ISSN 1813-5099

The Dhaka University Studies
Part- F

Dhaka University Law Journal

University of Dhaka
Bangladesh

Volume 23 Number 1 June 2012

Dhaka University Law Journal

(The Dhaka University Studies Part-F)
Volume 23 Issue No 1
June 2012

Dhaka University Law Journal

(The Dhaka University Studies Part-F)

Volume 23 **Issue No 1** **June 2012**

Submission

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

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

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

References, Footnotes and Layout

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

Journal Articles: Single Author

Antonio Cassese, 'The *Nicaragua* and *Tadiæ* Tests Revisited in the Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649, 651. [Here, the pinpoint reference is to page 651 which is preceded by the starting page 649 and a comma and space.]

Journal Articles: Multiple Authors

Taslima Monsoor and Raihanah Abdullah, 'Maintenance to Muslim Women in Bangladesh and Malaysia: Is the Judiciary Doing Enough?' (2010) 21(2) *Dhaka University Law Journal* 39, 47. [Note: honorific titles (and initials) are omitted. However, M, Md, Mohd and any other abbreviated form of Mohammad which are part of author's name should not be removed. 21 is the volume and 2 is the issue no of the journal. 2010 is the publishing year. Year should be placed in square brackets [] for journals that do not have volume number.]

Books: Single Author

Shahnaz Huda, *A Child of One's Own: Study on Withdrawal of Reservation to Article 21 of the Child Rights Convention and Reviewing the Issues of Adoption/fosterage/ kafalah in the Context of Bangladesh* (Bangladesh Shishu Adhikar Forum, 2008) 187. [Note: here 187 is the pinpoint reference. This reference is from the first edition of the book. In the case of editions later than the first, the edition number should be included after the publisher's name. It should appear as: 3rd ed]

John Finnis, *Natural Law and Natural Rights*, (Oxford University Press, 2nd ed, 2011) ch 4. [Here, a broad reference is made to chapter 4 of the book.]

Books: Multiple Authors

Richard Nobles and David Schiff, *A Sociology of Jurisprudence* (Hart Publishing, 2006) 49.

Paul Rishworth et al, *The New Zealand Bill of Rights* (Oxford University Press, 2003). [Note: when there are more than three authors, only first author's name should appear and 'et al' should be used instead of remaining authors' names.]

Books: Edited

Tom Ginsburg (ed), *Comparative Constitutional Design* (Cambridge University Press, 2012). [Note: where there are more than one editor, '(eds)' should be used instead of '(ed)'.]

Chapters in Edited Books

Jon Elster, 'Clearing and Strengthening the Channels of Constitution Making' in Tom Ginsburg (ed), *Comparative Constitutional Design* (Cambridge University Press, 2012) 15, 18.

Books: Corporate Author

McGill Law Journal, *Canadian Guide to Uniform Legal Citation* (Carswell, 7th ed, 2010).

American Psychological Association, *Publication Manual of the American Psychological Association* (6th ed, 2010) 176. [Note: a publisher's name should *not* be included where the publisher's and the author's names are the same.]

World Bank, *Gender and development in the Middle East and North Africa: women in the public sphere* (2004).

Theses

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

Working Paper, Conference Paper, and Similar Documents

Jens Tapking and Jing Yang, 'Horizontal and Vertical Integration in Securities Trading and Settlement' (Working Paper No 245, Bank of England, 2004) 11–12.

James E Fleming, 'Successful Failures of the American Constitution' (Paper presented at Conference on The Limits of Constitutional Democracy, Princeton University, 14-16 February 2007) 13.

Newspaper

Stephen Howard and Billy Briggs, 'Law Lords Back School's Ban on Islamic Dress', *The Herald* (Glasgow), 23 March 2006, 7.

Imtiaz Omar and Zakir Hossain, 'Coup d' etat, constitution and legal continuity', *The Daily Star* (online), 24 September 2005 <http://archive.thedailystar.net/law/2005/09/04/alter.htm> accessed 9 March 2014.

Internet Materials

International Whaling Commission, *Extending the Global Whale Entanglement Response Network* (28 January 2014) <http://iwc.int/extending-the-global-whale-entanglement-response-n> accessed 9 March 2014. [Note: here the date within parentheses is the last date of update of the web page, and the date after the URL is the date of last access.]

Cases

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

Additional District Magistrate, Jabalpur v Shivakant Shukla AIR 1976 SC 11207.

A T Mridha v State (1973) 25 DLR (HCD) 335, 339. [Here, the case is reported on page 335, and the pinpoint is to page 339. Full stops should not be used in abbreviations.]

Bangladesh Environmental Lawyers Association (BELA) v Bangladesh [1999] Writ Petition No 4098 of 1999 (pending). [Note: '& others,' '& another' should be omitted.]

Shahida Mohiuddin v Bangladesh [2001] Writ Petition No 530 of 2001 (unreported).

Parallel citations should not be used in citations of Bangladeshi cases. But in citations of United Kingdom Nominate Reports and early US Supreme Court decisions, parallel citations are used.

Statutes (Acts of Parliament)

Evidence Act 1872, s 2. [Note: 'The' should not precede the name of the statute, and comma (,) should not be used before the year]

Evidence Act 2006, s 15 (New Zealand). [Note: when necessary, give jurisdiction in parentheses to avoid confusion.]

Delegated Legislation

Family Courts Rules 1985, r 5.

Financial Institutions Regulations 1994, reg 3.

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

The abbreviation 'Ibid' should be used to repeat a citation in the immediately preceding footnote. Standing alone, 'Ibid' means strictly 'in the very same place' while 'Ibid, 231' means 'in the same work, but this time at page 231.' Avoid the use of 'Latin gadgets' such as *supra, infra, ante, Id, op cit, loc cit,* and *contra,* which are not widely understood. For cross reference and other purposes, following introductory signals can be used: See; See, eg,; See also; See especially; See generally; Cf; But see; See above/below n.

Published in June 2015 by the Registrar, University of Dhaka.

Subscriptions

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

Manuscripts and editorial correspondence should be addressed to:

Editor

Dhaka University Law Journal (Dhaka University Studies, Part-F)
Room No. 110, Kazi Motahar Hossain Bhaban
Faculty of Law
University of Dhaka
Dhaka-1000, Bangladesh
Tel: 58613724, 9661920-73/4348/4349
Fax: 58613724
E-mail: lawfacdu@gmail.com

Contributors

Md. Khurshid Alam
Associate Professor, Department of Law, University of Dhaka
&
Dr Muhammad Ekramul Haque
Associate Professor, Department of Law, University of Dhaka

Dr Mohammad Towhidul Islam
Associate Professor, Department of Law, University of Dhaka
&
Ferdous Rahman
Advocate, Judge Court, Dhaka

Quazi MH Supan
Associate Professor, Department of Law, University of Dhaka

Mohammad Azharul Islam
Assistant Professor, Department of Law, University of Dhaka
&
Azizun Nahar
Lecturer, Department of Law and Human Rights
University of Asia Pacific.

Moha. Waheduzzaman
Lecturer, Department of Law, University of Dhaka

Md. Jobair Alam
Lecturer, Department of Law, University of Dhaka

Dr Md. Abdur Rahim Mia
Associate Professor, Department of Law
University of Rajshahi

Dr Nahid Ferdousi
Associate Professor (Law), School of Social Science
Humanities and Language, Bangladesh Open University

Dhaka University Law Journal

The Dhaka University Studies Part-F

Volume 23 **Issue No 1** **June 2012**

Contents

The role of the Committee on Economic, Social and Cultural Rights in developing normative contents of the economic and social rights contained in the ICESCR 1
Md. Khurshid Alam
Dr Muhammad Ekramul Haque

Shareholders' Right to Distributions: A Misnomer 19
Dr Mohammad Towhidul Islam
Ferdousi Rahman

Does Part II of the Constitution of Bangladesh contain only economic and social rights? 45
Dr Muhammad Ekramul Haque

Denial of Service Attacks: Trends in Criminalization 51
Quazi MH Supan

Revisiting the Rights of Non-Muslims in Islamic State 67
Mohammad Azharul Islam
Azizun Nahar

Expropriation or Nationalization of Alien Property and the Standards of Compensation Required by International Law 83
Moha. Waheduzzaman

Legal and Policy Framework for Poverty Reduction in Bangladesh: An International Human Rights Law Perspective 97
Md. Jobair Alam

Violation of the Rights of Rape Victims: Response of Criminal Justice System of Bangladesh 127
Dr Md Abdur Rahim Mia

The State of Juvenile Justice System in Bangladesh: Time for Re-thinking 151
Dr Nahid Ferdousi

The Role of the Committee on Economic, Social and Cultural Rights in Developing Normative Contents of the Economic and Social Rights Contained in the ICESCR

Md. Khurshid Alam*
Dr Muhammad Ekramul Haque**

I. Introduction

The Universal Declaration of human rights adopted in 1948 is the first comprehensive document of human rights. It contained all human rights, including civil and political (CP) rights and economic, social and cultural (ESC) rights. Traditionally, human rights are classified into different groups. Among them, civil and political rights and economic social and cultural rights constitute two major groups. However, the UDHR did not make any distinction between these two types of human rights. It recognized both of them as of the same status. But, there was grave dispute on the issue of enacting covenant to include enforcement mechanism for the human rights. Ultimately, two different covenants were enacted in 1966: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). The ICCPR, in contrast to the ICESCR, contained an enforcement mechanism. The enactment of the two different Covenants in fact was the outcome of the traditional classification of human rights according to which ESC rights were treated as significantly different from CP rights. One of the main distinguishing features between the two was: in contrast to CP rights, ESC rights were not capable of judicial enforcement. Again, one of the main barriers identified in the way of enforcement of the ESC rights was: the contents of ESC rights were vague and not clear enough to be judicially applied, unlike CP rights. The objective of this article is to analyse the ESC rights recognized in the ICESCR and to examine whether their contents are vague or clear. I will argue in this article that the contents of the ESC rights recognized by the ICESCR have been sufficiently developed by the Committee on Economic, Social and Cultural Rights (CESCR) through its General Comments. It is beyond the scope of my article to show the entire developments of the contents of the ESC rights incorporated in the ICESCR. I will examine only the General Comments of the CESCR in this regard.

The Committee on Economic, Social and Cultural Rights (CESCR) was formed under the Economic and Social Council (ECOSOC) of the United Nations (UN) in 1985. The CESCR though was not a treaty monitoring

---

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

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

body for the ICESCR, yet it has been performing the role of a treaty monitoring body in practice. The CESCR made several General Comments on different ESC rights in order to clarify and elaborate the normative contents of those rights. Section II of this article will contain an overview of the ESC rights contained in the ICESCR by classifying them into different groups, section III will show how the normative contents have been developed through the General Comments of the CESCR and section IV of my article will contain the conclusion where I will argue that the eventual impact of the developments of the normative contents of the ESC rights made through the General Comments of the CESCR is that the contention that the ESC rights are not judicially enforceable due to their less developed contents is no more tenable.

II. ESC rights under the ICESCR

Part III of the ICESCR is the core part, which contains substantive provisions regarding ESC rights. The ICESCR, in its Part III, incorporated a range of ESC rights, which can be classified under the following five groups:

1. Recognition as rights
2. Recognition as fundamental right
3. State obligation: general declaration
4. Undertaking to respect
5. Undertaking to ensure right

1. Recognition as rights

The Covenant mentioned the following ESC rights directly as 'rights' to be recognized by the States Parties to it:

a) The right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.[1] Article 6(1) also adds that the state also recognizes to take appropriate steps to safeguard this right. Article 6 (2) explains the state obligation regarding this right, which says that—

> [t]he steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

b) The right of everyone to the enjoyment of just and favourable conditions of work.[2]

c) The right of everyone to social security, including social insurance.[3]

---

1 Article 6(1) of the ICESCR.

2 Article 7 of the ICESCR.

d) The right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.[4] Article 11(1) also adds that the States Parties will take appropriate steps to ensure the realization of this right.

e) The right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[5]

f) The right of everyone to education.[6]

g) The right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and its applications and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.[7]

2. Recognition as fundamental right

Right to be free from hunger is the only right that has been recognized by the Covenant as the 'fundamental right'. The phrase 'fundamental right' is not used anywhere in this Covenant except in connection this right. Article 11(2) of the Covenant says:

> The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

This right to be free from hunger seems to have better footing in the Covenant for two reasons. Firstly, it has been recognized as a 'fundamental right', and secondly, unlike other rights where the states have been directed to recognize them, the right to be free from hunger has been mentioned as an already recognized right where States Parties have been given direction to take further actions on the basis of the fact of this recognized right.

---

3 Article 9 of the ICESCR

4 Article 11 of the ICESCR.

5 Article 12(1) of the ICESCR.

6 Article 13 of the ICESCR

7 Article 15(1) of the ICESCR

3. State obligation: general declaration

There are a number of provisions in the Covenant, which contain some guidelines for the state in order to take steps regarding certain matters. The provisions are listed below.

a) Article 10 of the Covenant lays down the following provisions regarding family matters:

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

b) Regarding the right to education, Article 13(2) contains declaration of the following state obligations by which that right can be implemented:

The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

Regarding the same right, article 14 directs states to take a realistic plan, which says:

> Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

It appears that the above provisions of the Covenant are, in fact, certain principles of rights and directions of administrative nature, which impose obligation on state to move forward accordingly. However, it is possible to deduce the corresponding rights of the above state obligations.

4. Undertaking to respect

There are two provisions in the Covenant, which contain undertaking of the States Parties to respect certain freedom or liberty. They are—

a) Provision regarding parents' liberty to choose school has been enumerated in article 13(3). It says:

> parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

b) Provision regarding freedom of scientific research has been laid down in article 15(3) that says that '[t]he States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.'

5. Undertaking to ensure right

The Covenant incorporates certain trade union rights in a different form that declares that the States Parties have undertaken 'to ensure' these rights. Article 8(1) says:

The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

It appears that such an undertaking to ensure a right has not been provided elsewhere in the Covenant. It seems that the ICESCR recognized these rights in stronger form. It is worth mentioning here that trade union rights also have been mentioned in the article 22 of the ICCPR. Apart from all Part III rights, the ICESCR in article 1 of its Part I recognized a group right: people's right to self-determination.

III. ICESCR rights: an examination of their contents

In this section of the article, I will examine the normative contents of different ESC rights recognized in the ICESCR. The ICESCR incorporated most of the rights in general terms. However, the normative contents of the ICESCR rights have been further clarified by the CESCR through its General Comments made on different rights. I will describe in this section, how the CESCR played a significant role in clarifying contents of the ESC rights contained in the ICESCR.

1. Right to work and other related rights: Article 6 of the ICESCR deals with the right to work, while article 7 describes certain rights in the work. Article 6 includes the following aspects of the right to work:

i. General recognition of the right to work: article 6(1), in its first phase, recognized work as a right: 'The States Parties to the present Covenant recognize the right to work.'

ii. Freedom of choice of work: article 6(1), in its second phase, gives an explanation of the right to work. This explanation is inclusive, not exhaustive, as it started using the terms 'which includes'. It says that the right to work includes the freedom of choice that everyone can choose or accept the work of his or her own choice for earning his or her living expenses. It appears that this part of article 6(1) not only recognized the freedom of choice; it also indicated that the nature of work should be such that it will be sufficient for maintaining one's living expenses.

iii. General obligation of the States Parties: article 6(1), in its third phase, laid down the general obligation of the States Parties regarding the right to work, without specifying any specific obligation—that the States Parties 'will take appropriate steps to safeguard this right.'

iv. Specific obligation of the States Parties: article 6(2) provided an inclusive explanation of the appropriate steps to be taken by the states. It added that appropriate steps as stated above include the following:

> The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7 of the ICESCR recognized 'the right of everyone to the enjoyment of just and favourable conditions of work.' It then mentioned the following four particular aspects of 'just and favourable conditions of work:

i. Principles regarding remuneration: Article 7(a)(i) said that that the remuneration must be 'fair wages'. Article 7(a)(ii) further added that the remuneration should be sufficient for living a decent life for the workers and their families maintaining the expected standard set by the provisions of the ICESCR. Article 7(a)(i) also added the principle non-discrimination between man and woman regarding the payment of remuneration: 'equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.'

ii. Principles regarding working conditions: Article 7(b) said that that the States Parties to the ICESCR must ensure '[s]afe and healthy working conditions' for everyone.

ii. Principles regarding promotion: Article 7(c) recognized the equal opportunity for everyone to get promotion based only on the considerations of seniority and competence: 'Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.'

ii. Principles regarding rest and working hours: Article 7(d) said that the States Parties will ensure '[r]est, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.'

Contents added by the general Comment of the CERSCR

The CESCR elaborated the normative contents of the right to work in its General Comment 18. Everyone will have the freedom to choose his own work. Thus, any forceful imposition of any work will constitute the violation of the ICESCR. A person cannot be deprived of any employment unfairly. The work available must be 'decent' and sufficient to mitigate the expenditure for livelihood. The Committee reaffirmed that the States parties to the ICESCR have the obligation to 'abolish' and 'counter' any type of forced labour. Thus, if state party fails to prevent forced labour in any way would be held liable for breaching the right to work ensured by the ICESCR. The Committee has categorically emphasized on the need to

'reduce to the fullest extent possible the number of workers outside the formal economy, workers who as a result of that situation have no protection.' The Committee added that 'domestic and agricultural work must be properly regulated by national legislation so that domestic and agricultural workers enjoy the same level of protection as other workers.' Both 'availability' and 'accessibility' are equally important for the right to work. In elucidating the obligations regarding quality of the work, the Committee noted that the '[p] rotection of the right to work has several components, notably the right of the worker to just and favourable conditions of work, in particular to safe working conditions, the right to form trade unions and the right freely to choose and accept work.' The state must also ensure enforcement mechanism to redress work related wrong doings.

The right to work includes a state obligation that all people are enjoying the right without any discrimination on any ground like sex, colour, race, religion, etc. For giving the protection to children every state party requires 'to protect children from all forms of work that are likely to interfere with their development or physical or mental health.' Regarding the persons with disabilities, the Committee said that the '[s]tates parties must take measures enabling persons with disabilities to secure and retain appropriate employment and to progress in their occupational field, thus facilitating their integration or reintegration into society.'

2. Rights relating to trade unions: Article 8 of the ICESCR contains different rights regarding trade unions. They are—

i. Right to form and join trade union: Article 8(1)(a) recognized that everyone has the right 'to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests.' It further added that this right can be restricted only by law, provided the restrictions are deemed to be 'necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.' Article 8(1)(b) recognized the 'right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations.'

ii. Principles regarding functions of trade unions: Article 8(1)(c) recognized '[t]he right of trade unions to function freely.' It further added that this right can be restricted only by law, provided the restrictions are deemed to be 'necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.'

iii. Right to strike: Article 8(1)(d) categorically recognized the right to strike. However, it added that this right has to be 'exercised in conformity with the laws of the particular country.'

iv: Exclusions: Article 8(2) approved more restrictions of this right for certain sectors: 'This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces

or of the police or of the administration of the State.' Article 8(3) added that '[n]othing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.'

3. Right to social security: Article 9 of the ICESCR plainly recognized 'the right of everyone to social security, including social insurance.' This article does not contain any more elaboration or explanation of this right.

Contents added by the General Comment of the CESCR

The CESCR adopted its General Comment 19 on the right to social security incorporated in article 9 of the ICESCR. The first content is that no one will be arbitrarily deprived of the social security benefits. Every domestic law should provide a comprehensive system for social security for which the government shall entirely be responsible. The system should cover healthcare, sickness, old age, unemployment, employment injury, family and child support, maternity, disability, survivors and orphans. The benefits provided by the state must be adequate to live a decent life. Thus, a person's claim that the benefits obtained are not sufficient is actionable.

4. Family rights: Article 10 of the ICESCR contains a number of family related rights. They are—

i. Protection of the family: Article 10(1) imposed a duty on the States Parties to the ICESCR to accord the 'widest possible protection and assistance' to the family. This article termed the family as 'the natural and fundamental group unit of society.' It added that the above mentioned 'protection and assistance' should be accorded particularly for the establishment of the family and the care and education of dependent children.

ii. Principle regarding marriage: The later part of article 10(1) categorically mentioned that '[m]arriage must be entered into with the free consent of the intending spouses.'

iii. Principles regarding protection of mother: Article 10(2) laid down the provisions regarding two specific protections for the mothers. Firstly, '[s]pecial protection should be accorded to mothers during a reasonable period before and after childbirth.' Secondly, the article said about the maternity benefits: 'During such period working mothers should be accorded paid leave or leave with adequate social security benefits.'

iv. Principles regarding protection of children and young persons: Article 10(3) provided four specific protective protections for the children and young persons. Firstly, it adopted the principle of non-discrimination in awarding protection to them: 'Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.'

Secondly, in order to protect them from exploitation, the article added: 'Children and young persons should be protected from economic and social exploitation.' Thirdly, the article prohibited their employment which is injurious for them: 'Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law.' Fourthly, the article instructed the States Parties to enact legislation regarding prohibition of 'child labour': 'States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.'

5. Right to adequate standard of living: Article 11(1) of the ICESCR recognized 'the right of everyone to an adequate standard of living for himself and his family.' It added that this right includes 'adequate food, clothing and housing, and to the continuous improvement of living conditions.' Regarding the duty of the States Parties in implementing this right, the article said: 'The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.'

Contents added by the General Comment of the CESCR:

The CESCR adopted its General Comment 4 on the right to adequate housing, a right included in article 11(1) of the ICESCR. Referring to the article 11(1) where the right to adequate housing has been included as a component of the right to adequate standard of living, the CESCR said: 'The human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights.'[8] The CESCR termed the provision relating to the adequate housing contained in article 11(1) of the ICESCR as 'the most comprehensive' one. It said: 'Although a wide variety of international instruments address the different dimensions of the right to adequate housing article 11 (1) of the Covenant is the most comprehensive and perhaps the most important of the relevant provisions.'[9]

The normative contents added by the CESCR by its General Comment 4 are summarized below:

i. 'Housing' for whom: Is this right available to each individual? Or in case of a family, it belongs to only one person and the housing arrangements for other family members are included within the individual person who is the head of the family. A plain reading of article 11(1) seems to give an idea that in case of a family, the right belongs to head of the family, which appears from the wording used in article 11(1): 'the right of everyone to an adequate standard of living for himself and his family.' However, the CESCR clarified that the right is always individual, and in case of a family,

---

8 General Comment No. 4 of the CESCR, at para 1, contained in document E/1992/23.

9 Para 3 of General Comment No. 4 of the CESCR.

each individual member of a family is entitled to this right individually. The CESCR commented:

> The right to adequate housing applies to everyone. While the reference to "himself and his family" reflects assumptions as to gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted, the phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups. Thus, the concept of "family" must be understood in a wide sense. Further, individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance with article 2 (2) of the Covenant, not be subject to any form of discrimination.[10]

ii. Meaning of adequate housing: What sort of housing will be treated as appropriate, has been described by the CESCR in the following words:

> In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity.

iii. Criteria of adequate housing: The CESCR further enumerated some criteria for determining which housing is to be treated as 'adequate' within the meaning of the ICESCR. It said that 'the concept of adequacy is particularly significant in relation to the right to housing since it serves to underline a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute "adequate housing" for the purposes of the Covenant.'[11] It added that '[w]hile adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believes that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context.'[12] The CESCR then enumerated the following criteria of adequate housing:[13] legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy.

iv. State obligation to abstain and the right to housing: The CESCR particularly mentioned that 'many of the measures required to promote the right to housing would only require the abstention by the Government from certain practices and a commitment to facilitating "self-help" by

---

10 Para 6 of General Comment No. 4 of the CESCR.

11 Para 8 of General Comment No. 4 of the CESCR.

12 Para 8 of General Comment No. 4 of the CESCR.

13 Para 8 of General Comment No. 4 of the CESCR.

affected groups.'[14] The CESCR termed such obligations as 'immediate', irrespective of the economic condition of a state.[15]

v. Resource constraints and international assistance: The CESCR said that if a state fails to implement the right to adequate housing due to resource constraints, then the state should ask for international cooperation in this regard.[16]

vi. State obligation to give priority: The CESCR stated that '[t]he States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration.'[17]

vii. Violation of state obligation under article 11(1): The CESCR termed a particular situation as a violation of state obligation:

> It would thus appear to the Committee that a general decline in living and housing conditions, directly attributable to policy and legislative decisions by States parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant.[18]

vii. Immediate obligation: The CESCR said that the '[e] ffective monitoring of the situation with respect to housing' is an obligation that is to be performed by all states immediately, not progressively.

viii. Forced eviction: The CESCR particularly said that the 'instances of forced eviction are prima facie incompatible with the requirements of the Covenant.'[19] It added that the forced eviction 'can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.'[20]

Thus, it appears that the CESCR enumerated detailed normative contents of the right to adequate housing contained in article 11(1) of the ICESCR. It also clarified different state obligations regarding the right. Forced eviction has been treated as a prima facie violation of the ICESCR provision regarding the right to housing. It is worth mentioning here that the CESCR made another General Comment only on different aspects of the forced eviction. The CESCR in its General Comment 7 clarified the state obligations regarding the forced eviction. In introducing the General Comment 7, the CESCR said:

---

14 Para 10 of General Comment No. 4 of the CESCR.

15 Para 10 of General Comment No. 4 of the CESCR.

16 Para 10 of General Comment No. 4 of the CESCR.

17 Para 11 of General Comment No. 4 of the CESCR.

18 Para 11 of General Comment No. 4 of the CESCR.

19 Para 18 of General Comment No. 4 of the CESCR.

20 Para 18 of General Comment No. 4 of the CESCR.

> In its General Comment No. 4 (1991), the Committee observed that all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. It concluded that forced evictions are prima facie incompatible with the requirements of the Covenant. Having considered a significant number of reports of forced evictions in recent years, including instances in which it has determined that the obligations of States parties were being violated, the Committee is now in a position to seek to provide further clarification as to the implications of such practices in terms of the obligations contained in the Covenant.

The CESCR said that the '[f]orced eviction and house demolition as a punitive measure are also inconsistent with the norms of the Covenant.'[21] The CESCR added that '[i]n cases where eviction is considered to be justified, it should be carried out in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality.'[22] It further added that '[e]victions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights.'[23]

6. Fundamental right to be free from hunger: Article 11(2) of the ICESCR recognized 'the fundamental right of everyone to be free from hunger.' It has already been noted that the ICESCR used the term 'fundamental right' only in connection to the right to be free from hunger. Article 11(2) further guided the States Parties to take the necessary measures and specific programmes, individually and through international co-operation, in order to achieve the following two things:

> '(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
>
> (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.'

Contents added by the General Comment of the CESCR

The CESCR adopted the General Comment 12 specifically for the right to adequate food. The right to food has been directly recognized as a right in article 11(1) of the ICESCR, as stated above. However, the right to adequate food is directly linked to article 11(2) which deals with the right to be free from hunger. Thus, the discussion on the right to adequate food,

---

21 General Comment No. 7 of the CESCR, at para 12, contained in document E/1998/22.

22 General Comment No. 7 of the CESCR, at para 14, contained in document E/1998/22.

23 General Comment No. 7 of the CESCR, at para 16, contained in document E/1998/22.

which has been elaborated in the general Comment 12, have clarified the rights contained in both articles 11(1) and (2) above. In linking the right to adequate food to article 11 rights, the CESCR said in the introductory paragraph:

> Pursuant to article 11.1 of the Covenant, States parties recognize "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions", while pursuant to article 11.2 they recognize that more immediate and urgent steps may be needed to ensure "the fundamental right to freedom from hunger and malnutrition".[24]

The CESCR commented that '[t]he human right to adequate food is of crucial importance for the enjoyment of all rights.'[25] The CESCR clarified that the right to adequate food is an individual right which belongs to every individual individually: 'It applies to everyone; thus the reference in Article 11.1 to "himself and his family" does not imply any limitation upon the applicability of this right to individuals or to female-headed households.'[26]

The CESCR elaborated the normative contents of article 11, paragraphs 1 and 2, in the following words: 'The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. '

The CESCR also elaborated different state obligations and identified certain violations of the right. For example, the CESCR stated that '[e]very State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.'[27] In identifying violation of the right to food contained in article 11, the CESCR commented that '[v]iolations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger.'[28]

---

[24] General Comment No. 12 of the CESCR, at para 1, contained in document E/C.12/1999/5.

[25] General Comment No. 12 of the CESCR, at para 1, contained in document E/C.12/1999/5.

[26] General Comment No. 12 of the CESCR, at para 1, contained in document E/C.12/1999/5.

[27] General Comment No. 12 of the CESCR, at para 14, contained in document E/C.12/1999/5.

[28] General Comment No. 12 of the CESCR, at para 17, contained in document E/C.12/1999/5.

7. Right to physical and mental health: Article 12(1) of the ICESCR recognized 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.' Article 12(2) provided a non-exhaustive list of steps to be taken in order to fully realize the right. It said:

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

In elaborating the right to the highest attainable standard of physical and mental health, the CESCR adopted its General Comment 14 which clarified the normative contents of this right in the following words:

> The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

The public health system must be very effective which will provide all possible health-care facilities. The system should be accessible and should provide appropriate good services. The CESCR has mentioned some specific obligations regarding women's right to health:

> To eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence. The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.

The General Comment also elaborated States Parties' obligations and identified some violations.

Again, the right to water has been deduced from articles 11 and 12 of the ICESCR, and the CESCR adopted its General Comment 15 on the right to water:

> 11. The elements of the right to water must be adequate for human dignity, life and health, in accordance with articles 11, paragraph 1, and 12. The adequacy of water should not be interpreted narrowly, by mere reference to volumetric quantities and technologies. Water should be treated as a social and cultural good, and not primarily as an economic good. The manner of the realization of the right to water must also be sustainable, ensuring that the right can be realized for present and future generations.

8. Right to education: Articles 13 and 14 of the ICESCR contain principles relating to the right to education in different forms. They are—

i. General recognition of the right to education: 13(1) of the ICESCR recognized 'the right of everyone to education.' It added that 'education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.' It further added that 'education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.'

ii. Steps to be taken relating to the right to education: Article 13(2) categorically mentioned that the States Parties to the ICESCR will take the following actions in order to fully realize the right to education:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

iii. Liberty of parents to choose education: Article 13(3) says:

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

iv. Exclusions: Article 13(4) says:

> No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

v. Specific provision for compulsory primary education: Apart from making the primary education compulsory for all under article 13(2), as stated above, article 14 enumerated further state obligations regarding then implementation of free compulsory education for all. It said:

> Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Contents added by the General Comment of the CESCR

The CESCR adopted the General Comment 13 on the right to education contained in article 13 of the ICESCR. In elaborating the normative contents of the right to education, the CESCR has provided different conditions:

> 4. States parties agree that all education, whether public or private, formal or non-formal, shall be directed towards the aims and objectives identified in article 13 (1). The Committee notes that these educational objectives reflect the fundamental purposes and principles of the United Nations as enshrined in Articles 1 and 2 of the Charter. For the most part, they are also found in article 26 (2) of the Universal Declaration of Human Rights, although article 13 (1) adds to the Declaration in three respects: education shall be directed to the human personality's "sense of dignity," it shall "enable all persons to participate effectively in a free society," and it shall promote understanding among all "ethnic" groups, as well as nations and racial and religious groups. Of those educational objectives which are common to article 26 (2) of the Universal Declaration of Human Rights and article 13 (1) of the Covenant, perhaps the most fundamental is that "education shall be directed to the full development of the human personality."

The CESCR added that the education must be accessible, affordable and adaptable. The education provided by the state should 'enable students to

acquire knowledge and skills which contribute to their personal development, self-reliance and employability and enhances the productivity of their families and communities, including the State party's economic and social development;.' The Committee's comment regarding academic freedom is noteworthy:

> In the light of its examination of numerous States parties' reports, the Committee has formed the view that the right to education can only be enjoyed if accompanied by the academic freedom of staff and students. Accordingly, even though the issue is not explicitly mentioned in article 13, it is appropriate and necessary for the Committee to make some observations about academic freedom. The following remarks give particular attention to institutions of higher education because, in the Committee's experience, staff and students in higher education are especially vulnerable to political and other pressures which undermine academic freedom. The Committee wishes to emphasize, however, that staff and students throughout the education sector are entitled to academic freedom.

Thus, if an academic is harassed for expressing any academic opinion, then the state party concerned will be held responsible for violation of the right to education under the ICESCR. The general Comment 13 elaborated in detail the normative contents of the right to education contained in article 13 of the ICESCR. The General Comment also elaborated the obligations of the States Parties and identified some specific instances of violations of the right.

IV. Conclusion

The above discussion reveals that the Committee on Economic, Social and Cultural Rights (CESCR) played a significant role in elaborating the contents of different ESC rights contained in the ICESCR. In the light of this development of the contents of ESC rights made by the CESCR through the General Comments, it can be reasonably commented that many ESC rights contained in the ICESCR can no more be identified as vague; rather their contents have really become clear enough through the General Comments made by the CESCR.

Shareholders' Right to Distributions: A Misnomer

Dr Mohammad Towhidul Islam*
Ferdous Rahman**

1. Introduction

Investors, either an entrepreneur and/or a dormant investor prefer to invest their money in a company rather than any other business vehicle. The reason is that they can consider the risk diversification in their individual portfolio. The risk diversification ensures their expectation of return against their equity investment in a company. This return of expectation is named as the right to distribution of the shareholders. This right to distribution includes *inter alia* the right to dividend, and the right as a residual claimant at the time of winding up.

As a part of the distribution right, dividend is to be paid when the company has distributable profits for dividend. However, the shareholders cannot claim dividend as of right even if the company has distributable profit. This is because the payment of dividend remains on the discretionary power of the directors of the company whether to declare dividend or to declare a dividend reinvestment plan. Therefore, the dividend of the shareholder is on the state of the company as well as at the hands of the persons behind the management of the company.

Further, the shareholders have the right as residue claimant at the time of winding up if anything is left after discharging all the claims of creditors. It is very much usual that an individual invests his money with the expectation of return However, this right of the shareholders is also uncertain. They stay on risk of getting nothing if a company goes for liquidation when there is less chance of running profitably. Again, the chance of return is made subject to discretion of the directors as well as for the priority of the creditors.

To sell the share in the secondary market is another way remains for the ordinary shareholders to get the capital return against his investment. But again the price of shares of a particular company depends on the prospect of that company. This prospect is determined by the past declaration of dividend because no one wants to block his money in such company.

Therefore, it appears that the distribution right of the shareholders is in uncertainties. Since making equity investment in a company ensures neither the return of the shareholders against their investment nor their entitlement to the distributable profit of the company, the right to

---

* Associate Professor Dept. of Law, University of Dhaka.

** Advocate, Judge Court.

distribution stands as a misnomer. In jurisprudential interpretation, although the term 'right' denotes more certain and specific and enforceable by law, these traits of 'right' are missing in this 'right to distribution' and appears more close to mere possibility of return. Such mere possibility of distribution or mere expectation to distribution can be termed as a *Spes*, meaning hope or expectation to distribution not as a right to distribution.

Given this, this article aims at exploring the vulnerable state of the ordinary shareholders caused due to uncertainty in getting dividend, questioning the paradox of naming this uncertain entitlement as right, finding a balance between the jurisprudence of perception of right and the concept of the right to distribution under the field of corporate law, and the possible way-outs for the shareholders from such uncertainties. The answer to these questions would be helpful to develop a shareholder friendly dividend Policy Farther it would be supportive to enhance the corporate practice in respect of distribution of dividend. However this article is limited to the distribution right of the shareholders and the price correlation with the declaration of dividend and bonus share of the public limited companies only.

2. Distribution Rights in Corporate Law and Financial Practices

When a person makes equity investment by taking a share in a company he becomes entitled to distribution rights along together with other rights like voting rights, right to take part in the management if appointed as a directors, right to information, class rights when his shares fall in any special class of shares etc. The distribution right further includes dividend, bonus share, return of capital and right to claim as a residue claimant.

In Bangladesh, the Companies Act 1994 or other statute has not defined the term 'right to distribution'. However, it has been defined in the legislation of other countries as every description of distribution of a company's assets to its members (alternatively as its shareholders) in cash or in kind.[1]

This distribution of a company's assets is usually made by way of dividend payment. These are generally paid to members at the discretion of the directors that usually represents a share of the company's profits.

