this precedent.

Legal Aspects of Sight Pollution: Bangladesh Context

Bahreen Khan*

Introduction

Since few decades, "pollution" has appeared as a major concern to all. Due to various human activities in the name of development, people are facing various kinds of pollution. Pollution has got momentum in impacting adversely to our natural environment in recent decades. In earlier days, pollution was not treated as the most fatal problem in Bangladesh but since last few decades, people of this country have been experiencing various severe consequences from such misdeeds. The term "pollution" has numerous reflexive effects on human organs. Through its occurrence, it starts reacting on the tongue, the eyes, the nose, and the skin and eventually on our inner organs and our minds. "Pollution" is a process of making air, water, soil, etc. dirty.[1] In other words, pollution is the contamination of the environment as a result of human activities. Pollution can be many-fold: air pollution, water pollution, soil pollution, noise pollution and even sight pollution. Sight pollution is also referred as visual pollution.

This paper will try to divulge the various legal aspects of "sight pollution" found in Bangladesh, such as- of the creation, legal provisions, gaps and possible solutions. The reason for raising this concern is that in our country the issue of "sight pollution" has not yet been seriously taken into account, though ample instances are existent and are causing great annoyance to all in our daily life.

Definition and Elements of Sight Pollution

In an article the term "visual pollution" has referred to those elements of the landscape or "townscape" that the community finds unattractive, including buildings, business signs, stoplights and street signs, telephone and utility poles, and weeds and litter[2]. Visual blight includes billboards, power lines, cell towers, even ugly buildings. To the businessman, a well placed billboard may be a thing of beauty, but to the traveler whose view of the rolling hills or the rustic village is obstructed, it is visual pollution[3]. It is the most irritating one since it is able to be realized more easily, and it is also the more common. A lot of things may cause visual pollution. One

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1 The Oxford Advanced Learner's Dictionary, 7th Edition

2 Dunn, Madeline, updated by Montoya, Tito and White, Bob- Albuquerque's Environmental Story-Educating for a Sustainable Community

3 www.pollutionissues.com/Ve-Z/Visual Pollution (15 October, 2006)

of them are traffic jam which are too annoying for people[4]. Visual pollution falls roughly into three categories: natural, artificial and malicious[5].

So, the word "sight pollution" can be described as "any mental and/or physical situation caused by seeing or visualizing any specific thing, object or scene which the society does not approve to be seen as such or which diminishes the aesthetic value of any particular thing or area and impacts adversely in one's physical and psychological system and also on the natural environment". Through analyzing this description the following elements can be found:

i. There must be man-made occurrence of something;

ii. It is seen generally;

iii. It involves something which is not expected to be seen or which lowers down the aesthetic value of any particular sight or area;

iv. It has some specific impact on physical and/or psychological system of human beings and also on the surroundings; and

v. The impact must be adverse.

Origin of Sight Pollution in Bangladesh

The origin of causing sight pollution could be found during the British regime in this sub-continent. People of this region got many occasions to demonstrate their protest against the unfair attitudes and activities of the then Ruler. Since then projecting protest through posters, placards, flyers, handbills were very common to all and still retain their popularity. Besides these methods, graffiti[6] was used as an effective mean to attract peoples' attention. Most of the historical books mention these means as used in showing protest. The role of posters and graffiti were immense in communicating and achieving people's demand but at the same time had contribution in polluting our natural environment. These objects and means were never realized as "pollution" rather termed as "nuisance" in some of the relevant laws.

Sources of Sight Pollution

Sight pollution has been contributing in causing peoples' annoyance in many ways. As mentioned above that sight pollution was earlier caused mainly through posters and graffiti but now a day, the sources of sight pollution are diverse. As time is passing on, people are inventing new methods of causing sight pollution.

1. Advertisement of Products and Services

Now a day advertisement plays a great role in taking decision regarding any goods/products and services. To reach peoples' mind various means

4 www.youngreporters.org/article on Visual Pollution, Turkey

5 What is Visual Pollution? www.propertyservices.com/pollution

6 Words or drawings scribbled on public or private property without owner's consent.

of advertisement including those mentioned below have been introduced which in effect are causing sight pollution.

1.1 Posters on Walls: The use of papers in the form of posters, placards, leaflets are now mostly meeting the need of publishing advertisement of various goods, products and services to be offered. These paper based advertisements are pasted on the public wall to attract peoples' attention. Shortly after their pasting on walls, they often are found ripped off and the rest part remains pasted onto the wall in an ugly way. It is hard to find a wall in Dhaka without such an ugly sight. Even historical places, like Lalbagh Fort is loaded with posters on its walls[7]. It is unfortunate to note that the Lalbagh Fort along with other 93 structures have been declared by the *Rajdhani Unnayan Kartipakkhaya* (RAJUK) to be conserved due to their historical importance[8] but implementation of this decision is absent.

1.2 Delivering Flyers at Terminals: People can be found at various bus stoppages, terminals, junctions and even at market places delivering hand bills and flyers or throwing them inside the public transports. In most cases, people do not keep or read these handbills; rather throw them on the ground which causes letter.

1.3 Advertisement inside Public Transports: Advertisement can also be seen pasted inside the public transports such as bus and minibuses. Most of these advertisements contain hundred percent guarantees to cure diseases, like cancer, asthma or sexually transmitted diseases and also of coaching centres and part time jobs.

1.4 Advertisement on Lamp-post and Trees: In Dhaka city, it is rare to get any lamp-post or trees free from any hanging banners, placards or small notices. These haphazard advertisements of coaching centres, concerts, post vacancies, trading, medical treatment and other services, though meet the various demands of common people, but surely cause sight pollution at large.

1.5 Advertisement through Billboards: While passing by any roads, billboards can be easily seen placed at different sites. Haphazard placement of billboards, without following the relevant rules, is seriously causing sight pollution as it puts pressure on our eyes and may result in severe accidents while passing under it or while driving. Recently, there was an incident of death and destruction of properties due to the sudden toppling down of such billboards[9]. Besides, few billboards contain pictures which are in no sense culturally compatible with the values of Bengali culture. These pictures are mostly of advertisements of foreign dresses and goods but shown in a way which should not be allowed to be projected so

7 News report on sight pollution in the supplement *Dhakay Thaki* of daily Prothom Alo, page 8, dated 5 June, 2011

8 Gazette Notification published on 12 February, 2009

9 News report on billboard in the supplement *Dhakay Thaki* of daily Prothom Alo, front page, dated 15 May, 2011

openly. Bengali culture is surely different from foreign culture and watching these advertisements is definitely putting to a great number of people in an embarrassing situation.

1.6 Graffiti: This is another common way to advertise products, goods and services to common people. The taggers[10] can be found very active in doing so. Most of the road side walls are depicted with graffiti either of advertisement of any coaching centre, treatment centre or messages of any local political leader. Views of local leaders are often found expressed on public/private walls regarding occasions like felicitating national leaders, condemning opposition leaders, claiming for various rights or seeking support from public on any issue. Very recently, it is noticed that many private/public walls in Dhaka are covered with writings using sprays. Owners of these walls seem negligent and/or frustrated in stopping such irritating cultures or sometimes let their walls to be used for such writings. It involves huge money to erase graffiti which are either spent by private individual or government using peoples' money. As part of beautification of Dhaka and Chittagong, for ICC World Cup Cricket, 2011, many objects were placed, but right after their placement, these objects were found filled up by writings of common people. Such callous activities have jeopardized significantly the purpose for which those objects have been placed.

1.7 Banners, Small Hoardings and Placards: Placing of banners, small hoardings are seriously causing sight pollution, especially in Dhaka. While passing through Dhaka-Tongi Road and other roads of Gazipur district, a series of colourful banners, placards or hoardings can be found engraved along the side of roads or tagged with the lamp posts, containing greetings messages and pictures of the local political leaders along with the picture of the central leader. Adjacent to and in front of the Prime Minister's Office in Dhaka, banners, small hoardings can be found, containing messages of felicitation and pictures of our Prime Minister, receiving awards which are placed by the local political leaders.

2. Begging through Showing Scars and Diseases

At different road intersections and footpaths, especially in Dhaka, beggars often show their scars, diseases and illness to the people to get monetary assistance. This type of begging is another source of sight pollution. People rarely think of it in this way but it obviously has some impact on our physical and psychological systems. There are people who are really poor and needy and are begging money but at the same time a good number of people have been engaged in such begging as they have found this profession better than going for treatment, although they beg money for undergoing treatment. Besides, sometimes we hear that groups of people behind the scene are engaged in compelling poor people, by breaking their body parts, to beg.

[10] Persons who draw graffiti, on peoples' property, without taking consent.

3. Activities during Election

Indiscriminate use of papers and graffiti have been used in highlighting the profiles of election candidates and their mandates. Often, big arch shaped colourful gates, posters and banners are being used by the candidates and/or their supporters as part of election campaign. During every election, we see that these things are placed at various sites without following the relevant rules. Once these things are affixed, no and/or late attempts can be seen to remove the same even after the completion of election. Such attitudes simply create annoyance and trouble for people who hardly speak out on this matter. Recent newspaper reports have divulged that how the candidates of different *Paurasava* Elections, 2011, have violated the relevant election rules of "code of conduct". These reports also provided information of the various illegal acts of election candidates, such as printing colourful photographs, making election symbols at a size much bigger than the prescribed limit, and even of hanging posters on "*Shahid Minar*", a national monument! Graffiti on private/public property happens sometimes for which owners of such properties have to spend money from their own pocket to wipe out those graffiti. All these activities contribute in causing sight pollution.

4. Use of Technology

Now a days, use of various technologies makes peoples' life much easier as we can get information very quickly through. The internet wires and cables can be found hanging crisscross in most part of Dhaka city and in most cases in a very risky way resulting in civic discomfort and health hazard and providing an ugly sight. Even, some of these cables can be found holding some paper based advertisements! Very recently, the government has taken an initiative to take off these wires and cables from such risky hanging but still most of the cables are still hanging in a way that are causing trouble. This is also evident from a recent news report[11].

5. Callous Human Behavior

It is not a rare scene in Bangladesh that a person can be seen urinating and worse at any roadside drains or footpaths, beside walls, even at parks and bushes. This shameless attitude shown by the persons are also responsible for causing sight pollution to others and exposing risks to public health. It is often found in the shopping mall that mannequins are placed without putting any dress or their dresses are being changed in an open place. It is surely an embarrassment to pass these mannequins without cloths. Sometimes, pet animals are let loose, in open space ignoring the purpose for which these spaces have been made or their scenic values.

6. Littering and Other Bad Habits

Another very common scene in Bangladesh is that people throw trashes

[11] Report on hanging cables in the daily Prothom Alo, page 7, dated 22 May, 2011

anywhere they feel convenient. This irresponsible activity only happens due to non-enforcement of relevant laws. While walking through a footpath, foot over bridge, stairs of any public office or public road, it is hard to find the same free from spits and other human wastes. Most people neither think of using tissues or napkins to put such wastes nor of using the designated spittoons and dustbins. Roads, foot over bridges, walkways and underpasses can be found full of litter. Even parks and other open spaces are sprinkled with litter as people use these areas as part of recreation[12]. Besides, drains are chacked by wastes; floating solid wastes can be found there and in the lakes, ponds, *khals*[13] and even in the rivers[14]. Presently our sea-coast is also being affected by such bad human habits. Efforts have been made to clear these wastes but seem to be an abortive one. Educational institutions are also suffering from the same problem, as the walls of classrooms, desks, tables and chairs contain writings and pictures depicted by the students. Sometimes, seats of public transports can be found with writings of names, telephone numbers and indecent comments.

7. Dumping of Garbage

While walking on a footpath, public road or in a public place, garbage can be found dumped haphazardly. It can be broken parts of building construction materials, loose house-hold used products, rotten vegetables and other perishable items, debris and other liquid substances piled-up beside any public drain and even old/broken vehicles dumped at different places[15]. Sometimes, dumping of waste is done by the local government bodies while they clean any public road or drain and kept for a long time.

8. Unregulated Industrial Operation

Irrespective of their sizes, almost all the industries of Bangladesh drain out their toxic industrial wastes into the nearest water bodies. Almost every day, a news report can be found in any newspaper with/without a horrifying picture of floating solid wastes; the bizarre colour of the water and its quality[16]. The residents nearby these water bodies are forced to use such water for their daily work and to inhale the stinky odor emanating there from. Regular watching of such a site would have effect on our

12 News on cleaning activities undertaken by Scouts at Ramna Park, Dhaka, in the supplement *Dhakay Thaki* of daily Prothom Alo, page 7 dated 29 May, 2011

13 Water retention area, larger than a pond, which may has linkage with river.

14 News on dumping of solid waste in *Chaktai khal*, Chittagong, in daily Prothom Alo, page 21, dated 9 May, 2011

15 News report on nuisance, in the supplement *'Ain Adhikar'* of the daily Prothom Alo, page 2, dated 5 June, 2011

16 News on tannery's liquid waste in Hazaribag, Dhaka, in daily Prothom Alo, front page, dated 9 May, 2011; Report on poisonous wastes and shrinkage through encroachment of the river Bhahmaputtrya, in the daily Prothom Alo, page 9, dated 22 May, 2011; News report on water pollution in the supplement *Dhakay Thaki* of daily Prothom Alo, page 8, dated 5 June, 2011

mental system apart from its severe adverse health consequences. The stench emanating from the river *Buriganga*, in summer season, is unbearable. Apart from new reports, cases have been filed to prevent water pollution and encroachment of the river[17], but no effective and persistent steps, to relieve the lives of the residents, other aquatic organisms and the river itself can be seen. These water bodies have a great role in providing environmental services besides their aesthetic values. The blatant attitudes of the owners of the industries are responsible in degrading the natural environment and causing immense health hazard at the vicinity.

9. Unplanned Township

Once Dhaka was called by "city of mosque" and was blessed with rivers, lakes and parks. It could be renamed as "city of encroachment and pollution". The rivers of Dhaka such as *Buriganga, Sitalakkha, Turag* and *Balu* are constantly facing encroachment and pollution by various small/big land grabbers. The scenic views enjoyed by the elderly residents adjacent to these rivers would very shortly be written only in history books. The new generation is deprived of scenic views, breathing fresh air and enjoying natural beauty of rivers and lakes. Plenty of instances of encroachment and unplanned development of township can be noticed by visiting these places, as signboards of various land developers can be found or through news reports. These include, amongst others, attempt to shrink down the area of our National Parliament House by constructing new buildings; letting a portion of *Sohrawardi Uddyan*-a public park, for the construction of golf club; grabbing of lakes of Dhaka by different people and institutions, such as BGMEA Building at *Hatirjheel/Begunbari khal*, squeezing off Dhanmondi, Uttara and Gulshan-Banani lakes. Numbers of cases have been filed before the Supreme Court challenging these activities[18]. Apart from Dhaka, ample examples can be cited, such as indiscriminate selling of land adjacent to Cox's Bazar sea-beach, coasts of Kuakata and St. Martins Island and transforming these natural beauties into "places of unplanned buildings", in the name of so-called development. The unique views these areas possess are invaluable in terms of tourism and also play a significant role in providing eco-system services. Attempts can be seen to destroy the scenic beauties of the

[17] *Dr. Mohiuddin Farooque v Bangladesh and Others* (Industrial Pollution Case, Writ Petition No. 891 of 1994; 55 DLR, HC 59); *Bangladesh Environmental Lawyers Association v Bangladesh and Others* (Bur ganga Encroachment Case, Writ Petition No. 4098 of 1998); *Human Rights and Peace for Bangladesh v Bangladesh and Others* (Buriganga Encroachment Case, Writ Petition No. 3503 of 2009)

[18] *Bangladesh Environmental Lawyers Association (BELA) and Others v Bangladesh and Others* (Golf Court Case) Writ Petition No. 1859 of 2008; 2482 of 1998 (Gulshan Lake encroachment); *Dr. Mohiuddin Farooque v Bangladesh and Others* Writ Petition No. 7422 of 1997 (Encroachment of Gulshan Lake); *Dr. Mohiuddin Farooque v Bangladesh and Others* Writ Petition No. 948 of 1997 (Uttara Lake fill-up), *Bangladesh Paribesh Andolon v Bangladesh and Others* Writ Petition No. 3548 of 2003 (National Parliament Case); *State v Bangladesh and Others Suo Motu* Rule No. 19 of 2010 (BGMEA Case)

various sites of "*chharas*"[19] and "hills/hillocks" in Cox's Bazar, Chittagong, Sylhet and Chittagong Hill Districts[20]. All these activities are causing sight pollution in effect. Cases have been filed in the Supreme Court to stop these illegal activities[21].

Analysis of the Domestic Legal Provisions on Sight Pollution

It is essential to review the various provisions of laws as to whether these are sufficient to address the issue and whether these laws are at all being applied. Under this head, laws will be discussed in two sub-heads namely the relevant provisions and their analysis on gaps and existing situations.

1. Apex Law

1.1 Relevant Provisions: Until very recently, the Constitution of the Peoples Republic of Bangladesh had no specific provision on any kind of pollution or protection of environment. Part II of the same talks about the fundamental principles of state policy. State recognizes these policies as fundamental though it is not bound to provide any guarantee for their enforcement. Article 11 says "...fundamental human rights, respect for the dignity and worth of human person shall be guaranteed..." Article 15 embarks the state's responsibility to attain steady improvement in material and cultural standards of living of people and also of securing the right to reasonable rest, recreation and leisure. Through the 15th Amendment of our Constitution, the urgency of protecting and conserving the natural environment and resources has been reflected in Article 18A. It mentions that the State has the responsibility to conserve and develop the environment for present and future citizens and also to make provisions for the conservation and safety of natural resources, bio-diversity, forest and wildlife. Citizens and public servants have duties regarding the observance of law, performing public duties and protecting public property (Article 21); conserving national cultures and heritage of people and for its enrichment (Article 23); protecting against any sort of disfigurement and damages of all monuments or places of historical importance (Article 24).

Part III of our Constitution mentions of fundamental rights of the people which are guaranteed for the citizens. Article 32 guarantees, amongst others, the protection of peoples' life and personal liberty; the freedom of movement throughout Bangladesh is guaranteed in Article 36; and peoples' right to hold property is stated in Article 37. These rights can be enforced unless specific restrictions do not prevent in enforcing the same.

19 Stream flows through hill/hillock.

20 News report on hill cutting in Cox's Bazar in the daily *Jugantor*, page 18, dated 1June, 2011

21 *Bangladesh Environmental Lawyers Association (BELA) and Others v Bangladesh and Others* Writ Petition No. 6848 of 2009 (To save St. Martins Island); *Dr. Mohiuddin Farooque v.Bangladesh and Other* Writ Petition No. 6020 Of 1997 (Hill cutting in Chittagong)

1.2 Gaps and Existing Situation: The juxtaposition of both the causes of sight pollution and various provisions of our supreme law of the land can be used to try and divulge the agony of common people. Though the government is responsible for improving cultural standards and conserving national heritage, the people are being forced to watch advertisements of foreign shops containing pictures which are not attuned to our traditional culture. The violation of right to property can be evident while passing through a road or public places where advertisements either are hanging over and/or affixed on public/private properties. Our government is responsible to secure peoples' right to rest, recreation and leisure and protect public property, but most of our recreational areas, such as parks, playgrounds, lakes and rivers are in such a state that cannot satisfy peoples' demand. The constant dumping of various debris', into our common properties, like lakes and rivers and razing of natural hills for residential purposes, are few unfortunate examples of sight pollution. These natural beauties should be kept, maintained and conserved in a way so that the right to recreation of present generation and generations yet to come can be protected. Almost everyday, the national and local daily newspapers publish advertisements of selling lands adjacent to the Cox's Bazar and Kuakata sea beaches for making different resorts, motels, apartments and so on. It is needed to come forward to stop the grabbing of these natural blessings. The concerned authorities, like RAJUK, various developmental authorities and local government bodies responsible for urban and rural planning, are duty bound to secure people's right to rest, recreation and leisure as mentioned in Article 15 or public property mentioned in Article 21. The fundamental right to life, as mentioned in Article 32, inherently includes right to healthy environment which has been recognised through a case judgement[22]. This right can not be enjoyed if a resident next to any lake has to see the lake containing dirty water, floating/flowing litters and to inhale air with bad smell. This could lead to various health hazards apart from sight pollution. The freedom of movement mentioned in Article 36 is hindered for a walker/traveller as he would not want to pass through a park or a river which is filled up with wastes. Once common people start avoiding these places for recreation, they will turn into places for dumping or for doing other things, resulting in encroachment. A building owner could not properly enjoy his right to property, as guaranteed in Article 37, if his house and outer walls contain graffiti. This is surely not a meaningful life within the meaning of right to life as guaranteed in Article 32. During election time, recurrent violation of the code of conduct by the candidates becomes a common phenomenon and the violator has been punished rarely for committing the offence.

2. Local Government Laws

There are various local government laws in Bangladesh, such as:

22 *Dr. Mohiuddin Farooque v Bangladesh and Others* Writ Petition No.92 of 1996, 48 DLR,HC 438 (Danish Condensed Milk Case)

i. The Local Government (City Corporation) Act, 2009 (last amended in 4 December, 2011);

ii. The Local Government (Paurashava) Act, 2009;

iii. The Local Government (Union Parishad) Act, 2009;

iv. The Rangamati Hill District Local Government Parishad Act, 1989;

v. The Khagrachhari Hill District Local Government Parishad Act, 1989;

vi. The Bandarban Hill District Local Government Parishad Act, 1989; and

vii. The Chittagong Hill District Regional Parishad Act, 1998

viii. The Beautification and Advertisement Guidelines, 2009.

All these laws, except the guidelines (mentioned in serial viii.), contain almost same provisions. The basic difference among them is the level of punishment. It varies from maximum fine of Taka two thousand to fifteen thousand for commission of any offence stated in the laws and if the offence is the continuing one, additional Taka two hundred to five hundred will be charged for each day. The punishment is even lower (five hundred taka and twenty five taka respectively) for the violation of the laws mentioned in serial iv- vii.

2.1 Relevant Provisions: Since these laws have almost similar provisions, here, the Local Government (Paurashava) Act, 2009 and the Beautification and Advertisement Guidelines, 2009 are discussed.

2.1.1 Functions & Powers: As per this law, it is the main responsibility of Paurashavas to provide all civic amenities [Section 50(1)]. This law directs Paurashavas to do all needful to undertake the functions mentioned therein including beautification [Section 50(2)]. The functions stated in section 50 and schedule II include amongst others: i. collection, disposal and management of wastes from drains and roads; designating places for their disposal; ii. maintenance of the drainage and sewerage system; iii. declaring and maintaining public water body for recreational purpose; iv. maintenance of public roads for the convenience of people; v. developing and maintaining parks and open spaces for the recreational purposes; vi. arranging tours; conservation of the historical places; ensuring facilities for the recreation of people; and promoting national culture; vii. preventing prostitution and begging through irritating request or through showing scars, diseases/illness; and viii. initiating development plan for it. The Paurashavas are empowered to take all such actions necessary to implement the functions stated in the Act; constitute various Permanent/Standing Committees including for waste disposal, town planning and environment development, where experts of relevant field could be invited and/or co-opted (Section 55). The Act allows access of people to the meetings of their respective Paurashavas unless the meeting is confidential (Section 57). It is a duty of the Paurashavas to submit to the government their annual reports (Section

52) and to publish citizen charters to ensure better service for citizens (Section 53).

2.1.2 Offences: Schedule IV provides a list of offences which include amongst others: i. not paying applicable taxes and fees; ii. keeping animals and parking vehicles on roads not designated as such; iii. letting animals to stray; iv. negligent letting of sewerage wastes to be flowed in public roads/places; v. dumping/throwing any refuse on any street or in places not designated as such; vi. disposing of carcasses of animals without the sanction of the Corporation; vii. fixing any billboard, notice, placard or other means of advertisement against or upon any building or place, not designated as such; viii. letting loose any pet animals; ix. begging unfortunately for alms, or exposing or exhibiting with the object of exciting any deformity or disease or any offensive sore or wound; x. practising prostitution in any area, not designated as such; xi. illegal encroachment and commission of public nuisance in any public place and streets; and xii. attempts and abatement of any of the offences, mentioned in the Act. As per this law, Mayor/Councillors and other officers would be treated as "public servants" within the meaning of Section 21 of the Penal Code, 1860.

2.1.3 The Beautification and Advertisement Guidelines, 2009: This is not a law, but it mentions areas where placing of any sort of billboards for advertisement are prohibited. These restricted areas include air port, government hospital, traditional structures, and parks and so on.

2.2 Gaps and Existing Situation: Perusing the provisions of these laws, it is clear that every local government body has very specific tasks to prevent sight pollution by keeping public roads and places free from any sort of encroachment, damage, nuisance and inconvenience. If these tasks can be effectively carried out by it, the people might not experience annoyance caused by various advertisements, strange human behaviour and bad habits, mentioned under earlier headings. Generally, a person has to pay extra money for buying a plot/house/apartment adjacent to any public park, water body or open space assuming the fact that he would get fresh air and plenty of light and unobstructed scenic views. It is unfortunate that none of these facilities can be enjoyed by the owners of such houses. By lifting their window curtains or opening the window, their sight, with utter disgust, will only catch a horrible view that all filthy things are being dumped into or floating in such places. They can only be blamed themselves for buying such houses, adjacent to lakes, by paying extra money and eventually forcing themselves to accept their misfortune and hardship. They, though tax payers of their respective city corporation/*paurashava*/union *parishad*, rarely think of claiming at least a decent and peaceful right of living in their houses which is embedded as a fundamental right in Article 32 of our Constitution. If they think of complaining before the relevant local government bodies regarding the right to recreation, they will be getting no justice from the counterpart. No effective and persistent step is taken by these authorities to tackle the problem associated with peoples' right to healthy environment and right to recreation, although these Acts empower them to do so. Beggers can

be found all around Dhaka City showing their sores, deformities and diseases, though the Dhaka City Corporation has specific duty under this Act to stop such begging. Most public and private walls, lamp posts, some trees are covered by posters, notices and advertisements of all kinds, whereas the city corporations/*paurashavas*/union *parishads* seem inactive in preventing such illegal activities. Small shops making and selling tea, cigarette, light snacks, candies could be seen placed on footpaths or in the road corners in Dhaka. These shops are illegal as they have not taken any permission from the local government authorities and are contributing to make the vicinity ugly. Defying the specific guidelines on billboard, these are placed indiscriminately which are reported in national daily. It has been reported that people are suffering from sight pollution through the billboards, and how billboards are being projected in contravention of the guidelines of 2009. These billboards are placed in such a risky way that there are chances of accidents. In 2010, a giant billboard placed at Gulshan DCC Market-1 toppled down and took two human lives and injuring others, besides causing destruction of public and private property[23]. These laws make the relevant authorities responsible to evict all encroachment but the existing scenario is totally reverse. Besides, the restrictions imposed for placing billboards and advertisements are mentioned in the guidelines, which cannot be enforced by law. It is worth mentioning here that the city of Sao Paulo, in Brazil[24] has specific law, named the Clean City Act, 2007 to ban billboards and advertisements. Besides, in the USA, there is a law called the Highways Beautification Act, 1965 containing specific provisions on this.

3. Police Laws

The metropolitan areas of Bangladesh have separate police laws applicable for these areas and have similar provisions except the level of punishment. The applicable police laws are:

i. The Dhaka Metropolitan Police Ordinance, 1976;
ii. The Rajshahi Metropolitan Police Ordinance, 1992;
iii. The Chittagong Metropolitan Police Ordinance, 1978;
iv. The Khulna Metropolitan Police Ordinance, 1985;
v. The Sylhet Metropolitan Police Ordinance, 2006;
vi. The Barishal Metropolitan Police Ordinance, 2006; and
vii. The Police Act, 1861 (It applies to areas excluding the metropolitan areas.)

3.1 Relevant Provisions: As the provisions are almost same, in this article, only the Dhaka Metropolitan Police Ordinance, 1976 is discussed.