Another form of such distribution can be by way of issuing of bonus share. A company sometimes announces fully paid up shares in the name of the existing members at payment of the par value without any premium or administrative cost. However, these costs are covered by the share premium accounts or other accumulated undivided profit reserves. The bonus share is thus a bare mechanism for capitalizing profits. Moreover, the return of capital to the shareholders of the invested amount at the rate of face value of the share only not any premium paid by the Shareholder at the time of equity investment, and/or in the case of a partial reduction of

---

[1] *The Companies Act 2006* (UK) s 829

capital or part of the amount originally paid for the subscription of the share is also treated as a description of distribution.

Additionally, the shareholder has an entitlement to residue amount in the company's surplus assets at the time of winding up assuming there is a surplus after meeting the preferential payments as per law and agreement if any.

Despite all these forms of distribution to a shareholder, the right to distribution is more focused on the dividend and residue claim.

As a means of distribution, the term 'dividend' is used to mean the share of the profit that is distributed among the shareholders. String LJ defined dividend as prima facie a payment made to shareholders while the company is a going concern.[2] From the view point of the company, dividend means the part of profit that falls to the share of each individual member of a company. As a result, it is the portion of the corporate profits which has been set aside and "declared by the company as liable to be distributed among the shareholders"[3].

The dividend can be paid in cash or in kind. Dividend in kind can be by way of bonus share or cash dividend with an option of election between cash dividend and bonus share in lieu of cash.

The company's article of association may permit shareholders to elect to take additional fully paid ordinary shares in the company in whole or in part in lieu of cash dividend. A dividend in such form is known as scrip dividend.[4] This scrip dividend can be characterized as dividend reinvestment plan or bonus share. The characterization of bonus share is appropriate when the election of taking scrip dividend is made before the declaration of dividend.

Further, the characterization of dividend reinvestment plan is appropriate when the election by the shareholders is taken place after the declaration of dividend. Therefore, it can be said that dividend reinvestment plan comes with an option of election between cash and kind distribution whereas in case of bonus share, the option is more imposed than election.

In addition, if permitted by the articles of association a company has the power to convert its accumulated undivided profits into bonus shares. Directors may capitalize such profits and allot the ordinary shareholders in respect of the net amount capitalized fully paid up shares of the company. Two other sources for financing bonus shares are share premium accounts and capital redemption reserve fund. In the words of Supreme Court of India[5], a company issues bonus share when it intends

---

2 *Re Crichton's Oil Co.* (1902) 2 Ch 86 [95].

3 Ghulam Hossain J, in *Bacha F Guzdar v CIT* (1955) 1 SCR 876 [882].

4 Eilis Ferran, *Principles of Corporate Finance Law* (Oxford University Press, 2008) 259.

5 *Standard Chartered Bank v Custodian* (2000) 6 SCC [427].

to capitalize its profits. Such capitalization is done by transferring its reserve amount equivalent to the face value of the bonus shares, issued, to its nominal capital. In other words, the profits, capable for distribution but not distributed, is retained by the company under the head of capital against the issue of bonus shares to its shareholders in lieu of dividend. Therefore, another difference between dividend reinvestment plan and bonus share can be made with the contention that in case of bonus share there is an increase of the capital resulting additional shares entered into the secondary markets but there will be no increase of number of shares in the market in case of adoption of dividend reinvestment plan.

Excepting these dividend options, sometimes the directors can recommend dividend reinvestment plan under their managerial powers. On such recommendation, the distributable profits are to be reinvested for any new or existing ventures of the company. In lieu of it, some additional benefits meaning additional shares are allotted to the existing shareholders without having to pay the normal dealing cost. The shareholders cannot usually deny or refuse such plan.

In a typical dividend reinvestment plan, no new share is issued; therefore the number of share in the market does not increase. So, it does not affect the demand-supply relation of shares of the company in market. Further, the dividend reinvestment plan does not cause any dilution of the existing share capital. It means that there appears no impact on the company's earnings-per-share or dividend per share ratios as there would be where there is extensive take up of scrip dividend alternatives.

Further, at the time of company's winding up, the shareholders have the right to participate at the residue of assets if anything left after discharging all debts and preferential payments as required to be paid under law. However, all type of shareholders are not entitled to the surplus assets. It is determined as par the rights attached to the share held by the shareholder. Since the company is entitled to issue different classes of shares, the rights and privileges attached to shares also vary.

Variations of Distribution Rights as per Different Classes of Shares

Like the right of a shareholder to receive the distribution as residue claimant, the payment of dividend is also governed according to the rights attached to the share held by the individual shareholder.

The most usual form of shares, issued by a company is ordinary share or common stock. It attaches the common rights to its holder. The rights related to common stock depend largely on the articles of association and by-laws of the company. In general, owners of common stock have voting rights in a company along with rights to receive distributions of money as dividends from the company. In a successful company, common stock ownership can be very lucrative. However, if a company is unsuccessful,

common stock owners are usually the last in line to receive a distribution of the company's assets when the company's assets are liquidated.[6]

Again, a given country's statutes often vary with respect to the default rights of common stock owners. The company may also issue multiple classes of common stock, such as nonvoting common stock or common stock with special dividend rights.[7] For example in Bangladesh, as per section 71 of the Companies Act 1994, a company can issue various special classes of shares. These shares used to have various rights, privileges and priorities. Further, according to Article 3 of Schedule 1 of the Companies Act 1994, a company may by special resolution determine the following matters subject to its memorandum of association and without prejudice of any special rights previously conferred on the holders of existing shares:

(a) issue of preference shares, deferred shares or shares of having special rights

(b) restrictions that may be imposed with regard to dividend, voting, return of share capital or any other matter;

(c) Issue of any preference shares on the terms that it is liable to be redeemed or that it is so liable at the option of the company.

Moreover, different classes of shares hold different rights and priorities, such as the preference shares obtain further priority in payment of dividend, than the ordinary share and if anything left after distribution among ordinary shareholders, the deferred shareholders get the right to the residue dividend. Again, the preference shares may be of different types with varieties of distribution rights depending on the terms and conditions set at the time when shares have been issued.

For example, the following are the preference shares with the varieties of distribution rights:

(a) Preference shares carry a preferential right as to dividend in accordance with the terms of the issue and the articles, and hence preference shareholders are paid dividend before the dividend is paid to the equity shareholders of the company.

(b) Preference shares may be cumulative or non-cumulative. Dividend in arrears on cumulative preference shares can be paid in the subsequent years where there are profits sufficient for such payment. In case of non-cumulative preference shares, if no dividend is paid in a year, there is no right to receive it in future years.

(c) Preference share with participatory right used to have the right to participate with the ordinary shareholders at the residue payment

---

6 <http://www.enotes.com/business-law-reference> last accessed 28 March 2012.

7 Ibid.

at the time of winding up provided that usually the preference shareholder is not entitled to residue payment at winding up.

Another form of share is deferred shares, also called as founders or management shares. These are usually of small nominal amount with a right to take the whole or a proportion of the profits after a fixed dividend have been paid on the ordinary shares. Their rights depend on the articles or the terms of issue. Deferred shares are rarely used now.[8]

Dividend Declaration

The dividend declaration in the private companies is unusual. Many such companies are small family concerns where all the shareholders also act as directors. Such companies usually distribute the profit to the directors by way of remuneration rather than by formal declaration of dividend[9]. On the other hand, public companies are bound to follow the formal procedure of law for declaration of dividend. Again, when the public company is a listed one it needs to follow the additional requirements. For example in Bangladesh, companies run under the Bangladesh Securities and Exchange Commission (BSEC) regulations. Therefore, the sources of laws regulating corporate finance in Bangladesh are of two types: the Companies Act 1994 and the BSEC regulations. Similarly, the laws governing the distribution among the shareholders are also regulated by laws from these two sources. In addition, every company's dividend policy is also governed by its own documents of construction like memorandum of association and articles of association.

Regulations Governing Dividend Declaration

Payment of dividend is broadly governed by two fundamental principles. The first one is that *dividend must never be paid out of capital.* It is further supplemented by the second one i.e. *dividend shall be paid out of profits only.* In support of first principles, it is said that payment of dividend out of capital is a breach of trust and the company may require the directors to replace the capital. Explaining the reasons for such principle, Jessel MR said that the creditor of a company has no debtor but that intangible thing i.e. the corporation which has no property except its assets of business. The creditor therefore extends credit to a company based on its capital on the faith of representation that the capital shall only be applied for the purpose of business and be kept by the corporation and not return to the shareholders by any means.[10]

However, the Madras High Court held a dissenting view on breach when it states that payments of dividend by way of borrowing is not a breach of principle of return of capital. In the words of Ram Chandra Ayyar CJ, Madras High Court, "profits of a year under the mercantile system of

---

8 M Zahir, *Company and Securities Laws* (University and Press Limited, 2005) 33.

9 Ibid 158.

10 *Flitcroft Case* (1882) 21 Ch D [519].

accounting only mean the excess receipt for the year over expenses and outgoings during the same year. It will be open to the company to declare dividend on the basis of its accounts...where it is based on estimated profit which had not actually come in the form of cash to the company; it will be open to it to pay such dividend from out of other cash in their hand or perhaps even to borrow and pay them off. That will not amount to paying dividend out of capital."[11] Though the dissenting precedent is from Indian sub-continent, the views of Jessel MR is adopted in Bangladesh that no dividend can be declared for payment otherwise than profits of the year or any other distributable profits.[12]

In compliance with these principles, the company law allows dividends to be paid out of three sources namely, profits of the company for the year for which dividends are to be paid, undistributed profits of the previous financial years and a realized profit made on the sale of a fixed asset[13].

Another most important principle underlying corporate distributions to its shareholders is that the *distributions are* discretionary.[14] This means that the directors of a company have exclusive authority to declare distributions.[15] In absence of a declaration of dividends by the board of directors, shareholders have no direct proprietary interest in corporate earnings, there being no dividend in earnings until one is declared.[16] So, corporate directors have the ultimate say on when and how such distributions are to be made. The shareholders cannot claim dividends as of rights though the company has made profit in any particular financial year or there are distributable profits after balancing previous losses. In Bangladesh, the dividend shall be declared by the shareholders at the annual general meeting, but no dividend shall exceed the amount recommended by the directors.[17] However, the directors have exclusive power to declare interim dividend as and when they seems it justified by the profits of the company.[18]

Furthermore, the directors may before recommending any dividend set aside out of the profits of the company such sums as they think proper as reserve or reserves. This is left at the discretion of the directors and this may be applicable for meeting contingencies or for equalizing dividends or for any other purpose to which the profits of the company may be properly applied. Pending such application, the profits may at the like discretion

---

11 *Hariprasad v Amalgamated Commercial Traders* (1964) 1 Comp LJ 339, [349].

12 *The Companies Act 1994* (Bangladesh) sch 1 Art 98.

13 *Dimbula Valey (Ceylon) Tea Company v Laurei* (1961) a Ch. [353].

14 *Zellerbach v. Allenberg,* (1893) 99 Cal. [57].

15 *Gibbons v. Mahon,* (1890) 136 U.S. 549 [558].

16 *Miller v. McColgan,* (1941) 17 Cal.2d 432 [436].

17 *The Companies Act 1994* (Bangladesh) sch 1 Art 96.

18 Ibid Art 97.

either be employed in the business of the company or be invested in such investments as the directors may from time to time think fit.[19]

Financial Practice regarding Dividend Declaration

Since the dividend can be declared only out of surplus earning there must be an exact method of determining whether there is surplus earning for that purpose.[20] However the Act of 1994 provides no such guidance. The reasoning of such grey area of the Act can be taken to be justified by the words of Lord McNaughton when he states that to formulate rules for the guidance of whether profit exists to pay dividend would constitute embarrassment of businessmen in the conduct of business affairs.[21]

In response of the views of Lord McNaughton, there are two tests underlying the two principles of payment of dividends under the conduction of business affairs. Firstly, *balance sheet test* and secondly *company's profit and loss account test.* The former follow-up its assets and liabilities at the end of the year and the later record the company's financial success (or lack of it) over a period of year.[22] The balance sheet test implies that a company must not make distribution if its net assets are (or would be after distribution) less than it's paid up share capital and distributable reserves.[23] In other words, the dividend out of profits rule also requires the company's net assets after the payment of the dividend to be equal to or exceed the legal capital.

Net Asset = Total Assets less Total Liabilities

On the other hand, the profit and loss account test implies that a company may make a distribution only out of profits available for the purpose. It defines 'profits available for the purpose' as the company's accumulated realized profits so far as not previously utilized for distribution or capitalization, less its accumulated, realized losses so far as not previously written off in a reduction or reorganization of capital duly made.[24]

Net Profits = Sale Revenues less Expenses

Profits Available for distribution = Net Profit of This Year less Any Previous Year's Loss not Written off Yet

Thus, the thrust of the profit and loss account test puts on two points. Firstly, *the company needs to assess its accumulated profits and losses over the years to determine whether there are profits to support dividend payment.* Secondly, *no nimble dividend is permitted* i.e. unless the previous year's losses are replaced out of the profits earned in the particular year,

---

19 Ibid Art 100.

20 Shah J in *CIT v. Standard Vacuum Oil Co.* (1966) 1 Comp LJ [187].

21 *Dovey v Cory* (1901) ACC [477].

22 Jim Gower, *Principles of Company Law* (Sweet and Maxwell, 8th Ed. 2008) 289

23 Ibid 286.

24 Ibid 287.

no dividend can be paid. In consideration of profits and losses for the profit and loss account test, only the realized profits and losses are taken into consideration; the unrealized profits and losses are left out of account in calculation of distributable profits.[25]

The public limited companies listed with the Dhaka Stock Exchange Limited is required to follow some listing regulations before its dividend declaration. It can declare any dividend either interim or final, only after the close of a financial year. It is also required to make an announcement accompanied by a statement showing comparative figures of turnovers, gross operating profits, gross profits, and income from other sources and provision for taxation to the exchange before the declaration.[26]

Expectation versus Payment

From the shareholders' perspective, earning per share[27] and dividend per share ratio[28] are considered to measure the expected return of an individual shareholder against his shares. When the total return of an individual shareholder from the company is calculated, it is called dividend yield ratio. It measures the rate at which dividends provide a return to a shareholder. It is calculated as follows:

$$\text{Dividend Yield} = \frac{\text{Dividend per Share}}{\text{Market Price per Share}}$$

These concepts of dividend calculation and the return to the shareholders are necessary for various purposes, inter alia, to determine the fulfilment of expectation of the shareholders and also to verify the protection to the investments and risks associated with these investments, to find out the better risk management to the ordinary shareholders, to authenticate the efficient stock market, and to confirm the liquidity of the market.

Then again, from the company perspective, all dividends are declared and paid according to the amounts paid on the shares.[29] However, if and so long as nothing is paid upon any shares in the company, dividend is usually declared and paid according to the nominal value of the shares.[30]

Payment Procedure

Once a dividend is declared it becomes a statutory debt from the company to its shareholders. As pointed out by the Supreme Court of India[31], once

---

25 Ibid.

26 The DSE Listing Regulations (Bangladesh) (Reg. no 36(A) sub reg. 8.

27 Earnings per Share is calculated by dividing up Net Income after preferred dividend by Average number of issued shares.

28 Dividend per share ratio is calculated by dividing up total amount of dividend declared by the average number of issued shares.

29 *The Companies Act 1994* (Bangladesh) sch 1 Art 99.

30 Ibid.

31 Ghulam Hossain J, above n 3.

the declaration of dividend is made and it becomes payable. It partakes of the nature of debt due from the company to its shareholders as payable within two months from the date of declaration.[32] Such time frame has two exceptions; firstly, when there is dispute as to right to receive the payment; or secondly, when the dividend has been lawfully adjusted by the company against the sum due to it from the shareholder. However, no interest accrues against the company for the late payment of dividend to the shareholders.[33]

In addition, the internal procedure which a company has to follow while declaring dividend is left to its respective articles of association. Usually the articles of association require both the recommendation of the directors and the approval by the shareholders. If the articles unusually say nothing about the mechanism for determining dividends, then no normal principles that decisions would rest with the shareholders alone.[34]

Residual Claim

There is no express legal provision governing the position and rights of the shareholders as residue claimant. It is governed by the corporate practices. As being the holder of common stock, the shareholders usually have a right to return of capital at the time of winding up. However, such right as residue claimant is subjected to the following conditions:

(a) The Company's solvency is not impaired. Its assets worth is so much that all legitimate preferential claims as per law and agreements if any have been paid.

(b) After all legitimate claims have been paid on their priority basis, if anything remains that shall be divided among the shareholder on pro rata basis.

Under the Companies Rules 2000, rules 171 to 177 deals with the residue payment to the shareholders. In the Companies Rules such payment is also termed as dividend which is declared by the official liquidator. The procedure of declaration is subject to the following procedures:

a) All the preferential payment is made;[35]

b) Notice of not less than 14 days is served to the creditors who have not proved their debt mentioning the intention of declaring dividend in favor of the shareholders.[36]

---

32 *The Companies Act 1994* (Bangladesh) sch 1 Art 96.

33 Ibid Art 103.

34 Gower, above n 18, 285-6.

35 *The Companies Act 1994* (Bangladesh) s 325.

36 The Companies Rules 2000 (Bangladesh) rule 172, Form no 59 & 60.

c) The answers of the creditors lodged in response of the notice is verified in the manner as stated in rule 141 by the official liquidator and discharge their debt as deems fit to him.[37]

d) Minimum two months is elapsed after the service of notice.[38]

e) After minimum two months application for leave to declare dividend is made to the court by the official liquidator.[39] No dividend can declared without the sanction of judge.[40]

f) On obtaining the sanction from the court as to declaration of residue payment to the shareholders, a notice of not less than one month of the intention to declare and pay dividend is to be made to the persons who are supposed to be entitled to the residue claim. Such notice is made in the given forms.[41]

g) Dividend (the residue payment) is paid as per the rights attached to the shares.

3. Uncertainties and Conflict of Interest Control of the Creditors on Dividend Declaration

As discussed above, the creditors get preferential payment at the time of winding up. Furthermore, the creditors can influence the directorial decision of the company as to the declaration of dividend through their loan agreement with the company. Loan agreements between the sophisticated lenders i.e. banks and/or any non-bank financial institutions and the companies often contain covenants restricting the power of the later to declare dividends. On the other hand the trade creditors use other protective techniques such as retention of title or simply not becoming heavily exposed to a single debtor.[42] Another reason for caution is that the insolvency law is designed to address creditors' interest including the interests of creditors who cannot protect themselves contractually and save perhaps for some specific rules that might apply in the period when companies are in serious financial difficulties and potentially heading towards insolvency. It is, therefore, duplicative and perhaps damaging to worthwhile economic activity for the company law to take on that role as well.[43]

In order to protect their own interest in the loan agreements the creditors used to impose such covenant restricting distribution or that the distribution or dividend shall not exceed a specified percentage of the

---

37 Ibid rule 173.

38 Ibid rule 172.

39 Ibid rule 172.

40 Ibid rule 171.

41 Ibid rule 174.

42 Gower, above n 18, 301.

43 Ferran, above n 5, 242.

company's net profit. However, it has been held that the shareholders' right of participation in the profits of the company exists independently of any declaration of dividend by the company.[44] One study found that dividend restrictions in debt contracts are as important factors for 42% of US managers and for 8% of European managers.[45]

Dividend Payment as a Weapon at the hands of the Directors

One fundamental rule discussed before is that distribution is discretionary. In exercise of this principle, the directors may prevent themselves from recommending any dividend showing the reason of non-availability of profit for distribution. In such case, declaration of dividend by the shareholders is unlawful; even the shareholders cannot declare dividend unless the directors make any recommendation for the same. However, remuneration of the executive directors or the directors in managerial power is justified to be paid in such circumstances when dividend distribution would not have been justified. It has been held in case laws that the directors approving the payment of remuneration to them were held to be not guilty of any breach of duty.[46] It shows that though the expectation of the ordinary shareholders is made subject to the recommendation of the directors, the regular income of the directors are not being interrupted. Even in adverse financial states of the company, the remuneration of the directors are allowed though the company may face the loss due to the improper management of business or impromptu decision of the directors.

In response to the discretionary power of the directors it can be said that the shareholders declare the dividend or bonus share or both at the annual general meeting. However, they cannot declare a dividend in excess of the amount recommended by the directors. Further, in contested takeover or other exceptional circumstances where tactical disputes over directors' dividend recommendation may arise between minority and majority shareholders, shareholders can be expected generally to be disinclined to opt for lesser amount. Thus, it means that shareholders decisions to approve final dividend can appear as a rubber stamp. However, it is true that the shareholders do at least have the opportunity to review the dividend recommendation and may require the directors to justify them if the shareholders feel necessary.[47]

Though the directors exercise discretion as to recommend the dividend or not, there are certain factors which prevent the ordinary shareholder to raise objection against the arbitrary exercise of discretion, such as -

---

44 Ghulam Hossain J, above n 3.

45 F Bancel, UR Mittoo and N Bhattacharyya, 'Cross Country Determinants of Payout Policy: A Survey of European Firms' (2004) 33 *Financial Management* 107.

46 *Mac Pherson v European Strategic Bureau Ltd* (1999) 2 BCLC [203].

47 Ferran, above n 5, 238.

Firstly, the powerful market and commercial constraints on dividend policy limit the scope for abuse and hence for legal dispute;[48]

Secondly, the masking effect of a policy of paying dividends which are sufficient to satisfy the investors' demand even though the company's business and prospect would justify higher level means that it may be difficult to detect and prove wrongdoing;[49]

Thirdly, even if an action did reach the courts it is likely that in absence of evidence demonstrating a clear conflict of interests the court would be reluctant to second guess the directors' business judgment about dividend policy.[50]

To date, it was usual that, in the event of a conflict between the shareholders, the one who held the majority refuses to reach an agreement regarding the distribution of dividends in order to weaken the minority shareholder. The majority shareholder receiving some profit through the salary or through related-party transactions, prefer scrip dividend and/or dividend reinvestment plan which enable them to be in majority with more shares. Consequently, the minority shareholder is forced to sell and or to stop exercising his political and economic rights in order to recover at least part of the value of his investment.[51] Through this way the majority shareholders sometimes attempt to exclude the active minority shareholders who raise voice against the mala fide actions of shareholders in management in order to keep the control of corporate governance in hand. On the other hand, due to the consecutive non-distribution the shareholders do not get good price of their shares, and the majority shareholders get a chance of obtaining their shares under the pre-emptive rights. In such way the minority shareholders become bound to sell their shares to the existing majority shareholders at a lower price which ultimately results in losing their capital invested.

Expectation of Shareholders and Uncertain Position

The expectation of the investors making equity investment in any company primarily bears two objectives, either to earn quick return in the form of capital gain by way of selling the shares in secondary market or to have a regular income by way of dividend payment. Again, the regular income of the shareholders can be made by other means apart from cash dividend i.e. declaring bonus shares, rights shares etc. However, since dividend is paid in cash it is considered one of the best rewards a company can do to

---

48 Daniel R Fischel, 'The Law and Economics of Dividend Policy' (1981) 67 *Virginia Law Review* 699 [715]

49 *Re a Company, ex p Glossop* (1988) 1 WLR 1068 [1076].

50 *Burland v Earle* (1902) AC 83 PC.

51 Alvaro Marco, 'Shareholders' Right to Dissociate in case of Non-distribution of Dividends in Spanish entities' <http://www.legalknowledgeportal.com/category/topic/corporate-law> last visited 10 February 2014.

its shareholders for enhancing their wealth. The shareholders also enjoy additional benefit since the dividend which they receive is tax free and need not pay any tax on dividend and the company would be liable to pay dividend distribution tax.

These objectives are separate in sense but their rise or fall are relied almost on the similar variables. Established canons of corporate finance are that shareholders in the widely owned companies which paid dividend in past, are conservative in their dividend expectations. Their expectation continues to receive regular dividend in respect of their shares that those dividend will be smoothed over time and that any increases will reflect underlying longer term prospects for the business.[52]

However, it is already mentioned that dividend payment is at the discretion of the directors; the shareholders hardly have any say on whether dividend will be declared or not. Therefore, the shareholders' expectation of getting regular income is at uncertain positions. At the same time the market practice shows that shares will have a higher value where the company retains the profits and the past accounts of the company giving dividend to the members at handsome amount. Such dividend payment makes a good impression about the financial status of the company which eventually attracts new investors. Every prospective equity investor calculates the existing dividend yield of the particular company before investing thereon. The reason for attraction may be that before investing in any new company the prudent investor used to study the previous records of the company. Therefore, the expectation of the shareholder to get capital gain out of selling the shares in secondary markets is also dependent on the previous declaration of dividends.

Underlying Agency Conflict

The shareholders provide the capital to the company and the managers conduct the business as agents of the shareholders. Here lies the principal-agent relationship between the shareholders and the managers or directors. Out of this agency relation, the agency conflict arises when the managers run the business with the fund of the shareholders but lack the incentives to maximize profits over the longer term and fail to provide any gain to the shareholders in return of their investments. The agency conflict also arises when the managers of a high earning company retain its earnings in order to engage in more activities like dividend reinvestment plan that actually benefits the managers more than the shareholders.

Such conflicts raise the agency cost meaning that because of the divergence between shareholders interest and managers' interest, investors will pay less for shares in companies where shareholding is widely dispersed. It follows that to improve the price which the investors

---

[52] J Lintner, 'Distribution of Incomes of Corporations among Dividends, Retained Earnings and Taxes' (1956) 46(2) *American Economic Review* 97.

are willing to pay for its shares, the managers of a company should do all that they can do to reduce the agency cost.[53] Sometimes litigations are filed by the dis-satisfied shareholders against the company or the directors. The unattractive prospect of the commencement of such an action attracting media coverage is damaging to the company's commercial interest.[54] It also increases the agency cost. One probable way to mitigate such cost is to increase agreement between the shareholders and the managers. The degree of agreement (or disagreement) of the shareholders and the managers as regards the declaration of dividend or the reinvestment of the same is an economically determinant factor for resolving agency conflict.

The agency cost analysis suggests that companies should declare high dividend and where necessary raise finance from other sources. This will reduce agency costs because equity investors have the security of knowing that management will have had to expose their business records and their plans for the future to the scrutiny of the lenders or to the markets and may have had to submit restrictive covenants in order to secure the funds.[55] Mitigation of such agency cost is one of the fundamental objectives for any frameworks regulating dividend payment.

Uncertainties as Residue Claimant at the Time of Winding Up

The conditions, fulfilment of which the shareholders might receive something as residue claimant are themselves uncertain enough. First conditions underlies that the company should be solvent at the time of winding up. When a company is solvent and capable of running its ventures, why it would call its winding up?

Also the big priority list raises the suspicions about shareholders' receiving anything at winding up. The priority list may be as follows:

(a) The secured creditors of fixed charges

(b) The secured creditors of floating charges

(c) The unsecured creditors

(d) The holders of preference share

(e) The ordinary shareholders

However, before the payment of any debts, there is a provision for preferential payments under section 325 of the Companies Act 1994. In a winding up there shall be paid in priority to all other debts,

(a) All revenues, taxes, cesses and rates whether payable to the government or to a local authority due from the company

---

53 Ferran, above n 5, 235.

54 Ibid 239.

55 M Jensen, 'Agency Cost of Free Cash Flow, Corporate Finance and Takeovers' (May 1986) 76 *American Economic Review* 323.

(b) All wages or salary of any Clark and other servant in respect of service rendered to the company within two months next before the date of winding up.

(c) All wages of any labour or workmen not exceeding five hundred for each whether payable for the time or piece work in respect of the services rendered to the company

(d) Compensation payable under the Workmen's Compensation Act 1923[56] in respect of the death or disablement of any officer or employee of the company

(e) All sums due to any employee from a provident fund, a pension fund a gratuity fund or any other fund for the welfare of the employees maintained by the company

(f) The expenses of any investigation held in pursuance of clause (c) of section 195 of the Companies Act 1994

This shows that there remains hardly any chance for the ordinary shareholders to obtain anything at the time of winding up as a residue claimant.

4. Implication of Those Uncertainties

Aspects of No Payment and of Superfluous Payment of Dividend Causing Vulnerable Position of the Shareholders

Distribution is not only a mode of return, it can perform an information function also. Paying healthy consistent dividends in environment shaped conservatism is a way of indicating to investors who are not directly involved in managing a company that its management has long term confidence in the business and its prospects.[57] If the managers choose to increase the level of dividend, it may be interpreted not just as an indication of company's past profitability but also as a sign of greater dividend capacity in the future. However, a dividend cut may be taken as an indicator of long term problems within the company rather than as a temporary blip in profitability or liquidity.[58]

Some academics have developed the idea of dividends as an information conveying mechanism to suggest that managers may use dividend policy to signal the strength of their company and to distinguish it from the competitors. The underlying reasoning is that weaker competitors will not be able to afford to take that step because of the longer term expectations

---

56 *The Workmen's Compensation Act 1923* has been repealed by the *Labour Act 2006* (Bangladesh) and now the compensation is paid under the provision of *Labour Act 2006*.

57 WL Magginson, *Corporate Finance Theory* (Addison Wesley, 1997) ch 8.

58 JR Woolridge and C Ghose, 'Dividend Cuts: Do They Always Signal Bad News' (Winter 1986) *Midland Corporate Finance Journal* 20.

associated with paying off a generous dividend in one period.[59] In addition, discretionary power of the directors to recommend interim dividend without any other guard against their exercise of this discretionary power, acts as a weapon at their hand to regulate the secondary market of shares as well. For example, the announcement of dividend results in a strong factor regulating the price of share at the BSEC market. Again, when the directors find the share price downturn, they used to announce interim dividend even though the financial status of the company does not support. This interim dividend declaration is not subject to AGM or any other procedures. Such superfluous announcement of dividend sometimes facilitates the insider's trading affecting the interest of ordinary shareholders. It also hampers the efficiency of stock markets.

On the other hand, when no dividend is distributed for consecutive years, the price of the company's share (in case of a listed company) used to have a downturn. Such downturn might result in the non-confidence of the existing shareholder upon the present directors. It might increase the agency conflict. On such circumstances when the shareholders lose their confidence upon the directors they used to start a rebel against the directors. It is not uncommon to have unrest in the annual general meeting. Such unrest among the shareholders is known as short-termism. Failure to meet the shareholders expectation will have a negative effect on share price and may out the company into the frame as a potential takeover target.[60]

The loss of confidence of the shareholders upon the directors occurred especially when they (the directors) are waiving from declaring dividend with some mala fide motive or in spite of having enough profits in hand. In the word of Lord McNaughton, the vulnerable position of the shareholder is much more prominent. He stated: "People put their money into a trading company to give them an income and the sudden stoppage of all dividends would send down the value of their shares to zero and possibly involve its ruin'.[61]

On the other hand, declaration of over dividend attracts other big companies to acquire the company. Sometimes the directors recommend a healthy amount of dividend in spite of its loses in business to make the company target to others. At takeover bid, the price of the acquired company's shares and assets are valued as per their previous financial condition and declaration of healthy dividend is an indication of sound financial condition. Despite acquisition of the company, the investors with internal control sometimes save their investments by insider trading.

---

59 S Bhattacharya, 'Imperfect Information and Dividend Policy and the Bird in the Hand Fallacy' (1979) *Bell Journal of Economics* 259.

60 Ferran, above n 5, 237.

61 *Dovey v Cory* (1901) ACC [477].

When the directors recommend dividend in spite of the fact that the company faced loses and has no profit for distribution, it breaches the principles of dividend that dividend cannot be paid out of capital or any other un-distributable reserves. Payment of such superfluous dividend constitutes unlawful distribution. Such unlawful dividend amounts to a misapplication of corporate property and where the transferee of the assets has the knowledge of the fact rendering the distribution ultra vires that party is under duty to restore those assets to the company because he is deemed to hold the assets as a constructive trustee. Under the common law of directors' duties, the directors who pay dividends improperly may in certain circumstances be liable to compensate the company for the loss thereby caused.[62] When the distribution is made to a member which the member knows or has reasonable grounds for believing is made in contravention of the statutory distribution rules, that person is liable to repay it or if the distribution is otherwise than case, its value. Thus, when the payment is though unlawful is neither void nor voidable but can nevertheless be recovered from any receiver of it who knew or thought to have known that it was unlawful.[63]

The philosophy behind holding the directors and receivers of unlawful distribution to restitute is that it causes agency problems between the creditors and the controllers of the company, because excessive payouts are liable to undermine a company's financial position to the detriment of its creditors.[64] In such case, the position of the creditors becomes vulnerable and the creditors whose interest is affected may file any suit against the directors who are responsible for such breach; and the shareholders who receive the dividend may be required to restitute the same. Nevertheless the vulnerable positions of shareholders are not remedied like the creditors.

The vulnerable position of the shareholders becomes more adverse when they lose their investment. In view of the status of secondary stock markets in Bangladesh for last few years, it is the prime concern that many individual shareholders lost their investment. Such loss of investment occurs when the dividend yield ratio falls shorter than their actual amount of investment (the price at which they have taken the shares). In such case neither their expectation is not being satisfied through dividend nor can they come out of the market by selling in the secondary market. Their invested money used to be stuck in the non-prospective company or company with mala fide directors waiving dividend though the financial position of the company supports distribution. Then the question arises whether the liability would be the same when the directors avoid the declaration of dividend though there is enough profit to

---

62 *Flitcroft Case* (1882) 21 Ch D [519].

63 Gower, above n 18, 296.

64 Ferran, above n 5, 241.

recommend. Such question has still remains in the grey area of laws governing dividend policy.

In such cases, the directors can be made liable for loss suffered by the ordinary shareholders for non-payment of dividend or loss of capital out of the fall of share price in the secondary market due to the non-payment of dividend. In support of such liability, contention can be raised that the directors have defaulted to make proper representation of financial position of the company. In *Bairstow vs. Queens Moat Houses PLC*[65] the principle was applied to hold the directors liable where the accounts filed to give true and fair view of the company's financial situation as a result of accounting irregularities of which directors were aware. Another ground for holding the directors liable for the same would be their failure to promote the success of the company for any ulterior motive or on the ground of an act of negligence.

Efficient Frontiers

Vulnerable states are more adverse to the shareholders than the creditors. Shareholders undertake the risks with the expectation of returns. It has already been shown that how much susceptible that the return is. Theoretically and practically the shareholders assume more risk with the expectation of more return, but the previous discussion has shown the different. Such states also go against the principles of efficient frontiers. The principle of efficient frontiers states that higher the risk, higher the return.

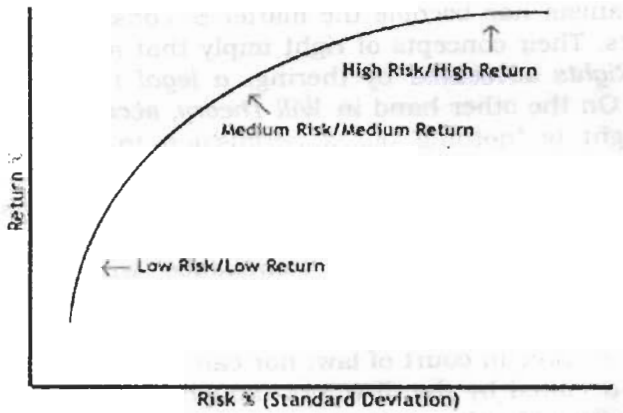

Figure: Efficient Frontier[66]

The shareholders undertake more risk than the creditors as the creditors are entitled to fixed rate of interest with the certainty of payment; even in

65 (2001) 2 BCLC [531].

66 <http://i.investopedia.com/efficient_frontier.png> last visited 09 February 2014.

case of default that acts as a debt upon the company. They also receive priority at the time of winding up. At the same time the ordinary shareholders undertake more risk than any other class of shareholder and similarly with the less chance of receiving any thing. Therefore, the right to distribution turns to be the incentive to them to undertake that risk.

Distribution Incentives as Right

Taking that incentive as a right can be a way to deal with such misnomer term of right of distribution; on the other way we should take it as a mere expectation distinct from the concept of right. Again when we want to use the term 'right' to describe the probable incentives to the shareholder, it can be a complete right in compliance with all requisites to be so or it is not a right at all. According to Buckland, a legal right is an interest or an expectation granted by law.[67] Under this definition, such incentive is a right. Similar view is also supported by the Supreme Court of India, "the shareholders' right of participation in the profits of the company exists independently of any declaration of dividend by the company.[68] Under these observations, incentive in the form of cash dividend, bonus share or scrip dividend is also a right though they are not enjoyable unless declared and not enforceable it not declared. When we term this as a right there must be some protection mechanism for such right like the creditor protection mechanism or mechanism adopted to ensure uninterrupted entrepreneurship providing immunities to the directors. There needs some enforcement mechanisms for such right since the shareholders cannot enforce the right against the directors unless declaration is made.