[23] Report on billboard in the supplement *Dhakay Thaki* of the daily Prothom Alo, , front page, dated 15 May, 2011

[24] News Report on 18 June, 2007 titled "Sao Paulo: The City That Said No to Advertising" in www. Businessweek.com/innovative/content

3.1.1 Functions: As per section 15 (c) every police officer's general duty is to prevent the commission of public nuisances to the best of his ability. Although the law does not define the term "nuisance", it however empowers the respective Police Commissioners to make regulations regarding the prohibition of hanging or placing of any cord, pole across a street or making of a projection or structure so as to obstruct traffic or the free access of light and air [Section 25 (1) (i)]. A police officer shall destroy or cause to destroy any animal, found in the street or public place, which to his opinion and also of the opinion of the veterinary officer that it is so diseased or severely injured and keeping it alive would be a cruelty to it. In such a case, while destroying it must be screened from the public gaze, as far as possible (Section 35).

3.1.2 Penalty: The penalty imposed for negligent letting loose any animal which causes danger, injury or annoyance to any person, is fine of maximum taka five hundred (Section 70). The penalty for slaughtering any animal or cleaning a carcass or hiding in or near to or within the sight of a street or public place is a fine of taka five hundred maximum (Section 73). The penalty of soliciting for the purpose of prostitution in any street or public place or within sight of any such place is imprisonment extending upto three months or of fine of taka five hundred maximum or both (Section 74). The penalty, for committing any nuisance by relieving himself or spitting or throwing any litter, refuse or rubbish so as to cause annoyance to any passer-by in or near any street or public place, is of fine extending taka two hundred (Section 80). The penalty for begging and exposing offensive ailments, sores, wounds or deformity in any street or public place is imprisonment extending upto one month. The penalty for spitting in any building or place occupied by the government or local authority in contravention of a notice board affixed therein, is a fine of taka one hundred maximum (Section 83). The penalty for affixing bills, notice or paper against or upon any building, wall, tree, fence, post, pole or other erection with calm, ink or paint or in any manner whatsoever is a fine of taka two hundred maximum (Section 95). Abetting of the aforesaid offences will be treated as an offence under the law (Section 97).

3.2 Gaps and Existing Situation: These laws specifically direct to take action against any sort of nuisances. As sight pollution in most cases fit with the term 'nuisance', it is the duty of respective police officers to prevent the commission of nuisance. Besides, our Constitution mentions the duty of all public servants to protect our public property from any sort of destruction and spoilages. These laws also direct the police to prevent public from showing any bad behaviour. Begging through showing ailments and affixing any advertisement in a place not designated as such should be stopped by the police officers. Surprisingly, these duties as directed by the police laws are seen to be performed rarely and due to their negligence, instances of sight pollution are increasing in an alarming manner and rate. These laws provide a negligible amount of fine as punishment of committing these nuisances. Such penalty is in no way compatible to the level of offence and hence offenders are fearless to repeat the same. Even though police takes

action to demolish any illegal erection of post or pole, the wrong-doers in most cases do the same offence immediately after their demolition. Rather, it becomes an open secret that most of the police officers take bribe or other unfair advantage from such wrong-doers, for which honest police officers are suffering from image problem.

4. Election Laws

There are numerous laws regarding election which contain several provisions having relevance to the issue of sight pollution. These laws are:

i. The Political Parties and Candidates Code of Conduct Rules, 2008;

ii. The Code of Conduct for Union Parishad Elections, 1997;

iii. The Code of Conduct for Upazila Election, 2008;

iv. The Code of Conduct for Paurashava Election, 2010; and

v. The Code of Conduct for City Corporation Elections, 2008.

4.1 Relevant Provisions: The provisions of various election laws are basically similar to each other and here the Political Parties and Candidates Code of Conduct Rules, 2008 is discussed.

4.1.1 Permitted and Prohibited Activities: Rule 7 of this law prohibits the candidates or their representatives to affix any sort of poster, leaflet or handbill on any building, wall, tree, electric or telephone pole, standing things, government/local government establishment, vehicle including bus, truck, train, steamer, launch, and rickshaw; however, hanging of posters is permitted under the law, and the poster should be black and white in colour, with the size not exceeding 23 inches by 18 inches; and the size, height, and diameter of election symbol should not be more than 3 metre. As per Rule 9 graffiti on wall, building, pillar, roof of a building, bridge, road divider, vehicle, and any other establishment is prohibited. The candidates or their representatives can not construct any *pandle* beyond 400 square feet in size; set any election camp on any road or public place but can place maximum one camp at each union *parishad/paurashava/*city corporation (Rule 10).

4.1.2 Penalty: According to Rule 18 the penalty for violating these provisions is imprisonment of maximum 6 months or fine of Taka fifty thousand maximum or both.

4.2 Gaps and Existing Situation: It is evident from the above mentioned provisions that election related laws contain some strong prohibitions imposed on candidates. These prohibited activities have their roots in causing annoyance to people at large and polluting our environment in various ways including visually. In recent past years, Bangladesh had experienced a number of elections. The candidates of these elections in most cases defied to obey the rules regarding code of conduct. From Parliamentary to local government elections, common people witnessed candidates' defiance to law. News paper reports were published regularly about this matter and no prompt action had been taken against the violators, and actions if taken were very insufficient and insignificant. In very recent Mayoral elections

2010 and 2011, there were instances of affixing posters on walls, vehicles, and public properties. Some of the candidates made their election symbols at a size far bigger than the authorized size. Although graffiti was found less in recent election campaigns, but placing of camps in public places was seen. The laws permit hanging of posters but as there is no specific limit of hanging, people had to endure sight pollution caused by these posters. The posters, once the election is over, are in most cases still found hanging, making the vicinity ugly and cause annoyance to people for a long time. These laws do not prescribe any direction to the candidates or the election commission to take actions for their prompt removal once the election is over.

5. Advertisement Laws

Various laws contain provisions regarding advertisement. Since other types of advertisements have already been stated in separate heads, in this head only undesirable and indecent advertisement related laws are discussed. They are:

i. The Undesirable Advertisement Control Act, 1952; and

ii. The Indecent Advertisement Prohibition Act, 1963

5.1 Relevant Provisions: The Undesirable Advertisement Control Act, 1952 prohibits advertisement of treatments or offering treatments of any venereal disease, sexual disorder, and irregularity of menstruation or any other prescribed disease, infirmity or abnormality; or offer to prescribe any remedy therefore; or giving or offering to give any advice in connection with the treatment thereof; it also prohibits the printers or publishers in doing so (Section 3). The term "advertisement" is defined in section 2 (1) as any notice, sign, visible representation, announcement, bill, hand-bill, circular or pamphlet, whether pictorial or otherwise. The penalty for violation is imprisonment extending one year or with fine of maximum 1000 taka or with both (Section 5).

The Indecent Advertisement Prohibition Act, 1963 also defines the term "advertisement" in section 2 (a) as any notice, circular, or other document, displayed on any house, building or wall, or published in any newspaper or periodical, any announcement made orally or by any means of producing or transmitting light or sound, but does not include trade circular issued by manufacturers of drugs to medical practitioners. The word "indecent" includes whatsoever may amount to any incentive to sensuality and excitements of impure thoughts in the mind on an ordinary man of normal temperament, and has the tendency to deprave and corrupt those whose minds are open to such immoral influence, and which is deemed to be detrimental to public morals and calculated to produce pernicious effect, in depriving and debauching the minds of persons [Section 2 (b)]. It prohibits, in section 3, persons from taking any part in publication of any indecent advertisement and knowingly allowing displaying any indecent advertisement on any property or public place or announcing therefrom upon which he has ownership, possession or any control. Section 5 directs persons authorised

to seize and detain any document, article or thing containing indecent advertisement and to be forfeited to the Government.

5.2 Gaps and Existing Situation: These laws, though age-old, have some specific provisions regarding showing, printing and publishing advertisements either undesirable or indecent in nature. The flagrant violations of these provisions are extremely obvious in the Bangladesh context. There is no instance of stopping the violation of these laws and people seem either have no reaction and/or simply are disgusted with the issue and accept it as a usual practice or find this culture interesting. These undesirable and indecent advertisements can be seen everywhere especially at terminals, inside public transports, on buildings, walls, public places, poles, roads, trees, printed and electronic medias and so on. As these laws have never been enforced by the concerned authorities and not known to all and also as the laws provide insufficient punishment, these illegal activities are going on unabated. Some of the billboards in Dhaka contain advertisements of outfits and dresses which in no way is compatible with our Bengali culture. Our Constitution specifically talks about promoting our culture not of other nations. It is indeed an embarrassment to watch these indecent advertisements with our family members. These two specific laws on advertisement clearly prohibit the printing, publishing and allowing the showing of such undesirable and indecent advertisements, whereas on the contrary people have to see the same which can be treated as sight pollution.

6. Environmental Laws

Our environmental legislations do not define the term "sight pollution" but through the interpretation of the definition of "pollution", sight pollution is covered. The basic laws on environment are:

i. The Bangladesh Environment Conservation Act, 1995;

ii. The Environment Conservation Rules, 1997.

6.1 Relevant Provisions: In this head the above mentioned laws are discussed.

6.1.1 Definitions: In section 2 of the Bangladesh Environment Conservation Act, 1995, few definitions have been given. "Pollution" is defined as "such contamination, or other alteration of the physical, chemical or biological properties of air, water or soil, including change in temperature, taste, turbidity, odour or any other characteristics of these or such discharge of any liquid, gaseous, solid, radioactive or other substances into air, water, or soil or any elements of the environment as will or likely to create nuisance or render such air, water or soil harmful, injurious, detrimental or disagreeable to public health, safety or welfare or to domestic, commercial, industrial, agricultural, recreational or other benefits, uses, or ecosystems including livestock, wild animals, birds, fish, plants or other forms of life". "Waste" means "any liquid, gaseous, solid and radioactive substance the discharge, disposal and dumping of which may cause adverse impact on environment". "Environment" is defined as "air, land, water and physical properties and the inter relationship which exists among and between them and human beings,

other living beings, plants and micro organism". "Environment conservation" is "the quantitative and qualitative improvement of different components of environment and prevention of degradation of standards".

6.1.2 Functions: It authorises in section 4 the Director General of the Department of Environment (DoE) to take all such steps as deemed necessary for the conservation of environment, improvement of environmental standards and control and mitigation of pollution of environment- including coordinating with other agencies; advising/directing concerned persons; examining any place or plants regarding pollution and ordering to mitigate the same. The Government, to conserve any area from environmental degradation, can declare it as "ecologically critical area" (ECA) as per section 5. This law prohibits the cutting of hills in section 6B and filling up and/or changing the nature of wetland in section 6E. Section 7 empowers the DoE to determine the compensation and direct the concerned person or group of persons to pay and take other corrective measures that is responsible, either directly or indirectly, through any act or omission, in causing injury to the ecosystem. The establishment or adoption of any industrial unit or project without obtaining environmental clearance from the DoE is prohibited under section 12.

6.1.3 Penalty: This law prescribes in section 15 the penalties ranging from imprisonment of one to ten years or fine of Taka five thousand to ten *lacs* or with both.

6.1.4 The Environmental Conservation Rules, 1997:

Rule 3 details out the factors to be considered while declaring any area as ECA; and the process of issuing environmental clearance for different categories of industries and projects basing on their impact on environment is elaborately mentioned in Rule 7.

6.2 Gaps and Existing Situation: The DoE has enormous power to accomplish the objectives of the law. The issue of "sight pollution" is covered within the definition of pollution as it mentions the word "recreation". Public places and water bodies including coasts, rivers, parks, gardens, *khals* and lakes and so on serve the recreational purpose of the community apart from providing environmental services but on the contrary the rivers, lakes and parks of Dhaka project an ominous sign by not serving the intended purpose to the visitors and persons passing through or by their sides. Most parts of these *khals* and lakes become a dumping place of wastes of all kind. Peoples' right to recreation is defied by causing pollution including sight pollution though this law authorizes to take necessary steps with other government agencies to keep their scenic beauties through pollution control. The rivers around Dhaka city, namely, *Buriganga, Shitalakkhaya, Turag* and *Balu* are constantly polluted by the dumping of industrial or municipal wastes and public interest litigations have been filed to stop such illegal activities[25].

[25] *Bangladesh Environmental Lawyers Association v Bangladesh and Others*, Writ Petition No. 4098 of 1998 (River Encroachment Case)

Though these rivers and the Gulshan Lake have been declared as ECA[26], no effective initiative could be seen to protect these areas from environmental degradation. The water quality of river *Buriganga has* reached such a state that experts advise not using the river water for drinking or other house-hold purpose. Cox's Bazar has the longest sea beach in this world but recent news paper reports tell how wastes are choking some parts of our coast and giving a wrong signal to the tourists especially the foreigners. Mushrooming of concrete structures is going on unabated and developers have initiated various development projects before taking environmental clearance. These developers give attractive advertisements in print and electronic media and the relevant agencies are not taking prompt action against the same. Besides, ample news reports can be found in the national dailies regarding the cutting of hills and filling up of wetlands. Very few instances of filing cases by the concerned agencies against such violators could be seen, though very recently, attempts have been taken by the Magistrate of the DoE to fine some of the offenders. Basically, sporadic, weak and/or non-enforcement of the relevant provisions is contributing to a large extent to the non-compliance of these legal provisions and putting common people in a helpless situation and depressing them from enjoying natural beauties.

7. Urban Planning Laws

There are numerous laws regulating the issue of urban planning. These are:

i. The Building Construction Act, 1952;
ii. The Town Improvement Act, 1953;
iii. The Chittagong Development Authority Ordinance, 1959;
iv. The Khulna Development Authority Ordinance, 1961;
v. The Rajshahi Town Development Authority Ordinance, 1976;
vi. The Chittagong Hill Tracts Development Board Ordinance, 1976;
vii. The Chittagong Division Development Board Ordinance, 1976;
viii. The Water Supply and Sewerage Authority Act, 1996;
ix. The Public Parks Act, 1904; and
x. The Conservation of Play Ground, Open Space, Park and Natural Reservoir of All Metropolitan Areas, Divisional Towns, Municipal Towns of Districts of Bangladesh Act, 2000. It is commonly known as *Joladhar Ain* (Wetland Act/ Act No. 36 of 2000).