Questioning Its Authenticity as Right

Lack of enforcement mechanism has become the matter of consideration for another group of writers. Their concepts of right imply that according to *the Interest theory of Rights* advocated by Ihering, *a legal right is a legally protected interest.*[69] On the other hand in *Will Theory*, according to Justice Holmes a legal right is "nothing but a permission to exercise natural powers and upon certain conditions to obtain protection, restitution or compensation by the aid of public force."[70] These writers deny recognizing any interest as right unless there are some guarantees of their enjoyment as well as enforcement. In compliance with their observations, the distribution right cannot be termed as right as it is not legally protected; neither the shareholder can obtain it unless recommended nor can they enforce in court of law; nor can they have any restitution of dividend not declared by the directors though the financial status of the company supported like the creditors.

---

67 W W Buckland, *'Some Reflections on Jurisprudence'* (Cambridge University Press, 1945).

68 Ghulam Hossain J, above n 3.

69 V D Mahajan, *Jurisprudence and Legal Theory*' (Eastern Book Company, 1996) 290.

70 Ibid 289.

Partially Recognized Right

Paton held a view little different from the above mentioned scholars. Although he defined legal right in terms of recognition and protection, according to him, there are three qualifications of this statement. One of them is partial recognition of legal right and also the cases where the court of justice does not have an adequate machinery to enforce their decisions.[71] In support of the view held by Paton the Indian Supreme Court observed that a declaration of distribution is necessary only for the enjoyment of profits. It does not impair the shareholders' right to distribution.[72] Under this observation, their entitlement to incentive is a partial right which lacks some fundamental requirements of being a legal right. These requirements include the right to enjoyment and right to enforcement. In concepts of legal right, enjoyment can be postponed like reversionary interest but not make a mere possibility. However, the settled principle on this regard is that such right of participation in the profit does not provide any proprietary right of the shareholder over that profit. As a result, where there is no proprietary right, the question of enforcement of the same never arises.

***Spes* to Distribution**

Like the expecting heir of a relative who will die in future, the shareholder is also a mere expectant of the distribution. Then how such expectation can be termed as a right? The expectation of a mere chance to accrue an interest or right in the property is termed as *spes successionis* in the legal world. Similarly the shareholders' expectation to receive dividend (which in corporate law has termed as distribution right) is quite alike to that mere expectation as shown above. Such mere expectation is better being termed as *spes* to distribution in the place of distribution rights where the Latin term *Spes* means hope or bare possibility. In the case of *Annada Mohan Roy vs. Gour Mohan Mallik*[73], the term spes successionis is shown as "the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman or *any other mere possibility of a like nature,*" the shareholders' expectation to distribution of profit is of a mere possibility of like nature.

5. Probable Way Outs and the Consequences

Mere expectation, its consecutive failure of its fulfilment, lack of enforcement of that distribution right might mislead the shareholders from equity investment. Therefore, it is essential to find some alternative ways by which the frontiers of the shareholders' risk undertaking and return can again be brought into its efficient form. This can give some remedy to loss suffered by the shareholders due to the unlawful waiver from distribution by the directors; arbitrary exercise of discretion of the

---

71 GW Paton, *'A text Book of Jurisprudence'* (Clarendon Pres, Oxford 1972) 325.

72 Ghulam Hossain J, above n 3.

73 65 Ind Cas [27].

directors. Moreover, such probable ways need to be in compliance with the fundamental principles of corporate laws.

Mandatory Dividend

There can be an option for mandatory dividend payment to the shareholders. Under such option, we can avoid the mala fide exercise of discretion of the directors as to the recommendation of dividend. The articles of association can contain the minimum mandatory dividend to be distributed each year by the company. This may be incorporated in law as is made in Greece (Article 45 of Codified Law 2190/1920), which according to Article 3 of Development Law 148/1967 is at least 35% of the Company's net profits, after all necessary withholdings to establish the statutory reserve.[74]

However such mandatory dividend would distort the basic difference between the equity finance and debt finance. This is because equity finance carries the right to participate in the share of profit and also to the surplus assets if left anything because of their assuming greater risk than the debt financiers. Such provision would also act as discouragement of the managers of the business to undertake large ventures. It would also act as a bar to the potential growth of the company.

Free Reserve

The company may form a reserve to meet the contingencies when it becomes unable to pay the dividend to its shareholders. In the Act 1994 there is such provision under Reg. 100, which states the discretion of the director to form reserves. The allowable uses of such reserve would be to meet contingencies, to equalize dividend, to reinvest or to any other purpose for which profit can be used. Here the risk of arbitrary application of discretion entrusted upon the directors remains. The directors may not form such reserve or may use the reserve for any such purpose as they think fit with mala fide intention.

On the other hand, in Indian Companies Act 1956 there is a provision of free reserve, which is mandatory with fixed rate of contribution of each year's profit. Here the most preferable option is that the reserve can be used only to pay dividend to the shareholders when there is no profit of that year at the hand of company. Section 205 (2A) of the Act prescribes that before any dividend is declared or paid, certain percentage of profits as may be prescribed by the Central Government, but not exceeding 10% will have to be transferred to the reserves of the Company. The term "Reserve" is also defined in the Rules made under the Act meaning "Free Reserves" i.e. reserve which are not created or set apart or intended for any special purpose. For example, Development Rebate Reserve, Capital Reserve or Special Reserve will not come under the category of free reserves for the purposes of this rule. If in a particular year, on account of inadequacy of profit, the company has to pay dividends out of the previous year's reserves.

---

[74] <http://www.titan.gr/en/titan-group/corporate-governance/rights-of-shareholders> last accessed 20 August 2012.

Right to Withdrawal

The right to withdrawal is recognized in the Spanish Companies Law. It implies that shareholders, dissenting with decision of the directors as regard the declaration of dividend or announcement of any dividend reinvestment plan, may withdraw his share and the company will reimburse him the amount invested.

Article 93(a) of the Spanish Companies Law (LSC in Spanish) expressly recognizes the shareholders' entitlement to participate in company profit-sharing. The decision whether or not to engage in profit-sharing within a company tends to be one of the most common sources of disagreement in the company activity. Also the Law 25/2011 incorporates new article 348 *bis* to the LSC which recognizes that shareholders of unlisted public limited companies, limited liability companies and limited partnerships have the right to withdraw in the event of non-distribution of minimum dividends (a third of profits yielded in the period for which the financial statements have been approved). The right to withdraw corresponds to the shareholder that voted in favour of the distribution agreement. When enforcing the legitimate right to withdrawal, the company shall be bound to provide the shareholder with a refund of the fair value of the latter's company shares or stocks. Although the new provision does not set down the basis for calculation of distributable profits, we can conclude that said profits are those resulting from the company's regular activity, which is why extraordinary profit or loss shall not be included, nor shall be any surplus recognized in the statements or any restructuring operating reserves.

There are two exceptions to this right to withdrawal: firstly, it is not applicable to listed companies and secondly whenever the company operation could be endangered if profit-sharing were conducted the company may choose not to recognize the right to withdrawal to defend the fact of prioritizing the company's best interest.

Solvency Based Test

The possibility of introducing an alternative solvency based approach was first explored by the European Commission on the alternatives to the Second Directives. Through the solvency based approach the directors undertake the personal liability to make good the loss of investment occurred to the shareholders. It has been already shown that due to non-declaration of dividend or unlawful distribution, the shareholders might lose their investment, in such case the directors undertake to reimburse the shareholders out of their own pocket under the solvency based approach.

A solvency based system places considerable faith in the deterrent effect of sanctions that would apply to the directors who deliberately prevent the recommendation of dividend though supported by the financial states of the company; or negligently authorized distributions that are not supported by the company's financial position.[75]

---

[75] Ferran, above n 5, 263.

Though similar provision is not adopted in Bangladesh, there is a chance of imposing personal liability on the directors. The same is provided under section 76 of the Companies Act 1994. Here it says that a limited company may by special resolution alter its memorandum so as to render unlimited liability of its directors or of any director. However, in such solvency based approach, whether the fundamental principle of company law i.e. limited liability is breached is a prime question. Again imposition of such personal liability discourages entrepreneurial activity. In response to this concern, personal liability of the directors to reimburse the loss of investment under the solvency based approach is made only for one year.

Personal Disqualification of the Existing Directors for his Election as Director for Next Term

If the directors were to manipulate the dividend payment to serve private interests rather than those of the members generally that would amount to a breach of their statutory duties to promote the company and to avoid the conflict of interest. For such default the directors may be subjected to civil or criminal liabilities. In India, there is a provision for personal disqualification of the directors for their being elected as director for next term though they might have the qualified amount of shares in the company. As per section 274 (1) (g) of the Companies Act 1956 of India, if a public company fails to pay dividend and such failure continues for one year or more, then any person who is a director of the company at the time when default is made, shall not be eligible to the appointed a director of any other public company for a period of 5 years.

Identification of Account

An obvious step to avoid the arbitrary decision of the directors as to recommendation of dividend would be the verification of account by independent authorities. Companies are required to produce account annually and to have them audited, thus providing a degree of verification and the declaration of the dividend is normally one of the decisions of the annual general meeting at which the accounts will be considered as well.[76] Therefore, the shareholders get a chance to know the present financial condition of the company and the independent authorities like auditors, chartered accountants, and credit rating companies would also bring a balance on the absolute power of the directors to recommend dividend.

Distribution in Kind

The distribution in kind applies where a company does not have profits available for distribution of sufficient amount to recover the distribution proposed. It may sell any of its assets with the accession of capital gain. In order to avoid the common law rules on distribution, especially in respect of distribution in kind, the asset would have to be transferred at market value.

---

[76] Gower, above n 18, 292.

Extension of the Powers of Ordinary Shareholders in Respect of Dividend Declaration

The dividend policy of a company is mostly regulated by its own articles of association. It would be more open to the companies to vest more direct control in the shareholders via the articles of association. For example, the shareholders might be given the power to exceed the amount of dividend recommended by the directors. However, such excessive power vested upon the shareholder might bring an adverse result. This is because most of the shareholders are dormant un-expert investors and they are ill informed also. Replacement of managerial power over them in the place of directors would not be wise.

Right to Dissociate of the Shareholders

It has been adopted in the European corporate legislation[77] that the shareholders are going to have the right to dissociate in case of non-distribution of dividend in spite of having available profit for the same. The concerned legislation states that upon the completion of fifth year of incorporation of the company, if proposal for distribution of dividend is not passed in the AGM (by the directors or the majority shareholders), the shareholders (even minor in number) have the right to dissociate. This right accrues not only when no dividend is declared but also when the declared dividend is less than one third of the distributable profits of the previous financial year.[78] Exercising the right to dissociate, the shareholder sells his shares out to the company itself. In case of failure of the parties to determine the price of the shares, the same is determined by independent valuation such as by an independent auditor accountant.[79]

However, this regulation is made applicable for the non-listed companies only. It would not bring the same result for the listed companies. Therefore, the minority shareholders in the listed companies still remain under the risk of losing their investment in case of non-distribution of any dividend.

Introduction of Non-Director Executives to Declare Dividend

In order to protect the shareholders from being toys at the hand of the directors who are majority shareholders also, governance mechanism of appointing independent non-executive directors to the board would be another strategy. Non-executive directors may have more access than the shareholders in general meeting to information about the company's financial status and prospects and are much better placed to impose pressure on the executive directors and management to justify their dividend policy. The combined code of corporate governance applicable in the UK also recommends the balance of executive and non-executive directors.[80]

---

77 European Directive 2007/36/EU.

78 *Capital Company Act* (Spa) 2006 (amended by Law 25/2011) Art 348.

79 Marco, above n 52.

80 Ferran, above n 5, 238.

6. Summary and Conclusion

The dividend policy and the principles governing the dividend payment are more prone to save the creditors' interest. In order to protect the creditor's interest the primary concern of the courts has been that the capital is maintained in the form of assets if not equal to the paid up capital at least sufficient to go round up the creditors. Once this is done a complete latitude is given to businessmen to pay dividend in good faith so as to keep up their company's reputation.

However, the shareholders purchase the shares with the expectation to get return either in the form of dividend or by way of capital gain. When the directors waive from recommending any dividend for consecutive few years, it causes an unsatisfactory situation among the shareholders. In spite of this, the value of that company's share at secondary market also falls. Therefore, the shareholders ultimately drop into an uncomfortable situation. They don't get any income nor can they get their invested capital back by disposing the shares at the capital market. The position becomes more vulnerable when the income out of shares held (by way of dividend or capital gain) is less than the principal amount invested.

In spite of such circumstance, the shareholders can sue neither the company nor the directors for compulsory distribution. The ground of such default is that the shareholders right to distribution is a mere expectation; their right to participate in the company's profit does not give them any proprietary right to enjoy the same unless declared. Such expectation under the heading of right is a mere misnomer. The term *Spes* (meaning bare possibility to entitle) is more appropriate to explain the nature of such grant to the shareholders in reply of their investment.

Many alternative ways can be suggested in order to provide for the fortification of shareholders' interest. It may be the incorporation of appropriate laws or rules but their enforcement and effectiveness completely depend on the underlying corporate practice, market performance and ultimately legal observation in case of interruption in such practices. One factor to be taken into account during those practices is that nothing of them causes imbalance in the interest and protection mechanisms to both the shareholders and the creditors; also in compliance with corporate law norms.

Does Part II of the Constitution of Bangladesh Contain only Economic and Social Rights?

Dr Muhammad Ekramul Haque*

Introduction

Part II of the Constitution of Bangladesh is titled 'Fundamental Principles of State Policy'. This part is an amalgam of different types of principles that include economic, social and cultural (ESC) human rights. The Constitution of Bangladesh, through its preamble, expressly declares its aim to establish 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'.[1] It is submitted that part II of the Constitution also includes other principles apart from economic and social rights. The part on the fundamental principles of state policy (FPSP) contains the detailed steps necessary for establishing economic and social justice which are contemplated in the preamble of the Constitution. However, the FPSP incorporated in this part have been declared to be judicially unenforceable under Article 8(2) of the Constitution. I will argue in this paper that the judicially unenforceable nature of the FPSP will create some practical problems. Because, the FPSPs have included different types of principles apart from economic and social rights. There are some principles inserted in this part which are to be made judicially enforceable by any means.

The rationale of incorporation of Fundamental Principles of State Policy (FPSP) in the Constitution:

It was stated in the Constituent Assembly of Bangladesh, during the time of debate on the draft Constitution, that the FPSP incorporated in Part II of the Constitution were 'the goal of the state'[2] 'for which the people have been struggling here for long time'.[3] Taj Uddin Ahmed, one of the key architects of the liberation movement of Bangladesh, stated in the Constituent Assembly:

---

* Associate Professor, Department of Law, University of Dhaka

1 *The Constitution of Bangladesh* Preamble.

2 Bangladesh, *Constituent Assembly Debates (GonoParishader Bitarka, Sarkari Biboroni)*, Constituent Assembly, 1972, vol 2, 261 (Mr. Asaduzzaman Khan N.E. – 90: Mymensingh- 15).

3 Ibid 114 (Hafez Habibur Rahman, N.E.-142: Comilla-12).

> At present we have prepared an agenda of fundamental principles of state policy. We do not claim that we have made everything ready in the constitution directly and properly. But what we have done is that: we have prepared a general principle according to which the Head of the State will run.[4]

Mr. Abdul Rouf Chowdhury, a member of the Constituent Assembly, pointed out that a 'constitution is not the accumulation only of laws, but at the same time it also includes certain principles.'[5] These principles indicate the goal of the state to achieve.[6]

Scope of fundamental principles of state policy (FPSP)

The Constitution of Ireland of 1937 limited its judicially unenforceable principles to the duties of the state regarding ESC rights. The constitution of Bangladesh encapsulates some other principles along with ESC rights within the category of judicially unenforceable principles.

The FPSP contained in Part II of the Constitution of Bangladesh may be divided into two groups: basic and derivative. Article 8(1) says:

> The principles of nationalism, socialism, democracy and secularism, together with the principles derived from them as set out in this Part, shall constitute the fundamental principles of state policy.

Thus, the first four FPSP are implicitly identified as the "basic" FPSP and all other FPSP set out in Part II are deemed to be derived from those basic four FPSP. The derivative principles set out in Articles 9 to 25 may be further categorized into the following five categories: administrative directions, general principles of human rights, ESC rights, duties of citizens and government employees, foreign policy.

Administrative directions

There are some FPSP which are general types of declarations or general policy formulations and involve different types of administrative actions to be taken. Article 9 gives an explanation of nationalism:

> The unity and solidarity of the Bangalee nation, which deriving its identity from its language and culture, attained sovereign and independent Bangladesh through a united and determined struggle in the war of independence, shall be the basis of Bangalee nationalism .

Article 10 states: 'A socialist economic system shall be established with a view to ensuring the attainment of a just and egalitarian society, free from the exploitation of man by man.' Article 11 speaks of people's participation in administration:

---

4 Ibid (Taj Uddin Ahmed).

5 Ibid 323.

6 Ibid.

> The Republic shall be a democracy...in which effective participation by the people through their elected representative in administration at all levels shall be ensured.

Article 12 is about secularism and freedom of religion, which says:

> The principle of secularism shall be realized by the elimination of—
>
> a) Communalism in all its forms;
>
> b) The granting by the State of political status in favour of any religion;
>
> c) The abuse of religion for political purposes;
>
> d) Any discrimination against, or persecution of, persons practising a particular religion.

Article 13 enumerates the general principles of ownership in the following words:

> The people shall own or control the instruments and means of production and distribution, and with this end in view ownership shall assume the following forms-
>
> (a) state ownership, that is ownership by the State on behalf of the people through the creation of an efficient and dynamic nationalized public sector embracing the key sectors of the economy;
>
> (b) co-operative ownership, that is ownership by co-operatives on behalf of their members within such limits as may be prescribed by law; and
>
> (c) private ownership, that is ownership by individuals within such limits as may be prescribed by law.

Article 16 specifies directions for rural development, which is ultimately related with the economic rights of the people. Article 16 states:

> The State shall adopt effective measures to bring about a radical transformation in the rural areas through the promotion of an agricultural revolution, the provision of rural electrification, the development of cottage and other industries, and the improvement of education, communications and public health, in those areas, so as progressively to remove the disparity in the standards of living between the urban and the rural areas.

Article 17 formulates the policy regarding education:

> The State shall adopt effective measures for the purpose of-
>
> (a) establishing a uniform, mass-oriented and universal system of education and extending free and compulsory education to all children to such stage as may be determined by law;
>
> (b) relating to education to the needs of society and producing properly trained and motivated citizens to serve those needs;
>
> (c) removing illiteracy within such time as may be determined by law.

Article 18(2) says that '[t]he State shall adopt effective measures to prevent prostitution and gambling'. Article 18A is about protection of environment and bio-diversity, which says: 'The State shall endeavour to protect and improve the environment and to safeguard the natural resources, bio-diversity, wetlands, forests and wild life for the present and future citizens.' Article 19(3) states that '[t]he State shall endeavour to ensure equality of opportunity and participation of women in all spheres of national life.'

Article 20(2) directs the state to foster creative endeavour. It says:

> The State shall endeavour to create conditions in which, as a general principle, persons shall not be able to enjoy unearned incomes, and in which human labour in every form, intellectual and physical, shall become a fuller expression of creative endeavour and of the human personality.

Article 22 directs the separation of the judiciary from other governmental power: 'The State shall ensure the separation of the judiciary from the executive organs of the State.'

Articles 23 and 24 concern conservation of national culture and protection of national monuments respectively. They state as follows:

> 23. The State shall adopt measures to conserve the cultural traditions and heritage of the people, and so to foster and improve the national language, literature and the arts that all sections of the people are afforded the opportunity to contribute towards and to participate in the enrichment of the national culture.
>
> 24. The State shall adopt measures for the protection against disfigurement, damage or removal of all monuments, objects or places of special artistic or historic importance or interest.

Regarding protection of tribal culture, article 23A says: 'The State shall take steps to protect and develop the unique local culture and tradition of the tribes, minor races, ethnic sects and communities.'

Human rights: general principles

Article 11 states: 'The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed'. Thus, this Article is a general provision that directs the establishment of a state where all human rights are guaranteed. Article 19(1) lays down the principle of equality of opportunity: 'The State shall endeavour to ensure equality of opportunity to all citizens'. Human rights are elucidated in greater detail in other articles of Part II (ESC rights) and in Part III (CP rights).

Economic, social and cultural rights:

Part II of the Constitution contains the provisions regarding ESC rights. Such rights are enunciated in the form of their corresponding duties of the state. Article 14 is a general direction to the state to emancipate the people from exploitation. It says:

> It shall be a fundamental responsibility of the state to emancipate the toiling masses-the peasants and workers-and backward sections of the people from all forms of exploitation.

Article 15 is the crux of this part: it contains the provision of some basic ESC human rights including basic necessities like food, clothing, shelter, and medical care. It states:

> It shall be a fundamental responsibility of the state to attain, through planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people, with a view to securing to its citizens-
>
> (a) the provision of the basic necessities of life, including food, clothing, shelter, education and medical care;
>
> (b) the right to work, that is the right to guaranteed employment at a reasonable wage having regard to the quantity and quality of work;
>
> (c) the right to reasonable rest, recreation and leisure; and
>
> (d) the right to social security, that is to say, to public assistance in cases of undeserved want arising from unemployment, illness or disablement, or suffered by widows or orphans or in old age, or in other such cases.

Article 18 is related to the right to health of the people generally. Article 18(1) says:

> The State shall regard the raising of the level of nutrition and the improvement of public health as among its primary duties, and in particular shall adopt effective measures to prevent the consumption, except for medical purposes or for such other purposes as may be prescribed by law, of alcoholic and other intoxicating drinks and of drugs which are injurious to health.

Article 19(2) is another provision that is ultimately related to the economic rights of the people as it talks of the equitable distribution of wealth. It says:

> The State shall adopt effective measures to remove social and economic inequality between man and man and to ensure the equitable distribution of wealth among citizens, and of opportunities in order to attain a uniform level of economic development throughout the Republic.

Finally, Article 20(1) recognized the right to work:

> Work is a right, a duty and a matter of honour for every citizen who is capable of working, and everyone shall be paid for his work on the basis of the principle "from each according to his abilities, to each according to his work".

Duties of citizens and government employees:

Apart from the rights of the citizens and duties of the state, Part II also contains certain basic duties of the citizens to observe the law and the Constitution. Clause 1 of Article 21 imposes a duty on the citizens to

observe the Constitution and laws. Clause 2 fixes the duty of public servants to serve the people. Article 21 reads as follows:

> (1) It is the duty of every citizen to observe the constitution and the laws, to maintain discipline, to perform public duties and to protect public property.
>
> (2) Every person in the service of the Republic has a duty to strive at all times to serve the people.

Foreign policy:

Article 25 of the Constitution contains directives regarding the foreign policy of the state. It says:

> The State shall base its international relations on the principles of respect for national sovereignty and equality, non-interference in the internal affairs of other countries, peaceful settlement of international disputes, and respect for international law and the principles enunciated in the United Nations Charter, and on the basis of those principles shall-
>
> (a) strive for the renunciation of the use of force in international relations and for general and complete disarmament;
>
> (b) uphold the right of every people freely to determine and build up its own social, economic and political system by ways and means of its own free choice; and
>
> (c) support oppressed peoples throughout the world waging a just struggle against imperialism, colonialism or racialism.

Conclusion

Part II on FPSP contains ESC human rights. It also embodies other administrative directions and general directions regarding the duties of the state and its citizens.[7] Therefore, the issue of protection of FPSP is not solely an issue of ESC rights, but also of those other principles. For example, it is not possible to deny judicial enforceability of article 21 which contains the duty of the citizens to protect the Constitution. Thus, if a citizen participates in violation of the constitution instead protecting it, the judiciary surely will declare such an act of the citizen as a violation of article 21, an FPSP.

Not all FPSP have been expressed in the same manner. The FPSP have been spelt out as general directions, general goals, instructions about taking effective measures, general declarations and primary duties and responsibilities to attain through planned economic growth. Therefore, different activities are possibly required of the State in regard to its responsibilities under the different specific FPSP.

---

[7] Huq commented that 'most of the social and economic measures directed towards the establishment of socialism have found expression in Part II of the Constitution dealing with the Fundamental Principles of State Policy.' (Abul Fazl Huq, 'Constitution-Making in Bangladesh' (1973) 46 (1) *Pacific Affairs* 59, 73).

Denial of Service Attacks: Trends in Criminalization

Quazi MH Supan*

Introduction

In the early nineties many cybercrimes predominantly fell in the grey area of law. The frequent exclusion of these crimes outside the grip of law may be attributed to weak or lack of legislation or poorly equipped investigators. Among these crimes, the smartest, most sophisticated and elite one that tops the list of 'untouchable' cybercrimes is DoS (denial of service) attack. A variety of new trends in legislation can be seen since the early tens of the 21st century to criminalize DoS attacks that were otherwise immune from criminal or civil justice systems. This article examines those trends. In doing so, the article first characterizes various DoS attacks and then scrutinizes the criminal law responses to those attacks and identifies the trend.

For the purpose of this article I will examine the legislations of selected countries from all the continents, namely, Asia, Europe, North and South America, Africa and Australia and I will categorize DoS related criminal laws in the following three groups:

(a) Explicit criminalization: Generally the recent cyber legislations fall in this category. This trend explicitly refers to DoS attacks, defines a DoS activity and penalizes it.

(b) Criminalization through broadly-worded provisions of illegal access and diminishing utility: Technologically advanced states could foresee many facets of future cybercrimes and accordingly their drafters had defined 'future cyber activities' with precision to criminalize them before they appeared.

(c) Ambiguous criminalization: Legislations that took place before the advent of DoS attacks have given rise to confusion and controversy in penalizing DoS attacks. Some legislations of this trend may be capable of penalizing a few variants of DoS attacks, but for most variants they have proved ineffective.

Dos and variants

Denial of Service (DoS) Attack is a criminal attack where the goal is to prevent a computing resource from being used. In other words, Denial of Service is an attack against an organisation's service that aims to prevent legitimate users from accessing it. Perhaps the situation has been best described by Graham Cluley's metaphor of '15 fat men trying to get

---

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

through a revolving door at the same time'.[1] More sophisticated DoS attacks may include other variants like DDoS[2] and DDoS.[3]

Kevin Mandia et al categorized DoS attacks in the following manner:[4]

> Destructive – Attacks which destroy the ability of the device to function, such as deleting or changing configuration information or power interruptions.
>
> Resource consumption – Attacks which degrade the ability of the device to function, such as opening many simultaneous connections to the single device.
>
> Bandwidth consumption – Attacks which attempt to overwhelm the bandwidth capacity of the network device.

In a denial of service attack, a hacker can prevent authorized or intended users from accessing resources and services. The hacker can target the computers or network connections. By carrying out the attack, the hacker can prevent users from accessing several websites, using email, video conferencing, banking services and online shopping. In effect, a denial-of-service attack prevents users from accessing any content from computers and networks that are affected by the attack. One of the most common ways of performing a denial-of-service attack on a website is to flood the website with a huge number of information requests. This will prevent other users from accessing it, as each website can accept only a limited number of requests. [5]

In most denial of service attacks, malicious users exploit the connectivity of the Internet to cripple the services offered by a victim site, often simply by *flooding* a victim with many requests. A DoS attack can be either a *single-source* attack, originating at only one host, or a *multi-source*, where multiple hosts coordinate to flood the victim with a barrage of attack packets. The latter is called a distributed denial of service (DDoS) attack.

---

1 Graham Cluley, *Naked Security*, <nakedsecurity.sophos.com> December 2010.

2 Distributed Denial of Service Attack: a DoS attack where the source attacker is not one computer or device, but several of them, typically located in disparate locations.

3 Distributed Reflector Denial of Service Attack: a DDoS attack that is amplified by a reflector. A reflector is typically an uncompromised device that unwittingly participates in a DDoS attack. Due to the design of the attack, it sends several times more traffic to the victim than what was sent to it. For a general understanding, see Verisign Public, Distributed Denial of Service (DDoS) Attacks: Evolution, Impact & Solutions, Verisign White Paper, 2012.

4 Kevin Mandia and Chris Prosise, *Incident Response: Investigating Computer Crime*, (Osborne/McGraw-Hill, Berkeley, 2001) 360-361

5 Hevin Houle and George Weaver, Trends in denial of service technology (CERT Coordination Center at Carnegie-Mellon University, October 2001). See also, David Moore, Geoffrey Voelker, and Stefan Savage, 'Inferring Internet denial of service activity in Proceedings of the USENIX Security Symposium' (Washington, DC, USA, August 2001)

Sophisticated attack tools that automate the procedure of compromising hosts and launching attacks are readily available on the Internet, and detailed instructions allow even an amateur to use them effectively.[6]

The perpetrators may even penetrate wi-fi networks with DoS attack tools.[7]One does not have to be an expert to initiate a DoS attack since attack tools are available free of cost.[8] For this reason many countries have criminalized production, distribution and procurement of DoS tools.

Hackers may launch a DoS attack by several ways including the take over computer resources, such as bandwidth, disk space, or processor time or disrupt configuration information, such as routing information. Basically, the hackers overload the website's system with so many online traffic requests that the website can't function and regular users can't access it. Often in denial of service attacks, the computers used to bombard the targeted web sites with traffic, have actually been hijacked or taken over by hackers. The computers are often infected with malware that give attackers control over the computer, usually without the website's knowledge. Such attacks may result in unusually slow network performance beyond the norm, unavailability of a particular website, inability to access any web site or dramatic increase in the number of spam emails received by the website.[9]

The reasons of DoS attacks are varied. They may include political conflicts, economic benefits for competitors, curiosity of some computer geeks and even cyber terrorism.[10]

Malicious hackers can commandeer thousands of computers around the world, and order them to deluge a website with traffic - effectively clogging

---

6 Alefiya Hussain, John Heidemann, and Christos Papadopoulos, 'A Framework for Classifying Denial of Service Attacks' ISITR2003569, Date: 25 Feb 2003 [This material is based upon work supported by DARPA via the Space and Naval Warfare Systems Center San Diego under Contract No. N66001-00-C-8066 ("SAMAN"), by NSF under grant number ANI-9986208 ("CONSER"), by DARPA via the Fault Tolerant Networks program under grant number N66001-01-1-8939("COSSACK") and by Los Alamos National Laboratory under grant number 53272-001.]

7 The infiltration may take place against the guest network infrastructure and also against the infrastructure responsible for the Wi-Fi roaming services. See Romain Robert et al, Wi-Fi Roaming: Legal Implications and Security Constraints (2008) 16(3) *International Journal of Law and Information Technology* 205-41, 227.

8 For discussions and analysis of various DoS tools, see Fafinski, S., Access denied: computer misuse in an era of technological change", (2006) 70(5) *Journal of Criminal Law* 424-442;, G. Kon, P. Church , 'A denial of service but not a denial of justice' (2006) 22 *Computer Law & Security Report* 416-417 ; J. Mirkovic, S. Dietrich, D. Dittrich, and P. Reiher, *Internet Denial of Service: Attack and Defense Mechanisms* (Prentice Hall, 2005) ; P. Hallam-Baker, *dotCrime Manifesto* (Addison Wesley, 2008).

9 Mark Koba, Denial of Service Attack: CNBC Explains, CNBC, 24 Jan 2013.

10 Ahsan Habib, Mohamed M. Hefeeda, and Bharat K. Bhargava, 'Detecting Service Violations and DoS Attacks' (Concept paper, CERIAS and Department of Computer Sciences, Purdue University, West Lafayette, IN 47907, 2007) 1-2.

it up, preventing others from reaching the site, and bringing the website to its knees. They may even urge internet users to volunteer to attack, for example, recently they have urged internet users to voluntarily join a botnet by downloading a DDoS attack tool called LOIC (Low Orbit Ion Cannon).[11] Supporters of WikiLeaks have orchestrated DDoS attacks on a number of websites who they feel have turned their back on the controversial whistle-blowing website.[12] In response to Stop Online Piracy Act (SOPA) and Protect Intellectual Property Act (PIPA) the sympathizers of Anonymous and Megaupload orchestrated DDoS attacks against multiple entertainment industry and US government websites has been dubbed 'OpMegaupload' by Anonymous supporters. Among the victims of the attacks were websites for the Department of Justice, the White House, the FBI, the US Copyright Office, Universal Music Group, the RIAA, the Motion Picture Association of America and a bunch of other sites.

Denial of Service attacks have existed since the early days of computing and have evolved into complex and overwhelming security challenges. Although the methods and motives behind Denial of Service attacks have changed, the fundamental goal of attacks, to deny legitimate users of some resource or service, has not. Similarly, attackers have always, and will continue to look for methods to avoid detection. The evolution in the technology of DoS attacks originates from this fundamental premise: establish a denial of service condition without getting caught. Malicious actors constantly explore new ways to leverage today's technology to meet their goals. Attackers work hard to engineer new techniques to distance themselves from the victim while amplifying the impact of their attack. Much of the evolution in DoS attacks goes hand-in-hand with the use and popularity of botnets. Botnets provide the perfect tool to help magnify the impact of an attack while distancing the attacker from the victim.

Denial of service attacks cause significant financial damage every year, making it essential to devise techniques to detect and respond to attacks quickly. Development of effective response techniques requires intimate knowledge of attack dynamics, yet little information about attacks in the wild is currently published in the research community.[13] DoS attacks are constantly evolving. The very recent DoS attacks showed extreme sophistication in attacking techniques and stealth attributes. Strict legal response, along with sophisticated defence technologies, is necessary to stop the menace.

---

[11] Are DDoS (distributed denial-of-service) attacks against the law? Graham Cluley, naked security, December 2010, nakedsecurity.sophos.com.

[12] There are numerous other stories, for example, a man was jailed in the USA who launched a DDoS attack against the Scientology website. Mitchell L Frost, 23, of Bellevue, Ohio, was given a 30 month prison sentence for a series of DDoS attacks he launched against the websites of high profile US right-wingers Bill O'Reilly, Ann Coulter and Rudy Giuliani. (See the references on internet)

[13] David Moore, Geoffrey Voelker, and Stefan Savage, 'Inferring Internet denial of service activity' in *Proceedings of the USENIX Security Symposium*, Washington, DC, USA, August 2001.USENIX.

Direct Criminalization

Laws penalizing DoS activities enacted in the last twelve years fall in this category. This trend specifically refers to 'denial of service' or 'denial of access'. South Africa, India and Bangladesh are good examples of states that have followed this trend. The South African legislators made their intention very clear in defining and penalizing DoS attack. Section 86(5) of the Electronic Communications and Transactions Act, 2002 provides:

> A person who commits any act described in this section with the intent to interfere with access to an information system so as to constitute a denial, including a partial denial, of service to legitimate users is guilty of an offence.

Thus under this section intention to interfere is a precondition to constitute a denial service attack. Obviously it is possible that someone, with no detailed knowledge, while experimenting with DoS tools, may initiate a DoS attack though he might not have any intention to commit such attack. Under this section such a person remains outside the gambit of law. It seems that an accused may use this 'lack of intention' as a good defence in an action for DoS attack. In an attempt to compensate this weakness the legislators have provided for provisions to penalize those who write or distribute codes or programmes to initiate a DoS attack. Section 86(3) states:

> A person who unlawfully produces, sells, offers to sell, procures for use, designs, adapts for use, distributes or possesses any device, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data, or performs any of those acts with regard to a password, access code or any other similar kind of data with the intent to unlawfully utilise such item to contravene this section, is guilty of an offence.

Thus the South African law not only bans DoS attacks, it also declares illegal procurement, adaptation, design, distribution or possession of any programme that may be used in implementing a DoS attack.