7.1 Relevant Provisions: The Town Improvement Act, 1953 talks about the planning of Dhaka. As per section 74, the use of land for purposes other than that laid down in the Master Plan[27], prepared and published by the RAJUK under section 73, by any person is unlawful. The Master Plan and

[26] Declared through gazette notification by the Ministry of Environment and Forest on 4th October, 2009

[27] Dhaka Metropolitan Development Plan (1995-2015)

the Detailed Area Plan (DAP)[28] are the documents of Dhaka containing the *mouza* maps and the descriptive particulars of roads, public and other buildings, fields, parks, pleasure-grounds and other open spaces, wetlands i.e. flood flow zone, sub-flood flow zone, retention ponds, etc. and also allocating areas of land for use of agricultural, residential, industrial or other purposes. The laws named in serial number iii.-vii. have similar provisions like it.

The objective of the Building Construction Act, 1952 is to prevent the haphazard construction of building and excavation of tanks in Bangladesh. No person can construct, re-construct, add or alter any building without the sanction of the Authorized Officer (Section 3) or use lands or buildings for purposes other than that mentioned in the sanction (Section 3A) and shall be directed to dismantle or remove any such unauthorised construction (Section 3B). It also restricts cutting of hills in section 3C; and also empowers Authorized Officers and any police officer, not below the rank of Sub-Inspector, in section 10A, to seize things used in hill cutting and arrest person engaged in such illegal activities.

The Authority, established under the Water Supply and Sewerage Authority Act, 1996, has the responsibility, under section 17, of constructing, developing and conserving systems for collection, pumping, processing and disposal of sewage and industrial wastes. Any activity resulting in damaging the sewerage system is a punishable offence under this law.

The government may make rules, under the Public Parks Act, 1904 for the management and preservation of any park and for regulating the same. Through such rules, admission of persons, bicycles can be regulated; bringing of dogs into the park, plucking, breaking trees/branches, disfiguring any buildings, monuments, removing marks, labels attached to trees/plants can be prohibited (Section 4).

Under section 5 of the *Joladhar Ain*, 2000, no person can: change the characteristics; or use otherwise; or rent/lease out, transfer to use otherwise, of any play ground, open space, park and natural reservoir earmarked as such; even cutting down of trees in any park is treated as change of character. The term "change of character" is defined in section 2(h) as earth filling, constructing any sort of building, semi-building, hut or any sort of change to the areas earmarked in the Master Plan or in any other government gazette notifications. The penalty for violating this provision is imprisonment for maximum five years or of fine extending to fifty thousand taka or with both (Section 8).

7.2 Gaps and Existing Situation: All these laws have specific provisions regarding town planning but in reality ample instances of violation are found. In the Master Plan of Dhaka, 68 parks, 10 play ground and 43 *khals* are earmarked but very few is in existence in their real sense. Those which still exist have lost most of their original character and failed to deliver the

[28] Prepared by RAJUK through a gazette notification dated 22 June 2010

service. Many lakes and *khals* have been encroached and fill up and now used for totally reverse purposes. Residential and commercial buildings have been constructed in lakes of Gulshan[29], Dhanmondi and Uttara. Begunbari *Khal* and *Hatirjheel* are also suffering the same problem and BGMEA building is still standing there defying all these legal provisions. Kalyanpur *Khal* now looks like a drain with garbage floating on it and Dholai *Khal* is now just carrying the name without any trace of it. Many parks of Dhaka instead of serving the recreational facilities are used for truck garage, site for electric and water pumps and for other purposes. Such illegal uses are going unabated, though there are strict provisions to halt the same. Different cases have been filed to restore their original character, so that both environmental and recreational aspects can be protected[30]. Very recently, it is evident from news reports that a giant developer company has been directed to stop encroaching and land-filling of the Boalia *khal*[31]. The residents, next to Gulshan-Banani-Baridhara Lake, instead of enjoying a scenic view, see the sight of wastes piled up along the lake bank or floating on water, and so forth line of huts made of polythene where poor people live, as they have no place to go. The colour of the lake water as also evidence of its quality. These residents and the persons passing through these lakes are suffering regularly with such sight pollution although the residents paid a huge sum of money as "additional" just to enjoy the scenic views. No persistent initiative in punishing wrong-doers for "changing the character" of an open space or wetland can be seen, though our Prime Minister has repeatedly expressed her willingness to protect these natural blessings and has given direction to conserve these places and cases have been filed for restoration.

8. Laws on Disadvantaged Groups

There are people around us who can be termed as disadvantaged groups either because of their poverty or of diseases, and/or unemployment. The laws dealing with them are:

i. The Lunacy Act, 1912;

ii. The Vagrant and Homeless People (Rehabilitation) Act, 2011; and

iii. The Bangladesh Disabled Welfare Act, 2001.

8.1 Relevant Provisions: The Lunacy Act, 1912 empowers the police officer, in section 13, to arrest all persons found wandering at large whom he has reason to believe to be dangerous by reason of lunacy and to take forthwith before the Magistrate; a magistrate, upon getting any information regarding

29 News report on encroachment of Gulshan Lake, Dhaka, in the daily Prothom Alo, front page, dated 21 May, 2011; on Gulshan Lake pollution, in the daily Prothom Alo, page 24, dated 5 June, 2011

30 *Bangladesh Environmental Lawyers Association (BELA) v Bangladesh and Others* Writ Petition No. 3475 of 2003(To save the parks of Dhaka Case); *State v Bangladesh and Others, Suo Motu* Rule No. 19 of 2010(BGMEA Case)

31 News report on encroachment of Boalia *khal*, Dhaka, in the daily Prothom Alo, front page, dated 8 January, 2012.

any person deemed to be lunatic, may cause him to be produced before him and summon his relative who has or ought to have the charge of him, under section 15.

The Vagrant and Homeless People (Rehabilitation) Act, 2011 defines "home less" as a person who has no specific place to reside or who helplessly lives either in the town or village as floating and does not take any government allowance from anywhere. A "vagrant" is a person who as no certain place to stay overnight and strolls around with no specific intension and as such irritates people in this manner or is found engaged, either by himself or under provocation, asking for alms in any public place but does not include a person collecting money or asking for food or gifts for a charitable, religious or other purpose (Section 2). The "Vagrant Advisory Board" constituted, under section 4, is required to advise the government to undertake schemes for the betterment of vagrants and homeless people (Section 5). Any police officer authorized in this behalf, may require any vagrant to appear before a Special Magistrate (Section 9); and such vagrant or homeless person can be ordered to be handed over to the reception centre or shelter home for maximum two years (Section 10); a vagrant can by him/herself or any local government authority apply to stay in such shelter home (Section 11). As per section 16, in every shelter home, there must be provisions for their welfare, learning discipline and training. For the rehabilitation of these people, the government must initiate some programme or may seek assistance from any private organization (Section 18). As per section 20, once, such persons are capable of doing job; they shall be released from the shelter home. A "Vagrant Welfare Fund" is to be created and maintained under section 21 of the Act. According to section 22, a vagrant shall be punished with three months imprisonment if s/he escapes from the shelter home or does not return in time.

The Bangladesh Disabled Welfare Act, 2001 provides various duties and functions of the coordination committee, executive committee and district committee, constituted for this purpose, for the welfare of disabled people, which includes amongst other to initiate activities to resist and prevent disability; identify disabled; educate, provide health care, rehabilitation and employment; facilitate their transportation and communication; provide social safety and so on.

8.2 Gaps and Existing Situation: These laws have specific provisions regarding lunatics and vagrants whom we often see at different places. Either these lunatics are found walking without/with extremely dirty clothes or shouting at people. Vagrants begging money from people is a very common scene in Dhaka. Various news reports suggest that in most cases these vagrants are being used by some groups of persons who are dependant on the earnings of these vagrants. The authority responsible to take proper steps to stop the same seems negligent to perform their duties. Some news reports also the law enforcing agencies of taking bribes from these vagrants and allowing them to be on the streets. These causing serious sight pollution to all. There are instances when the authority acts promptly in removing

vagrants and all beggars from the city road, like ICC World Cup Cricket, 2011. If this can be done during any special occasion, it could also be done regularly. As there are specific laws to regulate this issue, its implementation is expected to be seen. Plenty of disabled persons can be seen all around the country, especially at terminals, near bus stops, traffic signals, mosques, at foot over bridges, underpasses, footpaths, whose lives are in a miserable condition either because of such disability or forced to be used as such by other persons or groups and now have chosen begging as their profession. These laws on disabled and disadvantaged have sufficient provisions to address these problems but their application, has probably, never been implemented.

9. Laws on Nuisance

Pollution, in general, is treated as a matter that falls under the term nuisance. The laws that deal with this issue are several in numbers and have mostly been discussed in previous different heads. In this head, only couple of laws will be mentioned. These are:

i. The Penal Code, 1860; and

ii. The Code of Criminal Procedure, 1898.

9.1 Relevant Provisions: The Penal Code, 1860 details out certain activities as offences and provides penalty for the same. According to section 268, a person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes or fouls the water convenience or advantage. Corrupting or fouling water or public spring or reservoir, so as to render it less fit for the purpose of which it is ordinarily used, is a punishable offence. The penalty is imprisonment for a term which may extend to three months, or with fine which may extend to five hundred taka or with both (Section 277). Making atmosphere noxious to health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way is an offence. The punishment is fine which may extend to five hundred taka (Section 278). Causing danger, obstruction or injury to any person in any public way by doing any act or omission is a punishable offence; the punishment is fine maximum of taka two hundred (Section 283). As per section 284, the punishment for doing any negligent conduct with respect to poisonous substance is imprisonment extending six months or fine upto taka one thousand or both. The punishment for committing any public nuisance, not otherwise punishable under this Code, is fine extending to taka two hundred (Section 290). The punishment for unlawfully compelling any person to labour against his/her will is imprisonment extending one year or with fine or both, under section 374.

Under section 133 of the Code of Criminal Procedure, 1898, upon receiving a police-report or other information and on taking evidence, the District

Magistrate, a Sub-divisional Magistrate or a Magistrate of First Class can order any person who does any unlawful obstruction or nuisance to remove the same from any way or public place.

9.2 Gaps and Existing Situation: Usually people treat "pollution" as nuisance. Though there are specific provisions to prevent activities causing annoyance to people, plenty instances of these annoying activities can be found around us. Indiscriminate placing of advertisements, fouling the water of rivers, lakes, obstructing footpaths and other public places are a few examples of causing various types of pollution including sight pollution. These sections of laws are hardly enforced and the penalty imposed for their violation is too nominal. The law enforcing agencies and other concerned authorities seem, in most cases, indifferent to apply these legal provisions. Such inaction contributes to attracting people more to defy these legal provisions.

Case Laws on Sight Pollution in Bangladesh, India & Pakistan

Under this head, few cases, filed in the courts of Bangladesh, India and Pakistan, are discussed only. As sight pollution is not treated as a serious concern to common people, no exclusive petition on this issue can be found filed in the Indian Sub-continent. There are cases where if directions are given upon redresses sought they would serve the purpose of stopping sight pollution.

Bangladesh

As mentioned earlier that "pollution" is considered in one of our age-old laws i.e. the Penal Code, 1860 as "nuisance" but it is surprising to note that no case could be traced as instituted in any court regarding this issue. It can be interpreted in the way that though people treat these activities as "trouble" but are mysteriously reluctant to file a case before the court. Probably non-application of this legal provision helps the continuance of the misdeeds and has got its strong and persistent momentum in our country.

In 1994, for the first time in history, a public interest litigation (PIL) was filed, by Bangladesh Environmental Lawyers Association (BELA)-a national NGO, before the High Court Division regarding the enforcement of various election laws where aesthetic aspect was raised[32]. The respondents of this writ petition were the Election Commission, who was entrusted with the responsibilities of conducting the election of the Commissioners and Mayor of the Dhaka City Corporation on 30th January, 1994. The other respondents were the Ministry of Local Government, Rural Development and Co-operative, the Dhaka City Corporation, and the Ministry of Home.

The petitioner's submission was that the candidates of that election were responsible for ravaging of the walls and buildings all around Dhaka by words and signs of different colours and size which created such an ugly

[32] *Bangladesh Environmental Lawyers Association (BELA) v The Election Commission and Others* (Writ Petition No. 186 of 1994), 46 DLR, 1994 HC 235

sight that it repelled every body's view from every direction thereby causing torture upon the vision and extreme dissatisfaction, resulting in loss of peace and mental equilibrium. The petitioner also complained of the reckless use of microphone and loudspeakers at all places and at all hours of the day throughout the city which, added to the usual noise of the city due to other causes, had been aggravating the noise pollution causing hazard for the health of city-dwellers as much as creating hindrance to the normal activities. The erection of gates, arches and camps on the streets and pavements were seriously obstructing the public thorough-fare and causing hindrance to normal use of thorough-fares which also affected the mental equilibrium of the city-dwellers to an extent which was likely to become a health hazard. It was also stated in the petition that the respondents being fully aware of the violations of the various laws and the rules by the candidates, had not taken adequate action for preventing them or for correcting the damage already done in violation of the laws and the rules.

The court hearing both the parties directed the respondents to take necessary actions against violators who created environmental hazard and pollution dangerous to the life, peace of the city-dwellers immediately before election and to prevent further abuse of the rights of the city dwellers. The election was held only after the compliance was ensured.

In another case filed by petitioners who were all minors aged below ten years, the High Court Division issued a show cause notice to the relevant government authorities as to their inaction in taking effective steps to stop using Bangladeshi children as camel jockeys in the United Arab Emirates (UAE). The petitioners felt distressed in watching on television of the sights of children falling from the camel-back during camel race[33]. This case is still pending before the court.

A conversion of a public place, named as *"Lal Math"* which is meant for park, by the government agencies to construct residential plots, community centres and police station was challenged before the High Court Division, where Rule was made absolute in part and direction to use the place as park was ordered[34]. In the PILs on the conservation of parks and playgrounds of Dhaka and Sylhet, the High Court Division, has pronounced a judgment in 2011 and has directed the relevant government agencies to demarcate these areas with proper boundary marks and names and also to evict all encroachers from these public recreational places[35]. To protect the rivers of Dhaka, the High Court Division, in a judgment pronounced "continuous *mandamus*" and directed the relevant government authorities to demarcate

33 *Master Issa Nibras Farooque and Others v Bangladesh and Others* (Writ Petition No. 278 of 1996)

34 *M. Saleem Ullah and Others v Bangladesh and Others* (Writ Petition No. 4484 of 1996, 55 DLR, HC 1)

35 *Bangladesh Environmental Lawyers Association v Bangladesh and Others*, Writ Petition No. 3474 of 2003(Parks of Dhaka Case) & , Writ Petition No. 9216 of 2006(Parks of Sylhet Case)

the area of these rivers through proper survey, and to construct, roads and walkways along these rivers to prevent encroachment and also to take all necessary activities required to save these rivers[36].

Since sight pollution affects our "right to life", in one case the court held that "the expression does not mean merely an elementary life or sub human life but connotes in this expression the life of the greatest creation of the Lord what has at least a right to a decent and healthy way of life in a hygienic condition. It also means a qualitative life among others, free from environmental hazards"[37].

Apart from these cases mentioned above, numbers of PILs have been pending before the High Court Division, which though do not directly filed to get redress on the issue of sight pollution but, if granted, in effect will serve the purpose. These cases involve industrial pollution and encroachment of rivers; uses of public places, parks and playgrounds for different purposes; polluting, filling up of and construction in lakes and *khals;* unauthorised razing of hills; unplanned developmental activities in the coastal areas, and so on[38].

Pakistan

Many good judgments have been pronounced by the Pakistan Supreme Court. These are linked to sight pollution. Regarding the use of public place, the court has discouraged denial of valuable rights of the residents in respect of the plot, meant for specific purpose and has held that "the plots in a Housing Scheme for public use cannot be converted for other use"[39]; and had reiterated in another case wherein it was held that without obtaining no objection from the general public, such plots cannot be used for any other purpose[40]. Subsequently, in another case the court held that the conversion of Jubilee Park in Islamabad into a Mini Golf Park, which was earmarked in the original scheme, and was meant for low income groups, who were deprived of the benefits of having their own private gardens, compared to higher income groups, amounted to the denial of rights guaranteed to them[41]. In a landmark case, the Supreme Court held that the word 'life' has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere

36 *Human Rights and Peace for Bangladesh v Bangladesh and Others* (Writ Petition No. 3503 of 2009)

37 *Dr. Mohiuddin Farooque v Bangladesh and Others*, Writ Petition No. 891 of 1994, 55 DLR 2003 HC 69, relevant page-79(Industrial Pollution Case)

38 Case references cited in earlier headings in footnotes 17, 18, 20, 21, 22, 25 and 30.

39 *Fazal Din v Lahore Improvement Trust*, (PLD 1969 SC 223)

40 *Ardeshir Cowasje v Karachi Building Control Authority* (1999 SCMR 2883)

41 *Moulvi Iqbal Haider v Capital Development Authority and Others* (PLD 2006 SC 394)

existence from conception to death. A wide meaning should be given to the word 'life' to enable a man not only to sustain life, but also to enjoy it[42].

India

The Indian Supreme Court is very much pro-active in conserving natural environment and protecting peoples' right to life. A leading PIL was filed to stop the discharge of trade effluents by the tanneries in Kanpur, to the river *Ganga*, which was causing considerable damage to the people who used its water and also the aquatic life in it. In this case, the court took a bold stance in protecting the fragile environment by applying the notion of "strict liability" if circumstances deserves and directed to close down the tanneries which had directed to take steps for primary treatment, even though that might bring unemployment[43]. To save the *Taj Mahal* from environmental pollution, in a leading case, the Supreme Court of India directed to shift industries those were responsible for polluting the ambient air around Taj Trapezium Zone (TTZ) and causing damage to it as its white marble became yellowed and blackened in places[44]. The public trust doctrine, along with precautionary principle and polluter pays principle, were applied in another case where a public land was leased out to a private company which constructed a Motel beside the river *Beas* and made some construction on the riverbed and the banks of the river to save the Motel from flood, which had forced the river to divert its course and caused damage to the people of the locality. The court directed the lease be quashed and also of restoration of the land to its original condition, the cost of which was borne by the Motel[45]. A case was filed against Ratlam Municipality which was not providing sanitary facilities to the dwellers and the court directed the municipality, who pleaded financial inability, to remove nuisances within six months[46].

Recommendations and Conclusion

It is apparent from the above discussion that plenty of laws exist dealing either directly or indirectly, to tackle sight pollution. Analyzing the issues involving sight pollution, reviewing the various legal provisions and their level of implementation, following steps can be considered to address the issue:

1. Changes in Election Laws

The existing election laws can be amended by inserting provisions regarding:

42 *Ms. Shehla Zia and Others v WAPDA* (Human Rights Case 15-K of 1992, PLD 1994 SC 693)

43 *M.C. Mehta v Union of India* (AIR 1987, 4 SCC 463)

44 *M.C. Mehta v Union of India* (Writ Petition No. 13381 of 1984, AIR 1997 SC 734)

45 *M.C. Mehta v Kamal Nath and Others* (AIR 1997, 4 SCC 463)

46 *Municipal Council, Ratlam v Shri Vardhichand and Others* (AIR 1980, SC, 1622)

i. Mentioning of the quantity of posters and other structures to be hung and placed, as the case may be, in any area.

ii. Taking some sort of bond and/or security from the candidates regarding their commitment to remove all campaign materials from the area within a specified time once the election is over.

iii. Taking prior approval, from the Election Commission, regarding the design of the posters before its printing and hanging.

iv. The empowerment of the Election Commission to suspend the official declaration of the name of the winning candidate till a specified time so that the candidates can dispose off all materials used in election campaign; if the candidates do not comply with the direction, money should be deducted from the candidate's *jamanot* (money deposited as security money to the Election Commission) to remove all materials. And

v. Imposition of high penalty for the violation of election laws.

2. Changes in Advertisement, Local Government and Police Laws

The following points can be taken into consideration in changing these laws.

i. In the local government laws, there are no specific provisions regarding the allocation of places in every village/union/ward where people can affix their advertisements instead of putting them haphazardly wherever they want. Again, the design of such advertisements must follow the specifications which must be mentioned in these laws. Increased amount of fine must be imposed on the violators.

ii. Penal provision should be inserted in all relevant laws as to the disfigurement and/or defacement of any statues and historical structures; and also for creating sight pollution.

iii. These laws must contain provisions regarding adequate instruments/tools/vehicles of these authorities to remove the nuisance from public places. Adequate budget and manpower must be allocated to undertake these works properly.

iv. These laws need to add a specific prohibition regarding the hanging cables with the mention of high penalties.

v. All these laws contain nominal punishment; hence need necessary amendments for inflicting greater and stringent punishment to offenders.

3. Amendments in Town Planning & Environmental Laws

i. Till present no land zoning law has been formulated to stop haphazard and unplanned development. It is absolutely necessary to prepare the Master Plan and the DAP of all areas of Bangladesh

in line with relevant town planning laws. The provisions of DAP prepared for Dhaka should be strictly adhered by all so as get a liveable Dhaka. Again, monitoring of the compliance of these two documents is essential by all relevant agencies.

ii. The Bangladesh Environment Conservation Act, 1995 and the Wetland Act, 2000 have prohibited changing the nature of any wetland and open spaces, for which many cases are pending before the court. But persistent attempts can be seen to change their nature. Hence, these laws can incorporate provisions of imposing punishment of imprisonment as mandatory instead of keeping discretionary power of the court. This law must spell out specifically the issue of sight pollution.

iii. Strict enforcement of law should be ensured for protecting our coastline from any sort of nuisance. There is a policy named "Coastal Zone Policy, 2005" as part of government's vision to take necessary steps. Since this document can not be enforced by law, a specific rule should be formulated regarding the management of the coastal area.

4. Keeping of Commitments in Election Manifesto by Candidates & Showing of Right Signals by Political Leaders

The election manifesto of the candidates must have a commitment towards compliance of all election rules and also of a promise to remove the campaign materials in a given time. The political leaders should project prompt actions against their followers and supporters who placed different banners, posters or hoardings on any public place felicitating the leader and thereby causing sight pollution.

5. Community Policing

To resist sight pollution, community policing can be introduced to stop nuisances like: using public places and public transports for distributing flyers, hand-bills, and so on; graffiti on public/private walls and buildings; dumping and throwing trashe here and there.

6. Volunteering by Social Organizations to Maintain Recreational Places

Different social organizations should initiate taking stringent measures to protect and maintain places of recreations so that people can get fresh air and new generations can avail these places for outdoor games, exercise and other social activities and hence step out of the culture of engaging only in "Face Book" and video games which eventually will invite health complicacies.

7. Initiating *Suo Motu* Actions by Judges

Besides, filing of cases by aggrieved persons, judges can initiate *suo motu* actions against the offenders who are creating problems in our day to day life, and this may bring a positive deterrent effect for the offenders.

8. Rewarding the Heroes

Persons assisting the relevant agencies in identifying the polluters and taggers should be rewarded by the government. Officers of relevant government agencies who are actively serving the nation in resisting any sort of activity causing damage to natural environment must get incentives to pursue the cause. The government may initiate rewarding persons/ organizations/ business houses that have projected great responsibility in keeping any locality clean and beautiful by declaring him/it as "Envirostars" for a year or allowing them tax waivers.

9. Job Creation to Stop Begging

For the betterment of people who are begging at different places and/or unemployed, the government and NGOs working in the relevant field must initiate motivational programme and creation of jobs so that they can come out of begging. Recently, the present government has taken an initiative of "job creation for 100 days" for these people but it is not done on a regular basis. So, this can be undertaken regularly.

10. GO/NGO Partnership for Placing & Maintaining Public Toilets, Dustbins and Spittoons

"Cleanliness Partnership Programme" can be initiated by government and non-governmental organizations to get better result as it will grow a sense of ownership among participants. Plenty of spittoons, dustbins, public toilets, either stationary or mobile, can be constructed, placed and maintained through such programme.

11. Enhancing the Role of Ministry of Tourism to Keep Natural Beauties and Heritage Beautiful

"Beautification Initiative" can be undertaken by every government/non-governmental offices at regular intervals. The Ministry of Tourism can come forward to keep our national heritages and natural beauties beautiful, so that tourists find them attractive.

12. Corporate Social Responsibility of Business Houses

Giant business entities should come forward to project eagerness as part of their corporate social responsibility in keeping the areas, where their offices and/or factories/industries are located, clean and beautiful which may encourage others to keep those areas clean.

13. Role of Educational Institutions

All educational institutions can undertake various activities including the following to make their students understand the urgency of keeping neighbourhoods clean:

i. Schools have great opportunity to educate their pupils at their childhood regarding the impact of pollution and their expected role in combating the same. It should be engraved in the mind of

youths that sight pollution involves negative behavior and it is unacceptable.

ii. Different educational institutions can arrange "Clean Campus Contest" to make students with the necessity of resisting sight pollution. Award can be given to the best batch who can maintain classrooms and premises free from graffiti and other annoying activities causing pollution.

iii. Educational institutions can arrange different contests and competitions on this issue like, debate, essay writing, drawing and invite renowned personalities to deliver lectures before them.

14. Role of Religious Leaders

In our country religious leaders play a great role in taking decisions. These leaders should shoulder the responsibility in raising the consciousness and attitudinal change of mass people by explaining the importance of clean environment.

15. Creating Mass Awareness

Massive awareness programs should be initiated by government, NGOs and Media in order to motivate people to abide by the laws. They can people of: all civic rights and clamming of the same by filing tort cases relating to nuisance; demanding incorporating "right to environment" in the Constitution of Bangladesh as a fundamental right; and claiming the formulation of specific laws on nuisance like "Clean City Act" or "City Beautification Act" that have been found in other countries.

The issue of sight pollution is caused in Bangladesh due to lack of enforcement of relevant laws. If these laws are strictly applied without mercy, people would think twice before doing any misdeeds. People of this country in most cases do not apply civic sense and are not conscious about other peoples' feelings. Growing of civic sense should be practiced from early stage of life and parents must preach the same and have a role in teaching their children. Making our country beautiful should always be kept in our mind and our responsible attitude will help showcasing a different Bangladesh towards the world. As our State has pledged, in the Constitution, to conserve the natural resources, forest and biodiversity for present and future citizens, strong measures should be taken to achieve the same. As part of intergenerational equity, we are duty bound to preserve our natural beauties for the generations yet to come. Meaningful and positive attitudinal change of our mindset and enforcement of relevant laws will make possible to stop causing sight pollution.

Poverty and Human Rights: Determining the Relationship on the Basis of Conceptual Frameworks

Md. Jobair Alam*

Introduction

The relationship between poverty and human rights is very complicated. Poverty is often hoodwinked in splendour, and often in extravagance. It is the drudgery of many people to occult their neediness from the rest. Consequently, they expedite themselves by temporary means, and every day is cast away in contriving for tomorrow. Human rights, on the other hand, are intrinsic to every human being. Everyone is entitled to the same simply because of being a human. In addition, poverty and human rights are counteractive to each other because poverty stands as a barrier before the enjoyment of human rights. Hence, to determine the relationship between them is insidious. It becomes much more destructive when the perception of poverty is accepted as *'a violation of numerous basic human rights.'* This expresses the moral intuition that, in a world rich in resource and accumulation of human knowledge, everyone ought to be guaranteed the basic means for sustaining life, and that those denied these, are victims of fundamental injustice.[1] This is succoured by another intuition, which is that the average opulence in most societies, and definitely so in developed countries, is more than sufficient to eradicate poverty from the face of the earth.[2] Although those institutions may be true, such a broad statement may fall into the so-called *"fallacy of exaggeration"*[3]. Again, under human rights jurisprudence, since every denial does not constitute a violation of human rights, it is a question as to an ongoing debate of international human rights literature and practice. This gap is more of ideological than historic significance.