The most relevant legislation to prosecute a DoS attack in Bangladesh is the Information and Communication technology Act, 2006. Section 54.(1)(f) defines a DoS attack as denying or attempting to deny access to any person authorized to access any computer, computer system or computer network by any means without permission of the owner or any other person who is in charge of a computer, computer system or computer network. As this provision does not explicitly refer to intention or knowledge, strict liability may not be ruled out. Again, it does not specifically declare possession or distribution of DoS tools illegal. Whether possessing or distributing DoS tools may be regarded as 'attempting to deny access' will remain to be seen. Criminalization of possession of DoS tools may give rise to interesting problems for investigators and law enforcers. For example, in Aaron Caffrey, Aaron was accused of launching a DoS attack against the computer system of the Port of Huston. Aaron denied the allegation and claimed that a Trojan that installed itself on his

computer launched the attack. No Trojan was found on Aaron's computer and he argued that the Trojan deleted itself and Aaron was acquitted.[14]

The DoS legal regimes of Bangladesh and India are identical as it appears that section 54.(1)(f) of the Information and Communication Technology Act, 2006 is an exact reproduction of section 43(f) of the Information Technology Act, 2000 of India.

New Zealand amended its Crimes Act of 1961[15] to define and penalize DoS attack. The Crimes Amendment Act 2003[16] repeals Part 10 of the Crimes Act 1961 and introduces a new Part 10. Under the heading of 'damaging or interfering with computer system', the substituted section 250(2)(c)(ii) defines a DoS attack. According to this provision, anyone who intentionally or recklessly, and without authorisation, knowing that he or she is not authorised, or being reckless as to whether or not he or she is authorised, causes any computer system to deny service to any authorised users, commits DoS attack.

The Canadian legislative trend falls both in direct criminalization and criminalization through willful inference of data. In 1985 Canada passed the Criminal Law Amendment Act. This amendment added Section 342.1 to the Criminal Code of Canada as well as adding Subsection (1.1) to Section 430 of the Code. The Criminal Law Improvement Act 1997 added Subsection (d) to Section 342.1(1).

The Canadian Criminal Code names an offence of mischief in relation to data that contains certain provisions in respect of denial of service to legitimate users.[17] A person will be guilty of this offence if he willfully obstructs, interrupts, or interferes with the lawful use of data.[18] Again he will be guilty of the offence if he willfully obstructs, interrupts or interferes with any person in the lawful use of data or access to data to any person who is entitled to access thereto.[19] The newly introduced Subsection (1.1) to Section 430 of the Code reads:

> (1.1) Every one commits mischief who wilfully
>
> (a) destroys or alters data;
>
> (b) renders data meaningless, useless or ineffective;
>
> (c) obstructs, interrupts or interferes with the lawful use of data; or
>
> (d) obstructs, interrupts or interferes with any person in the lawful use of data or denies access to data to any person who is entitled to access thereto.

---

14 For more on this case see, Shelley Hill, 'Driving a Trojan Horse and Cart through the Computer Misuse Act' (2003-04) 14(5) *Computers & Law*

15 Act No. 43 of 1961.

16 Act No. 39 of 2003.

17 *Canadian Criminal Code*, s 430 (1.1)

18 *Canadian Criminal Code* s 430 (1.1) (c)

19 *Canadian Criminal Code* s 430 (1.1) (d)

Here provisions of Subsection (d) directly criminalize a DoS attacks while Subsection (c) introduces broad scope of criminalization for obstruction, interrupting or interfering with lawful use of data.

Indirect Criminalization through Illegal Access and Diminishing Utility

This trend does not refer to 'denial of service' explicitly rather it makes penal provision with broader ambit in a way that any type unauthorized access, both denying and non-denying access of service or to computer data, becomes an offence. Laws of the USA, Republic of Albania and Antigua and Barbuda are good examples of this trend.

The American legislation appears more advance in time than that of other countries having cyber legislation. The American law does not criminalize DoS attacks directly rather its broadly-worded provisions almost unquestionably criminalize DoS attacks.

The Computer Fraud and Abuse Act (The CFAA) prohibits a person from "knowingly caus[ing] the transmission of a program, information code, or command, and as a result of such conduct, intentionally causes damages without authorization to a protected computer."[20] Under this provision knowledge of transmission and intentional damage are two prerequisite to constitute a crime. The requisite "damage" element under the CFAA has been defined as "any impairment to the integrity or availability of data, a program, a system, or information"[21] and a "protected computer" means a computer "which is used in or affecting interstate or foreign commerce, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication."[22] The CFAA also criminalizes attempts to launch a DoS attack.[23]

The CFAA also has a civil liability component that permits "[a]ny person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunction relief." Thus the targets of the DoS attack can sue the individual(s) who were responsible for the damages incurred as a result of the attack (e.g., server downtime, costs to repair, and in some lost revenue.[24]

---

20 18 U.S.C. § 1030(a)(5)(A).

21 18 U.S.C. § 1030(e)(8).

22 18 U.S.C. § 1030(e)(2)(B).

23 18 U.S.C. § 1030(b).

24 18 U.S.C. § 1030(g). [There is a limitation that requires the damages exceed $5,000; however, some courts have liberally construed its calculation to include consultation services (e.g., IT/security persons) used to assess the extent of damage caused by the attack. Also, this provision does not require that a person ever be convicted before being sued for damages.]

The legislation of Antigua and Barbuda is a combination of broadly worded criminalization and criminalization through diminishing utility. The legislators made their intention clear in the Preamble to the Computer Misuse Act, 2006 by describing the Act as 'an Act to prohibit the unauthorized access, use of or interference to any program or data held in a computer and to a computer itself...'

Section 12.(1) of the Act provides:

> A person who without authorization does any act-
>
> (a) which causes; or
>
> (b) which he intends to cause, directly or indirectly, a degradation, failure, or other impairment of function of a computer, program, computer system, computer network or any part thereof commits an offence...

Thus this provision does not specifically refer to denial of service attacks and a plain reading of the provision may be indicative of its vagueness. But if read with the Preamble, the act of causing degradation or other impairment of a computer network becomes an act of unauthorized act of interference and the language is broad enough to include a denial of service attack as it diminishes the utility of a computer network. The Act also criminalizes production, sale, procurement for use, import, export or distribution of any device or computer programme designed r adapted for the purpose of committing a DoS attack.[25]

Republic of Albania criminalizes DoS attack under the heading of 'interference in the computer transmissions, in the Criminal Code of 1995.[26] Under article 192/b '[i]nterference, in any way, in the computer transmissions and programs, constitutes a penal contravention'. The words 'interference, in any way, in the computer transmissions' are wide enough to include, unquestionably, DoS attacks.

Perhaps the Argentine provision is wider than that of Albania. In Argentina, destroying completely or partially, erasing, altering temporarily or permanently, or in any way preventing the use of data or programs through any means, whatever the medium containing them, during the processing of an electronic communication, is an offence.[27] The act of preventing the use of data or programs during the processing of an electronic communication undoubtedly refers to a DoS attack. And if this provision is not well enough to prosecute a DoS attack, an alternative provision is provided in the same legislation which penalizes interruption or obstruction of any communication through any means.[28] The sale, distribution or dissemination of DoS tools has also been criminalized.[29]

---

25 Section 13(1)(a), the *Computer Misuse Act 2006.*

26 Law No.7895, dated 27 January 1995.

27 *National Criminal Code* (Law No. 11.179 of 1984) s183¶ 2

28 Ibid s 197.

29 *National Criminal Code* s 183 ¶3

Ambiguous Criminalization

The cyber legislations that had taken place before DoS attacks were in existence fall in this category. Cyber laws in some countries were taken by surprise with the advent of sophisticated DoS attacks. The legal unpreparedness forced the law enforcers to apply the existing laws to criminalize the 'future crimes' and thus to meet the circumstances.

The original United Kingdom Computer Misuse Act of 1990 (CMC) is a good example of ambiguous criminalization. The CMA came into existence because legislation intended for other purposes did not always fit the particular facts before the court. While in some cases the prosecution succeeded in obtaining a conviction[30], in many cases prosecution failed.[31] As a result of the problems in prosecuting such cases a Royal Commission was set up and following their recommendations the Computer Misuse Act was enacted.

Although, the legislation was drafted before the Internet and Internet related crime became a major concern the courts have by statutory interpretation of key words managed to apply the Act to a variety of circumstances that could not have been envisaged by the original drafters of the legislation.[32] The CMA covered three distinct offences, namely, unauthorized access to computer material[33], unauthorized access with intent to commit other offence[34] and unauthorized modification of computer material.[35]

---

30 *R v Whiteley* (1991) 93 Cr. App. R. 25, CA. [Whiteley a computer hacker was convicted of criminal damage, he gained unauthorized access to a computer network and altered data contained on discs in the system, thereby causing the computers in question to be shut down for periods of time.]

31 See for example, *R v Gold and Schifreen* [1988] 2 W.L.R. 984. [Gold and Schifreen were hackers who gained unauthorized access to the Duke of Edinburgh's computer files contained on British Telecom Prestel Gold network. They were convicted of committing an offence contrary to section 1 of the *Forgery and Counterfeiting Act 1981* (FCA) for making a false instrument. On appeal their convictions were quashed as the court said that the electronic impulses that formed the password could not be an instrument within the definition of section 8 (1)(d) of the FCA.]

32 ICF Legal Subgroup, *Reform of the Computer Misuse Act 1990*, ICF, 30th April 2003.

33 Section 1: It is an offence to cause a computer to perform any function with intent to gain unauthorized access to any programme or data held in any computer. It will be necessary to prove the access secured is unauthorized and the suspect knows this is the case. This is commonly referred to as hacking.

34 Section 2: An offence is committed as per section1 but the Section 1 offence is committed with the intention of committing an offence or facilitating the commission of an offence. The offence to be committed must carry a sentence fixed by law or carry a sentence of imprisonment of 5 years or more. Even if it is not possible to prove the intent to commit the arrestable offence the S1 offence is still committed.

35 Section 3: An offence is committed if any person does an act that causes unauthorized modification of the contents of any computer. The accused must have

At least for DoS attacks, certain provisions of the Act were in the center of confusion and controversy from the very beginning. Section 3 of the Act criminalizes unauthorized modification of the contents of any computer. The question was whether the offence of doing anything with criminal intent "which causes an unauthorised modification of the contents of any computer" covered DoS attacks. While some DoS attacks may delete or alter data in a computer system, there are DoS attacks that will not delete or change data. If the term 'modify' means to change or alter data, the latter DoS attacks are not covered by section 3.[36] Although section 3 CMA does not specifically refer to DoS attacks, some argued that its lack of precision and technology-neutral language appears to provide sufficient flexibility for such a case to be prosecuted. Some government lawyers, with supports from academics, expressed the opinion that any sort of DoS attack was covered by existing legislation. Section 3 of the CMA does not require unauthorized access to a computer system, merely unauthorized "modification of the contents of any computer". The requisite intent that accompanies this offence is to render data stored on a computer unreliable, or impair its operation. And this loophole was first exposed by DPP v Lennon,[37] the first reported criminal case in the U.K. concerning DoS attacks.

David Lennon, a UK teenager of 18 and a disgruntled employee,[38] overwhelmed an email server of his former employee by sending over five million messages. The massive volume of email disabled the office server.[39] The Crown Prosecution Service brought criminal action against David Lennon under section 3 of the Computer Misuse Act, 1990. The CMA explicitly outlaws the 'unauthorised access' and 'unauthorised modification' of computer material. Lennon's lawyer had successfully argued that the purpose of the company's server was to receive emails, and therefore the company had consented to the receipt of emails and their consequent modifications in data. District Judge Kenneth Grant, who ruled that an email bomb did not violate the CMA because email servers were set up to receive emails. As such, each individual email could be ruled to make an 'authorised modification' to the server. District Judge

---

the intent to cause the modification and be aware the modification has not been authorized. There is no necessity for any unauthorized access to have been obtained during the commission of this offence. This offence is used instead of *The Criminal Damage Act 1971*, as it is not possible to criminally damage something that is not tangible.

36 Hill, above n 14

37 [2005] EWCA Crim 2150.

38 Lennon was employed by Domestic & General Group PLC (D&G) for three months until he was dismissed in December 2003.

39 To bombard D&G server with emails, Lennon downloaded a mail bombing program from the internet, the Avalanche v3.6, and set the Avalanche to mail until it stopped. The emails also spoofed the name of Betty Rhodes, D&G's Human Resources manager, therefore they appeared to originate from Ms Rhodes, rather than from Lennon.

Kenneth Grant concluded that sending emails is an authorized act and that Lennon had no case to answer, so no trial took place. The Director of Public Prosecutions (DPP) appealed against this ruling, that there was no case to answer. Lord Justice Keene and Justice Jack disagreed with Judges Grant's reasoning, allowed the appeal and remitted the case to the district judge to continue the hearing, stating that the district judge had erred in that ruling by "rather miss[ing] the reality of the situation by wrongfully finding that there was no case to answer". The unproblematic question the court had to answer was whether the addition to the data on D&G's server arising from the receipt of emails sent by Lennon was unauthorized within the meaning of s.17(8). Since Lennon was not the person entitled to determine whether or not such "modification" should be made, requirement of s.17(8a) was satisfied. Then, the question was whether Lennon "had consent to the modification from any person who was so entitled" according to s. 17(8b). The appeal court answered in the negative. Lennon eventually pleaded guilty and, in 2006, he was sentenced to two months' curfew with an electronic tag. But by that time, amendments to the 1990 legislation were already included in the Police and Justice bill.

The initial decision on Magistrates Court gave rise to heated debate and arguments that led to renewed calls for the CMA to be updated so as to deal with changes in technology and use. The first attempt to amend the Computer Misuse Act, to put the illegality of DoS attacks beyond doubt, was a Private Member's Bill to amend the Act was introduced by the Earl of Northesk in 2002, but like most Private Members' Bills, it failed to become law. In June 2004, the All Party Internet Group made an inquiry into the Act and the inquiry highlighted the possibility of a loophole for DoS like attacks. One of the key recommendations of this inquiry was that an explicit 'denial of service' offence of impairing access to data should be introduced. Although Ten Minute Rule Motions, like all Private Member's Bills, are very unlikely to become law, Derek Wyatt,[40] the Labour MP for Sittingbourne and Sheppey made a 10-minute pitch to Parliament (House of Commons) in March 2005 for changes to the CMA. In his speech he observed:

> Although high-profile DDoS attacks have been made against e-commerce and, especially, gambling sites, the UK Government and the country's critical infrastructure could also be attacked. It is essential for a law to be in place to make prosecution possible when offences are committed, because that will send the strong and unambiguous message that e-crime is treated with the utmost seriousness. International co-operation is also the key. Increasing sentences for section 1 offences to two years will create an extraditable offence, and bring the law into line with the European cybercrime convention.[41]

---

40 At that time he was the chair of All Party Internet Group (APIG).

41 Out-law.com, Parliament hears 10 minutes on Denial of Service law, http://www.out-law.com/page-5508, retrieved on 1 June 2013.

Changes were made to the Computer Misuse Act in 2006 but they were not made live at the time. In October 2007 they were adopted in Scotland, but not in England and Wales. The Statutory Instrument to bring them into force was finally passed on 24th September and the changes came into effect for England and Wales on 1st October 2008. The Police and Justice Act 2006 (s.36) amended s.3 of CMA criminalizing DoS attacks, punishable by a maximum of 10 years' imprisonment. This amendment brought the U.K. in compliance with A.5 of the Council of Europe Cybercrime Convention and A.3 of the E.U. Framework decision on Attacks against Information Systems.

The Philippine legislation defines hacking in its widest possible ambit. Under Electronic Commerce Act, 2000, hacking or cracking refers to unauthorized access into or interference in a computer system/server or information and communication system; or any access in order to corrupt, alter, steal, or destroy using a computer or other similar information and communication devices, without the knowledge and consent of the owner of the computer or information and communications system, including the introduction of computer viruses and the like, resulting in the corruption, destruction, alteration, theft or loss of electronic data messages or electronic document. Theoretically it is possible to incorporate a wide variety of cybercrimes within the heading of hacking and apparently such incorporation seems alright before actual application of the law in the real world. While this definition of hacking may well include a varied spectrum of cybercrimes, it will not include a DoS attack. The reasons are twofold: firstly, under this definition access or introduction of computer viruses is essential to constitute a crime and a devastating DoS attack does not need any access. Secondly, a DoS attacker will deploy malicious code or virus or BOTNET to launch an attack but the qualifier 'resulting in the corruption, destruction, alteration, theft or loss of electronic data messages or electronic document' eliminates any possibility of successfully prosecuting a DoS attack as most DoS attacks will not result in the conditions prescribed in the qualifier. This provision is yet to be tested in a court of law in the Philippines.

Conclusion

Many software commonly used to run and maintain internet infrastructures and access and manipulate internet benefits may contain severe design or coding flaws that make themselves vulnerable to DoS attacks. DoS attack history indicates that many hosts used as DoS attack agents are subverted[42] through well-known vulnerabilities in commonly used software.[43] Insecure design of common web browsers and email software are exacerbating the problem. Allen Householder et al observe:[44]

---

42 The Code Red worm and Power malicious code are two well-known examples.

43 Allen Householder, Art Manion, Linda Pesante, and George M. Weaver In collaboration with Rob Thomas, 'Managing the Threat of Denial-of-Service Attacks' (CERT Coordination Center, Carnegie Mellon University, 2001) 22-23.

44 Ibid 23.

> A significant number of these vulnerabilities allow attackers to gain root/or administrator access from a remote location. Attackers gain complete control over the computer and may use it to suit their purpose, which may be to use it as a DDoS agent. Current economic pressures lead vendors to focus on achieving a fast time to market rather than on designing secure networks and applications. Without some financial (or legal) incentive to behave more securely, developers will continue to produce vulnerable products.

The current legal trend does not seem to be ready to penalize the developers of these vulnerable products, though developers of the DoS tools may be prosecuted, albeit minimally.

Many states are reluctant to legislate or amend existing laws to cope with the DoS menace. Some do not consider it as a serious threat and some think that existing legislation is sufficient to prosecute DoS attacks if the investigators are equipped with advanced technologies and legal skills. Ahmad Kamal observes:

> There are many who take the view that the existing legislation already covers denial of service attacks without any need for amendments, and that the better preparation of cases nd more sophisticated evidence gathering techniques, rather than legislative change, hold the key to combating the rising wave of cyber-crime.[45]

Sole reliance on technology has its own problem. Providing protection against some types of DoS and especially DDoS attacks can be technically challenging. It is often hard to distinguish legitimate from illegitimate activity, which means that genuine traffic can be discarded through protective measures. The lessons learned from the North American and European experiences remind us that technological sophistication is not the lone way forward to successfully prosecute DoS attacks, advanced technology must be complemented by new or amending laws that will define DoS activities either specifically or by introducing broadly-worded provisions that will clearly and unambiguously include, among others, DoS activities.

---

[45] Ahmad Kamal, *The Law of Cyber-Space: an Invitation to the Table of Negotiations* (United Nations Institute for Training and Research, Geneva, 2005) 41-2.

Table A: DoS Criminalization Trends

State	Criminalization Category	*Mens rea*	Criminalization of DoS Tools	Legislation	Punishment
Bangladesh	Direct criminalization	without permission of the owner or any other person who is in charge of a computer, computer system or computer network	No	Information and Communication Technology Act, 2006	Imprisonment for a term not exceeding ten years or a fine not exceeding Taka ten lac or both.
India	Direct criminalization	without permission of the owner or any other person who is in charge of a computer, computer system or computer network	No	Information Technology Act, 2000	Damages by way of compensation not exceeding one crore rupees to the affected person.
Republic of the Philippines	Ambiguous	without the knowledge and consent of the owner of the computer or information and communications system	No	Electronic Commerce Act, 2000	A minimum fine of one hundred thousand pesos and a maximum commensurate to the damage incurred and a mandatory imprisonment of six months to

					three years.
New Zealand	Direct criminalization	intention or recklessness, knowledge of non-authorisation	No	Crimes Act of 1961 as amended by the Crimes Amendment Act 2003	Imprisonment for a term not exceeding 7 years.
South Africa	Direct criminalization	intention	Yes	Electronic Communications and Transactions Act, 2002	A fine or imprisonment for a period not exceeding five years.
USA	Broadly worded provision	knowledge of transmission and intentional damage	No	Computer Fraud and Abuse Act (18 USC 1030)	A fine under this title or imprisonment for not more than ten years.
Canada	Direct criminalization and Broadly worded provision	willful action	No	Criminal Code of Canada	Punishment provided for mischief.
Argentina	Broadly worded provision	strict liability	Yes	National Criminal Code	Imprisonment of a term not less than one month nor more than two years. (2nd Para, Section 183); imprisonment for a term of not less than

					six months nor more than two years. (Section 197).
Antigua and Barbuda	Broadly worded provision	Without authorization, strict, actual act is not necessary if intention can be proved	Yes	Compute r Misuse Act, 2006	A fine of fifty thousand dollars and to imprisonme nt for ten years or to both.
Republic of Albania	Broadly worded provision	strict liability	No	Criminal Code of Republic of Albania, 1995	A fine or imprisonme nt up to three years when the alleged brings about serious consequenc es, imprisonme nt up to seven years.
UK	Broadly worded provision	non-authorization	No	Compute r Misuse Act 1990	Imprisonm ent for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both.

Revisiting the Rights of Non-Muslims in Islamic State

Mohammad Azharul Islam*
Azizun Nahar**

1. Introduction:

Human dignity as a manifestation of God's favour on mankind finds its recognition in the Holy Qur'an.[1] One of the manifestations of the dignity of human being within the paradigm of Islam is, as Kamali observes, its insistence on the essential equality of each and every individual of the human race.[2] The essence of Islam, a complete code of life, is essentially mercy to all people, both Muslims and non-Muslims.[3] One of the significant aspects constituting an embodiment of this Mercy, as one noted author rightly observes, is the way the canons of Islam deal with people belonging to other faiths.[4] Moreover, the tolerant attitude of Islam towards non-Muslims, whether they be those residing in their own countries or within the Muslim lands, can be clearly seen through a study of history and the history delineated by both Muslim[5] and non-Muslim[6] historian bears this testimony.[7] The vibes of just relations between Muslims and non-Muslims were not a political stratagem devised by Muslim rulers rather they sprang from the noble teachings of Islam as imbedded in the Qur'an and authentic Sunnah of the Prophet (PBUH).[8]

---

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

** Lecturer, Department of Law and Human Rights, University of Asia Pacific.

1 Al-Isra 17:70. Allah ordains: Now, indeed, we have conferred dignity on the children of Adam, and borne them over land and sea, and provided for them sustenance out of the good things of life, and favoured them far above most of Our creation. Translation in this article is adapted from Muhammad Asad, *The Message of the Qur'an* (Dar al Andalus, Gibraltar, complete edition, 1980)

2 Kamali,Mohammad Hashim, *The Dignity of Man: An Islamic Perspective* (First published by Ilmiyah Publishers, 1999, Revised edition, Islamic Text Society Cambridge, UK, Reprint of the revised edition published by Ilmiah Publishers 2002) 45.

3 The reiteration of this principle is lucidly illustrated when the Holy Quran proclaims that the Prophet (PBUH) is a mercy for all creatures. See Al Anbiya 21:107. Dr. Saleh al Aayed " The Rights of Non-Muslims in Islam (Part 1-13): An Islamic Basis" , (last modified 16 October, 2011) < http://www.islamreligion.com/articles/374/>

4 Ibid

5 Muslims are those people who complied with the fundamental tenets of Islam as espoused in the Qur'an and authentic Sunnah of the Prophet (PBUH).

6 People who do not put faith to the basics of Islam as demanded by the Qur'an and authentic Sunnah of the Prophet (PBUH).

7 See above n 3.

8 See above n 3.

In this paper, the authors will meticulously explore whether Islam has granted all the necessary rights to the Non-Muslims without making any discrimination on the grounds of religion and at the same time to observe that whether Islamic State in practice, is able to ensure these rights properly.

2. Conceptualizing Islamic State:

Islamic State may be defined as that type of state whose basis is firmly rooted in the Qur'an and the Sunnah of the Prophet (PBUH) and the affairs of this state are conducted in accordance with the Qur'anic injunctions and the Prophetic Sunnah. An Islamic State, as one scholar opines, is in essence, an ideological state[9] and strives to ensure all types of basic rights to its citizens without any sort of discrimination. Thus, justice and welfare constitute the basic features of an Islamic State.

3. The Classification of Non-Muslim Citizens

Different scholars endeavoured to divide non-Muslims from their own understanding of the Qur'an, Sunnah, practices of rightly guided Caliphs and overall historical analysis. But undeniably their classification is not the last word since their juristic efforts are prompted by their own societal context and subjective understanding.

Sayyid Abul A'la Maududi, typically regarded a traditionalist Islamic Scholar, divides non-Muslim citizens of an Islamic state into three distinct categories, namely

(a) Those who become the citizens of an Islamic State under some pact or agreement;

(b) Those who become its subjects after being conquered by the Muslims in an armed confrontation or battle, and

(c) The third category includes those who reside in the Islamic State in any other way.[10]

Another distinguished jurist opines that non-Muslims are classified into four categories as follows:

a) Warriors

b) Peace seekers

c) Peace truce holders

d) Non-Muslims living or residing in an Islamic governed country.[11]

On the other hand, Hashim Kamali, a renowned Islamic scholar of contemporary time, observes that Muslim jurists have distinguished between two categories of non-Muslims, namely

---

9 Maududi, Sayyid Abul A'la "The Islamic Law and Constitution"(Khurshid Ahmad trans, Islamic Publications (Pvt.) Limited, Lahore, 11th edition, 1992) 274.

10 Ibid, 278.

11 Shaikh Mohammad Saleh Alothaimeen < www.arriyadh.com> (Accessed on 9 September 2009)

(i) *Dhimmis* or *al-muwatinun* i.e. permanent residents of Muslim-dominated territory,

(ii) *Musta'min* i.e. non-Muslims granted safe conduct and residence there temporarily for a particular purpose.[12]

Kamali deftly clarifies that *musta'min*, during their stay in Muslim territories, are entitled to safe conduct and the protection of their lives and properties in the same way as the *muwatinun*.[13]

Amidst the different classifications Kamali's classification seems to us very reasonable, relevant and easily conceivable in contemporary global order.

Though jurists differed as to the classification of non-Muslims we would focus on the *dhimmis* or *al-muwatinun*.

4. Rights of the Non-Muslims in Islamic State

Now we will shed light on the rights granted by Islam to the Non-Muslims and Islamic State is under an obligation to ensure these rights to them.

4.1 Protection of Life, Property and Honour:

The foremost obligation of an Islamic state is to ensure, protect and preserve the life, property and dignity of its citizens without subjecting them to any sort of discrimination. Even these rights are equally applicable to visitors both Muslims and non-Muslims. Allah (SWT) ordains:

> And if any of those who ascribe divinity to aught beside God seeks thy protection, grant him protection, so that he might [be able to] hear the word of God [from thee]; and thereupon convey him to a place where he can feel secure: this, because they [may be] people who [sin only because they] do not know [the truth]. [14]

These fundamental rights cannot be taken away by the state except in accordance with law. The life of non-Muslim cannot be taken away until and unless he is guilty of killing someone and allegation is proved beyond reasonable doubt. Allah (SWT) says:

> Say: "Come, let me convey unto you what God has [really] forbidden to you: "Do not ascribe divinity, in any way, to aught beside Him; and [do not offend against but, rather,] do good unto your parents; and do not kill your children for fear of poverty - [for] it is We who shall provide sustenance for you as well as for them; and do not commit any shameful deeds, be they open or secret; and do not take any human being's life - [the life] which God has declared to be sacred - otherwise than in [the pursuit of] justice: this has He enjoined upon you so that you might use your reason;[15]

The Prophet of Islam (PBUH) upheld the inviolability and sanctity of the life of non-Muslims. He mentions:

---

12 Mohammad Hashim Kamali, "Freedom, Equality and Justice in Islam" (Ilmiah Publishers, 1st edition 1999)78

13 Ibid.

14 At-Tawbah (Repentance) 9:6.

15 Al-Anaam 6:151

> Whoever kills a person, with whom we have a treaty, will not come close enough to Paradise to smell its scent, and its scent can be found as far as forty years of travel [away].[16]

Islamic Law prohibits to snatch away the property of the non-Muslims by Muslims and if such illegal act takes place he or she will be prosecuted by the competent court. Prophetic tradition, in this regard, provides:

> Indeed God, Mighty and Majestic, has not allowed you to enter the homes of the People of the Book except by their permission, nor has He allowed you to hit their women, nor eat their fruit if they give you what is obligatory upon them [from the jizyah].[17]

Islam also enjoins to respect the right of asylum and make the same right inviolable unless necessitated by state authority on justifiable grounds. Prophetic tradition asserts:

> The obligation imposed by the covenant is communal, and the nearest Muslim must try hard to fulfill it. Anyone who violates the protection granted by a Muslim will be under the curse of God, the angels, and all people, and on Judgment Day no intercession will be accepted on his behalf.[18]

In response to a query regarding granting asylum to Ibn Hubayra by Umm Hani, a female companion, who is at war with her brother, Prophet (PBUH) states:

> Anyone you have given asylum to is under the protection of all of us, O Umm Hani.[19]

It is also prohibited under Islamic law to defame and tarnish the dignity of non-Muslims.

4.2 Freedom of Speech & Expression:

Within the constitutional and statutory framework of an Islamic state all non-Muslims, like Muslims, will enjoy the freedom of thought, opinion, speech and expression subject to the limitations imposed on the ground of public interest, security etc. Maududi, though a traditionalist and orthodox scholar, vehemently states that they are allowed to criticize the Government, its officials including Head of the State. Furthermore, he continues, to assert that they can criticize Islam as Muslims can avail the right of criticizing their religion. State cannot coerce them to act against their ideologies and conviction.[20]

---

16 *Sahih Bukhari* ahadith no. 3166, 6914. See also *Sunan Ibn Maajah*, vol. 2, Book: 15 Blood Money (Kitab Ad-Diyat), Hadith no. 2686 (this hadith is narrated by Abdullah bin Aa'mar). See also hdaith no. 2687 (this hadith is narrated by Abu Hurairah and the distance is 70 years instead of 40 years). Compiled from *Sunan Ibn Maajah*, (Bangla Translation) Translated by the translation and research division of Tawhid Publications, Dhaka, Tahqiq: Nasiruddin Albanee, 1st edition July, 2014, vol. 2. See also *Jami at-Tirmidhi*, hadith no. 1403, *Sunan-i- Nasai*, hadith no. 4750.

17 Reported by *Sunan-i- Abu Dawud*. For details on *jizya* see note 80.

18 *Sahih Bukhari*, hadith no. 6755, *Sahih Muslim*, hadith no. 1370, from the hadith of Ali.

19 *Sahih Bukhari*, hadith no. 357, *Sahih Muslim*, hadith no. 82.

20 Above n 9, 296-297

4.3 Right to Social Security:

Islam pioneers in establishing welfare and social security to all of its citizens irrespective of race, colour, sex, religion or other criteria. Apart from providing financial benefits from *Bait al-Mal* (state treasury) Islam encourages Muslims to pay *sadaqa* (voluntary spontaneous charity) to needy people.[21] History bears lot of instances where non-Muslims were benefitted from individual charity and especially from state treasury. Caliph Umar and Umar b. Abdul Aziz's policy to make arrangement for pension and special fund for needy non-Muslims of Damascus and Basra respectively are glaring examples.[22] Even disable non-Muslims are immune from *Jizya* and other taxes. Some of the early Muslims[23] used to distribute part of their post-Ramadan charity (zakat ul-fitr) to Christian monks, based on their understanding of the following verse of the Quran:

> As for such [of the unbelievers] as do not fight against you on account of [your] faith, and neither drive you forth from your homelands, God does not forbid you to show them kindness and to behave towards them with full equity: for, verily, God loves those who act equitably. God only forbids you to turn in friendship towards such as fight against you because of [your] faith, and drive you forth from your homelands, or aid [others] in driving you forth: and as for those [from among you] who turn towards them in friendship; it is they, they who are truly wrongdoers![24]

4.4 Non-Muslims and the Criminal Laws:

The majority scholars held the notion that the Penal Laws are the same for the *Dhimmis* and the Muslims and both are to be treated alike in this regard. To them, the *Dhimmis* will stand in the equal footing with Muslims.[25] However, Imam Malik Ibn Anas goes a step further and held that the *Dhimmis* are exempted from the punishment for adultery. He based his opinion on the decisions of Umar and Ali who lay down that if a *Dhimmi* commits adultery his case should be referred to his co-religionists.[26] No punishment can be inflicted for taking foods and drinks declared lawful by their religions but prohibited by Islam. We concur with Imam Malik and express that matters relating to the observance of their own religious rites cannot be incriminated by an Islamic state provided those are accompanied by violence and create turmoil in the state. Since maintaining the public order and establishing peace and tranquillity is one of the sacred responsibilities of a welfare state anyone found committing those activities must undergo punishment in accordance with the penal laws of the land.

---

21 The Qur'an focuses on charity in many places. As for example, see 2: 110, 177, 3: 134, 30: 38, 57: 18, 63: 10, 64: 16, 17.

22 For a detailed discussion see Al Qaradawi, Dr. Yusuf *O-Muslimer Proti Islamer Udarata* (Mahmudul Hasan trans, published by Sarwar Kamal, Chittagong, 1st edition, 1994)28-30. [trans of: *Ghayr al-Muslimeen fil-Mujtama' al-Islami* , Cairo, 1992]

23 Sarkhasi "Al-Mabsut" vol.2 p.202. See also Jassas"Al-Ahkam ul-Quran vol. 3. p.215

24 Al-Mumtahina 60:8-9.

25 Maududi, above n 9, 305.

26 Ibid.

4.5 Non-Muslims and the Civil Laws:

Absolute equality exists between the Muslim and non-Muslim citizens regarding the protections, security and liberties entailed by the Civil laws of the country. The same parameter regarding enjoying rights and fulfilling duties are maintained between them. However, non-Muslims get special priorities in certain matters namely manufacturing, taking and dealing with wine or other things permitted under their religion, rearing, trading and eating pigs etc. Not only this, non-Muslims shall be recompensed by Muslims if the latter spoil their wine or cause injury to their pigs.[27]

Professor Dr. Yusuf al Qaradawi opined that the Non-Muslims are entitled to do the above-mentioned activities only within themselves and within their territories. But they are not allowed to extend these activities in the Muslim society or hurt the religious feelings of the Muslims by carrying out these activities.[28]

4.6 Right to follow their own Personal Law:

Since Qur'an explicitly proscribes to use force in religious matters non-Muslims will naturally be governed by their own personal laws. Rulings peculiar to their own religions, not Islamic Shairah, will regulate their affairs. This is the standard maintained since the genesis of the functioning of Islamic State. 'Umar bin' 'Abd al-'Aziz, popularly known in Islamic history as fifth Caliph and second Omar, once asked for a verdict in this respect from Hasan al-Basri[29], saying : "How is it that the Caliphs left the *Dhimmis* free in the matters of marriages regardless of consanguinity and in the matters of drinking wine and eating pork?" Hasan replied:

> The *Dhimmis* accepted to pay *Jizyah* only because they wanted to be free to live in accordance with their own Personal Law. You have only to follow what your predecessors did. You are not to deviate or to innovate.[30]

However, it is lawful to get the dispute decided in accordance with Islamic Shariah if requested by the non-Muslim disputants. Allah ordains:

> if they come to thee [for judgment], thou mayest either judge between them or leave them alone: for, if thou leave them alone, they cannot harm thee in any way. But if thou dost judge, judge between them with equity: verily, God knows those who act equitably.[31]

---

27 Alauddin, *Durr al-Mukhtar*. It contains authentic collection of the judgments and verdicts of the Hanafi School of thought. It is regarded as one of the reliable books in the field of Islamic Jurisprudence especially by the Hanafis.

28 Qaradawi, Prof. Dr. Yusuf Al, *Adhunik Jug: Islam Kaushal O Karmoshuchi* (Muhammad Sanaullah Akhunji , Notun Safar Prakashani, Dhaka-1219. 2nd edition 2003)154 [trans of: Priorities of Islamic Movement in the Coming Phase (first published,1992)]

29 Hasan al-Basri: one of the most eminent scholars from the second generation of Muslims known for his asceticism and knowledge. He was born in Medina in 642 CE, the son of a slave captured in Maysan, who was freed by the Prophet's secretary, Zaid bin Thabit. He was brought up in Basra, Iraq. Hasan met many Companions and transmitted many reports of Prophet Muhammad. His mother served Umm Salama, the wife of the Prophet. He died in Basra in 728 CE at the age of 88

30 Maududi, above note 9, 286.

31 Al-Maeda, 5:42.

Even non-Muslim western scholar Adam Metz, confesses and testifies in the *Islamic Civilization in the Fourth Century of the Hegira*:

> Since the Islamic Law was specifically for Muslims, the Islamic state allowed the people of other religious affiliations to their own courts. What we know about these courts is that they were church courts and prominent spiritual leaders were the chief justices. They wrote a great number of books on canon law, and their rulings were not confined to matters of personal status. They included such problems as inheritance and much of the litigations between Christians that did not involve the state.[32]

Gustav LeBon goes to the extent of saying that nations had never known conquerors more tolerant than the Muslims, or a religion more tolerant than Islam."[33]

4.7 Right to observe their own Religious Rites:

Non-Muslims are fully guaranteed, in an Islamic state, to perform their religious rites and festivals. It is not unusual, of course for the government, to put certain reasonable restrictions for public purposes and on the ground of security, maintaining communal harmony etc.