After 1948, with the Universal Declaration of Human Rights- human rights and poverty reduction proceeded on separate conceptual tracks owing to the great influence of cold war politics. Since the mid of 1990s, there has

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1 Beetham, D. 1995. *"What Future for Economic and Social rights?"*. Political Studies Association, Sheffield, vol. XLIII, at p. 44.

2 Sengupta, A. 2007. "Poverty *Eradication and Human Rights, In: Freedom from poverty as a human right – who owes what to the very poor?"*. Pogge, T. (ed). Oxford, Oxford University press, at p.323.

3 Costa, Fernanda Doz . *Poverty and human rights: From rhetoric to legal obligations a critical account of conceptual frameworks,* available at: http://socialsciences.scielo.org/scielo.php?pid, last visited on 23 October 2011.

been increasing recognition of poverty as a human rights problem.[4] Within the structure of United Nations this has happened particularly after the World Conference on Human Rights in Vienna in 1993, which affirmed the individuality, interdependence and interrelation of all human rights.[5] This was followed by several declarations and resolutions acknowledging poverty as an important human right issue.

However, international human rights practitioners still lack conceptual clarity while connecting poverty with human rights, especially from a human rights law perspective. This paper attempts to bridge this conceptual gap. The object is to analyze different conceptual frameworks, their strengths and weaknesses and to suggest which one is the most accurate approach from an international human rights law perspective.

Towards Conceptual Clarity: The Notions of Poverty and of Human Rights

This is not very easy to conceptualize the notions of poverty and of human rights. This becomes acute when a transformation is made in outlook from theory to practice, since a practical rendezvous hints that a) there are significant overlaps and common objectives; as well as b) they are in fact distinct through intersecting endeavours in many cases.

The conceptualization of poverty and human rights would be smooth if the concept of the former was a clear and an unambiguous one. Hence, there is an obvious problem in *'defining poverty'*. Most definitions of poverty are arbitrary and relative, even if they are based on statistical analyses.[6] Most definitions are drowning up at a low level. Many people are clustered on or near poverty lines, so slight changes in the definition can remove or add people to the lists of those who are poor.[7] Again more practically, poverty is a specific, local, contextual experience. As "Voices of the Poor: Can Anyone Hear Us?" the compelling World Bank study puts it: "Poverty is experienced at the local level, in a specific context, in a specific place, in a

4 United Nations Centre for Human Settlements. *"Cities in a Globalizing World: Global Report on Human Settlements 2001"*, available at: http://books.google.com.bd/books?id=Kk8f9E-Hcj0C&pg=PA46&lpg=PA46&dq, last accessed on 29 June 2011.

5 Vienna Declaration and Programme of Action. *World Conference on Human rights, 1993,* UN Doc A/ CONF. 157/24.

6 Most of the definitions made are based on random choice or personal whim, rather than any reason or system. Unrestrained and autocratic use of authority is visible. There is no participation of the stakeholder in defining the term. No special protection is provided for comparatively vulnerable and marginalized groups. Principle of equality and non-discrimination has not been uplifted, Available at, www.ngfl-cymru.org.uk/vtc/ngfl/sociology/**poverty_definitions**.ppt, *last accessed on 9 August, 2012.*

7 Ibid.

specific interaction."[8] Human rights, on the other hand, though can easily be understood but, while linking the same with poverty issue, various unresolved questions may arise. The major questions are, whether the concept is a moral or a legal one, or how could the binding obligations be determined referring to human rights and to what extent, or who are the duty bearers and so on.

However, in spite of having such unresolved issues, the concept of poverty is moving towards human rights based vision. In the paper namely, "Poverty reduction and Human Rights: A Practice Note", the view of United Nations Development Programme[9] is expressed in the following words[10]:

> The definition of poverty is steadily moving towards a human rights-based vision highlighting its underlying multitude of causes. The increased awareness that the respect for human rights is a sine qua non for socio-economic outcomes challenges the proposition that income should be used as a good and sufficient proxy indicator for measuring poverty. UNDP's attempt to capture the multi-dimensional nature of poverty is expressed in its efforts to develop the Human Development Index, the Gender-related Development Index, and the Human Poverty Index. These efforts have opened up avenues for more holistic approaches to poverty analysis, reduction strategies and monitoring.

The Concept of Poverty

The literacy of poverty is not a new one rather bygone and broad in scope. Some of the most prominent social scientists have been trying to elucidate on the concept of poverty for more than 200 years.[11] The reason being that, poverty of our century is unlike that of any other. So, the view presented as regards to this is variable, for example, human poverty is more than income poverty[12]-it is the denial of choices and opportunities

8 D. Narayan, R. Patel, K. Schafft, A. Rademacher and S. Koch-Schulte. 2000. *Voices of the Poor.* Volume 1 - Can Anyone Hear Us?, New York, published for the World Bank by Oxford University Press, at p. 230.

9 Hereinafter referred as UNDP.

10 UNDP.2003. *Poverty reduction and Human Rights: A Practice Note, p.6, available at:* http://www.cities-localgovernments.org/committees/cisdp/Upload/general_docs/povertyreduction-humanrightsenglish%281%29.pdf, *last accessed on 8 May 2012.*

11 Saunders, P. 2004. *Towards a Credible Poverty Framework: From income Poverty to Deprivation.* Social Policy Research Centre Discussion Paper, Sydney, University of New South Wales, n. 131, at p. 7.

12 Income poverty describes a person or family who lives on or below the minimum acceptable way of life. It's most likely to occur in people who have a low income. Women, disabled and lone parents are at higher risk of being in income poverty. Changes in the economy, employment being terminated and low income can have a factor on income poverty. The income approach to poverty, which considers people

for living a tolerable life.[13] In the recent past, poverty was defined as insufficient income to buy a minimum basket of goods and services.[14] Today, the term is usually understood more broadly as the lack of basic capabilities to live in dignity.[15] This definition recognizes poverty's broader feature, such as hunger, education, discrimination, vulnerability and social exclusion.

However, as a matter of fact here the definition of poverty is based on capability approach only. Because in the last two decades, the poverty discourse has succumbed much beyond the income criterion, to the concept of *'well being'*. This was happened chiefly owing to UNDP Human Development Report (HDR) which was clearly influenced by Amartya Sen's 'Capability Approach', where poverty is seen as "*capability deprivation*".[16] To quote him[17]:

> Poverty must be seen as the deprivation of basic capabilities rather than merely as lowness of incomes, which is the standard criterion of identification of poverty. The perspective of capability poverty does not involve any denial of the sensible view that low income is clearly one of the major causes of poverty, since lack of income can be a principal reason for a person's capability deprivation.

This approach relates the notion of poverty to the notion of *'impoverished lives'* and to deprivations in the basic freedoms i. e., both positive and negative freedom that people can and do enjoy such as the freedom to avoid hunger, disease, illiteracy, and so on. For example, the UNDP's Human development Index (HDI) is an average of three measures of

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earning less than a certain amount annually as poor, is not an accurate measure of how well people live.

13 UNDP. *Human Development Report 1997: Human Development to Eradicate Poverty*, p.2. Available at: http://hdr.undp.org/reports/global/1997/en , last accessed on Nov 2011.

14 ESCR Committee, *'Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights'* (2001) E/C. 12/2001/10, paras 7 and 8.

15 Ibid.

16 As per the *capability deprivation*, poverty must not be based on the criteria of lowness of income but also can be seen as a deprivation of basic capability and that will show the standard of identification of poverty. No doubt low income is main cause of poverty but lack of income is also the principle reason for a person's capability deprivation. The insufficient income is a strong predisposing factor for impoverish of life. The capability approaches to poverty are deprivation (intrinsically important whereas low income is only instrumentally significant), income is not the only instrument in generating capabilities and the impact of income and capabilities varies between communities, families and even individuals.

17 Sen, Amartya, 1999. *Development as Freedom.* Oxford University Press, at p.87.

deprivation: vulnerability to death, deprivation in knowledge and lack of decent living standards.[18]

Recalling these aspects, Sen speaks for poverty that is concerned with basic freedoms because these are recognized as being fundamentally valuable for minimal human dignity.[19] This concern for human dignity motivates the human rights approach, which postulates that people have inalienable rights to these freedoms.[20] If someone has failed to acquire these freedoms, then obviously her rights to these freedoms have not been realized. Therefore, poverty can be defined equivalently as either the failure of basic freedoms- from the perspective of capabilities, or the non-fulfilment of rights to those freedoms – from the perspective of human rights.[21] Sen's theory which recognizes that deprivations in basic freedoms are not only associated with shortfalls in income but also with systematic deprivations in access to other goods, services and resources necessary to human survival and development as well as interpersonal and contextual variables.

Again, recalling the features of capability, it can be stipulated that, non-fulfilment of human rights would count as poverty when it meets two conditions- a) the human rights involved must be those that correspond to the capabilities which are considered basic by a given society; and b) inadequate command over economic resources must play a role in the casual chain leading to the non-fulfilment to human rights.[22]

The Concept of Human Rights

Human rights are a global vision backed by state obligations and are essential for the existence of human being itself. Promotion and protection of human rights are thus legal obligations of all states in national and international sphere, as is clearly stated in articles 55 & 56 of the UN Charter.[23] The obligation becomes bold, when the states extend their

18 There are two HPIs, one for industrialized countries and another for developing countries. Various standards are used for measuring those three dimensions and the latest includes a fourth dimension: social exclusion. UNDP. Human Development Report 2003: *Millennium Development Goals: a Compact Among Nations to End Human Poverty*. New York: Oxford University Press, 2003, p. 61.

19 OHCHR. 2004. *Human Rights and Poverty Reduction: a Conceptual Framework*, New York and Geneva, p.9.

20 Ibid.

21 Ibid, at p.10.

22 Ibid.

23 Article-56 of the *UN Charter* says all Members pledge themselves to take joint and separate action in co-operation with the UN for the achievement of the purposes set forth in Article 55. Some of the purposes mentioned under article-55 are, higher standards of living, full employment, and conditions of economic and social progress and development, solutions of international economic, social, health, and related problems; and international cultural and educational cooperation.

respect to the same by ratifying other binding international human rights instruments i.e., International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights etc.

In 1948, the Universal Declaration of Human Rights as well as the two Covenants of 1966[24] established that poverty is a human rights issue.[25] This view has been reaffirmed on numerous occasions by various United Nations bodies, including the General Assembly and Commission on Human Rights.[26]

Again, human rights are based on the inherent dignity of every human person. To uphold this human dignity poverty is the greatest clog. Therefore, international human rights law always emphasizes on the protection of human dignity by reducing the intensity of poverty. This is why, the rudiment definition of human rights is almost unanimous[27] but the purposive definition of it particularly when a link of it is expounded to poverty becomes very obscure. Whether it should be accepted as a legal or moral one- leads this hazard. There is an increasing trend to use human rights language as a legitimate moral discourse that evokes universality[28] and consensus of fundamental values among otherwise competing traditions on a shared minimum standard of human dignity.[29]

While poverty cannot be unconcealed as a denial of economic and social rights exclusively (because also civil and political rights are compromised), its connection with human rights is mainly addressed through them.[30] As a consequence, the discussions about whether economic and social rights create legal or moral obligations are particularly relevant to the poverty and human rights discussion. Unfortunately, this is not always diaphanous in the positions of those who worked on the issue, particularly in the UN context.[31]

24 International Covenant on Civil and Political Rights, 1966 and International Covenant on Economic, Social and Cultural Rights, 1966.

25 The Preamble to the 'Universal *Declaration of Human rights'* and the common Preamble to the 'International *Covenant on Civil and Political Rights'* and the *'International Covenant on Economic, Social and Cultural Rights'* emphasize the importance of *"freedom from want"*.

26 For example, General Assembly resolution 55/106 of December 2000 and Commission on Human Rights resolution 2001/31 of 23 April 2001.

27 Rahman, Dr. Mizanur. 2006. *"Human Rights: The bridge across borders"*, vol-17 Journal of the faculty of Law, the DU studies, Part-F, at pp. 79-116.

28 Bari, Dr. M. Ershadul. *1992. "Human Rights and World Peace"*, vol-3 Journal of the faculty of Law, the Du studies, Part-F, at pp.1-12.

29 Rawls, J. 1996. *"Political Liberalism"*. New York: Columbia University Press, Ch. XVIII and XX, at pp. 227-230.

30 While calculating the connection of poverty with human rights, the latter should be considered as a composite one covering, economic, social, cultural, civil and political rights.

31 Above note-3, at page 5.

In my study, I shall always ascribe to human rights in the legal sense, as a set of internationally legally binding norms based on international treaties and customs as well as the authorized interpretations of those instruments.

The Linkage between Poverty and Human Rights

The United Nations Committee on Economic, Social and Cultural Rights defines poverty as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.[32] So, poverty is the absence of some social and economic phenomena principally. Hence, poverty has been and remains a constructed social and economic reality. The poor are not poor simply because they are less human or because they are physiologically or mentally inferior to others whose conditions are better off. On the contrary, their poverty is often a direct or indirect consequence of society's failure to establish equity and fairness as the basis of its social and economic relations. So, it is no more a matter of argument that there is no linkage between poverty and human rights.

Again, there is an emerging view that poverty constitutes a denial or non-fulfilment of human rights. However, does it mean that poverty is the same thing as no-fulfilment of human rights in general or should certain kinds of human rights matter in the context of poverty? If so, then how can they be determined form the rest? These are the kind of questions need to be addressed first. Though the simplest approach would be to take all embracing one i.e., to define poverty as non-fulfilment of any kind of human rights but it would not be appropriate to do so. Because for it would clearly be odd to characterize certain cases of non-fulfilment of rights as poverty e.g., denial to speak.[33] So, there are some clear associations that constrain the nature of the concept of poverty especially at the occasion of connecting it with human rights. Hence, we are not entirely free to characterize poverty in any way we like.[34]

Here, as a matter of fact, this link is to be drawn from the viewpoint of capability deprivation since the "capability approach' is widely accepted as the conceptual 'bridge' between poverty and human rights. This congregates new variables to economics which reflects the inherent and instrumental appraisal of fundamental freedoms and human rights, indeed. While pondering the oration on poverty and human rights it shall be focused from three different viewpoints firstly, poverty itself as a violation of human rights; secondly, poverty as a cause of violation of human rights; then a human right to be free from poverty.