4.8 Protection to the Places of Worship:

It is incumbent on the Islamic state to protect the right of non-Muslims towards their religion and other rights ancillary thereto. They should be allowed to build their own places of worship and religious institutions. A group of scholars maintain, as regards building places of worship, between purely Muslim areas and non-Muslim areas. They though allow reconstruction and repair of existing places of worship in purely Muslim areas, decline to grant the right of constructing new places of worship.[34] However, in the contemporary pluralistic global order this distinction in many areas will be blurred due to the co-existence of different religious communities. If an area is purely accommodated by a particular religious community and no space is available for others to live in there, the necessity to construct places of worship for them will be in vein and this would certainly weaken the social fabric and demolish communal harmony and mutual respect.

4.10 Freedom of Trade and Profession:

Islamic state, as regards lawful trade and business or other occupation, should ensure equal opportunities and privileges for all of its citizens irrespective of race, colour, religion, sex or any other criteria.[35] All scholars unanimously held that interest is unlawful for both Muslims and Non-Muslims. They will not be permitted to deal with wine and pigs in the Muslim society.[36] However, in their own residential area, if separate from Muslim locality, they can be allowed to do so.[37] Prof. Adam Metz showed that no injunctions of Islamic

---

32 Adam Metz, 'Islamic Civilization in the Fourth Century of the Hegira' (Prof Muhammad Abdul Hadi trans.) Vol.1, 85.

33 Bon, G Le, "The World of Islamic Civilization of the Arabs", (Tudor Pub. Co; First Edition, 1974) 605

34 Maududi, above n 9, 309.

35 Ibid 298.

36 See note no. 22, p. 35.

37 See note no. 28.

Shari'ah restrain the non-Muslims to carry out their trade and other professions. Through his research, he established the truth that most of the great money exchangers were Jews and most of the doctors were Christians.[38]

4.11 Protection from Foreign Aggression:

Islamic Shariah guarantees equal rights for both Muslim and Non-Muslim citizens to be protected from external aggression. By realizing *Jizya* Islamic state affirms that it is under a strict obligation to ensure protection against foreign aggression, defense against foes, and even ready to pay ransom to on their behalf if they are taken captive by an enemy.[39] Mawardi, an eminent scholar, has encapsulated the concept of protection of non-Muslim citizens from both internal and external aggression in a lucid manner. He opines:

> The payment of the *jizya* entitles the people of the covenant to two rights. First that they be left undisturbed. Second, that they be guarded and protected. In this way, they can be secure in society and protected from outside threats.[40]

Ibn Hazm, renowned Zahiri Scholar, emphatically opines :

> If we are attacked by an enemy nation who is targeting the People of the Covenant living among us, it is out duty to come fully armed and ready to die in battle for them, to protect those people who are protected by the covenant of God and His Messenger. Doing any less and surrendering them will be blameworthy neglect of a sacred promise.[41]

Historical evidences namely Abu Ubayda al- Jarrah's order to return *Jizya* for their inability to protect *Dhimmis* of Syria [42]and Ibn Taymiya's insistence to ensure release of Non-Muslims prisoners of war along with the Muslim PoWs from the captivity of Tartar[43] suggest the obligation of the authorities in charge of an Islamic state and of course their compliance with the dictates of Islamic Shairah. Islamic Law always stringently emphasizes to protect the people of the covenant. Al-Qarafi, another celebrated classical scholar states:

> The covenant is a contract that has conditions that are compulsory for us, for they are under our protection as neighbors, and the covenant of God and His Messenger, and the religion of Islam. If someone harms them with inappropriate speech, defamation, any type of harassment, or is an accomplice to such actions, then he has made light of the covenant of God, His Messenger, and Islam.[44]

Islam taxes rather entitle them to be benefitted from the *Bait al- Mal* (state treasury). Khalid bin Walid, in his illustrious "Covenant of Peace" given to the people of Hirah, provided:

---

38 Adam Metz, "Islamic Civilization in the Fourth Century of the Hegira" (Prof Muhammad Abdul Hadi trans) Vol.1, 86.

39 See, for details, Qaradawi, above n 33.

40 Mawardi,"*Al-Ahkam al-Sultaniyya*" , 143

41 Qarafi "*Al-Furuq*" vol.3 p. 14-15

42 Imam Abu Yousuf, "*Kitab al Kharaj*, 149-151

43 Qaradawi, above n 22, 10.

44 Qarafi "*Al-Furuq*" vol.3, 14.

> I have stipulated that if any one of them becomes unfit to work on account of old age or some other cause, or if anyone who was formerly rich becomes so poor that his co-religionists have to support him by giving him alms, such persons will be exempt from paying the *Jizyah* and they, together with their dependents, will be helped from the Islamic Treasury *(Bait al-Mal)*.[45]

Islamic scholars permit, as a curative measure, simple imprisonment, for the defaulters of *Jizya*.[46] But, specific context, ability and intention of the *Dhimmis* and other relevant facts must be reckoned by a competent judicial authority before prescribing such punishment. Islamic Law is so lenient that it prohibits to realize *Jizya* from the property of the deceased *Dhimmis* or from his legal heirs.[47]

4.13 Right to be Exempted from Military Service

It is incumbent only upon the capable Muslim male to participate in warfare to protect the sovereignty of the state. *Dhimmis* are absolutely exempted from military service. They are only enjoined to pay *jizyah* as a substitute for exemption from compulsory military service and an Islamic state is under a strict legal obligation to ensure their security. The basic philosophy of this issue is summed up by a renowned scholar in the following words:

> Evidently, only those people who believe in the basic ideology of the State sincerely can and should fight for its protection. Again, only the believers in that ideology can be expected to honour the-moral principles, which have been prescribed by Islam for warfare. Others can fight for it only as mercenaries and, consequently, they cannot be expected to observe the Islamic ethical code in the heat of the battle. These are the main reasons why the *Dhimmis* have been exempted from military service and have only been enjoined to pay their monetary share in the defence of the State. *Jizyah* is thus not only a symbol of loyalty to the State but it is also the contributory compensation for exemption from military service, and that is why it is imposed only on males, capable of military service.[48]

In case of failure to ensure protection to the non-Muslims the *Jizyah* and *Kharaj* that might have been realized from them, must have to be returned.[49] Historical evidence bears the testimony of this principle. During the battle of Yumuk, Abu 'Ubaidah, the Commander-in- Chief ordered his subordinate authorities to pay back *Jizyah* and *Kharaj* while observing their inability to secure the life and property of non-Muslims properly and effectively.[50] After being refunded *Jizyah* and *Kharaj* the non-Muslim community unequivocally asserted the following statement:

> We prefer your Government and its keen sense of justice to the cruelty and injustice of our own co-religionists and we are not going to allow their agents to enter the gates of the city unless we are overpowered by them.[51]

---

45 Ibid, 85.

46 Ibid, 70.

47 Imam Abu Yousuf, *Kitab al-Kharaj* ; Al-Mabsut, Vol. X , 81

48 Moududi, above n 9, 291-292.

49 Moududi above n 9, 292. See also n 22, 48.

50 Maududi, above n 9, 313.

51 Ibid, 292-293. See also note 22, 48.

4.14 Right to hold Government Posts

One eminent author explicitly states that with the exception of few key posts[52]all other services shall be open to them without subjecting to them any sort of discrimination and prejudice.[53] In keeping conformity with the principles of *adl* the govt. should prescribe the same criteria of competence for Muslims and Non-Muslims and the most competent persons will always be selected without any sort of bias and favoritism.[54] This rule is applicable to both civil and military services.

Dr. Yusuf al Qaradawi held that posts like Imam, Head of the State, Commander-in-Chief, Judge in the Court of Muslims and duty of distributing *sadaqa* cannot be held by the Non-Muslims as these posts are inextricably related with the ideologies of Islam.[55]

Jurist like Mawardi opines that the Non-Muslims can be assigned to perform the duty of propagation department, an important post in the Islamic State. Celebrated western historian Adam Metz mentioned that it was a surprising matter that many Non-Muslims were employed in Islamic State.[56]

4.15 Right to be the Head of the State

A non-Muslim is not entitled to hold the post of the Head of the State as this office is inextricably related with religion and the person holding this office must adhere to the Shariah and administer the State in accordance with the principles of the Sharia especially the Qur'an and Sunnah.

According to Dr. Ghilani, the head of the State of an Islamic State shall be a Muslim and a Mujtahid (the one who has the ability to exert himself). Allama Shatibi wrote in his Al Istihsan that there has been a consensus (Ijma) on this point that he must be a Mujtahid.[57] As non-Muslims do not accept Islamic ideology they cannot be the Head of an Islamic State. Dr. Qaradawi also supports this view.[58]

4.16 Capacity to Participate in Election

Scholars differ in this issue. One group opines that there is no historical evidence suggesting that the *Dhimmi* had ever participated in the election process of the Four Guided Caliphs. Even they claim that non-Muslims community never exerted such demand.[59] Thus, the natural corollary of this opinion is that non-Muslims should be denied

---

52 The author defined key posts as those posts which are inextricably connected with the formulation of fundamental policies and the regulation and control of important departments. In each and every ideological state, only the true holders of that ideology who are of course, skilled in their respective fields are furnished with these duties.

53 Moududi, above n 9, 297.

54 Ibid, 319.

55 Ibid, 35.

56 Above n 32, 105.

57 Shatibi was quoted by Dr. Riazul Hasan Ghilani in his *Reconstruction of Legal Thought in Islam*, 235.

58 Metz, above n 22, 35.

59 A. R. Awang, *The Status of the Dhimmi in Islamic Law* (International Law Book Services, India, 1994) 194-195.

any voting right.[60] On the other hand, different notion works in the minds of other scholars. Mawdudi being aware of the requirements of modern society adopts a liberal and tolerant approach toward *Dhimmis*.[61] He emphatically expresses:

> ...In regard to a parliament or a legislature of the modern conception which is considerably different tfrom the advisory *Shura* in its traditional sense, this rule could be relaxed to allow non-Muslims to become its members provided that it has been fully ensured in the constitution that (i) It would be ultra vires of the Parliament or the Legislature to enact any law which is repugnant to the Qur'an and the *Sunnah*. (ii) The Qur'an and the *Sunnah* would be the chief source of the public law of the land. (iii) The head of the state or the assenting authority would necessarily be a Muslim.[62]

However, he is in favour of restricting their rights to the national problems of the state or to the issues peculiar to their own community. Moreover, they, like Muslims, will be debarred from injuring the basic values of Islam.[63] Alternatively, it is possible, he opines, to set up of a distinct and separate representative Assembly for fulfilling their legitimate constitutional demands.[64]

The current authors believe that non-Muslims should be allowed to participate in the election process, to nominate representatives, play a coordinated role in the national affairs of the country.

4.17 Right to Testify

Divergent views exist among the Islamic jurists regarding this issue. Few scholars held that witness must be Muslim and as a corollary of this rule they maintained that Non-Muslims are not entitled to testify against Muslims except in certain cases specially in case of extreme necessity e.g. testimony of a non-Muslim in matters of will during a journey in the absence of any Muslim. All schools of Islamic jurisprudence unanimously held that non-Muslims are admissible as witnesses without any sort of restrictions in relation to other non-Muslims.[65] Other group of jurists opined that in no circumstances evidence of non-Muslims are accepted.[66] To me, the most appropriate view is that which is held by few classical and modern scholars. A group of scholars including Ibn Taymiyyah recorded to qualify non-Muslims as witnesses in the discovery of truth both for or against the

---

60 Ibid

61 Islam, Md. Towhidul, *Non-Muslims' Rights In Islam and its Compatibility with International Human Rights,* 2005 15(1) *Dhaka University Law Journal,* 137.

62 Above n 9, 295-296.

63 Ibid, 296.

64 Ibid.

65 See *Fiqh-al- Islami* vol. 6, p. 563, *Bada'i-al-sanai* vol.6, p.282. They based their arguments on the verse: "The Unbelievers are protectors, one of another."(Al-Anfal 8: 73).

66 They ventured to base their argument on the verse: "and take for witness two persons from among you, endued with justice, and establish the evidence (as) before Allah." (At-Talaq 65: 2). See also Al- Baqara 2:282.

Muslims.[67] Dr. Hashim Kamali has endeavoured to clarify this stance in the following manner:

"Their testimony is...generally admissible in disputes concerning acts and transactions in which they usually participate and interact freely with their partners and clients, Muslim or non-Muslim."[68]

Hashim Kamali also took pain to spell out the areas where the evidence of non-Muslims will not be accepted: "In certain other disputes, such as those concerning marriage and divorce, religious offences and matters of Muslim worship, the testimony of non-Muslims is not admissible in disputes involving Muslims."[69]

The prime reason behind this lies in the very fact that difference of religion serves as a ground of doubt (*subh).*

As justice[70] is central to Shariah, the main focus of course, in case of rendering evidence will also be on discovery of real truth.

4.18 Right to get Dawah

Each and every non-Muslim is entitled to get *dawah* from the Muslim community. It is evident from the following verse of the Holy Qur'an:

> Who is better in speech than one who calls (men) to Allah, works righteousness, and says, "I am of those who bow in Islam?[71]
>
> Further elaboration specifically the verse of sura al baqarah regarding no compulsion in religion and the verse of another chapter udu ila sabily rabbiqa wa hikmah may be considered.

---

67 Kamali, Mohammad Hashim, *Islamic Law in Malaysia: Issues and Developments* (Ilmiah Publishers, Kuala Lumpur, 1st edition, 2000) 182.

68 Above note 12, 89.

69 Kamali, above n 12, 89. He cited few authorities in support of his statement from Mahmud Shaltut, *Fiqh al-Quran wa'l- Sunnah,* Kuwait, Matabi Dar al-Qalam, 69; Uthman, *al-Fikr al-Qanuni al-Islami: Bayn Usul al-Shariah wa Turath al-Fiqh,* Cairo: Maktabah Wahbah, n.d.; p. 269. He also referred to Zuhayli, *al Fiqh al-Islami,* VII, 856.

70 The very word *'adl'* is used to place something in its rightful place; it also means according equal treatment to others or reaching a state of equilibrium in transactions with them *(al-taswiyah fil-muamalah). 'Adl'* (also *'adalah)* thus signifies moral rectitude and fairness since it means that things should be where they belong. See also, Kamali, above n 11,103. Kamali in the same book (p. 106) vehemently mentions that justice is treated as a supreme virtue and it is, in all its various manifestations, one of the overriding objectives of Islam to the extent that it stands next in order of priority to belief in the Oneness of Allah *(tawhid)* and the truth of the Prophethood *(risalah)* of Muhammad (PBUH). Allah stressed on justice and fair dealing several times in the Holy Qur'an. As for example, "Allah commands justice, the doing of good" (Al-Nahl, 16:90). "O ye who believe! stand out firmly for Allah, as witnesses to fair dealing" (Al-Maedah 5: 8). "We sent aforetime our messengers with Clear Signs and sent down with them the Book and the Balance (of Right and Wrong), that men may stand forth in justice" (Al-Hadid 57:25).

71 Fussilat, 41:33.

4.19 Right to receive Proper Education

Islamic State is under a very strict obligation to impart education[72] to all of its citizens and persons residing within it's territory temporarily. As a component of proper education, Islamic state as an ideological state, would ensure proper arrangement so that non-Muslim community can impart their own religious teachings to the children and other persons of their community. Islamic state, in no way, compels them to study Islam or related courses since this would go against the basic tenets of Islam. In spite of being an orthodox scholar Maududi even goes to such extent to opine that they are entitled to introduce their own religious discourses in the National Universities and Colleges.[73]

4.20 Right not to be insulted

As per Islamic injunctions are concerned, non-Muslims are protected against any type of word, expression or gesture which would tarnish their dignity in the society and offends their religion. The Holy Qur'an clearly ordains: "Revile not ye those whom they call upon besides Allah, lest they out of spite revile Allah in their ignorance..."[74]

Asad, the renowned exegete, explains this verse in the following way:

> This prohibition of reviling anything that other people hold sacred - even in contravention of the principle of God's oneness - is expressed in the plural and is, therefore, addressed to all believers. Thus, while Muslims are expected to argue against the false beliefs of others, they are not allowed to abuse the objects of those beliefs and to hurt thereby the feelings of their erring fellow-men.[75]

4.21 Right not to be disheartened by Public Utterance of Hurtful Speech

None really possesses under the Sharia any authority to hurt the feelings of non-Muslims by any hurtful speech publicly. Allah (SWT) says:

> Allah loveth not that evil should be noised abroad in public speech, except where injustice hath been done; for Allah is He who heareth and knoweth all things. Whether ye publish a good deed or conceal it or cover evil with pardon, verily Allah doth blot out (sins) and hath power (in the judgment of values).[76] Dr. Hashim Kamali maintains that hurtful speech, in this text, comprises that which is addresses both to an individual, to more than one person, or to the community at large.[77]

---

72 Islam lays strong emphasis on seeking knowledge. The Holy Qur'an ordains: Proclaim! (or read!) in the name of thy Lord and Cherisher, Who created- Created man, out of a (mere) clot of congealed blood. Proclaim! And thy Lord is Most Bountiful. He who taught (the use of) the pen, - Taught man that which he knew not. (Al-Alaq 96: 1-5)

73 Moududi, above n 9.

74 Al-Anaam 6:108

75 Asad, Muhammad, *The Message of the Qur'an* (Dar al Andalus, Gibraltar, complete edition, 1980)188.

76 An-Nisa 4:148-149.

77 Kamali, above n 12, 167.

The Sunnah of the Prophet (PBUH) instructs us not only to avoid the utterance of hurtful speech but also to preserve fraternity, peace and tranquillity in the society. It is narrated on the authority of Jabir that he heard the (Holy Prophet) say: A Muslim is he from whose hand and tongue the Muslim's are safe.[78] Kamali vehemently remarks that although the *hadith* refers to Muslims, the message contained in it, however, is not confined to believers alone.[79]

5. Obligations of the Non-Muslims-At a glance

We will not likely to focus on the obligations of the Non-Muslims in this paper elaborately. Nevertheless, for the sake of some clarifications it seems necessary to take an overview of those obligations.

5.1 Paying Jizyah

Jizyah[80] is an annual tax charged on per capita and every major, sane and capable non-Muslim male are bound to pay it.[81]

---

78 *Sahih Muslim*, vol. I, Book 1 The Book of Faith (Kitab-al-Iman), Chapter 14 Concerning the comprehensiveness attributes of Islam Hadith no. 65. See also hadith no. 64 & 66.

79 Kamali, above n 12,170.

80 As regards the derivation of the word *Jizya* (sometimes spelt as *jizyah)* jurists differ in their opinions. To Monqiz-As-Saqqar, this term is derived from the root word *jaza* meaning compensate. He furher adds that "Jizya" is a derived term in the form of "ficla" from "Mujazā" which is the noun "compensation", meaning "a sum of money given in return for protection". On the other hand, Ibn Al-Mutaraz opined that it is derived from "ïdjzā" or "substitute" or "sufficiency" because it suffices as a substitute for the "dhimmi's embracement of Islam". See Saqqar, Moqiz-As, *Jizya in Islam*, translated from Arabic to English by Elisawy, Hayem retrived from See http://www.loadislam.com/artical_det.php?artical_id=481&section=wel_islam&subsection=Misconceptions accessed on December 09, 2010.Yusuf al Qaradawi mentions that the word *jizya* is derived from the *jazaa'*, meaning "reward", "return", or "compensation", and defines it as "a payment by the non-Muslim according to an agreement signed with the Muslim state". See http://en.wikipedia.org/wiki/Jizya accessed on December 9, 2010. Qaradawi opines that Jizya is an annual tax charged on per capita and every major, sane and capable non-Muslim male are bound to pay it. See Qaradawi, Dr. Yusuf al "*Ghayr al-Muslimeen fil-Mujtama' al-Islami*" ,"Generosity Towards Non-Muslims In Islam" originally written in Arabic, translated into Bengali by Hasan Mahmudul as "O-Muslimer Proti Islamer Udarata published by Sarwar Kamal, 1st edition, Chittagong, 1994, p. 44. Women, children, old, insane and the poor persons are exempted from paying jizyah. If the Islamic State is unable to give protection, it will not collect jizyah from the Non-Muslims. If after collecting Jizyah, the State becomes unable to render protection it is bound to return the jizyah to the respective persons. See Ibid, p. 48. The amount of the jizya is fixed by the head of the state with due consideration of the capability of payers. It is noteworthy to mention that if the term jizya is too offensive to non-Muslims it is liable to be changed. Umar bin Khattab, the second Caliph of Islam levied the jizya upon the Christians of Banu Taglibh and named it sadaqah (alms) out of consideration for their feelings. The jizyah was also imposed on Muslim men who could afford to buy their way out of military service. For instance, during the Ottoman Empire Egyptian Muslim peasants exempted from military service was required to pay the jizyah. Conversely, if a Christian group elected to serve in the state's military forces, it was exempted from the jizyah. Historical examples of this abound: the Jarajima, a Christian tribe living near Antioch (now in Turkey), by undertaking to support Muslims and to fight on the battle

5.1.1 Reasons of Paying Jizyah

This tax is imposed on them for their protection and they are exempted from defending the Islamic State.[82]

5.1.2 Determination of the amount of Jizyah

The amount of this tax is determined by the head of the state on the basis of the capability of persons. Thus, equality is ensured by taking more from the rich, a bit less from the middle class and very small portion from the lower class.[83]

5.1.3 Exemption from Jizyah

Women, children, old, insane and the poor persons are exempted from paying jizyah. If the Islamic State is unable to give protection, it will not collect jizyah from the Non-Muslims. If after collecting Jizyah, the State becomes unable to render protection it is bound to return the jizyah to the respective persons.[84]

5.2 Paying Kharaj

Like Muslims, the Non-Muslims have to pay Kharaj.[85] The head of the state has the discretion to determine the amount of Kharaj.[86]

---

front, did not have to pay the jizyah and were entitled to a share of the captured booty. See http://www.islamonline.net/servlet/Satellite?cid=1119503544994&pagename=IslamOnline-English-Ask Scholar%2FFatwaE%2FFatwaEAskThe Scholar accessed on December 09, 2010. Quoted from Islam, Mohammad Azharul, Examining the Relevance and Validity of Sharecropping under Islamic Land Law, *Dhaka University Law Journal*, vol. 19, No. 2, December, 2008, footnote no. 81, p.205. *Jizya*, in no way, can be construed as a price received from non-Muslims due to their disbelief in Islam. Moreover, *jizya* cannot be regarded as a punishment on the same premise. See Ramadan, Said, *Islamic Law Its Scope and Equity* (P.R. Macmillan Limited, Ludgate House, London, 1st edition)1961.

81 Qaradawi, above n 22, 44.

82 Moududi, above n 9, 207.

83 The underlying philsopy can be substantiated on the basis of one of the verses of the Qur'an. The Qur'an proclaims: ...God does not burden any human being with more than He has given him...(At-Talaq 65:7). See also note 22, pp. 44-45.

84 Qaradawi, above n 22, 48

85 The very word Kharaj, in literal sense, means the revenue derived from a piece of land or a slave. In technical connotation, it implies the tax imposed on land. Basically, it is a tax levied on the producer of the landed property owned by the non-Muslims in an Islamic State. For details see, Aghnides, Niclas P. *Mohammedan Theories of Finance with an Introduction to Mohammedan Law and a Bibliography*, published by Sh. Muhammad Khalil B.A., LL.B. for Premier Book House, 4-5 Katchery Road, Lahore, West Pakistan, 2nd Impression, 1961, p.376; Doi, Abdur Rahman, I, *Shariah: The Islamic Law* (Taha Publishers Ltd. London, 1st edition 1984, Reprint 1997)389-390. Quoted from Islam, Mohammad Azharul, Examining the Relevance and Validity of Sharecropping under Islamic Land Law, *Dhaka University Law Journal*, vol. 19, No. 2, December, 2008, footnote no. 112, p.205.

86 Ibid, 45.

5.3 Trade tax

A state can impose tax both upon Muslim and non-Muslim traders. Juristic opinions differ on the amount of tax payable to the state, the different rate of tax. But underlying cause of such differences is certainly attributable to the exigencies of time and society. As to the different rate of tax between Muslims and non-Muslims the opinion of Maududi is not tenable *in toto* as he refers the factor of participation by Muslims in the defence of the country and non-availability of time and overall protecting them against undue competition.[87] But the argument placed by Dr. Abdul Karim Zaydan seems comparatively convincing. To him, the reason of taking double amount of trade tax from the non-Muslim is that while Muslims has to pay Zakat for each sort of property specifically defined by the Qur'an and the Sunnah the Non-Muslims only have to pay trade tax and nothing else.[88] Dr. Yusuf al-Qaradawi supports this view.[89] But to the authors of the present article, the argument placed by Abdul Karim Zaydan also lacks ingenuity and more specifically is premised on wrong analogy since Zakat is purely a religious obligation payable by Muslims only. It does not have any connection with the trade tax purely determined by the government of a state. Subjecting non-Muslims to double amount of trade tax upsets the basic tenets of Islam specially the principle of *adl* or justice.

5.4 Respecting the Islamic State and Law

Both Muslims and non-Muslims should be respectful towards the Islamic state and its underlying values and ideologies.[90] Muslims are even proscribed by the Qur'an to abuse the God of other religious communities.[91] Likewise, non-Muslims should not involve in such kind of activity which is concomitant to injure the basic tenets of Islam.[92]

6. Concluding Remarks

From the above discussion, it obviously appears that Islamic State, as an ideological State, does not discriminate on grounds of religion rather it is under watertight obligation to ensure the enjoyment of those rights, which Islam has granted to Non-Muslims. Some key posts, which are never allotted to them, are purely justified on the basis of religious or ideological grounds. Certain restrictions or prohibitions are ordained for the very purpose of ensuring communal harmony and peaceful co-existence of Muslims and Non-Muslims. However, in certain fields, they are treated more liberally. In comparison with modern secular state, they are more secured, well protected and stand on a better position as regards the enjoyment of rights, privileges and benefits in an Islamic state. The glorious history of Islamic Civilization bears this testimony.

---

87 Moududi, above n 9, 291

88 Zaydan, Dr. Abd al-Karim, *Ahkam al-Dhimmiyin wal-Musta'minin*", 186.

89 Qaradawi, above n 22, 51

90 Moududi, above n 9 , 69.

91 The Qur'an says: But do not revile those [beings] whom they invoke instead of God, lest they revile God out of spite, and in ignorance... (Al-An'am 6:108). See Muhammad Asad, *The Message of the Qur'an* (Dar al Andalus, Gibraltar, complete edition, 1980) 188.

92 Maududi, above n 9, 70.

Expropriation or Nationalization of Alien Property and the Standards of Compensation Required by International Law

Moha. Waheduzzaman*

Introduction

Expropriation or nationalization of property owned by a foreign national is an especially important phenomenon in international law. Expropriation generally denotes "the taking of property by a state from the ownership of private individuals. This may be a single asset, as in a rubber plantation or building development, or it may be an entire industry. Nationalization is best regarded as a species of expropriation, referring to the second situation."[1] However, nationalization in most cases is likely to be part of a political and social reform of the entire socio-economic system of the state. A state's respect for the private rights of aliens has never been an absolute obligation. Like most other obligations, it is subject to the legitimate higher interests of the state. Indeed, a state's recognized status under international law as a sovereign entity always validated its authority to nationalize or expropriate the property owned by a foreign national. International law, therefore, at no time imposed an absolute bar on expropriation of alien property but at every time there was considerable disagreement among the states as to the rules of expropriation due to the political differences between capitalist and socialist states coupled with the economic differences between developed and developing states. In the matters of payment of compensation, the moot questions that have principally divided the developed and developing world and have also vexed the international courts and tribunals are: What is the standard by which to measure compensation? Whether there is any and what, indeed if any, is the rule of customary international law to measure compensation? And last but not the least, what does 'adequate compensation' mean and whether and how far 'adequate compensation' is now a condition of and measure for lawful expropriation of alien property. This paper is principally an attempt to state what may be the current compensation requirements under international law on expropriation of alien property after throwing light on the ongoing theoretical debate between the developed and developing world as well as appreciating how the different courts and tribunals have responded to or approached the issue.

At the outset, however, two things should be made clear. *First,* there are in fact two related problems that exist in the context of the requirement to pay compensation on expropriation of alien property. The first problem

---

* Lecturer, Department of Law, University of Dhaka.

1 M. Dixon, *Text Book on International Law* (London: Oxford University Press, 2005) 248.

deals with the total amount of obligation of the expropriating state, i.e. whether international law requires full or partial compensation. The second problem involves valuation, i.e. if compensation, whether full or partial, is to be paid, tribunals must of necessity apply a method to achieve that standard. So, this aspect of the problem deals with the various accounting methods employed to estimate the value of the property taken. As it is already apparent, this article will only concern itself with the first of these two related problems.

Second, a distinction is commonly made between lawful and unlawful expropriations of alien property. Drawing of such distinctions is useful since it entails important practical consequences. To the present author, however, such distinctions are also useful in determining or identifying more precisely what is or what is not the issue of the present article.

Expropriation is obviously unlawful when the state takes the property violating its treaty obligations with regard to the property interests of aliens. This is based on the universally upheld principle of *pacta sunt servanda* which dictates that a state is bound, in good faith, to carry out its treaty obligations. Very often, however, an alien and his property are not protected by a treaty. In those cases, the alien and his property rights are protected by the settled rules of customary international law. According to the classical customary requirements[2], definitions of expropriation include legal criteria that (1) there must be a public purpose for the taking, (2) the taking be non-discriminatory against aliens, and (3) the state provide just compensation. Violation of any of these requirements will render the expropriation unlawful and in consequence *reparation* will follow to remedy the wrong. In practice it has been expropriations without satisfactory compensation which have caused international problems. A state claiming that the expropriation was unlawful (as opposed to arguing about the amount of compensation offered) may be entitled to different remedies, including an enhanced monetary sum.[3] For example, in cases of illegality the tribunal could order restitution of the entire property to the injured party (very unlikely) or its full monetary equivalent and this may include an element for future lost profits.[4] In practice, therefore, a state that offers compensation, however derisory, may be in a better position than a state that offers no compensation or whose expropriation is unlawful on other grounds.[5]

'Reparation', therefore, is the consequence of an unlawful state conduct whereas 'compensation', in the instant case, is one of the requirements of lawful expropriation of alien property. Former is about the consequence of

---

2 For a scholarly discussion on the classical customary international law to protect alien property see, Francis J Nicholson "The Protection of Foreign Property under Customary International Law," (1965) 6 *Boston College Law Review* 391-415.

3 Dixon, above note 1,253.

4 Ibid.

5 Ibid.

violation of an international obligation while the latter, properly understood, is a 'rights' issue from both sides of the dispute. At the one hand, *expropriation* is a *right* inherent in the sovereignty of the *expropriating state*; on the other hand, the *alien* also has the *right* to receive *compensation* on such expropriation since payment of compensation is one of the conditions of lawful expropriation. Scope of this article is not the former that deals with the 'consequence of violation of an international obligation', i.e. state responsibility but the latter that deals with the 'highly contentious issue of compensation' on expropriation of alien property, i.e. state obligation. To be more specific, this article concerns with the international obligation to pay compensation itself and not with the consequence of violation of this obligation or the other obligations in the context of the requirements of a lawful expropriation based either on the customary or the treaty rule of international law.

The Standard by Which to Measure Compensation

There still remains disagreement, lesser or greater, between the developed and developing states as to the standard by which to measure compensation. Here the argument centres not about the amount of compensation that must actually be paid on nationalization or expropriation of alien property but on the procedural question of which system of law, international or national, sets the standard for compensation.

According to the view of the developed world, the standard of compensation required by international law is the 'international minimum standard', the main thrust of which is to judge the justness of compensation by reference to international criteria rather than the provisions of municipal law of the nationalizing state. This view of the developed world has gained at least partial, if not full, recognition from the United Nations General Assembly Resolution on the Permanent Sovereignty over Natural Resources adopted in 1962. Paragraph 4 of the Resolution declares:

> nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid *appropriate compensation* (emphasis supplied) in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted.[6]

---

6 GA Res. 1803 (XVII), 17 UN GAOR Supp. No. 17, p. 15, UN Doc. A/5217 of 14 December 1962. This resolution was approved by the General Assembly by a vote of 87 in favour, 2 opposed and 12 abstentions.

Thus, Resolution 1803 requires the state to pay compensation in the event of an expropriation. Although the measure of such compensation is to be made "in accordance with the rules in force in the State" performing the expropriation, the General Assembly clearly did not intend the state to have exclusive control over the amount of compensation awarded. This intent is evidenced by the phrase "and in accordance with international law" and the sentence "in any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted."

Developing states, on the other hand, stick to the 'national treatment' standard to judge the propriety of compensation. According to this standard, the compensation given if matches up to that guaranteed to nationals under municipal law, it is *ipso facto* just and proper. This view is supported by the General Assembly Resolutions of 1974[7]. Article 2.2(c) of the 1974 Charter affirms the right of each state to:

> nationalize, expropriate or transfer ownership of foreign property in which case *appropriate compensation* (emphasis supplied) should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the state considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.[8]

The radical nature of the Charter is obvious when its provisions are compared with those of Resolution 1803. The Charter merely provides that compensation should be paid and is quite explicit in declaring that the expropriating state, unless agreed to otherwise, has exclusive authority to decide how much compensation shall be tendered. Thus, under the Charter, the definition of compensation is the sole responsibility of the expropriating state taking into account its "relevant laws and circumstances." In other words, compensation would be determined at least in part by domestic law, not by customary international law.

Now, which of the abovementioned views or standards or resolutions giving support to those particular views declares the rules of international law by which courts and tribunals can judge compensation? We must remember that declaratory statements contained in the UN General Assembly Resolutions are not laws themselves. They are laws only when they are evidentiary or reflective of an already existing custom or when

---

7 Res. 3201 (S-VI) on Declaration on the Establishment of a New International Economic Order (NIEO), S-6 UN GAOR Supp. No. 1, p.4, UN Doc. A/9030 of 1 May 1974; Res. 3281(XXIX) on Charter of Economic Rights and Duties of States, 29 UN GAOR, Supp. No. 31, p. 50, UN Doc. A/9631 of 12 December 1974. Resolution 3281 was approved by the overwhelming vote of 120 to 6, with 10 abstentions.

8 Ibid. Resolution 3281.

they are transformed, in the course of time, into norms of customary international law through recurrent state practice coupled with the necessary *opinio juris*. Therefore, neither 1803 Resolution nor 1974 Charter is *ipso facto* law unless reflects an already existing custom or is transformed subsequently into norms of customary international law.

The legal effect of UN General Assembly resolutions has been the subject of much discussion. And it is generally agreed that the legal effect varies with the intent, nature and content of the resolution and also with the nature of the support received. In view of the revolutionary nature of the 1974 Charter as compared to traditional concepts of international expropriation law as well as Resolution 1803, the question becomes whether the Charter has modified traditional international law. Several scholars[9] who have considered the question generally agree that it does not lay down established rules which have already become part of international law. This author quotes with approval the view of one such scholar:

> If this provision of the Charter is law-creating and it is understood in the sense described above, it would have totally changed what was understood to be the law up to that time, at least by the present author and by many others. Compensation would no longer be a matter governed by international law. However, a look at the governing resolution and the preamble of the Charter is revealing. The resolution refers to the consideration that the General Assembly "stressed the fact that the Charter shall constitute an effective instrument towards the establishment of a new system of international economic relations based on equity, sovereign equality, and independence of the interests of developed and developing countries". The Charter itself in its preamble speaks of the *promotion* of the establishment of the new international economic order, *contribution* towards the creation of certain conditions and the need to establish and maintain a just and equitable economic and social order. While declarations or resolutions of the UN General Assembly could contribute to the creation of new law, create new law or be declaratory of existing law in the appropriate circumstances, the provisions cited above, *inter alia*, clearly indicate that prescriptions such as are contained in Article 2.2(c) of the Charter do not reflect the existing law but are rather intended to reflect a goal to be achieved in the realisation of a new international economic order. The Charter itself has a strong programmatic character and does not purport to be a declaration of pre-existing principles. In any case Article 2.2(c) does not appear to *establish* a changed view of the law on the part of the 120 States voting in favour of it. There is evidence in the *travaux preparatoires* and in the General Assembly debates that they regarded the Article as reflecting an aspiration or an objective. There is also evidence that the provision is regarded by many States as an emerging principle which is in the process of being

---

9 Neville "The Present Status of Compensation by Foreign States for the Taking of Alien Owned Property," (1980) *13 VAND. J. TRANSNAT'L L.* 63-66; Weston. "The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth (1981) 23(75) *AM. J. INT'L L* 437, 441; Brower and Tepe "The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?" (1975) *9 INT'L LAW* 295.

> established but has not yet been established. Thus, at the most, it is no more than "soft" law so-called.
>
> In any event, even if the Article signified a changed *opinio juris* and consistent practice (this latter is certainly not established), the question arises what effect do the votes against and the abstentions have, as reflections of assertions of the right to contract out or protest against new developments. This is, indeed, a difficult issue. Its resolution in favour of change may require more consistent, unqualified and unswerving practice in the face of continued objection, even if one were to concede that eventually the persistent objector cannot impede change. All in all, it would not appear that at the present time Article 2.2(c) reflects a changed principle of international law relating to compensation.[10]

In *Texaco Overseas Petroleum Co. V Libya*[11], an arbitration arising out of Libyan oil nationalizations, the arbitrator, Professor Dupuy, thoroughly considered the questions as to the legal status of 1803 Resolution and 1974 Charter or rather the effect of these resolutions on the customary compensation requirement under international law. Dupuy distinguished between resolutions which essentially codify an existing area of agreement and those which attempt to create a new principle. He stated that the former do not create a custom but confirm one, while the latter are only binding to the extent that they have been accepted. The arbitrator acknowledged that the UN General Assembly resolutions may have a certain legal value but added that this legal value must be determined on the basis of circumstances under which they were adopted and by analysis of the principles which they state. He therefore proceeded to consider these two factors and concluded, after consideration, that the 1974 Charter had not become law because the provisions of the Charter, *first,* were deemed contrary to many traditional principles of international law, *second,* failed to receive support of a significant sector of the international community, and *third,* were primarily political, rather than legal, declaration. Furthermore, in view of the universal acceptance of Resolution 1803, he concluded that it represents the current compensation requirement. To come to this conclusion, Dupuy particularly relied upon the voting patterns of the two resolutions. According to his analysis, the principles stated in Resolution 1803 were assented to by a great many States representing not only all geographical areas but also all economic systems.[12] On the other hand, even though the Charter was also adopted by a very large majority, Dupuy emphasized that all the industrialized countries with market economies had abstained or voted against it.[13]

---

10 C.F. Amerasinghe, "Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice" (1992) 41 *International and Comparative Law Quarterly* 22-65, 34-35.

11 53 (1977) ILR 389; For details on the case see e.g. Lee A. O'Connor, "The International Law of Expropriation of Foreign-Owned Property: The Compensation Requirement and the Role of the Taking State" (1983) 6 *Loy. L. A. Int'l & Comp. L. Rev.* 355, 362-366.

12 Ibid 487.

13 Ibid 489.

Thus, it can definitely be concluded with some credibility that the 1974 Charter does not, in itself, reflect the rule of customary international law. *Amoco International Finance Corpn. V Iran*[14] and *Kuwait V American Independent Oil Co.*[15] are but two other leading examples where again the 1803 Resolution was accepted by the arbitrators as reflecting the customary compensation requirement under international law. In the *Amoco* Case the tribunal found that despite the UN General Assembly resolution in 1974, the prompt payment of just compensation is an obligation which is accepted as a general rule of customary international law. The tribunal stated that this rule reflected the practice of states, was relied in numerous expropriation conventions and that US-Iran Treaty of Amity was just another example of such a practice.

The principles set forth in the 1974 Charter may create even more uncertainty as different host nations may have different or even conflicting expropriation laws. Furthermore, one must not forget that expropriation or nationalization of property owned by a foreign national is only one particular example of the rules relating to the treatment of aliens. Dixon rightly observes: "it is treated separately only because it is one of the most contentious areas of state responsibility wherein there is considerable disagreement between developed and developing states."[16] There is an international minimum standard to treat aliens in the absence of treaty provisions. And it is domain of international law to determine the standard of treatment and not municipal law. Any violation of this obligation gives rise to state responsibility.[17] If the same dynamic is applied when a state nationalizes or expropriates the property owned by a foreign national, then, only 'international minimum standard' and not 'national treatment' can be the standard by which courts and tribunals will measure compensation. The proposition is very simple, when a state nationalizes the property of its own national the standard can be (and really is) municipal law but when it nationalizes the property of a foreign national 'international minimum standard' cannot be replaced by 'national treatment' standard. And this is so even after we have fullest respect and confidence upon a state's economic sovereignty over its natural resources. Moreover, if we take 'national treatment' as the standard to measure compensation the problem will far more be complicated instead of being softened and mitigated as the number of litigations will be increased when the foreign national's state will offer 'diplomatic protection'[18] on the ground of non-payment of just and proper compensation.

---

14 (1987) 15 Iran-U.S.C.T.R. 189.

15 21 (1982) ILM 976 [commonly known as *Aminoil* Case]

16 Above note 1, 248.

17 For state responsibility in the absence of treaty provisions see Garcia and Garza V USA: *Mexico V USA* (1926).

18 For diplomatic protection see, for example, *Mavrommatis Palestine Concessions* Case (*Greece V UK)* [1924] PCIJ

The Measure of Compensation

It is a settled rule of customary international law that compensation has to be paid on expropriation or nationalization of alien property. And we have just seen that 'international minimum standard' and not 'national treatment' is (or should be) the criterion to judge the propriety of compensation. But there again the view of developed and developing states fundamentally differs as to the amount of compensation set by 'international minimum standard'. The dispute is vital since it has practical consequences.

The long standing view of developed states, Harris writes, was expressed in a note from the United States Secretary of State Hull to the Mexican Govt. in 1940 on the expropriation by Mexico of foreign oil interests: "the right to expropriate property is coupled with and conditioned on the obligation to make *'adequate, effective and prompt'* (emphasis supplied) compensation. The legality of an expropriation is in fact dependent upon the observance of this requirement."[19] Therefore, according to the Hull formula adequacy of compensation is one of the component parts of lawful expropriation. But when is compensation said to be adequate? According to one general, accepted and traditional meaning compensation is adequate when it reflects the full value of the property taken irrespective of all the circumstances. This view was restated in the *Anglo-Iranian Oil Company Case.*[20] However, what would be construed by full value of the property will vary from case to case. To take one simple example, if the company is a 'going concern' it may even include 'future lost profits' *(lucrum cessans)* along with the value of the undertaking at the date of expropriation.[21] On the contrary, if a company's prospects were poor, it cannot and will not include 'future lost profits' as value of the property taken.[22]

Not surprisingly developing states have objected to this Hull formula of adequate compensation. Developing states urge for taking into consideration all the relevant circumstances including the economic viability of the nationalizing state, the importance of the expropriated property, the benefits which the foreign nationals have already acquired through commercial activities in the state etc. And compensation if assessed by reference to all these relevant factors it may fall short of the full market value of the property and will not include an amount for 'future lost profits'.

Supposing that the Hull formula at one time stated a customary rule of compensation of general application, it not longer does so due to this wholesale objection by developing states. The problem is that the view of developing states could not also replace the Hull formula of adequate

---

19 D.J. Harris, *Cases and Materials on International Law* (London, 1998) 568.

20 (1952) ICJ Rep 93.

21 *Amoco International Finance Corpn. v Iran* (1987) 15 Iran- U.S.C.T.R. 189.

22 See e.g. *Sola Tiles Case* (1987) 14 Iran- U.S.C.T.R. 223.

compensation because the 1974 Charter, favouring the view of developing states, had found little favour in international arbitral awards. Instead actual awards always tend to steer a middle course accepting the disagreement between developed and developing world over legal principles as, *inter alia*, a reflection of political and ideological differences. Harris, therefore, rightly comments: "neither 1974 Charter has found favour nor has the Western 'prompt, effective and adequate' compensation standard been readily adopted by International Tribunals. Instead tribunals have recently been attracted by the 'appropriate compensation' rule upon which states generally were able to agree in Resolution 1803. It was used, for example, in the *Aminoil* case, in the *Amoco* case and other *Iran-United States Claims Tribunal* cases."[23]

Importantly, however, the term 'appropriate compensation' has not only been incorporated in 1803 Resolution but also in the 1974 Charter.[24] The main difference between them is that under 1803 Resolution whether the compensation actually paid is appropriate is to be judged by reference to the national law of the expropriating state as well as international law. Whereas under 1974 Charter, it is to be judged solely by reference to national law. The problem, however, is to know what does 'appropriate compensation' mean. Some cases or arbitral awards are, by way of illustration, cited below to ascertain its meaning.

In the *Aminoil Arbitration*[25] a tribunal of three arbitrators adopted the standard of 'appropriate' compensation laid down in the 1803 Resolution and observed, in its *dicta*, that the determination of the amount of an award of 'appropriate' compensation could be better carried out by means of an enquiry into all the circumstances relevant to the particular concrete case, than through abstract theoretical discussion. Though the indemnity in fact awarded on the facts of the case could be regarded as amounting to 'full' compensation, the *dicta* certainly support for a flexible and equitable approach to the question of the standard of compensation. In the *Libyan American Oil Co. Arbitration*[26] the sole arbitrator, Mahmassani, held that the classical doctrine that required the payment of 'prompt, effective and adequate' compensation is no more imperative and that only 'convenient and equitable' compensation is required in cases of nationalization. The decision of the case, together with the reasoning of the arbitrator based on a concept of equity, confirmed that certain cases of nationalization may warrant less than full compensation. In the course of the judgment the arbitrator also observed that adequate compensation as including loss of future profits, such as was awarded in some old arbitral decisions,[27] was no more acceptable as an imperative general rule. It now retains only the

---

23 Above note 19, 570.

24 See paragraph 4 of the 1803 Resolution and Article 2.2(c) of the 1974 Charter.

25 See, for details, Amerasinghe, above note 10, 39-40.

26 (1977), (1982) 62 ILR 140. For details on the case see Amerasinghe, Ibid 41-42

27 *Delagoa Bay Railway Case* (*G.B. V Portugal*) (1900) Moore, 2 Arbitrations, p. 1865; Shufeldt Claim (*USA V Guatemala*) (1930) 2 U.N.R.I.A.A. 1079.

value of a technical rule for the assessment of compensation, a useful guide in reaching settlement agreement and stands only as a maximum rarely attained in practice.

In the *Amoco Finance Case*[28] the tribunal thought that a lawful expropriation demanded 'just' compensation which in the context of the governing treaty meant the value of the expropriated asset as a 'going concern'. *Banco Nacional de Cuba V. Chase Manhattan Bank*[29] is a municipal court case where the US Federal Court of Appeals showed a manifest preference for the term 'appropriate' instead of 'full' or 'adequate' and also admitted the possibility that in certain cases of expropriation less than full compensation may be payable according to international law.

Interpretation of the term 'appropriate compensation' by the *Iran-United States Claims Tribunal* has varied according to the views of particular Chairman of the Chamber of Tribunal concerned. "For the most part 'appropriate compensation' has been understood by the Tribunal in a way that approximates more closely to the views of western states than to those of developing states."[30] In the *Sola Tiles Case,*[31] for example, Bocksteigel, Chairman of Chamber One, interpreted the term 'appropriate compensation' as equivalent to 'adequate compensation' of the Hull formula. It was, however, held that 'appropriate compensation' was to be determined in light of the particular circumstances of the case so that if, a company's prospects were poor, no compensation should be awarded for its 'going concern' value. Again in the *American International Group Case*[32] the tribunal used the term 'appropriate' to describe the compensation payable but rejected the view that less than full compensation could be appropriate compensation and meet the requirements of customary international law. In the *INA Corporation Case*[33] Lagergren, an earlier chairman of chamber one, adopted a very flexible approach when he said that 'appropriate compensation', in the context of large-scale nationalizations, will mean the 'fair market value' standard to be discounted in taking account of 'all circumstances.' However, such discounting may, of course, never be such as to bring the compensation below a point which would lead to 'unjust enrichment' of the expropriating state. It might also be added that the discounting often will be greater in a situation where the investor has enjoyed the profits of his capital outlay over a long period of time, but less or none, in the case of recent investor, such as INA. Lagergren, however, doubted whether the standard of 'appropriate compensation' with the above meaning has replaced the Hull formula for other lawful expropriations too.

---

28 Above note 14.

29 658 F.2d 875 (2d Cir.1981). See, for details, Amerasinghe, above note 10, 46-47.

30 Harris, above note 19, 570.

31 Above note 22.

32 (1983) 4 Iran-US C.T.R. 96.

33 (1985) 8 Iran-U.S.C.T.R. 373. For detail on the case see Harris, D. J. *Cases and Materials*. Above note 19, 571.

Noticeably, the opinion of the judges and the arbitrators in the above mentioned decisions and arbitral awards differs not in accepting or recognizing 'appropriate compensation' as a standard to measure compensation but only as to the meaning of the term 'appropriate compensation.' From the above mentioned analysis and assessment of cases we can reach certain definitive conclusions. They are:

i) As the Hull formula presently does not reflect customary international law, 'adequate compensation' cannot be said to be a condition of and measure for lawful expropriation or nationalization of alien property unless 'appropriate compensation' is given a meaning equivalent to 'adequate compensation.'

ii) Nationalization or expropriation of alien property on the payment of 'appropriate compensation' is, however, generally accepted to reflect customary international law and it seems to require consideration of all the relevant circumstances of the case. International decisions and arbitral awards cited above bear testimony to this fact. And the value of judicial decisions are stated in Article 38 (1) (d) of the Statute of International Court of Justice (ICJ) as 'subsidiary means' for the determination of law and in Article 59 of the same statute as declaratory of existing law.

iii) What is 'appropriate compensation' will, however, differ from case to case. Sometimes it may be equivalent to the Hull formula of 'adequate compensation.' Again it may fall short of it if the attending circumstances of the case so demand. Thus the requirement to pay 'appropriate compensation' is so flexible that it encompasses both the 'equitable' (fair value)[34] and the 'Hull formula' (full value)[35] approaches. This is most emphatically witnessed by the disagreement among the tribunal in *Shahin Shane Ebrahim V Iran*[36] where the majority favoured the former and the minority the latter.

Significance of Adequate Compensation Still Remains!

From what has been said and the stand that has been taken in this paper one might jump to the conclusion that 'adequate compensation' as a measure of compensation on nationalization or expropriation of alien property has lost all its importance. But that is not necessarily the case. The customary law requirement of 'appropriate compensation' is not any

---

34 M. Rafiqul Islam "Permanent Sovereignty over Natural Resources: Its Changing Landscape and Continuing Relevance in a Globalised World" in Dr. M. Rahman (ed), *Human Rights and Sovereignty over Natural Resources* (ELCOP: Dhaka,2010) 1-21, 9.

35 Ibid.

36 (1995) Iran-US Claims Tribunal.

peremptory rule (i.e. *jus cogens*) of international law. So the states can derogate from it at any time by incorporating the Hull Doctrine of compensation in their bilateral treaties. In such cases ascertainment of the meaning of the term 'adequate compensation' becomes important. The most obvious examples of this are the bilateral investment agreements. "Of course, these bilateral agreements, binding on the parties, do not necessarily reflect general customary law, but at least they suggest that the imposition of conditions of lawful expropriation in bilateral treaties is not prohibited by international law, even if they are not mandatory"[37]. Even after admitting this theoretical possibility we can argue with much credibility that the more 'appropriate compensation' will gather its strength as a rule of customary international law, it is less likely that the states will adopt Hull doctrine of 'adequate compensation' instead of 'appropriate compensation' as a measure of compensation.

Conclusion

Traditional customary international law has for long required that the taking of alien property must be non-discriminatory, for a public purpose and fairly compensated for. These general rules are frequently involved in testing the legality of an expropriation. And where its requirements are not complied with, the taking of alien property is judged to be confiscatory. However, the rule that requires payment of compensation on expropriation of foreign-owned property is the one about which one finds the most serious controversy. The more exact rendition of this rule is that the taking of alien property must be accompanied by *prompt, effective and adequate* payment of compensation. This particular understanding of the nature of payment of compensation along with the other general rules involved in expropriation have long received, in the United States and other developed and common market nations which promote free enterprise, strong affirmation as the basic rules of customary international law with respect to state responsibility for economic injuries to aliens.

In a relatively recent time, however, the traditional norm of customary international law has been subject to considerable attack, particularly from the developing nations. As obvious, the bulk of the controversy has centred on the classical standard's compensation requirement. Importantly, the controversy does not in general focus on *whether* compensation should be paid, but instead centres on *how much* compensation should be paid. Changes that took place in the political climate of the world with the spread of communism and the shedding of colonial domination or decolonization has had a substantial impact upon the protection afforded to foreign investment by traditional international law. Since the 1920s after the nationalizations associated with the Bolshevik revolution in the Soviet Union, authorities and the governments of various communist countries have consistently maintained that international law has no minimum standard, leaving the question of

---

[37] Dixon, above note 1, 250.

compensation to the domestic jurisdiction of states. The difficulty in this matter, however, grew more and more with the emergence of the former colonial areas into the status of full-fledged independent states. With the emergence of new nations with strongly nationalistic sentiments, the old alignment of colonial power and colony ceased to exist. These newly independent nations wished to take their places among the nations of the world. A strong sense of nationalism and a desire to retain control over natural resources and the means of production caused these newly emerged less developed countries to resort to expropriation of foreign – owned capital. As a result, there immediately arose a clash between the property rights of the expropriated owners and the rights to sovereignty of the expropriating nation.

Thus, the attack on the traditional rules of international law emanates principally from the under-developed nations. Since international law obtains its legitimacy from consensus, developing states argue that because they were excluded from the creation of the traditional standard of compensation and because this standard has subsequently been rejected by a large segment of the international community, the traditional standard of compensation is invalid today or no longer represents the consensual norm of international law. Jurists from developing countries have expressed a variety of views in support of their nations. Some espouse the view that, whatever the rule of international law in the past, the modern law is predicated only on the premise that compensation is always a matter entirely within the domestic jurisdiction of the host state. Some sought to outright reject the traditional rules developed to protect foreign investment arguing that these rules were evolved to further the aims of colonialism and, today, do not qualify as international law. Others believe, as most Latin American countries did even in the nineteenth century, that all that international law requires is that the host state accords to aliens the same treatment which it gives to its own nationals, and no better. The capital-exporting states, on the other hand, interposing on behalf of their nationals whose property has been expropriated have always insisted on the 'minimum standard' principle, which obliges a state to grant a minimum of protection to aliens regardless of the treatment given to its own nationals.

In this backdrop, a realistic appraisal of the problem indicates that international law as it is currently conceived to be- that is, that body of rules based on the concurrent wills of the several sovereign states- cannot supply a *sure and certain* generally approved rule to regulate the situations created by expropriation of alien property by a host state. It is difficult to state in black or even gray letter what is the international law now as regards compensation for expropriated alien properties. What can be stated with some semblance of agreement is that *some* form of compensation is due to an expropriated company. The plethora of international laws including treaties, regional agreements, tribunal awards and decisions, and the host country's own laws lead to no real agreement on the standard of compensation due to an expropriated company.

Acknowledging the opposing positions of the developed and developing nations as well as the difficulties to lay down what the *law is* in this highly contentious matter, the present author has consciously attempted, in this paper, to state what *may* or rather *ought to* be the standards of compensation under the current customary international law. After conceding, for reasons observed in the body, the 'international minimum standard' as yardstick, the author has tried to find out what should be the measure of compensation under the 'minimum standard' principle on the expropriation of an alien property. The following paragraph sums up the view and position of the author as to what *may* or *ought to* be the current customary compensation requirement on expropriation of foreign-owned property.

The question of 'adequate compensation' is essentially connected with the measure of compensation on expropriation or nationalization of alien property. The Hull formula of compensation is throughout objected by the developing states and also less relied upon by the judges and arbitrators of the international courts and tribunals since the adoption of 1803 Resolution in 1962 and can no longer be accepted as reflecting the customary rule of compensation of general application. Therefore, 'adequate compensation' being one of the component parts of the Hull formula can be regarded neither as a condition for valid expropriation nor as the basis for measure of compensation. On the contrary, the present position is that 'appropriate compensation' is to be paid on expropriation or nationalization of alien property. And it must be accepted that 'appropriate compensation' will vary according to the circumstances attended in each particular case including, *inter alia*, whether the expropriation was entirely of an individual nature or part of a general legislative reform measure seeking to establish a better economic and social order. As a matter of fact it may amount to 'adequate compensation' in the sense and meaning in which it is used in the Hull Formula of Compensation. In that case it would be incorrect to state that the tribunal has applied the Hull formula of adequate compensation or regarded it as the basis for measure of compensation, rather the case is one where the tribunal thought 'adequate compensation' as appropriate taking into account all the relevant facts and circumstances of the case. Conversely, no objection can be taken when 'appropriate compensation' falls short of the full value of the property taken or disallows 'future lost profits' if warranted or admitted by the peculiar facts and circumstances of the case.

Legal and Policy Framework for Poverty Reduction in Bangladesh: An International Human Rights Law Perspective

Md. Jobair Alam*

1. Introduction

It is globally accepted that poverty inhibits not only human and social development, but also severely restricts a citizen's ability to enforce his or her guaranteed fundamental rights, which in essence, compromises sustainable development in more ways than one. Around 31% [1]of the total population of Bangladesh, most of which are women, live under the poverty line.[2] In addition to the historical reasons particular to Bangladesh in terms of inadequate policies to a) address poverty, b) efficient management of resources, as well as the consistent failure on the part of the government to tackle violation of human rights and fundamental freedoms, the dearth of knowledge and conceptual clarity amongst policy makers and successive governments in Bangladesh regarding the connection between poverty and human rights is acute. This has led to weak and in some cases, no use or implementation of international human rights instruments to address poverty reduction.

The present study focuses on using the international human rights instruments to which obligations, Bangladesh is a party, to deal with poverty reduction. To conceptualise the notions of poverty, the study argues that it is a violation of human right. The object is to assess, how far the legal and policy regime of Bangladesh, is reflective of poverty as violation of human rights and then to analyse the existing scenario of poverty in the light of that frameworks. It is also cogitated that whether poverty can be reduced to a substantial degree, if the obligations under the international human rights instruments are adequately and satisfactorily implemented.

---

* Lecturer, Department of Law, University of Dhaka.

1 UNdata. *MDGs Database*, United Nations Statistics Division, available at: <http://data.un.org/Data.aspx?d=MDG&f=seriesRowID%3A581> last accessed on 24 August 2014.

2 National estimates of the percentage of the population falling below the poverty line are based on surveys of sub-groups, with the results weighted by the number of people in each group. Definitions of poverty vary considerably among nations. For example, rich nations generally employ more generous standards of poverty than poor nations. See, *The World Factbook*, Central Intelligence Agency, USA, available at:<https://www.cia.gov/library/publications/the-world-factbook/fields/2046.html> last accessed on 8 August 2014.

2. Conceptualising the Notions of Poverty and Human Rights

Poverty and human rights are interconnected[3] although this is very difficult to conceptualise them in an interconnected way. This is because a) there are significant overlaps and common objectives between them; and b) they are in fact distinct through intersecting endeavors in many cases. This conceptualisation would be smooth if the concept of poverty were a clear, unambiguous and definite one. But, there is an obvious paradox in defining poverty. Most definitions of poverty are arbitrary and relative, even if they are based on statistical analyses.[4] Most definitions are drown up at bottom level.[5] Many people are clustered on or near poverty lines, so slight changes in the definition can remove or add people to the inventories of those who are poor.[6] Again more lucidly, poverty is a specific, local, contextual experience.[7] Poverty is experienced at the local level, in a specific context, in a specific place, in a specific interaction.[8] Human rights, on the other hand, while congregating with poverty issue, various unresolved questions may arise. The major question is, whether the concept is a moral or a legal one.[9]

However, in spite of having such ambiguities while linking poverty with human rights, it is a practical necessity to remove this gap. Because, the indivisibility, interdependence and interrelatedness of human rights is

---

3 Thomas Pogge, *'Poverty and Human Rights'*, (2002), available at: <http://www2.ohchr.org/english/issues/poverty/expert/docs/Thomas_Pogge_Summary.pdf,> last accessed on 24 August 2014.

4 Most of the definitions made are based on random choice or personal/ organizational 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, available at, <www.ngfl-cymru.org.uk/vtc/ngfl/sociology/poverty_definitions.ppt>, *last accessed on 24 August 2014.*

5 Ibid.

6 Ibid.

7 OHCHR. *'Human Rights and Poverty Reduction: A Conceptual Framework'*, (2004) available at: < http://www.ohchr.org/Documents/Publications/PovertyReductionen.pdf,> last accessed on 24 August 2014.

8 D. Narayan et al, *Can Anyone Hear Us? : Voices of the Poor* (New York, published for the World Bank by Oxford University Press, 2000) Volume *1*, 230.

9 When the analysis of poverty is narrowed to extreme poverty, Arjun Sengupta argues that there is a legally binding obligation upon the states to end poverty. 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. He strengthens his position deducing that the denials related to extreme poverty are easily identified with already recognized human rights law and that poverty eradication procedures would transmute as customary law. See, UN Doc: E/CN.4/2006/43, 2 March, 2006, 41.

often recalled and reiterated in human rights instruments[10] and by human rights bodies, although frequently disregarded in practice. The interdependence of all human rights is unequivocal when considering the situation of persons living in poverty, which are both a cause and a consequence of a range of mutually reinforcing human rights violations.[11]

2.1 The Concept of Poverty

The discourse of poverty is not a new one rather anterior. But, poverty of our time is unlike that of any other. This is unsteady, for example, human poverty is more than income poverty[12]-it is the abjuration of choices and opportunities 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 avows poverty's broader feature, such as hunger, health, education, discrimination, vulnerability and social exclusion. Because, living in poverty leads the poor very often to be treated badly, both by the state and society and to unclasp form voice and power in those institutions.[16] However, as a matter of fact, I shall base my definition on 'capability approach' only. The reason is that in the last two decades, the poverty discourse has transcended

---

10 For example, Para-5 of the *Vienna Declaration and Programme of Action, 1993* states, all human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights.

11 UNGA, *'Promotion and protection of human rights: human rights situations and reports of special rapporteurs and representatives'*, (09 August 2012) available at, <http://www.ohchr.org/Documents/Issues/Poverty/A-67-278.pdf> last accessed on 24 August 2014.

12 Income poverty describes a person or family who lives on or below the minimum acceptable way of life. It is 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 earning less than a certain amount annually as poor, is not an accurate measure of how well people live.

13 UNDP, *'Human Development Report: Human Development to Eradicate Poverty'*, (1997) available at < http://hdr.undp.org/reports/global/1997/en> last accessed on 24 August 2014.

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 World Bank, *World Development Report* (2000/2001) (available at: <http://siteresources.worldbank.org/INTPOVERTY/Resources/WDR/English-Full Text-Report/ch1.pdf> last accessed on 24 August 2014.

from the income criterion to the concept of 'well-being'.[17] This was happened owing to the UNDP Human Development Report (HDR), which was clearly influenced by Amartya Sen's 'Capability Approach', where poverty is seen as 'capability deprivation.'[18] To quote him[19]:

> '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'.

So, as per the capability deprivation, poverty must not be based on the criteria of lowness of income only[20] but also can be seen as a deprivation of basic capability. This will show the standard of identification of poverty.[21] No doubt low income is main cause of poverty, since lack of income can be the principle reason for a person's capability deprivation and a strong predisposing factor for impoverish of life.[22] So, income matters in the matter of poverty, but not the sole indicator of poverty where it is low. This is because, income is not the only instrument in generating capabilities.[23]

---

17 Sen starts from the position that living may be seen as a set of interrelated functionings, including both beings and doings. Important functions are being adequately nourished, being a good health, avoiding mortality, being happy, having self-respect and taking part in the life of a community. A person's well-being can be assessed using either realized functionings (What she is actually doing) or her set of available alternatives (her real opportunities). All feasible vectors of functions are aggregated in the capability set. Apparently a person's well-being is reflected in the functions actually achieved, whereas a capability set reflects a person's freedom to have well-being comparable to the budget set in terms of commodities. The advantage of referring to capability sets rather than to achieve functionings is clearly related to the intrinsic value of freedom in Sen's conception, thus, he postulates the use of the informational base of capability sets in the analysis of people's well-being. See, Amartya Sen, *Development as Freedom* (Oxford University Press, 1992) 39-52.

18 The Capability Approach was first articulated by the Indian economist Amartya Sen in the 1980s. It has been employed extensively in the context of human development, for example, by the United Nations Development Programme (UNDP), as a broader, deeper alternative to narrowly economic metrics such as growth in GDP per capita. Here 'poverty' is understood as deprivation in the capability to live a good life.

19 Sen, above n 17, 87.

20 Ibid.

21 Ibid.

22 Ibid.

23 Flavio Comin, Mozaffar Qizibash and Sabina Alkire, *Capability Approach: Concepts, Measures and Applications* (Cambridge University Press, 2008) 32.

2.2 The Concept of Human Rights

Human rights are a global vision backed up by the state obligations and are essentials for the existence of human beings themselves.[24] They are intrinsic to every human being, simply because of being human. Around the world, peoples and nations have recognized the importance of human rights as a fundamental part of social justice.[25] For most people, human rights are a set of values as much as a set of laws. For activists, they can be a set of tools or a vision. Human rights also express themselves as the global social justice movement for our time.[26] Though this rudiment definition of human rights at present time is almost unanimous[27] but the purposive definition of it particularly when a link of it is expounded to poverty it 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]

Poverty leads to the violation of Human Rights in general.[30] So, 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.[31] 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 United Nations (UN) context.[32] However, presently the United Nations and the international system around it are increasingly calling upon to navigate new territory in terms of addressing human rights issues which are more complex and global in scope and impact.[33]

---

24 Samantha Power and Graham Allison (eds.), *Realizing Human Rights: Moving from Inspiration to Impact* (Palgrave Macmillan, 2000) 357.

25 Curtis F. J. Doebbler, *Introduction to International Human Rights Law* (CD Publishing, USA, 2007) 173.

26 Available at < http://www.nesri.org/human-rights/human-rights-a-global-vision> last accessed on 24 August 2014.

27 Dr. Mizanur Rahman, *"Human Rights: The Bridge across Borders"* (2006) 17(2) *Dhaka University Law Journal* 79-116.

28 Dr. M. Ershadul Bari, 'Human Rights and World Peace', (1992) 3(1) *Dhaka University Law Journal* 1-12.

29 J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1996) 227-230.

30 Thomas Pogge (ed.) *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor* (Oxford University Press, 2007) 59.

31 Ibid.

32 Thomas Pogge, *Poverty and Human Rights* (Polity Press, Cambridge, UK, 2002) 5.

33 Alisa Clarke, *The Potential of the Human Rights-Based Approach for the Evolution of the United Nations as a System* (2011) 12(4) *Human Rights Review* 2.

In my study, I will 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 authorised interpretations of those instruments.

3. Linking Poverty with Human Rights

The 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.[34] It advances the idea that linking poverty and human rights creates an opening where the former concept can be understood and addressed in terms of deprivation of capabilities or lack of empowerment, as a denial and even a violation of human rights, rather than in terms of income or charity.[35] Furthermore, this congregates new variable to economics which ruminates the inherent and instrumental appraisal of fundamental freedoms and human rights.

The Office of the High Commissioner for Human Rights (OHCHR) favors that, the use of Sen's 'capability approach' is an exact conceptualisation of poverty from a human rights perspective and there is a 'natural transition from capabilities to rights'.[36] Under this approach, they further added that poverty is 'the failure of basic capabilities to reach certain minimally accepted levels'[37] and it is also 'the absence or inadequate realisation of certain basic freedoms'[38]. Being so, since freedom is the common element that links the two approaches, there is a conceptual equivalence between basic freedoms and rights.

Again there are some difficulties in this theoretical correspondence. *Firstly*, the concept of basic capabilities is contingent, while human rights are not. *Secondly*, the content of each basic capability is also contingent, while international human rights law is defined universal minimum core content of rights.[39] Since, poverty denotes an extreme form of deprivation, only

---

34 Polly Vizard, *Poverty and Human Rights: Sen's 'Capability Perspective' Explored* (Oxford University Press, 2006) 12, 23, 108

35 Maritza Formisano Prada, *Empowering the Poor through Human Rights Litigation* (UNESCO, 2011, 13-8)

36 OHCHR, *'Human Rights and Poverty Reduction, a Conceptual Framework'*, (New York and Geneva, 2004) available at: <http://www.unhchr.ch/html/menu6/2/povertyE.pdf.> last visited on 24 August 2014.

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

38 OHCHR. *'Human Rights and Poverty Reduction, a Conceptual Framework'*, New York and Geneva, (2004) available at:< http://www.unhchr.ch/html/menu6/2/povertyE.pdf.>last visited on 24 August 2014.

39 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. See, United Nations' Committee on Economic,

those capability failures would count as poverty that is deemed to be 'basic' in some order of priority.[40] The OHCHR argues that different communities may, of course, have a different understanding of what would qualify as 'basic' capabilities.[41] There is a suspicion here with the human rights discourse which jeopardises 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.[42] This conflict has been recognized in an obscure way by the 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] On the basis of this identification, the capability approach provides a framework in which the capability to achieve a standard of living adequate for survival and development is characterised as a basic human right. Shelter, housing, adequate nutrition, safe water and sanitation, access to basic health and social service and education are the primary consideration here among others.[44]

So, international human rights law and the capability approach have complementary and reinforcing elements and that these elements provide the basis for a cross-disciplinary framework for analyzing poverty as a human rights issue. Moreover, they stand out as two approaches that are concerned first and foremost with the well-being of individuals, their freedom, dignity and empowerment.

4. Legal and Policy Framework for Poverty Reduction

Human rights exist to stabilise human beings from any deprivation in a legal context. Owing to this fact, poverty under international human rights law is seen as violations of rights i.e., economic, social, 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. But, this type of attention based on human rights approach is directed not from very past. Depicted with the UN Charter in 1945 the concept has got an

---

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.

40 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 24 August 2014.

41 Ibid, at p. 6.

42 Kirsten Hastrup, *Human Rights on Common Grounds: The Quest for Universality,* Kluwer Law International 2001, Vol. 2, 198-210.

43 Ibid 8.

44 P. Vizard, *Poverty and Human Rights: Sen's Capability Perspective Explored* (Oxford University Press, 2006) 66.

articulated view now a day both at international and national jurisdictions. Bangladesh is not an exception in this context, where a legal and policy framework exists to reduce poverty.

4.1. International Framework

The idea of human rights spawned an entire area of international law with a diverse set of human rights treaties and declarations addressing a wide range of issues, such as food, shelter, education, health, social security and more. Human rights law provides standards and mechanisms to protect those rights necessary to ensure primarily dignity and then freedom and equality. To uphold this human dignity on which the whole international human rights law paradigm is founded, poverty is the greatest impediment amongst others. Therefore, international human rights law always emphasises on keeping human dignity intake by reducing poverty.[45] In absence of this concern, it is very likely to jeopardize the whole human rights edifice.

The abovementioned thinking, lead to the formulation of various international human rights instruments declaring either expressly or impliedly that poverty should be reduced in order to promote and protect human rights. The first comprehensive instruments among them can be attributed to the United Nations Charter, 1945 and then Universal Declaration of Human Rights, 1948. To clarify and confirm the latter two separate covenants on Civil and Political rights and the Economic, Social and Cultural rights were adopted in 1966. Since then a large number of conventions have been adopted[46] and the process is still continuing.