32 OHCHR. 2008. *Human Rights, Health and Poverty Reduction Strategies*, Health and Human Rights Publication Series, Issue No, 5, Geneva, at p. 6.

33 OHCHR. 2004. *Human Rights and Poverty Reduction: a Conceptual Framework*, New York and Geneva at p.5.

34 Sen, Amartya. 1992. *Inequality Re-examined*, Harvard University Press, at p. 107.

Poverty Itself as a Violation of Human Rights

This approach hails that, poverty is dissonant with human dignity on the basis of which human rights are founded. Hence, poverty is a negation of all human rights. Recognizing this approach the UNDP states that poverty is a denial of human rights and that the elimination of poverty should be addressed as a basic entitlement and a human right- not merely as an act of charity.[35] The same view has also been expressed by Mary Robinson in the following way:

> [e]extreme poverty to me is the greatest denial of the exercise of human rights. You don't vote, you don't participate in any political activity, your views aren't listened to, you have no food, and you have no shelter. Your children are dying of preventable diseases-you don't even have the right to clean water. It's a denial of the dignity and worth of each individual which what the universal declaration proclaims.[36]

So, under this approach, poverty is indisputably the most potent violation of all human rights, and constitutes a threat to the survival of the greatest numbers of the human population. As poverty has intensified in both rich and poor nations alike, the view of poverty as a human rights and social justice issue has contrived increased recognition with the passage of time.

The Office of the High Commissioner for Human Rights (OHCHR) favours that, the use of Sen's "*capability approach*" is an exact conceptualization of poverty from a human rights perspective and there is a 'natural transition from capabilities to rights'.[37] Under the same approach, they further added, that poverty is 'the failure of basic capabilities to reach certain minimally accepted levels'[38] and it is also 'the absence or inadequate realization of certain basic freedoms '[39]. Being so, since freedom is the common element that links the two approaches, there is a conceptual equivalence between basic freedoms and rights.

35 UNDP. 2003. "*Poverty reduction and human rights: a practice note*", Available at: http://www.beta.undp.org/content/dam/aplaws/publication-pdf , last accessed on November 2011.

36 Robinson, M. BBC News, Thursday, 21 Nov. 2002. Available at http://news.bbc.co.uk/2/low/talking_point/forum/1673034.stm. Last visited on November 2011.

37 OHCHR. 2004. "*Human Rights and Poverty Reduction, a conceptual framework*", New York and Geneva, available at http://www.unhchr.ch/html/menu6/2/povertyE.pdf, last visited on November 2011.

38 Sen, A. 1992. "Inequality *Re-examined*". Cambridge: Harvard University Press, at p. 109, cited in Hunt, Nowak & Osmani, HR/PUB/04/1, 2004, p.7.

39 OHCHR. 2004. "Human *Rights and Poverty Reduction, a conceptual framework*", New York and Geneva, at p. 9, available at http://www.unhchr.xch/html /menu6/2/povertyE.pdf , last visited on November 2011.

Again there are some difficulties in this theoretical correspondence. First, the concept of basic capabilities is contingent, while human rights are not. Second, the content of each basic capability is also contingent, while international human rights law and jurisprudence is defining universal minimum core content of rights.[40] Since, poverty denotes an *extreme* form of deprivation; only those capability failures would count as poverty that is deemed to be *basic* in some order of priority.[41] The OHCHR argues that different communities may of course have a different understanding of what would qualify as "basic" capabilities.[42] There is a suspicion here with the human rights discourse which jeopardizes the alleged conceptual equivalence. The "capability set" that each society will list as basic can't be equivalent to human rights. This is because the universality of the catalogue of human rights is beyond any political discussion and communities preferences. This conflict has been recognized in an obscure way by the Office of the High Commissioner for Human Rights (OHCHR). Where it has been argued that although there is some degree of relativity in the concept of poverty from empirical observation it is possible to identify certain basic capabilities that would be common to all.[43] So, still there is a conceptual snare, because the human rights discourse does not claim universality based on an empirical observation rather on a moral and legal imperative.

Poverty as a Cause of Violation of Human Rights

This approach marks poverty as the cause of many human rights violations, mainly economic and social, not excluding civil and political also. This approach holds that poverty socially excludes a group of people whose human rights are then systematically violated. So, here poverty is not considered as *priori* a human rights violation but a cause of human rights violations.

The Vienna Declaration has characterized *extreme poverty as a violation of human dignity,*[44] but avoided calling it a violation of human rights,

40 'The committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party.' UNITED NATIONS. Committee on Economic , Social and cultural Rights. The nature of state parties obligations. *General comment* 3, UN Doc. HR1/GEN/1/Rev.1 at 45, 1990, § 1 and 10.

41 Hunt, P. Nowak, M. & Osmani, S. 2004. "Human *Rights and Poverty Reduction, a conceptual framework*", OHCHR, HR/PUB/04/1 at p. 7. Emphasis added.

42 Ibid, p. 6.

43 Ibid, p. 8.

44 *Vienna declaration and Programme of action*, adopted by the World Conference on Human Rights on 25 June 1993 (UN Doc: A/CONF. 157/23). Article-25 of it states: The World Conference on Human Rights affirms that extreme poverty and social exclusion constitute a violation of human dignity and that urgent steps are necessary to achieve better knowledge of extreme poverty and its causes, including those related to the problem of development, in order to promote the human rights of the poorest, and to put an end to extreme poverty and social exclusion and to

arguably because of the reluctance of governments to accept legal responsibility. It observes that the existence of widespread extreme poverty inhibits the full and effective enjoyment of human rights.[45]

However, poverty is not *per se* a violation of human rights, since there are several conceptual steps before naming poverty as a human rights violation. Philip Alston, for example, considers that poverty is a violation of human rights only to the extent that a) a government or other relevant actor has failed to take measures that would have been feasible; and b) where those measures could have had the effect of avoiding or mitigation the plight in which an individual living in poverty finds him or herself.[46]

Again, this is argued that, poverty can be alleviated and human rights still be violated. However, if human rights are realized there may not be any poverty. So, it would be more accurate to consider poverty eradication as playing an instrumental role in creating conditions of well-being for the rights holder.[47]

This approach seems to be more realistic and legally accurate than the previous one. The complexities of the phenomenon of poverty make it very difficult to assume that poverty implies human rights violations without further inquiries. With the present development of international human rights law and standards, it seems reasonable to require empirical and analytical evidence to establish that one specific deprivation, which is clearly characterized as poverty, is at the same time a human rights violation. The analytical effort needed is to prove that the state had violated a concrete human rights obligation that was feasible and could have had an impact other than negative.[48]

Human Right to be Free from Poverty

Under this view, poverty is not reckoned as the denial of all or several human rights but the violation of one specific right[49]. This proposal puts light on the so called absolute/extreme poverty[50] and expounds that

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promote the enjoyment of the fruits of social progress. It is essential for States to foster participation by the poorest people in the decision-making process by the community in which they live, the promotion of human rights and efforts to combat extreme poverty.

45 UN DOC A/CONF.157/24, 1993, cited in Alston, 2005, p. 786.

46 Alston, 2005, p. 787.

47 UN DOC : E/CN.4/2006/43, 2 Mar. 2006, §41.

48 Costa, Fernanda Doz. 2008, *"Poverty and human rights: From rhetoric to legal obligations a critical account of conceptual frameworks"*, Revista Internacional de Direitos humanos, no-9, at pp. 80-107.

49 This idea came from the UNESCO's draft document *'Abolishing Poverty Through the International Human Rights Framework: Towards an Integrated strategy for the social and Human Sciences.'* Draft V. 3 , report, 2003, p. 3.

50 Absolute poverty is defined as a deprivation of what is required to live a life that is worth living. See, Campbell, T. *Poverty as a violation of Human Rights: Inhumanity*

everyone has the right to the means of basic subsistence. However, in this arena, moral claim is totally different from legal one.

Freedom from Poverty as a Moral Human Right

The human rights in practice and theory have been influenced greatly by the liberal tradition.[51] The propagators of liberalism advocated for the inclusion of freedom from poverty as a fundamental human rights concern.[52] However, liberalism is not the only philosophical foundation of human rights. So, in the best case scenario, poverty is not a violation of universal human rights rather a national problem of social injustice. Nevertheless, the influence of the liberal tradition in the human rights discourse cannot be denied.

In this connection, Pogge's view in '*World Poverty and Human rights*' is a major attempt to move this debate forward, locating his theory within the traditional liberal idea of negative obligations. He argues in favour of a moral human right that everyone has to a standard of living adequate for health and well-being[53]. He goes further to give meaning to this right, positioning that governments and citizens of affluent democracies have a negative duty towards the global poor.[54]Indeed, he argues that poverty in developing countries cannot be seen as disconnected from industrialized countries opulence. However, while arguing in favour of moral human right Pogge did not negate the legal human right. To quote him[55]:

> Human rights of both kinds can coexist in harmony. Whoever cares about moral human rights will grant that laws can greatly facilitate their realization. And human right lawyers can acknowledge that the legal right and obligations they draft and interpret are meant to give effect to pre-existing moral rights. In fact, this acknowledgment seems implicit in the common phrase 'internationally recognized

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or Injustice? In: Freedom from poverty as a human right – Who owes what to the very poor? Pogge, T. (ed.). Oxford, Oxford University Press, 2007, page 55.

51 The indubitable values of the liberal tradition are based on the belief that individual freedom is paramount in political and social considerations, and that government power should be limited so as to interfere as minimally as possible in that freedom. It does want to ensure political, social and economic conditions which guarantee the individual the freedom to reach his fullest potential, but this is often seen in economic terms. The state, or government, was seen as an inhibiting obstacle to the full expression of economic activities, and the liberal tradition wants that obstacle removed or at least limited as much as possible, available at: http://www.lotsofessays.com/viewpaper/1682655.html, last accessed on 8 August 2012.

52 Blau, Judith R. and Alberto Moncada. 2005. *Human Rights: Beyond the Liberal Vision.* The USA, chapter-1.

53 Pogge, T. 2002. *"World Poverty and human rights: Cosmopolitan responsibilities and reforms"*, Cambridge. Polity Press, at p. 53.

54 Ibid, p.145 and 172.

55 Ibid, p.2.

human rights'. It is clearly expressed in the Preamble of the Universal Declaration of Human Rights (UDHR), which presents this Declaration as stating moral human rights that exist independently of itself.

Amartya Sen has also contributed to the debates in ethics and political theory to quell the theoretical obstacles to view global poverty as a violation of human rights.[56] Sen, composes a broad theory that a) incorporates positive obligations of assistance and aid towards the global poor; and b) supports a sub-class of fundamental freedoms and human rights that focuses directly on the valuable things that people can do and be.[57] Unlike Pogge, Sen contests the liberal assumption that freedoms only imply negative obligations. So, he (Sen) builds a broad theory which covers positive obligations of assistance and aid towards the global poor. Hence, both Sen and Pogge have developed political and moral theories that include freedom from poverty as a major human rights concern.

Freedom from Poverty as a Legal Human Right

Since, this approach is not expressly recognized in international human rights law; this is to be built from various legally binding obligations that have already been recognized. Here, while dealing with this wave, some want to cover only extreme poverty, other want to argue that the right to be free from poverty is the opposite of the right to an adequate standard of living or the right to development.

Legal Human Right to be Free from Extreme Poverty

When the analysis of poverty is narrowed to extreme poverty, Arjun Sengupta[58], argues that there is a legally binding obligation upon the states to end poverty.[59]According to him, the international community will be more willing to accept this binding obligation if there is more manageable number of people, who are clearly and demonstrably most vulnerable to suffering from all forms of deprivation.[60] He strengthens his position deducing that the denials related to extreme poverty are easily

56 Vizard, Polly. 2006. *Pogge -vs- Sen on Global Poverty and Human Rights*, Centre for Analysis of Social Exclusion, LSE, pp.1-22, available at: https://papyrus.bib.umontreal.ca/jspui/bitstream/1866/3357/1/2006v3n2_VIZARD.pdf, last accessed on 8 August 2012.

57 Vizard, Polly. 2005. *The Contributions of Professor Amartya Sen in the Field of Human Rights*, Centre for Analysis of Social Exclusion, LSE, pp.5-8, available at, http://eprints.lse.ac.uk/6273/1/.pdf, last accessed on 8 August 2012.

58 Arjun Sengupta is a professor at the School of International Studies, Jawaharlal Nehru University, New Delhi and a research professor at the Centre for Policy Research, New Delhi. He is also a former member of the Indian Planning Commission and a former executive director of the IMF. He is currently the Independent Expert on the Right to Development for the Human Rights Commission, Geneva.

59 UN Doc: E/CN.4/2006/43,2 March, 2006, 41

60 Ibid, p. 70

identified with already recognized human rights law and that poverty eradication procedures would transmute as customary law.

Thomas Pogge while editing the famous book namely, Freedom from Poverty as a Human Right: Who owes what to the very poor? Rightly concluded as follows:

A right to be free from extreme poverty is supported by the basic character of the interests it refers to, but also by the cheapness of its fulfilment. A case could be made that the denial of justice to the global poor is also a problem of irrationality, given that poverty eradication does not significantly affect, and perhaps enhances the national and individual self-interests of all. A right to basic resources trumps, as any other right, consequentialist and self-interested preferences, but this does not mean that, in practice, consequentialist considerations contradict pro-poor policies. On the contrary, eradication of poverty would most probably increase aggregate global welfare, and would certainly not imply an important sacrifice for anybody.[61]

Here, Pogge further added that, the right to basic necessities derives from a principle of humanity, understood not as charity or simple benevolence, but as a nuclear element of justice, even if justice is narrowly understood as dealing with merit and desert.[62] Institutionally, on the other hand, a right to be free from extreme poverty deserves constitutional standing, and arguments based on democratic disagreement and informational deficits must be rejected.[63] Directly, such a right commands judge to enforce it if the democratic branches fail to do so. Indirectly, it justifies a more responsive approach to legal problems, in particular, those arising from alleged violations of other legal standards (like mandated political representation) and the resistance of the victims of extreme inequality.[64] So, the presence of extreme poverty that may result from the absence of basic necessities is very likely to endanger the essence of justice. Hence, judiciary has to play an active and bold role in order to keep the public confidence on it.