The reaffirmations of the UN in fundamental human rights[47] made it imperative that those rights are existing from the very past, before the inception of the UN itself. In this arena, the inherent right[48] of 'right to

---

[45] This can clearly be inferred from various international instruments that may either be the *Universal Declaration of Human Rights, 1948* or *the Covenant on Economic, Social and Cultural Rights, 1966.*

[46] For a list of these international instruments, see, for example, Werner Levi, *Contemporary International Law: A Concise Introduction* (Westview Press, 1993) 163.

[47] The Preamble of the *UN Charter* states that "We the peoples of the United Nations determined...to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."

[48] Inherent rights are those rights which exist merely because of being a human. Human rights are inherent in all human beings, who possess them from birth. The dignity of the persons who have those rights should be respected because these are their moral birth right and not merely because of certain rough calculations concerning general welfare. See, Morsink Johannes, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (University of Pennsylvania Press, 2009) Chap-1.

life'[49] has been codified as a Civil and Political right[50] (hereinafter abbreviated as CP right). This CP right is joined with another ESC right (Economic, Social and Cultural right) namely, adequate standard of living.[51] From this viewpoint, the right to life, for example, identifies a state of affairs and the secure conditions for a human life that people should enjoy. Poverty threatens life, security and health. So, it would seem that whatever needs to be done to ameliorate poverty-ridden conditions falls under the responsibilities associated with these rights. That is, these rights imply a right to be free from poverty.[52] Hence, the presence of poverty may threaten the enjoyment of the right to life as well as adequate standard of living [53](CP as well as ESC rights). So, to ensure the right to life, it is equally important to reduce poverty. This view was somehow been reflected around 65 years back in the UN Charter since article 56[54] of the UN Charter imposes an obligation on all of its member states for the realisation of certain human rights that develop the basic conditions of life and living standards in pursuance of article 55.[55] All UN members have

---

49 The *right to life* is undoubtedly the most fundamental of all rights. All other rights add quality to the life in question and depend on the pre-existence of life itself for their operation. The *Human Rights* Committee refers to it as 'the supreme right from which no derogation is permitted even in time of public emergency' (General Comment-6). To those commentators arguing in favour of a hierarchy of rights, the right to life is undoubtedly at the apex of that hierarchy; to those submitting arguments for universal fundamentality and thus no hierarchy, the right to life is still recognized as pre-eminent because given violations can never be remedied. See, Rhona K.M. Smith, *Textbook on International Human Rights* (Oxford University Press, 2007) 194.

50 Article 6(1) of the *ICCPR* states that every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

51 Article 11(1) of the *ICESCR* states that, the States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

52 David. P Forsythe (ed), *Encyclopedia of Human Rights*, (Oxford University Press, 2009) Vol.1, 316.

53 Ibid.

54 Article 56 of the *UN Charter* states that all Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

55 Article 55 of the *UN Charter* states that with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a) higher standards of living, full employment, and conditions of economic and social progress and development; b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

pledged themselves to implement those rights in their territories for their nationals.[56] The responsibility for implementation of these international human rights standards have been imposed upon the national governments by the 'International Bill of Human Rights'[57] and other international human rights instruments in consonance with international co-operation. Another enhancing factor in this boundary is the UN resolution concerning poverty at different times.[58]

The impact of poverty is global but the presence of it is local.[59] Poverty is more severe in developing and third world countries rather than the rest.[60] The demonstrated quest of the third world for development in order to overcome poverty was eventually recognized in the *1986 UN Declaration on the Right to Development,* subsequently reaffirmed by the *Vienna Declaration and Programme of Action* adopted by the World Conference on Human rights. Development here perceived as the key to unlocking the inequitable distribution and utilisation of resources, which had characterised the global economy for so long to the grave detriment to the third world. It entails that the concept of development must entail not only the idea of economic betterment but also of greater human dignity, security, justice and equity.[61] This ultimately leads to the consensus that there has to be an end to poverty. Under this declaration, 'right to development' is regarded as a prerogative of state and a reflection of its territorial sovereignty.[62]

---

56 Above note 54.

57 The *International Bill of Human Rights* consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols. UN Fact Sheet No.2 (Rev.1), *The International Bill of Human Rights,* available at: <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> last accessed on 24 August 2014.

58 Resolutions of the Commission on Human Rights on Extreme Poverty: E/CN.4/RES/2004/23, E/CN.4/RES/2003/24, E/CN.4/RES/2002/30, E/CN.4/RES/2000/12, E/CN.4/RES/1999/26, E/CN.4/RES1998/25, E/CN.4/RES/1997/11, E/CN.4/RES1996/10, E/CN.4/RES1995/16, E/CN.4/RES1994/12, E/CN.4/RES/1993/13, E/CN.4/RES/1992/11, E/CN.4/RES/1991/14, E/CN.4/RES/1990/15, E/CN.4/RES/1989/10, E/CN.4/RES/1988/23. Relevant resolutions of the General Assembly: A/RES/57/211, A/RES/53/146, A/RES/47/196, A/RES/46/121.

59 Narayan, above n 8, 230.

60 Areas in the world where poverty is common include India, South-East Asia, Africa and South America (third world countries.) However, most countries in the world experience poverty to some degree, for example Australia. Visit for more details, <http://members.iinet.net.au/~rabbit/poverty.htm> last accessed on 24 August 2014.

61 Lucila L Salcedo et al, *Social Issues,* 1999. 4.

62 Ibid.

In 1993, *the Vienna Declaration and Programme of Action*[63] recognised the solemn commitment of all states to fulfill their obligations to promote universal respect for, observance and protection of all human rights and fundamental freedoms for all.[64] Here, priority is given on the immediate alleviation and eventual elimination of poverty since it inhibits the full and effective enjoyment of human rights.[65] Before that, the *Declaration on Social Progress and Development, 1969*[66] was declared for the equitable redistribution and mobilisation of resources,[67] progressive increasing of the provision necessary for budgetary and other resources[68] and adoptions of other measures. One of the bold objectives of such proposed initiatives was to eliminate poverty and the assurance of a steady improvement in the levels of living.[69]

In poverty reduction, the matter of resource mobilisation is an important factor. Taking this view into consideration[70] *the Cairo Declaration on Population and Development, 1994* says for a strategically allocation of resources[71] among various sectors, which in turn depends upon social, political, economic and cultural realities of the country. In this regard it has determined a 'call for action'[72] i.e., enacting legislation, formulating policies, monitoring, generating public support, etc.

In 1995, *the Copenhagen Declaration on Social Development* [73]acknowledged that the people of the world have shown in different ways an urgent need to address profound social problems, especially poverty, unemployment and social exclusion.[74] It was further added that the main task for overcoming those problems is to address both their underlying and structural causes and their distressing consequences in order to reduce uncertainty and insecurity in the life of people.[75] In this regard, certain commitments were made like, ensuring the international community and international organisations, particularly the multilateral

---

63 UNGA. 1993. A/CONF.157/23, available at <http://www.unhchr.ch/huridocda/huridoca.nsf/%28symbol%29/a.conf.157.23.en > last accessed on 24 August 2014.

64 *The Vienna Declaration and Programme of Action, 1993*, Section-1.

65 Ibid.

66 G.A.res. 2542 (XXIV), 24 U.N. GAOR Supp. (No. 30) at 49, UN Doc. A/7630 (1969)

67 The *Declaration on Social Progress and Development, 1969*, Part-III

68 Ibid, article 16.

69 The *Declaration on Social Progress and Development, 1969*, part 2, article 10(c).

70 The *Cairo Declaration on Population and Development,1994*, para-4.

71 Ibid.

72 Ibid.

73 UNGA. 1995. A/CONF.166/9, available at< http://www.un-documents.net/cope-dcc.htm> last accessed on 24 August 2014.

74 The *Copenhagen Declaration on Social Development, 1995*, annex-1, para-1.

75 Ibid.

financial institutions[76] to assist developing countries in particular to achieve the goal of eradicating poverty.

To eradicate poverty one of the main challenges is of financing especially in developing countries. This challenge has been addressed by the *Monterrey Consensus of the International Conference on Financing for Development, 2002.* It speaks for the mobilisation of both domestic[77] and international resources[78] in common pursuit of growth, poverty eradication and sustainable development.

Through the Millennium Declaration and the Millennium Development Goals (MDGs) the world is addressing various dimensions of human development, such as halving by 2015 the proportion of people living in extreme poverty.[79] Developing countries are working to create their own national poverty eradication strategies based on local needs and priorities. The United Nations Development Programme (UNDP) advocates for these nationally-owned solutions and helps to make them effective through ensuring a greater voice for poor people, expanding access to productive assets and economic opportunities, and linking poverty programmes with countries' international economic and financial policies.[80] At the same time, UNDP contributes to efforts at reforming trade, debt relief and investment arrangements to better support national poverty reduction.[81]

So, the abovementioned muniments have widen the horizon beyond existing national and international socio-economic settings, for example, a)

---

76 Ibid.

77 The *Monterrey Consensus of the International Conference on Financing for Development, 2002.*

78 Ibid.

79 UN Secretary General Ban-Ki- Moon said 'eradicating extreme poverty continues to be one of the main challenges of our time, and is a major concern of the international community. Ending this scourge will require the combined efforts of all, governments, civil society organizations and the private sector, in the context of a stronger and more effective global partnership for development. The Millennium Development Goals set time bound targets, by which progress in reducing income poverty, hunger, disease, lack of adequate shelter and exclusion — while promoting gender equality, health, education and environmental sustainability — can be measured. They also embody basic human rights — the rights of each person on the planet to health, education, shelter and security. The Goals are ambitious but feasible and, together with the comprehensive United Nations development agenda, set the course for the world's efforts to alleviate extreme poverty by 2015', available at: <http://www.un.org/millenniumgoals/bkgd.shtml> last accessed on 26 August 2014.

80 UNDP. 2012. *Poverty Reduction, Zimbabwe,* available at: <http://www.undp.org.zw/focus-areas/povertyreduction?3a1ed061a28f8a5e62fd4865066ea7fa,> last accessed on 24 August 2014.

81 Ibid.

reveals the presence of poverty as a human rights concern;[82] b) removes the marginal attentions to 'poverty' and 'poverty reduction';[83] c) helps frame pro-poor policies at a greater range presently;[84] d) directs to follow various conditions and consensus;[85] e) helps focus on issues which can either exacerbate poverty or enshrine a human right not to be poor and in establishing specific rights entitlements that bear on reducing poverty.[86]

So, taking the entire international phenomenon altogether represents the view that in international arena sufficient instruments exist which are worthy enough to shape a ground on the basis of which it can be said that a legal and policy framework exists for poverty reduction *albeit* not fully developed.

4.2 National Framework

Bangladesh is a party to many of these international human rights instruments *albeit* with certain reservations.[87] This, as per international legal and jurisprudential discourse, makes it imperative that, the Government of Bangladesh shall endeavor to implement those provisions and create the framework nationally in consonance with international legal and policy environment and co-operation.

The Constitution of Bangladesh pledges that it is the fundamental aim of the state to realise a society in which the rule of law, fundamental human rights and freedoms, equality and justice will be secured for all citizens.[88] Again, the main butt of our national building was to set up a socialist society upholding the principles of equality and justice-political, economic and social.[89] Accordingly, fundamental rights for the citizen of Bangladesh have been guaranteed in the Constitution which is civil and political in nature.[90] On the other hand, most of the socio-economic rights are accommodated in part-II as the fundamental principles of state policy,[91]

---

82 Osvaldo Feinstein and Robert Picciotto (eds), *Evaluation and Poverty Reduction: Proceedings from World Bank Conference* (OED, 2000) 165.

83 Else Oyenetal, *Best Practices in Poverty Reduction: An Analytical Framework* (CROP, 2002) 1.

84 Paul Mosley, *The Politics of Poverty Reduction* (Oxford University Press, 2012) 16-49.

85 T. Pogge & A. Follesdal (eds.), *Real World Justice: Grounds, Principles, Human Rights and Social Institution* (Springer, 2005) 22.

86 Asbjorn Kjonstad Lucy and Peter Robson (eds) *Law and Poverty: The Legal System and Poverty Reduction* (Zed Books, 2004) 22-34.

87 Dr. Md. Rahmat Ullah 'Bangladesh's adherence to International Human Rights Instruments: A Critical Study', in Dr. Mizanur Rahman (ed) *Human Rights and Empowerment* (ELCOP, Dhaka, 2001) 175-181.

88 The Preamble of the *Constitution of the People's Republic of Bangladesh.*

89 Ibid 3

90 Ibid, part-III (arts 26-47).

91 Ibid, Part-II (arts 8-25).

the Constitution itself terms those as 'principles' not laws.[92] Being so, though these provisions are not enforceable by the court directly but the court is not indifference to enforce them indirectly. This is evident from various verdicts of the Supreme Court of Bangladesh.[93] So, the Constitutional pledge to uphold and ensure the rights of the people led to a framework to combat against poverty.

Again, article 15 of the Constitution says that it shall be a fundamental responsibility of the state to attain, through planned economic growth, a constant increase of the productive forces and a steady improvement of the material and cultural standard of living of the people, with a view to securing to its citizens- (a) the provision of basic necessities of life, including food, cloth, shelter, education, and medical care; (b) the right to work, that is the right to guaranteed employment at a reasonable wage having regard to the quantity and quality of work; (c) the right to reasonable rest, recreation and leisure; (d) the right to social security, that is to say the public assistance in cases of undeserved want arising from unemployment, illness or disablement, or suffered by widows or orphans or in old age or in other such cases. To combat poverty, furthermore, the apex law provides certain other provisions relating to equality of opportunity,[94] principle of non-discrimination,[95] advancement of backward section of society,[96] compulsory education,[97] and the instrument of development.[98] The ultimate goal of those provisions in broad terms is eradication of poverty and development of Bangladesh. So, in accordance with this constitutional obligation since 1973, Bangladesh has been formulating national development plans known as the 'Five-Year Plan'.[99]

---

92 Muhammad Ekramul Haque , 'Legal and Constitutional Status of the Fundamental Principles of State Policy as embodied in the Constitution of Bangladesh' (2005) 16(1) *Dhaka University Law Journal* 13-32.

93 For example in *Secretary, Ministry of Finance, Government of Bangladesh v Mr. Md. Masdar Hossain & others* 20 BLD (AD) 104, the court does not seem to enforce the Principle directly but the court criticized the state for non-implementation of Article 22 of the Constitution of Bangladesh, one of the Fundamental Principles of State Policy.

94 Article 19(2) of the *Constitution of the People's Republic of Bangladesh* states that, the State shall adopt effective measures to remove social and economic inequality between man and man and to ensure the equitable distribution of wealth among citizens, and of opportunities in order to attain a uniform level of economic development throughout the Republic.

95 The *Constitution of the People's Republic of Bangladesh*, art.28(1).

96 Ibid, Article 28(4).

97 Ibid, Article 17.

98 Ibid, Article 16.

99 Since independence the development process of Bangladesh has been following 'Five-year Plans' and all succeeding 'Five-year Plans' are continuation of the preceding one. Five annual development Plans make one" Five-year Plan" and each budgetary year targets to complete one annual development plan of the five-year's plan. For more details, see: Ullah, Dr. Md. Rahmat, 'Human Rights, Poverty and

It has been visible that all five -year development plans have given due emphasis on poverty reduction.[100] In the fifth five-year plan[101] it is mentioned that poverty reduction is the over-riding object of the plan. To achieve this objective, certain initiatives are decided to carry out, like, generation of productive employment, achievement of food self-sufficiency, human resources development, development of infrastructure, curbing population growth, provision of environment, closing the gender gap and establishment of better social justice through more equitable distribution of income.

However, in line with this journey, the 'Sixth Five Year Plan' of Bangladesh (FY2011-15), which came into operation from July 2010, puts accelerated growth with equity and social justice as the cornerstone of the underlying development strategy. Accelerating growth, decent job creation, human development and reductions of poverty, reducing income inequality and regional disparities are overarching goals of this latest plan.[102]

In order to ensure access to the assistance of the World Bank, in recent times, Bangladesh being an inexperienced country has prepared primarily

---

Development Planning in Bangladesh: The PRSP Debacle' in Dr.Mizanur Rahman, (ed) *Human Rights and Development* (ELCOP, Dhaka, 2002) 101-108.

100 *The First Five-Year Plan (1973-1978)* recognized poverty reduction as one of its foremost objectives. The basic approach for alleviation of poverty was generation of employment through higher growth, and, using monetary and fiscal policies to facilitate equitable distribution of basic goods to make them available at reasonable prices to the poor; The *Two-Year Plan (1978-1980)* placed top priority on the growth rate, rather than on poverty reduction. The *Second Five-Year Plan (1980-1985)* of Bangladesh focused on poverty reduction through growth of income and employment. Growth with equity through expansion of employment was expected to raise the purchasing power. For poverty alleviation, planners provided incentive to agricultural support and agro-process industries as these would contribute to the development of the rural economy. The *Third Five-Year Plan (1985-1990)* of Bangladesh placed poverty reduction to sixth position among eight pronounced objectives. Generation of employment through the dynamic private sector, satisfaction of minimum basic need through increased supply and higher income and faster economic growth was expected to take care of poverty. Since economic growth was seen as the cure for endemic poverty, the Plan provided only marginal support for delivery of basic social services to the poor and the plan disadvantaged. The *Fourth Five-Year Plan (1990-1995)* held poverty alleviation and employment generation through human resource development as one of its major objectives. The plan emphasized the resilience of the poor and the disadvantaged groups to survive against most adverse circumstances.

101 The *Fifth Five-Year Plan (1997-2002)* of Bangladesh considers alleviation of poverty as synonymous with development. For this purpose, development strategies seek to accelerate economic growth, enforce higher investments in basic services and social sectors, restructure institutions and administrative framework, enhance the poor's crisis coping capacities and build up their asset base and promote targeted income and employment programmes.

102 *Introduction of the fifth five-year plan (1997-2002),* Planning Commission, Ministry of Planning, Government of the People's Republic of Bangladesh.

an Interim Poverty Reduction Strategy Paper (I-PRSP).[103] The I-PRSP was prepared under the constraints of limited opportunities for consultation and thematic review. Being so, a number of gaps were identified during post-document reviews and consultations as well as in the Joint Staff Assessment of the World Bank and the IMF for appropriate consideration in the preparation of the full-blown PRSP that addresses- i) environment-poverty interface, ii) strategy for water resources management, iii) quality improvement in education, iv) mainstreaming gender issues in agriculture, v) rural development and labor market, vi) private sector development, vii) medium term plan for trade policy reforms, viii) financial sector reforms, ix) policies and institutions for rural non-farm activities, and x) medium term framework on sectoral policy priorities.[104]

The Government vision for a 'Poverty free Bangladesh' is to reduce poverty within the shortest possible time through attaining higher economic growth. In line with its objective, NSAPR II (FY 2009-11) was approved by the then Caretaker government in 2008. In 2009, the same has been revised to align the NSAPR II in line with the development vision of the present govt.[105]

Furthermore, over the last 20 years, Bangladesh has been exposed to the policy reform process introduced by the World Bank and IMF through their Structural Adjustment Policies (SAP) and Enhanced Structural Adjustment Policies (ESAP).

However, in the arena of statutes concerning the adherence to the poverty reduction is not satisfactory both in terms of a) making the laws; as well as b) content of laws. Though poverty is one of the greatest problems in this region particularly in rural area from very past but the first law enacted remotely related to poverty reduction was 'The Bengal Rural Poor and Unemployment Relief Act, 1939 (Bengal Act X of 1939).[106] The poor and unemployed people could have received financial aid[107] under this

---

103 *A National Strategy for Economic Growth, Poverty Reduction and Social Development*, Economic Relations Division, Ministry of Finance, Government of the People's Republic of Bangladesh, April 2002.

104 *National Strategy for Accelerated Poverty Reduction,* General Economics Division, Planning commission, Government of the People's Republic of Bangladesh, October 2005.

105 In January 2009 the political regime of Bangladesh has changed and Awami League came into power and revised the NSAPR II. The revised NSAPR II is based on the reality of multidimensionality of poverty and takes into account the dynamics of the socio-economic factors that reinforce and perpetuate poverty in the country. For, more details, see, *National Strategy for accelerated Poverty Reduction II (Revised) FY 2009-11.* General Economics Division, Planning Commission, Government of the People's Republic of Bangladesh, December 2009.

106 East Pakistan Code, Vol. VI, at pp. 9-15 (Now stands repealed).

107 *Bengal Rural Poor and Unemployment Relief Act, 1939,* s 3.

repealed Act of 1939.[108] After the birth of Bangladesh in 1971, the first law enacted regarding poverty matter in 1989, namely, The Bogura Polli Unnayon Academy Ordinance, 1989 (Act No. IX of 1989).[109] This Act, mainly dealt with the rural development issue through the reduction of poverty. In the same year, Palli Parishad Ain, 1980 (Act No. XXXIII of 1989) was enacted for ensuring the overall improvement of the village people. Both of the laws of 1989 now stand repealed. However, in 1999, the Palli Daridro Bemochon Foundation Ain (Act No. XXIII of 1989)[110] was enacted. Among the different activities of the foundation established[111] under this Act, one of the bold functions is to reduce the poverty and to ensure the equality of man and woman.[112] However, after 1999, there is no specific law made, with a proximate connection to poverty reduction.

Owing to this lack of strict and available legal provision, the judiciary is also a little bit reluctant to give any direction relating to poverty issue. However, The Supreme Court (SC) of Bangladesh in a recent case namely *'Ain O Salish Kendra (ASK) and Others vs. Government of Bangladesh and Others'*[113] has given the verdict that is pro-poor in nature. 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 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"[114]

So, the international instruments to which Bangladesh is a party, the constitution and other laws, judicial decisions, national development plans- all contain provisions regarding the reduction of poverty, although not fully developed. So, the Government cannot stand distinct well outside the adherence of poverty reduction initiatives rather it is under a clear obligation to reduce poverty. This is also because of the fact that it is respectful both to the human rights and human dignity.

---

108 The said Act, have been repealed in 1960 through the *Bengal Rural Poor and Unemployment Relief (Repeal) Ordinance, 1960* (EPO No. XX of 1960).

109 *Bangladesh Gazette* dated 27 August 1989, 42 DLR 1990,13-15.

110 *Bangladesh Gazette* dated 10 December 1999, 52 DLR 2000, 1-13.

111 Ibid, section 4.

112 Ibid, section 15(1).

113 Writ Petition No. 3034 of 1999, 19 BLD HCD (1999) 488.

114 Ibid.

5. Poverty in Bangladesh: A Profile

Though different measurement techniques provide somewhat different data about the level and incidence of poverty, the general picture of poverty in Bangladesh is critical. In an assessment of statistics on poverty based on human development indicators, UN Human Development Report points out that 86% of the total population of Bangladesh live below the poverty line.[115]

5.1 Poverty: A Brief Scenario

Bangladesh is one of the world's poorest countries, ranking third after India and China in the extent of poverty.[116] The population is predominantly rural, with about 85 per cent of its total population[117] living in rural areas. Around 31% of the rural population presently suffers the indignity of chronic poverty, low consumption, hunger and under-nutrition, lack of access to basic health services, illiteracy and other deprivations for more than a decade. About 24% of the total population currently lives in extreme income-poverty. About 19% of rural households cannot have 'full three meals' a day; about 10% subsist on two meals or less for a number of months every year. While Bangladesh has come out of the 'shadow of famine', the problem of starvation still persists. However, 47% people are staying below poverty line and 28% of population lives under the extreme poverty line. About 40 million people go to bed without meal every night. This observation shows that Bangladesh is a country of poor. The long term growth trend fluctuates here randomly. Although, several international organizations like IMF, World Bank; Government and Non-Governmental organizations(NGOs) have been working for the alleviation of poverty but the success in the field is very negligible i.e., 1% or 1.8% at best each year.[118] Statistics[119] show reduction of poverty in the last five years (1999-2004) from 44.7% to 42.1%. But according to the principles of Millennium Development Goals (MDG), it has to reduce poverty by 1.15% every year.[120]

---

115 UNDP, *'Human Development Report'*, (1993) *available* at: <http://hdr.undp.org/en/reports/national/asiathepacific/bangladesh/name,2748,en.html> last accessed on 24 August 2014.

116 Population live below poverty line in China is 13.4%, in India 29.8% and in Bangladesh is 31.51%, available at:< http://www.indexmundi.com/g/r.aspx?v=69> last accessed on 24 August 2014.

117 Total population (in thousands)-142319, Total male-71255, Total female-71064, *Bangladesh Bureau of Statistics*, available at: <http://www.bbs.gov.bd/Home.aspx,>last access on 24 August 2014.

118 The *Daily Star*. 2006 <http://www.thedailystar.net/2006/05/01/d605011110192.htm> (last accessed on 15 July 2014)

119 Ibid.

120 Ibid.

Again, the geography of poverty, regional variations, and spatial patterns are also critical in Bangladesh, because a) economic growth and setbacks are not static over time, b) nor are they uniform over space and the rate for Bangladesh during 2000s was much lower than that of the rates in China, India and Vietnam.[121] The poverty map[122] of Bangladesh presents a zigzag picture. Poverty headcounts rate[123] is also different.

Another dimension of poverty in Bangladesh is 'seasonal poverty', locally known as Monga, indicates the seasonal deprivation of food during the pre-harvest season of *Aman peddy*, where the incidence of poverty is much higher.[124] An analysis of household income and expenditure survey (HIES) data shows that average household income and consumption are much lower during Monga season than in other seasons, and that seasonal income greatly influences seasonal consumption.[125] However, lack of income and consumption smoothing is more acute in greater Rangpur, the North West region, than in other regions, causing widespread seasonal deprivation. For example, HIES findings suggest that, while the rural poverty-headcount rate nationwide was 43.8 percent in 2005, the greater Rangpur (northwest) region had a rural poverty rate of 57.4 percent.[126]

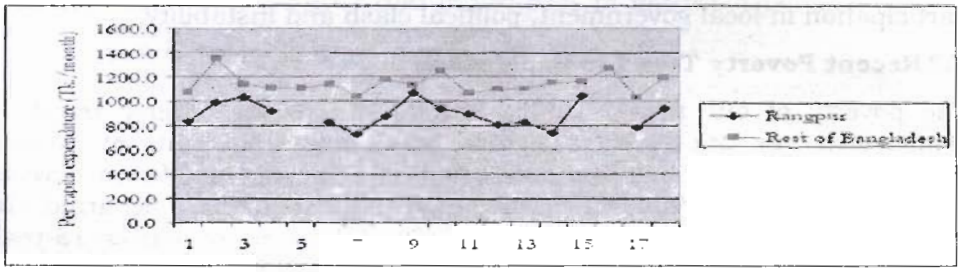

Figure: Distribution of Per Capita Expenditure.[127]

---

121 Ullah, above note 99.

122 Poverty mapping is an important statistical instrument that can estimate the poverty incidence at Upazila levels. The Bangladesh Bureau of Statistics(BBS) and the World Bank, in collaboration with the World Food Programme(WFP), recently updated the poverty map for Bangladesh which was financially supported by the UK's Department of International Development(DfID). The poverty map is available at: <http:/siteresources.worldbank.org/INTBANGLADESH/.pdf> last accessed on 28 July 2014.

123 HIES Survey Report (2010) Available at: <*www.bbs.gov.bd/home.aspx*> *last accessed on 24 August 2014.*

124 SR Khandker, 'Seasonal and Extreme Poverty in Bangladesh: Evaluating an Ultra poor micro-finance Project' (Policy research Working Paper no. 5331, The World Bank, 2012) available at: <http://www-wds.worldbank.org/external/default/WDSContentServer> Last access on 12 August 2014.

125 Ibid

126 Ibid

127 HIES Survey Report (2005), BBS. Available at: *www.bbs.gov.bd/home.aspx, last accessed on 16 July 2014.*

5.2 Causes of Poverty

Most of the altercations concerning poverty and poverty related policy originate from difference in, what is perceived to be the major determinants and causes of poverty. Poverty is a holistic phenomenon. It is multi-facet and interactive. What causes poverty in an emblematical third world country like Bangladesh? In fact there is no single cause of poverty; the plight of some poor could be due to several factors, each contributing to some degree of observed poverty. It is therefore, very important to identify the extent of the situation to which each of these factors contributes to observe poverty. Failure to isolate the real causes of poverty may result in institutional and policy interventions that do not alleviate poverty rather could actually foster the cause to invigorate poverty. However, some of the most notable reasons sorted out by the Government and Policy makers are- rapid growth of population, [128] corruption in every sphere of administration,[129] illiteracy, unemployment as well as chronic irregularity of work, natural calamities (river erosion, cyclone, tidal surge, excessive rain),[130] lack of administrative fairness and accountability, limited access to public services; lack of mass people's participation in local government, political clash and instability.

5.3 Recent Poverty Trend in Bangladesh

The poverty of our time is unlike other. The recent poverty trend in Bangladesh has undergone a significant change.[131] In spite of various traumas, Bangladesh has been successful in achieving significant poverty reduction since 1990s.[132] Sizeable poverty reduction occurred in Bangladesh between 2000 and 2005, as well as over the longer 15-year time horizon of 1991-2005.[133] However, the recent poverty trend in Bangladesh can be shown in the following ways under different headings:

5.3.1 Basic Rights Deprivations

Bangladesh has made almost satisfactory progress with respect to increasing access to education both at primary and secondary levels. Net primary enrollment rates rose from 60.5 % in 1991 to 91.9% in 2010, 93.5% in 2009 while at the secondary level enrollment rates have risen to 43% in 2008 and 49.1% in 2009 from 28%. Again one of the key MDGs is

---

128 CPD, 'Containing Population Pressure for Accelerating Poverty Reduction in Bangladesh', (UNFPA Paper Series 25, 2009). Available at: http://cpd.org.bd/pub_attach/unfpa25.pdf, last accessed on 24 August 2014.

129 Ibid.

130 The Daily Star, above note 118.

131 Ambar Narayan, Nobuo Yoshida and Hassan Zaman, *Trends and Patterns of Poverty in Bangladesh in Recent Years* (World Bank, 2007) available at: http://www.cleancookstoves.org/resources_files/trends-and-patterns-of.pdf, last accessed on 16 August 2014.

132 Ibid.

133 Ibid.

to achieve universal primary education by 2015. This entails, a) 100% enrollment in primary education, and b) 100% completion of primary education. Against these targets, the school enrollment rates fall drastically from primary education[134] to secondary.[135] In 2008 about 50.7% pupils completing grade 5 made a transition to the first year of secondary school. Gross enrollment rate in the secondary phase was only 49.8% in 2008, 53.9% in 2009. This suggests that the country has not been quite successful in addressing and achieving equity, equality, and efficiency of the delivery of primary and secondary education.

In 2005, 19.5% and 7.8% of the total population belonged to the class of hardcore poor and ultra poor respectively who are unable to afford even an adequate diet a day.[136]

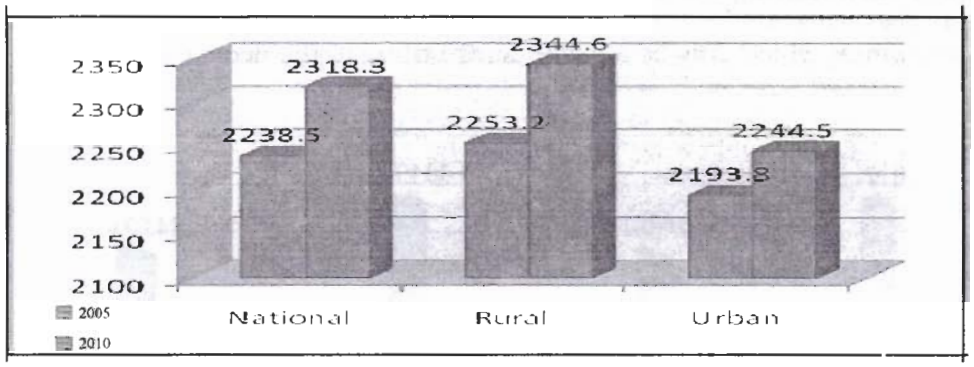

Figure: Per Capita Calorie Intake (K.Cal.)

Health is one of the most important indexes of human development.[137] Poor health is both the cause and effect of poverty, illiteracy and ignorance.[138] The goal of the health, population and nutrition sector is to achieve sustainable improvement in the health, nutrition, and reproductive health, including family planning, for the people, particularly to vulnerable groups, including women, children, the elderly and the poor. Some of the major pictures here are, total fertility rate declined to 2.7 in 2007 from 3.3 in 1996-97; under-five mortality rate per 1000 live births declined to 65 in 2007 from 116 in 1996-97; percentage of children's vaccination has improved to 81.9 in 2007 from 54.1 in 1996-97;

---

134 Grade 1 to 5.

135 Grade 6 to 10.

136 Based on cut-offs in Kilo Calorie per capita per day, Direct Calorie Intake Method (DCI) provides three measures of poverty: absolute poverty (<=2122Kc/capita/day), hardcore poverty(<=1805 Kc/capita/day) and ultra poverty (<=1600 Kc/capita/day). See, *'An analysis of the National Budget: Allocation for the Ultra Poor'*, by Centre for Policy Dialogue (CPD), 23 March 2011.

137 UNDP, *Human Development Report* (1990) available at <http://hdr.undp.org/en/reports/> last accessed on 23 August 2014.

138 Ibid.

percentage of delivery by trained person also increased from 8 in 1996-97 to 18 in 2007.[139] Nevertheless, the achievement of universal health coverage, the removal of rural-urban, rich-poor and other form of inequalities and the provision of essential services for vast majority of the population continue to remain major challenges for the health sector. More specifically, issues such as poverty related infectious diseases, mothers suffering from nutritional deficiency, child suffering from malnutrition, poor maternal and child health, unmet need for family planning and the rise in STD infections constitute major challenges.

5.3.2 Living Standard and Welfare

Data on various indicators of living standards and welfare also show improvement during 2005–10, corresponding to the decline in poverty. The data also shows[140] an increase in the coverage of social safety net programmes, which may be a factor contributing to the decline in poverty.

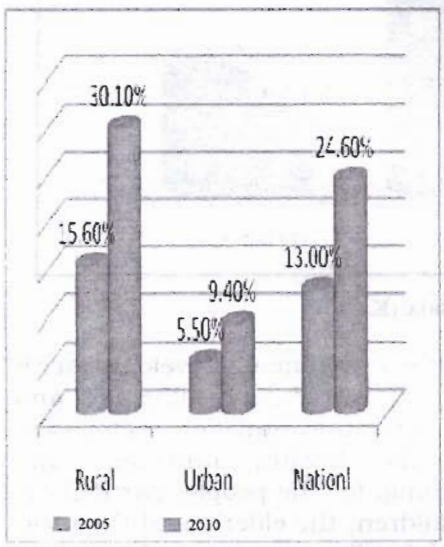

Figure: Households with Access to Electricity

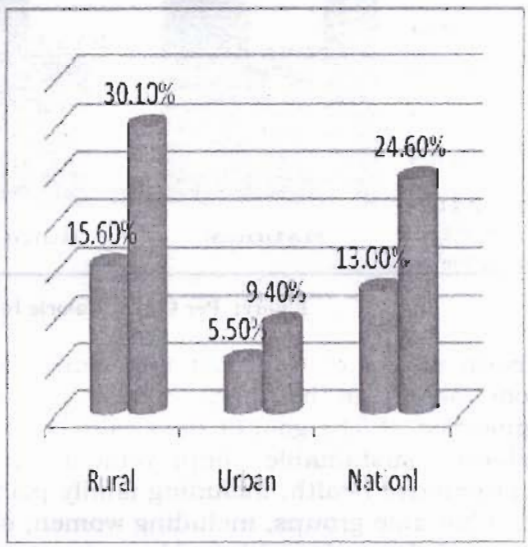

Figure: Households Benefiting from SSN

5.3.3 Household Income and Expenditure

Macroeconomic data shows that real GDP in Bangladesh has grown at an estimated rate of over 6 percent during 2005/06–2009/10. Estimates of household income, expenditure and food intake from the HIES show significant improvements during 2005–10. These data are consistent with a significant decline in poverty rates.

---

139 *HIES Survey Report* (2010) BBS, available at:< www.bbs.gov.bd/home.aspx>, *last accessed on 15 July 2014.*

140 Ibid.

Year	National	Rural	Urban
2010	11480	9648	16477
2005	7203	6096	10463

Figure: Average Monthly Household Income in Taka[141]

Year	National	Rural	Urban
2010	11200	9612	15531
2005	6134	5319	5833

Figure: Average Monthly Household Expenditure in Taka[142]

5.3.4 Poverty Reduction and Poverty Headcount Rate

Though not satisfactory but a sizeable poverty reduction has occurred in Bangladesh in the last few years as the latest poverty map[143] shows. Poverty headcount rates based on both upper and lower poverty lines[144] using the Cost of Basic Needs (CBN) method show that the proportion of poor in the population declined considerably between 2005 and 2010.