The enumerated rights in the ICESCR are subject to resource availability and may be realized progressively.[65] General Comment No. 3, adopted in 1990, confirms that state parties have a "core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights" enunciated in the covenant since without that, the covenant "would

61 Available at: http://books.google.com.bd/books?id=Aa7PBl9Qx4MC&pg=PA254&lpg , last accessed on 1 may 2012.

62 Pogge, Thomas (eds). 2007. Freedom from Poverty As a Human Right: Who Owes What to the Very Poor?, Oxford University Press, p.254.

63 Ibid.

64 Ibid.

65 Article 2.1.

be largely deprived of its raison detre."[66] More recently, the committee on Economic, Social and Cultural Rights began to identify the core obligations arising from the "minimum essential levels 'of the right to food, education and health[67], and it confirmed that these core obligations are "non-derogable"[68]. In General Comment no. 14, it[69] emphasizes that it is particularly incumbent on all those in a position to assist, to provide "international assistance and cooperation, especially economic and technical" to enable developing countries to fulfil their core obligations.[70] In short, core obligations give rise to national responsibilities for all states and international responsibilities for developed states, as well as, others that are 'in a position to assist'.[71]

The United Nations General Assembly (UNGA) has resolved that extreme poverty and exclusion from society constituted a violation of human dignity. To state it exactly[72]:

> Extreme poverty and exclusion from society constitute a violation of human dignity and that urgent national and international action is therefore required to eliminate them ... it is essential for States to foster participation by the poorest people in the decision-making process in the societies in which they live, in the promotion of human rights and in efforts to combat extreme poverty, and for people living in poverty and vulnerable groups to be empowered to organize themselves and to participate in all aspects of political, economic and social life, in particular the planning and implementation of policies that affect them, thus enabling them to become genuine partners in development.

Today almost half of the population in developing countries lives in extreme poverty, and are denied basic human rights such as the right to an adequate standard of living, including food and housing, the highest attainable standard of physical and mental health, and education. People living in poverty across the world are often socially excluded and marginalized from political power and processes. Their right to effectively participate in public affairs is often ignored. People living in poverty are subjected increasingly and disproportionately to a range of administrative and legal policy measures that seek to criminalize, penalize, segregate and

66 General Comment No. 3, Para. 10.

67 General Comment Nos. 11, 13 and 14 respectively.

68 General Comment No. 14, para.47.

69 Committee on Economic, Social and Cultural Rights

70 General Comment No. 14, Para 45. The Covenant refers to "international assistance and cooperation' in articles 2.1, 11.2, 15.4, 22 and 23.

71 Committee on Economic, Social and Cultural Rights, 25th session, Geneva, 23 April-11 May 2001, Agenda item 5, para-16.

72 General Assembly Resolution 53/146 on Human Rights and Extreme Poverty adopted December 18, 1992.

surveil them because of their situation.[73] The elimination of extreme poverty is not a question of charity, but a pressing human rights issue. Being so, states are legally obligated to realize human rights for all, prioritizing the most vulnerable, including those living in extreme poverty.[74]

Poverty as the Violation of the Right to an Adequate Standard of Living

In purely material terms, an adequate standard of living[75] implies living above the poverty line of the society concerned, which according to the World Bank, includes two elements: 'The expenditure, necessary to buy a minimum standard of nutrition and other basic necessities and a further amount that varies from country to country, reflecting the cost of participating in the everyday life of society.' ICESCR General Comment 12 finds that what is 'adequate' 'is to a large extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions'.[76]

While ensuring the adequate standard of living, those who are poverty stricken must be treated differently in a positive manner because they are less in standard in comparison to the rest. In this connection the judiciary may take a pivotal role while upholding its verdict that is pro-poor in nature. In a recent judgment in the case namely *'Ain O Salish Kendra (ASK) and others v Government of Bangladesh and Others*[77], the Supreme Court of Bangladesh has shown this type of drift. The Court held that:

> Our constitution both in directive state policy and in the preservation of the fundamental rights provides that the state shall direct its' policy towards securing that the citizens have the right to live, living and livelihood. Thus our country is pledge bound within its economic capacity and in an attempt for development to make

[73] The Special Rapporteur's report to the sixty-sixth session of the General Assembly (October 2011)

[74] UNHR. Office of the High Commissioner for Human Rights. 2011. Special Rapporteur on Extreme Poverty and Human Rights.

[75] As per Article 25(1) UDHR, 'everyone has the right to a standard of living adequate for the health and well-being of himself and his family'. This provision sets out some of the elements of this right: a) food; b) clothing; c) housing; d) medical care; and e) necessary social services. Again, under Article 11 ICESCR, everyone has the right to 'an adequate standard of living for himself and his family'. The Committee on Economic, Social and Cultural Rights has issued several General Comments explaining the components of this right including the right to adequate housing (General Comments 4 and 7), the right to food (General Comment 12), the right to water (General Comment 15) as well as the right to social security (General Comment 19).

[76] ICESCR, General Comment, 12, E/C.12/1999/5, available at, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/420/12/PDF/G9942012.pdf?, last accessed on 9 August 2012.

[77] Writ Petition No. 3034 of 1999, 19 BLD HCD (1999) 488.

effective provision for securing the right to life, livelihood etc. any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to live conferred by constitution.

The Indian Supreme Court speaking in this regard[78], in Shantistar Builders v. Narayan Khimalal Tatome and Others[79] case held that constitutional right to life guarantees to ensure the equality of the "weaker segments of society", and found that meeting basic needs is indispensable to the development of individuals. It is declared:

"Basic needs of man have traditionally been accepted to be three- food, clothing and shelter. The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, right to clothing, the right to a decent environment and a reasonable accommodation to live in. The difference between the need of an animal and the human being for shelter has to be kept in view. For the animal, it is the bare protection of body; for the human being, it has to be a suitable accommodation that would allow him to grow in every aspect physical, mental and intellectual. The Constitution aims at ensuring fuller development of every child. That would be possible only if the child is in a proper home ... a reasonable residence is a indispensable necessity for fulfilling the Constitutional goal in the matter of the development of a man and should be taken as included in 'life'.

In this connection, the capability approach provides a framework in which the capability to achieve a standard of living adequate for survival and development is characterized as a basic human right. Adequate nutrition, safe water and sanitation, shelter and housing, access to basic health and social services and education are the prime consideration here. The governments and other actors have individual and collective obligations to defend and support the same. [80]

Vizard, further justifies a broad conception of legal human rights that takes into account global poverty in several international norms[81] covering the regional and national ones. Again to deal with the complexities of

78 About adequate standard of living, to life, to adequate food, to adequate housing, to development

79 (1990) 1 SCC 520.

80 Vizard, P. 2006. *"Poverty and human rights, Sen's capability perspective explored"*. Oxford: Oxford University Press, at p.66.

81 United Nations Charter, articles 55 & 56; the Universal Declaration of Human Rights, articles 1(1), 25 & 26: the International covenant on Civil and Political Rights, preamble & article6: the International covenant on Economic, Social and Cultural Rights, preamble & articles 11, 12, 13 & 14; International Convention on the Elimination of All forms of Racial Discrimination, article 5(e); the Convention on the Elimination of All forms of Discrimination against Women, articles 11, 12, 13, 14(1-2) AND THE Convention on the Rights of the Child, articles 1, 24, 26, 27,28 & 29. Vizard, 2006, p.143.

poverty and its implications for the enjoyment of human rights- capability approach can be used as a conceptual framework.

Vizard highlights that international human rights law and the 'capability approach' has complementary and reinforcing elements.[82] These elements provide the basis for a cross-disciplinary framework for analyzing poverty as a human rights issue.[83] Moreover, they stand out as two approaches that are concerned first and foremost with the well-being of individuals, their freedom, dignity and empowerment. So, Vizard provides an important framework and conceptual clarity to the actual links between the idea of a "basic capability set", international human rights law and international machinery for monitoring and enforcement. This is particularly important for the human rights community.

Poverty as the Main Concern of the Right to Development

The demonstrated quest of the third world for development was eventually recognized by the international community in the 1986 UN Declaration on the Right to Development and subsequently reaffirmed in the Vienna Declaration of 1993, but it has not been codified in a legally binding document.[84] It purports to identify the relevance of development to economic, social, cultural and political spheres and gloss over the major development concern.[85] More broadly, this is the right to a process of development in which all human rights and fundamental freedoms are realized, and is seen as an evolving social arrangement and international order that facilitates the realization of, and actually realizes in a progressive manner, all those rights.[86]

The content of the right to development revolves on the idea of how to put a human rights approach in development processes. Known as the right to process to development, Article 1 of the Declaration on the Right to Development states that "the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and

82 Above note, 80.

83 Ibid.

84 United Nations. *Declaration in the Right to Development*, Adopted by the United Nations General Assembly resolution 41/128 of 4 December 1986 and *Vienna Declaration and Programme of Action,* adopted by the world conference on Human Rights on 25 June 1993 (UN DOC : A/CONF . 157/23).

85 Islam, Dr. M Rafiqul .' *Development as a Human Right an Economic Analysis from the third world perspective'*, in: Rahman, Dr. Mizanur (edited) Human Rights and Development, Published by Empowerment through Law of the common People, Dhaka.2002, pp. 1-16.

86 Sengupta, A. " *Poverty eradication and Human rights, In : Freedom from Poverty as a human right- Who owes what to the very poor?*" . Pogge, T. (ed.). Oxford, Oxford University Press, 2007, page 338.

fundamental freedoms can be fully realized."[87] Under the declaration the right to development includes: full sovereignty over natural resources, self-determination, popular participation in development, equality of opportunity, and the creation of favourable conditions for the enjoyment of other civil, political, economic, social and cultural rights.[88]

So, the right to development is a composite right to process of development. It is not only an umbrella of right, or the sum of a set of rights. The integrity of these rights implies that if anyone of them is violated, the whole composite right to development is also violated. This can be understood in terms of a 'vector' of human rights composed of various elements that represent various economic, social, and cultural rights as well as civil and political rights. It might be said that under the condition of poverty, in which violations of human rights has occurred under the both international covenants, it is also a violation of the right to development. That argument, for instance, is acknowledged by the General Assembly in its resolution.[89] It has been affirmed there[90] that in the full realization of the right to development, the rights to food and clean water, the right to shelter, and the right to housing are required to be fulfilled. In other words, if those rights are violated, so is the right to development.

The right to development is a human right in itself but it is also a composite right, constituted by other human right that forms the core of its content. Thus, the composite right improves, that is, is gradually realized, if some rights are improved, but no right regresses or is violated[91] and this is a comparative advantage of recognizing poverty as a violation of a specific but complex human right.

In this connection this is notable here that Sengupta argued in favour of considering poverty as a violation of the human right to development. While speaking in favour of right to development he added that the right to development is proposing a qualitatively different approach, in which considerations of equity and justice are primary determinants of development.[92] Not only that, the whole structure of development is shaped by these determinants. Sengupta also put forward that in order to reduce poverty there must have the presence of certain standards which could be found within this approach.[93] In the words of Sengupta:

87 Above note, 84, article, 1.

88 Above note, 86.

89 Resolution No. A/RES/53/155, 25 February 1999

90 Ibid.

91 Ibid.

92 Sengupta, Arjun. 2000. *The Right to Development as a Human Right*, Harvard, p.14, available at: http://www.harvardfxbcenter.org/resources/working-papers/FXBC_WP7--Sengupta.pdf, last accessed on 10 August 2012.

93 Ibid.

> If poverty has to be reduced, the poor have to be empowered and the poorest regions have to be uplifted. The structure of production has to be adjusted to produce these outcomes through development policy. The aim of the policy should be to achieve this with the minimum impact on other objectives such as the overall growth of output. But if there is a trade-off such that growth will be less than the feasible maximum that will have to be accepted in order to satisfy the concern for equity. This development process has to be participatory. The decisions will have to be taken with the full involvement of the beneficiaries, keeping in mind that if that involves a delay in the process, that delay should be minimized.[94]

So, in this connection, if a group of destitute or deprived people have to have a minimum standard of well-being, a simple transfer of income through money or subsidies may not be the right policy. They may actually have to be provided with the opportunity to work, or to be self-employed, which may require generating activities that a simple reliance on the market forces may not be able to ensure.

However, the right to development, like all other human rights, has an element of 'utopianism' owing to their normative standard that cannot readily be enforced. At the same time since it implies the continuous improvement in the standard of living and economic development, it is also a goal of the UN and in many member countries. So, in this arena the scope of it, clear obligations, right holders, duty bearers etc. must be determined, which may establish a potential link between poverty and human rights.

Conclusion

Thus, the dubiousness of poverty which is often identified as predicament or deprivation of well-being is a conglomeration of a bunch of denials and perhaps an enigma of international human rights law. Living in poverty is more than this, that leads the poor very often to be treated badly both by the state and society and to unclasp from voice and power in those institutions.

Hence, Human rights exist to stabilize the human from any deprivation with a legal context. So, poverty under international human rights law is seen as violation of rights i. e., economic, social and cultural as well as civil and political. This ultimately requires a legal commitment of each responsible actor and recognizes the poor people as the right holders to pursue their rights from those actors to whom the rights are due.

So, poverty is more than the material deprivation. It is a violation of human dignity, indeed. Hence, this is indisputable that there remains strong linkage between human rights violations and the complex aspects

[94] Ibid, at p.15.

of the phenomenon of poverty. In my view, the least accurate one is to consider poverty as a per se violation of human rights. On the other hand, to consider poverty as the violation of one specific human right is normatively feasible but ambitious one.

Again, to conceptualize poverty as the violation of human right to an adequate standard of living is the most powerful and auspicious one. This approach should be developed and human rights movement should pay attention to. The reasons being that, a) human rights law is an evolving discipline; and b) the human right movement was effective and powerful in setting far reaching goals. However, in the current state of affairs to consider poverty as a cause of human rights violations, seems to be the safest and clearest that will help reduce poverty comprehensively, in a sustainable and safe way that ultimately gift to people a life with dignity-the long cherished expectation of the whole human civilization ever.