Poverty Head Count Rate (%) from 2010 and 2005 HIES				
Residence	Upper Poverty Line		Lower Poverty Line	
	2010	2005	2010	2005
National	31.5	40.0	17.6	25.1
Rural	35.2	43.8	21.1	28.6
Urban	21.3	28.4	7.7	14.6

Table: Poverty Head Count Rate[145]

---

141 Bangladesh Household Income and Expenditure Survey: Key Findings and Results (2010) BBS.

142 Ibid.

143 Poverty Mapping is a statistical exercise to estimate the incidence of poverty at sub-national levels, which enables Govt. civil society organizations, and development partners to identify locations of poor areas with great accuracy. In Bangladesh the official poverty rates are produced at the national and divisional levels only using HIES. The latest poverty map is available at: <http://www.bbs.gov.bd/webtestapplication/userfiles/image/Updating Bangladesh pm.pdf> last accessed on 22 August 2014.

144 *HIES Survey Report.* 2010. BBS, available at: <http://siteresources.worldbank.org/BANGLADESHEXTN/Resources/BDSummaryBrochure.pdf > last visited on 24 August 2014.

145 *HIES Survey Report* (2005 & 2010) BBS, available at: <http://siteresources.worldbank.org/BANGLADESHEXTN/Resources/BDSummaryBrochure.pdf > last visited on 28 June 2014.

5.3.5 Rural and Urban Gap

While the rural-urban gap has closed slightly between 2000 and 2005, the gap still remains considerable. Rural poverty rate in 2005 was 44 percent, compared to an urban poverty rate of 28 percent. Rural areas account for 75 percent of the total population of Bangladesh, but 82 percent of the poor population which is not consistent with article 16 of the Constitution.[146]

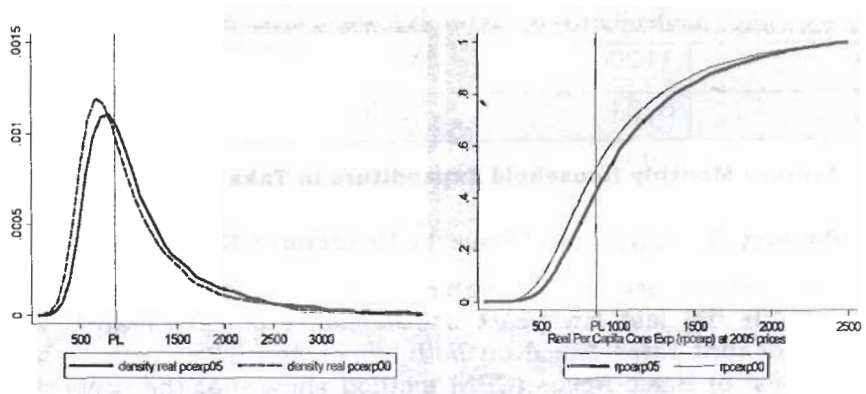

Figure: Rural and Urban Gap Comparison

5.3.6 Comparison to other South Asian Countries

Despite the progress in reduction of poverty Bangladesh still has a larger proportion of people living below the income poverty line, where it is defined as € 1.25 a day compared to many developing countries. Again the structure of the 'Bangladesh Economy' is in a slow steady of motion.

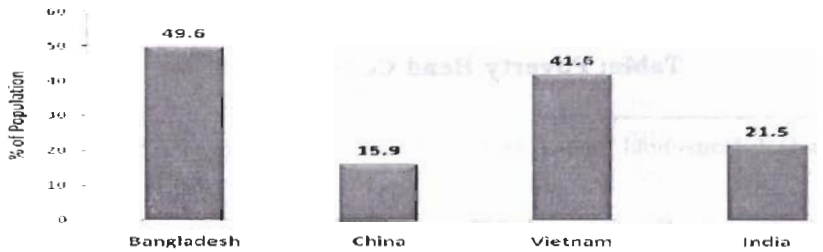

Figure: Poverty Headcount Ratio at $1.25 a day (PPP) (% of population) in 2005

---

146 Article 16 of *the Constitution of the People's Republic of Bangladesh* states that the state shall adopt effective measures to bring about a radical transformation in the rural areas through the promotion of an agricultural revolution, the provision of rural electrification, the development of cottage and other industries and the improvement of education, communication and public health, in those areas, so as progressively to remove the disparity in the standards of living between the urban and the rural areas.

Notwithstanding specific areas of progress, however, aggregate poverty rates remain dauntingly high. Pockets of extreme poverty persist. Inequality is a rising concern. Women continue to face entrenched barriers and insecurities in their attempts to consolidate their gains on social and economic fronts.[147] Governance weaknesses stand in the way of acceleration in the growth process. So, judging by current trends, breaking wholly free of the poverty chains remains a distant goal.

6. Combating the Poverty Paradox of Bangladesh within the Existing Framework

On the basis of the abovementioned data and information it is clear that some progress has been made in the arena of poverty reduction in Bangladesh.[148] However, the line of this reduction is unsteady and unsatisfactory. The way it advanced is very unpredictable and perhaps improper.[149] Several reasons may be connected to this.

The first and foremost reason may be attributed to the asinine conceptualisation of poverty. Here, poverty is still perceived as a material deprivation only or the failure to earn the livelihood.[150] According to the National Encyclopedia of Bangladesh, 'Poverty is an economic condition in which one is unable to enjoy a minimum standard of living. It is a state of existing in amounts (of earnings or money) that are too small to buy the basic necessities of life. The visible effects of poverty are malnutrition, ill health, poor housing conditions, and illiteracy. The impoverished people suffer from unemployment, underemployment and lack of access to resources.'[151] This very concept of poverty is acute among the successive governments of Bangladesh, policy makers, NGO workers and development activists. But, recently poverty is regarded as less of material deprivation and more of failure to achieve basic capabilities to live in dignity.[152]

---

147 IMF, *Bangladesh Unlocking the Potential: National Strategy for Accelerated Poverty Reduction* (GED, 2005) ix.

148 Pierella Paci and Marcin Jan Sasin, *Making Work Pay in Bangladesh: Employment, Growth, and Poverty Reduction* (World Bank Publications, 2008) 8.

149 For example, the existing initiatives towards poverty reduction are carried out without linking with human rights.

150 Paul Spicker, Sonia Alverez Leguizamon and David Gordon *'Poverty: An International Glossary'* (International Studies in Poverty Research, 2007) Volume 1, 172.

151 Available at <http://www.banglapedia.org/HT/P_0240.HTM> last accessed on 24 August 2014.

152 OHCHR, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (2006) available at:

Owing to this dearth of knowledge regarding the perception of 'Poverty', the poverty reduction programmes, a) do not match with the real causes of poverty and of their beneficiaries; and b) are not so diversified to match with particular problem. The design and implementation of appropriate measures to enhance the economic condition of the poor have largely been the prerogative of national governments,[153] though influenced to an extent by large international agencies and individual donors.[154] In Bangladesh public development discourse is heavily influenced by donor agencies. As a result government efforts harmonized with global trend of coordinated strategy of poverty reduction.[155] The Government's anti-poverty action is more in line with aid discourse than any local knowledge as well as reality of particular people. This limitation of government strategy of poverty reduction gives space to the NGOs (Non-Government Organization) to work for poverty reduction. Their poverty perception is drawn from empirical data as well as information found during field visit.[156] The NGOs working in Bangladesh believe that the individual limitation cause poverty and that can better reduce poverty from the society having cognitive legitimacy.[157] This fundamental mistake of understanding both poverty as well as negating 'capability' approach work as a catalyst of not becoming the stakeholder as self-employed rather aid based. So, when the aid allocation diminishes the poor people get back their poor condition again and poverty persists.

The second reason may be attributed to the failure to the conceptual bridge between poverty and human rights. The conceptual framework

---

<http://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf > last accessed on, 24 August 2014.

153 UEMOA *'Regional Integration for Growth and Poverty Reduction in West Africa: Strategies and Plan of Action'*, (2006) available at: <http://www.ecowas.int/publications/en/macro/srrp.pdf > last accessed on 23 August 2014.

154 Ware Newaz, *Impact of Micro – Credit Programs of Two Local NGOs on Rural Women's Lives in Bangladesh* (Academic Dissertation presented in the University of Tampere, 2003)

155 Ibid.

156 Saifuddin Ahmed, *'NGO Perception of Poverty in Bangladesh: Do their Programmes match the reality?'*, (2006) available at <https://bora.uib.no/bitstream/handle/1956/1473/Masteroppgave-ahmed.pdf> last accessed on 24 August 2014.

157 Legitimacy is a generalized perception or assumption that the actions of an entity are desirable, proper or appropriate within some socially constructed systems of norms, values, beliefs and definitions. Cognitive legitimacy refers to the acceptance of a new kind of venture as a *taken for granted* feature of the environment.

presents a clear vision of a human rights approach to poverty reduction, a vision that explicitly encompasses accountability and empowering people as actors for their own development.[158] A human rights approach is also important from various other dimensions. According to the OHCHR:

> A human rights approach is grounded in the United Nations Charter, Universal Declaration of Human Rights, and binding provisions of human rights treaties. Moreover, it sharpens the moral basis of the work carried out by economists and other policy-makers, directing their attention to the most deprived and excluded, especially those excluded by discrimination. It describes how a political voice for all people and access to information are integral to development. Informed and meaningful participation in development is a matter of right rather than privilege.[159]

Furthermore, without this conceptual bridge, it is not convenient to view poverty as a violation of human rights. But, this very well-known edifice is well outside the ambit of poverty discourse. This is mainly because, in that case, it may result in certain obligations on duty bearers i.e., Government, NGOs, etc.

Then, the national poverty reduction arena is poor in quality and quantity as well as slow in development. Absence of adequate statutes to address poverty issue as well as the reluctance of the supreme judiciary to address the same is vigilant. A solid foundation of the rule of law is widely acknowledged as a necessary precondition for poverty reduction and equitable economic development.[160] But, the very idea is remote from the actual reality in Bangladesh.

The international framework developed by the world community on the other hand, still suffers from certain uncertainty and obscurity. The perception of poverty and its connection to human rights are still a matter of ongoing debate. Though accepting poverty as a violation of human rights is now becoming popular. But at the same time it raises some unresolved questions as well. For example, there is an emerging view that poverty constitutes a denial or non-fulfilment of human rights. But does this mean that poverty is the same thing as non-fulfilment of human

---

158 OHCHR, *Human Rights and Poverty Reduction: A Conceptual Framework,* (New York and Geneva, 2004) 2 available at:http://www.ohchr.org/Documents/Publications/PovertyReductionen.pdf, last accessed on 23 August 2014.

159 Ibid.

160 R. V Van Puymbroeck, 'Law and Justice for Development' 2003 (1) *World Bank Leg. Rev.* 12.

rights in general – i.e., does the non-fulfilment of any kind of human rights constitutes poverty? Or should only certain kinds of human rights matter in the context of poverty? If so, how are we to decide which ones, and can the discourse on poverty be indifferent to the rest?[161] Although those questions are answered by OHCHR in the following words:

> The simplest approach to take would be the all-embracing one- i.e., to define poverty as non-fulfilment of any kind of human right. This approach would obliterate any conceptual distinction between poverty and non-fulfilment of human rights by definition, but it would not be appropriate to do so. For it would be farcical to characterise certain cases of non-fulfilment of rights as poverty, no matter how lamentable those cases may be.[162] For instance, if a tyrant denies his political opponent the right to speak freely, that by itself would not make the latter poor in any plausible sense. Certainly a deprivation has occurred in this case, but it seems implausible to characterize this deprivation as poverty.[163]

The reason it seems implausible is that when reconnoitered as a social problem, the concept of poverty has acquired a specific connotation that ties it closely with lack of command over economic resources.[164] Since, poverty entails some kind of bereavement, when it is ventilated as a social enigma, the concept has a much more restricted inclosure because of its well-settled congregation with deprivation caused by economic constraints. This link cannot be repudiated. A definition of poverty therefore, is necessary that refers to the non-fulfilment of human rights, but without delinking it from the interdiction of economic resources. It is argued that Amartya Sen's 'capability approach' furnishes a concept of poverty that replenishes these twin requirements.

Finally, the response of Bangladesh Government to international arena in poverty reduction is not satisfactory. It has escaped some of its responsibility by a) not ratifying the international instrument or b) by reserving some of its provisions. On the other hand, the instruments

---

161 OHCHR, *'Human Rights and Poverty Reduction: A Conceptual Framework'* (New York and Geneva, 2004) <http://www.ohchr.org/Documents/Publications/PovertyReductionen.pdf> last accessed on 24 August 2014.

162 Ibid.

163 Ibid.

164 For this reason Amartya Sen, who has done more than anyone else to broaden the concept of poverty, insists that "there are some clear associations that constrain the nature of the concept, and we are not entirely free to characterize poverty in any way we like." See, A. Sen, *Inequality Re-examined* (Cambridge, Harvard University Press, 1992) 107.

ratified or promised to comply with are not adequately complied with, i.e., Bangladesh has failed to attain the MDGs to many respects already.[165]

So, the poverty study in Bangladesh readily lays itself open to the charge of concentrating too much exertion on the darker and more depressing aspects as a whole. Mass poverty still remains a stubborn and persistent problem here that appears to defy the solution.

6. Conclusion

Thus, the relationship between poverty and human rights is at once both simple and complex. The negative relationship between them is self-evident. The very concept of poverty talks about the denial of human rights and freedoms necessary to enjoy quality of life commensurate with human dignity. People living in poverty are in double jeopardy. They suffer a violation of their economic rights and not far away from the risk of discrimination and a denial of other civil and political rights. So, poverty is a complex human rights issue. Taking this view into consideration, in the context of prevailing global realities and human rights stream, the poverty reduction should eventually be emphasized. This can be done by, a) developing national poverty reduction framework, and b) complying with the international framework developed in collaboration with international human rights law.[166]

Bangladesh, however, has never had a homegrown holistic dynamic strategic framework to combat poverty nor had a clearly articulated operational approach been developed to address the issue. As a result, what has served as a strategy for poverty reduction in Bangladesh has been like more than aggregation of a large number of various donor-funded micro projects[167] supplemented by some discrete domestically funded programmes. Where, poverty is accepted only as a material deprivation without linking with human rights. Therefore, the poverty reduction paradigm is very unsteady, improper and unpredictable. This is supportive by poverty data and scenario.

---

[165] Out of the 52 MDGs targets, Bangladesh is on track on 19 of them; and 14 of them need attention, available at: <http://www.undp.org.bd/mdgs.php> last accessed on, 24 August 2014.

[166] These two steps are very important because, i) a national framework works as a *sine qua non* to reduce this national problem of social injustice, and ii) poverty can be reduced to a substantial degree, if the obligations under the international human rights instruments are adequately and satisfactorily implemented. See, UN Fact Sheet No. 25, the Office of the High Commissioner for Human Rights (OHCHR), *Forced Evictions and Human Rights*, available at <http://www.ohchr.org/Documents/Publications/FactSheet25en.pdf> last accessed on 17 September 2014.

[167] Debapriya Bhattacharya and Rashed A M Titumir, *'Poverty Reduction in Bangladesh: Absence of a National Framework, an Abundance of Donors Strategies'* (CPD Working Paper Series, Poverty, Inequality and Social Justice, paper 4) 2.

So, for a steady and progressive reduction of poverty, the establishment of conceptual framework between poverty and human rights is important on the one hand, as well as the development of a national framework in consonance with international one is urgent on the other hand. The sooner is better.

Violation of the Rights of Rape Victims: Response of Criminal Justice System of Bangladesh

Dr Md. Abdur Rahim Mia*

1. Introduction

Bangladesh is a patriarchal society where gender inequality is a norm. Discrimination of women is usually not considered by the society as a wrong, immoral or even illegal. Women are often treated cruelty at home and by the family, in the workplace and at the societal and national level. As a consequence of such treatment, aggrieved women are supposed to seek relief from the Criminal Justice System (CJS), but non friendly CJS atmosphere often prevents them from proceeding for a formal solution. The criminal process include everything that is required to be done from the moment a woman comes into contact with the CJS and at every stage, although woman have rights but often these rights are violated. After rapes have been committed, women victims repeatedly are heard to complain that they not only suffer loss, injury and emotional trauma, but are poorly treated by the agencies of criminal justice. They are victimized doubly: by the criminal and by the system.[1] Criminal justice is based on different activities of the court proceedings, functions of police and prosecutions such as filing of a case, investigations, framing of charge, trial, conviction or acquittal etc.[2] Responses of any constituent of CJS i.e. police, prosecutors, Judges and doctors may affect the criminal proceedings. Police inefficiency, corruption, gender insensitivity are responsible for violating the rights of rape victims. Most of the victims are disappointed at the obstructive role of the police. The judiciary is not sympathetic to women's cause. Gender insensitivity of lawyers, doctors and sometimes Judges affect rape victims. There are some discriminatory laws in Bangladesh which fails to provide equal rights and status to women as against men. Moreover, structural difficulties of CJS also limit rape victims' enjoyment of rights. As a result, rape victims remain in a state of despair from seeking justice. This article examines the practical role of different constituents of the CJS and structural difficulties of the CJS, for which the rights of rape victims are violated and it also concludes with recommendations to overcome this problem.

---

* Associate Professor, Department of Law, University of Rajshahi

1 George F Cole, *The American System of Criminal Justice* (Monetery, California, New York, Brooks/Cole Publishing Company 1935)132.

2 Robert D Pursley, *Introduction to Criminal Justice,* (New York, Macmillan Publishing Company, 1987) 29; M Abdul Hannan, *Human Rights of the Accused in the Criminal Process*, (Gurgaon, India, Madhav Books, 2009)1; M Faiz Ud-Din and M Abdul Hannan, 'Protection of Human Rights in Criminal Justice: Bangladesh Perspective' (Research Project 1998, Rajshahi University, Bangladesh) 1; Shaheen Akhter Munir, 'Violence Against Women in Bangladesh' (An Annual Research Report BNWLA, Dhaka 2005) 77.

2. Causes behind Unwillingness of Rape Victims to take Legal Action

Unwillingness to take legal remedy is itself a violation of women's rights, because it creates mental pressure and limits rape victims to seek justice against the perpetrators. Rape[3] is a frequent occurrence in Bangladesh. In most cases, the victims or their family members remain silent due to social stigma or in fear of the rapist.[4] The patriarchal tradition in Bangladesh almost always places the burden on the rape victims to file a case. For fear of more harassment from police, doctors and advocates, most of the victims do not want to file a case. Most of the guardians of the victims hide the incidents or do not want to file the case for fear of culprit's pressure or for honour of the family in the patriarchal society, or, to ensure a good marriage of victims.[5] There is also reluctance of the victims to report because of the shame of public admission and insensitive environment in the police station. There is also a lack of police response and the slow process of bringing the guilty to book. However, even when these formidable barriers are crossed, the rate of arrest, prosecution and conviction of perpetrators are insignificant. One reason for the low rate of conviction may be the limitation of the police to produce a charge sheet, a necessary step to pursue a case against the offender.[6] Some women are even afraid of filing cases, as they believe it is impossible to conduct a case without offering bribe to some vested groups at various stages of proceedings.[7] Illiteracy, poverty and family pressures also play a vital role, as these women have virtually no access to the courts. When the victims are illiterate or unaware, they innocently destroy signs of rape. Mina Begum (22), a victim of rape case,[8] said that she had been raped one year earlier and after rape this matter was settled with the condition that rapist would marry her. She filed a case later when the rapist refused to marry her. By that time the signs of rape were destroyed and she could not produce sufficient evidence to prove her case. Again many rape victims do not have the financial resources to take the matter to court and therefore remain silent.[9] The expenses involved in seeking legal redress, such as, doctor's fees, lawyers' fees, court fees, and other incidental expenses,

---

3 *The Penal Code,1860* ss 375, 376.

4 Sima Moslem, *Dharshan Chitra,: Analysis of Rape Victims in Bangladesh (2002-2004),* (Dhaka, Bangladesh Mahila Parishad, 2004) 25.

5 ASK, 'State Response to Gender Violence', *Rights and Realities* (Dhaka, Ain O Salish Kendra, 1997)133; UNDP, *Human Security in Bangladesh, In Search of Justice and Dignity* (Dhaka, United Nations Development Program (UNDP), 2002) 101.

6 Ibid 133

7 Mohammad Yusuf Ali, 'Easy access to justice: Overcoming the Problems', *The Daily Star* (online), September 15, 2007 <http://archive.thedailystar.net/law/2007/09/03/hra.htm>

8 Case No- 216 /1999, *Nari O Shishu Nirjaton Damon Tribunal*, Rajshahi.

9 Shelby Quast (ed) , *Justice Reform and Gender* (Geneva Centre for the Democratic Control of Armed Forces, Geneva, 2009)

make it very hard for poor victims. Since most of the people in Bangladesh live overwhelmingly in rural areas,[10] travel costs pose an additional burden for them, especially for poor rape victims. Sometimes police takes money from the culprits and in addition, local elites threaten the victim from seeking assistance from the local police.[11] Sometimes, local elites take money from the perpetrators and persuade the victim's husband to declare his wife as bad character.[12] Many women have small children to care for and it can be difficult for them to arrange childcare during the court case period.[13] The elaborate legal proceedings often discourage women from taking legal action. The harassment and complexities involved in court procedures make rape victims accept out of court settlements. Political or any other form of backing from influential people obviously makes the process much more difficult to seek justice against the guilty parties.[14] The bribe that victims have to pay to the court officials, and even to the opposing lawyer, often becomes a deciding factor in the ultimate settlement before filling a case.[15] In some cases, parents of the victim mutually settle the matter in exchange of monetary compensation from the culprits. Rape victims suffer severe physical and psychological damages.[16] The sudden shock of humiliation makes the victim almost numb and inactive and such a reaction followed by fear and shame of social ostracism prevent her from taking any initiative.[17] A woman who is raped undergoes a traumatic experience on at least two occasions - first when she is raped and second during the subsequent trial.[18] Another drawback is that rape cases are not heard in camera and the victim has to face humiliation of repeating her ordeal and answering embarrassing questions in front of an eager and unscrupulous court audience.[19] Thus the victims do not come forward in order to save

---

10 A country populated over 14. 4 million, 80% of whom live in village communities that means 8 out of 10 Bangladeshi live in country side. See, more details, 'World Development Report, 2004', available at <*http://econ.worldbank.org/files/30042select* pdf, last accessed on 4 May 2005.

11 Moslem, above note 4,70

12 *Ibid*

13 Quast, above note 9.

14 Faiz Ud-Din and Hannan above note 2, 147

15 M. Shamsul Haque, 'Anti-corruption mechanisms in Bangladesh', <*http://www.article2.org/mainfile.php/0901/371*> last accessed on 4 January 2011.

16 Cole, above note 1, 89.

17 Yasmin Akhtar, Sharmeen Afroza Farouk, Rizwana Akhter, *A research on rape and burden of proof: a study on procedural inadequacy* (Dhaka, Bangladesh National Women Lawyers Association, 1999) 91.

18 Taslima Monsoor, *Management of Gender Relations: Violence against Women and Criminal Justice System of Bangladesh* (Dhaka, British Council, EWLR, 2008) 25.

19 Murlidhar C Bhandare (ed) *The World of Gender Justice* (New Delhi, Har-Anand Publications Private Ltd, 1999) 36.

themselves from embarrassment and, in turn save the family from shame.[20] It is humiliating for a rape victim to be questioned on her sexual history who, in addition to the trauma and indignity of describing her ordeal, must also bear the humiliation of revealing her sexual history during the trial.[21] There is also an overwhelming tendency in Bangladesh towards settling rape cases through local arbitration or *shalish*. Under such practices, the highest penalties of the rapist were found to be ranging from monetary penalty to a verdict to marry the victim. In case of rape related pregnancies, many Bangladeshi girls are forced to marry their rapists.[22] Later the husband forces her to have an abortion and denies all allegations.[23] Considering social stigma, the victims also agree to marry the men who raped them. If a rape victim is forced to marry the rapist and the marriage is broken thereafter, it becomes very difficult to bring about remedy. In that case, the rape victim and divorced woman cannot file a rape case and the rapists go unpunished. In fact, the rapists take the marriage as a strategy to avoid court case and punishment. According to Bangladesh Human Rights Commission, in 2010 the number of incidents of rape violence was 677 and only 374 cases were filed.[24] Even if they are reported, the unscrupulous officers in the police stations show negligence to register the cases. Even if the case is registered and an investigation starts, the female victims mostly feel shy and embarrassed to answer delicate questions posed by male investigating officers; as a result, the truth is not revealed.[25] For these above reasons, many rape victims do not want to file cases against the perpetrators. In this context, it is not surprising that most rape cases go unreported. The perpetrators of rape continue to go free despite the law because of three major reasons; the social stigma attached to rape, the accused often being the more powerful party and the legal loopholes in the system.[26]

---

20 Salma Sobhan 'Bangladesh: Women and the Law--A Case Study' (2001) 1(2) *Human Development Review* 189.

21 Monsoor, above note 18, 25; Cole, above n 1, 89.

22 Farhana Akhter, 'Marriage with rapist!', *The Daily Star* (online), 4 July 2003 <http://archive.thedailystar.net/law/200307/04/fact.htm>

23 Moslem, above note 4 ,72.

24 Bangladesh Human Rights Commission Report, 2010.

25 Motiur Rahman, 'Human Rights in Bangladesh: Women Perspective' in Khaleda Salahuddin, Roushan Jahan, and Latifa Akanda (eds), *State of Human Rights in Bangladesh: Women's Perspective* (*Dhaka: Women for Women,* 2002) 27.

26 Nilufar Matin, 'Women's Rights: Freedom of Participation and Freedom of Violence' in Ain O Salish Kendra(ed), *Human Rights in Banladesh,* (Dhaka, 2001) 236.

Rape Violence in Bangladesh from January, 2001 to September 2012[27]

Year	Number of Incidents	Cases Filed
2001	778	297
2002	1412	709
2003	1381	640
2004	977	443
2005	835	334
2006	741	227
2007	634	298
2008	263	157
2009	446	244
2010	626	323
2011	939	529
2012	913	477
Total	9945	4744

According to this table, from January 2001 to September 2012, only 47.70% cases were filed out of 9945 reported cases in the whole of Bangladesh and 52.30% cases were not filed. It is evident from the chart that victims are unwilling to bring in forefront their ill fate.

3. Response of Rape Related Laws

Laws are made in order to reduce crime.[28] But the reality does not give any positive picture in the case of the offence of rape. The legal provisions of most protective laws for women suffer from various loopholes or shortcomings.[29] Existing statutory laws of Bangladesh relating to women are hardly enforced or are misused. These laws have proven largely

---

27 Chart Prepared by Researcher from Documentation Unit, *Ain O Salish Kendra*, Dhaka

28 Taslima Monsoor, 'Justice delayed is justice denied: Women and Violence in Bangladesh', *The Daily Star* (online), 2 March 2006 <http://archive.thedailystar.net/law/2006/03/02/index.htm>

29 Afroza Begum, *Protection of Women Rights in Bangladesh: A Legal Study in an International and Comparative Perspective* (Thesis submitted to the Faculty of Law, University of Wollongong, Australia, 2004) 1

ineffective in promoting women's positions.[30] Since women form the most vulnerable group in the society, they repeatedly suffer from the existing discriminatory justice system established by these laws. The provision of section 155 (4)[31] of the *Evidence Act,* 1872 affects victims of rape. In rape cases, evidence about the victim's past sexual experiences is presumed. 'Want of consent' is often very difficult to prove in the court, almost never are there any eye witnesses, the evidence is unavoidably circumstantial.[32] Marks of resistance on the body of the victim are one such set of circumstances that form the evidence. But there may be situations in which there may be no such marks of physical injury i.e the women may be too weak or too dazed to resist, and the number of men may make resistance futile and may even cause more harm than passive submission.[33] Under these circumstances the lack of injury cannot lead to an inference of consent by the women. As stated above, the section is wide enough to apply, not only where rape is charged under the category of 'want of consent', but also where it is charged under some other head---- for example, where the offence is committed in respect of a girl below the statutory age. The fact that the prosecutrix is a person of 'generally immoral character' cannot have any significance whatsoever, where the prosecution is not based on the want of consent. As regards the credibility of woman as a witness, there does not seem to be any reason why the law should contain a rule discriminating against women. If 'generally immoral character' is regarded as discrediting the prosecutrix, then the same principle should also be applied for discrediting the character of the male accused. Rape followed by murder can not be tried under the *Nari O Shishu Nirjaton Damon Ain,* 2000 (NSNDA), if the incident of rape is not proved, because NSNDA is quite silent about this matter.[34] Under such circumstance, the case will have to be restarted under the *Penal Code, 1860* (PC). Naturally, defence counsel would try to convert rape and try to dub cases of rape followed by murder as 'murder case' so as to immune the accused from the purview of the special law.[35] It should be included in the definition of rape in the Act of 2000. Rape is not only a physical

---

30 The prime reasons for this are: the shortcomings and ineffectiveness of laws, women's inability to access legal proceedings, the traditional and cultural negative views about women's rights, the expensive and time consuming judicial process, the lack of efficient judiciary, and other socio economic reasons. See for more details, 'Domestic Violence: In Search of a Legal framework', *The Daily Star,* 11 March 2005, 27.

31 Section 155 (4) of the *Evidence Act 1872* states, When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

32 Murlidhar C. Bhandare (ed), *The World of Gender Justice* (New Delhi, Har-Anand Publications Private Ltd, 1999) 36.

33 BNWLA. above note 17, 50.

34 *The Nari O Shishu Nirjatan Damon Ain 2000* s 9; BNWLA, *Violence against Women in Bangladesh* (Dhaka, BNWLA, 2002) 75.

35 Ibid

torture but also a mental torture. So, mental torture should be brought into the definition of rape.[36] In fact, the definition of rape mentioned in section 375 of *Penal Code*, 1860 (PC) or section 2(e) of NSNDA, 2000 is neither complete nor updated according to the laws of Bangladesh. Rape is an intercourse committed forcibly and against the will of the victim.[37]

---

36 *Penal Code 1860* s 375

"A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:

Firstly, Against her will; Secondly, Without her consent; Thirdly, With her consent, when her consent has been obtained by putting her in fear of death, or of hurt; Fourthly, With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married; and Fifthly, With or without her consent, when she is under fourteen years of age.

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception: Sexual intercourse **by a man with his own wife, the wife not being under** thirteen years of age, is not rape.'

According to the *Nari O Shishu Nirjaton Damon Ain 2000* (amended in 2003),

'Rape' means rape stated under section 375 of the Penal Code 1860 subject to section 9 under this Act.

Section 9 of Act of 2000 is reproduced here: If any person commits rape with a woman or a child, shall be punished with rigorous imprisonment for life and with fine.

Explanation: Whoever has sexual intercourse without lawful marriage with a woman not being under sixteen years of age, against her will or with her consent obtained, by putting her in fear or by fraud, or with a woman not being above sixteen years of age with or without her consent, he shall be said to commit rape; ii. If in consequence of rape or any act by him after rape, the woman or the child so raped, died later, the man shall be punished with death or with transportation for life and also with fine not exceeding one lac taka; iii. If more than one man rape a woman or a child and that woman or child dies or is injured in consequences of that rape, each of the gang shall be punished with death or rigorous imprisonment for life and also with fine not exceeding one lac taka; iv. Whoever attempts on a woman or a child-

a) To cause death or hurt after rape, he shall be punished with rigorous imprisonment for life and also with fine.

b) To commit rape, he shall be punished with imprisonment for either description, which may extend to ten years but not less than five years rigorous imprisonment and also with fine.

v. If a woman is raped in the police custody, each and every person, under whose custody the rape was committed and they all were directly responsible for safety of that woman, shall be punished for failure to provide safety, unless otherwise proved, with imprisonment for either description which may extend to ten years but not less than five years of rigorous imprisonment and also with fine.

37 Naima Huq, 'Reflections on the Perception of "Consent" in Rape Cases' (2005) 16(2) *Dhaka University Law Journal* 72

The definition provided in these two laws poses more questions than solutions. The NSNDA is silent on the issue of women's committing suicide to escape violence of rape. In such cases, the people who force a woman to commit suicide can't be brought under the special law.[38] Even if a woman commits suicide for getting relief from repression such as rape or dowry related violence, that suicide is not triable under the NSNDA.[39] There is again a lot of confusion regarding the provision relating to child born as a consequence of rape. The person committing rape shall bear the responsibility of maintenance of the child born out of rape and the tribunal will decide what amount of expense the rapist shall pay.[40] There is anomaly in the NSNDA since it does not address a situation whereby the rapist has no property at all or where there are more than one rapist, from whose estate money shall be recovered for maintenance and who will be the father of the child.[41] The NSNDA also assumes that a woman must bear the burden of continuing a forced pregnancy. The NSNDA is silent as to what would happen to the child who is born if her mother fails to prove case against its rapist father? According to the personal laws, mother is the primary guardian of a child born out of marriage or any other sexual intercourse (rape inclusive). Therefore, it is very natural that the child born as a sequel to rape will be reared up by the woman.[42] The innocent child will have to face immense sufferings in her/his life.[43] Due to rape and illegitimacy question, rights of that child are seriously hampered in Bangladesh.[44] Through an amendment in 2003, the words 'fourteen years' appearing twice in the section 9 of NSNDA have been substituted by the words 'sixteen years' which implies that any man who forcefully engages in sexual intercourse with his wife (who is over sixteen years of age), shall not be liable for committing rape. The issue of marital rape has thus been overlooked under the law.

3.1 Burden of Proof

It is a pity that the rape victim herself has to prove that she has been raped. According to the *Law of Evidence, 1872*, the burden of proof lies on the victim, especially in rape cases. Moreover, a rape victim has to satisfy the court that she did not consent to such sexual act and she was forced into the act. She also has to produce the physical signs of struggle which may be extremely difficult for her. Whether the victim is an infant or child

---

38 BNWLA, above n 34, 76

39 Ibid

40 *The Nari O Shishu Nirjaton Damon Ain 2000,* s 13

41 BNWLA, *Violence against Women in Bangladesh 2008-2009* (Dhaka, BNWLA, 2010) 45.

42 BNWLA, *Violence* against *Women in Bangladesh,* (Dhaka, BNWLA, 2002) 79.

43 Ibid

44 Ibid

under 14 years, the law remains the same. A child with no knowledge about sex has to describe her experience to the police and to the court. The innocence of the accused need not be proved by the defence because the court begins the trial treating the accused as innocent.[45] No accused can be punished for any allegation of committing offence unless the allegations are proved beyond doubt. It is also impossible to witness a rape incident by a person except the abettor of the rapists. One rape victim, named Rafia Khatun said to a researcher that she had been raped in a dark place and she identified the culprits but without any eye witness the case was dismissed whereas the incident truly happened.[46] Another rape victim named Latifa Khatun said, she could not produce witnesses in court, because nobody had seen this incident.[47] Thus in all cases the court has to depend on circumstantial evidence. However, where the witnesses are available, sometimes they cannot narrate ins and outs of the fact accurately during the examination into the court.[48] When the victims are illiterate or unaware, they innocently destroy signs of rape. When a woman is raped, she must convince the police, then be subjected to a medical examination and finally undergo an embarrassing and humiliating cross-examination in the court, which mentally devastate the victim.[49] In most cases, police, opponent lawyers do not hesitate to humiliate her by asking irrelevant and scandalous questions.[50] Thus a rape victim is abused at various stages---while seeking help from the police, going for the medical test to doctor, and finally in the court.[51] Regrettably, the offenders do not face such uncomfortable situations. It is also found that some victims or parents of the victim withdraw the pending cases or mutually settle the matters in exchange of money.[52] This also causes psychological sufferings to the victim. Most often, insensitivity to women's issues and corruption of police, doctors, and advocates becomes barriers to prove the case. For these above reasons, it is impossible for a victim to prove rape.

4. Responses of Criminal Proceedings

Responses of any constituent of the CJS i.e. police, doctors, prosecutors and Judges may affect the criminal proceedings and the rights of rape victims may be violated.

---

45 AIR 1931 ALL 356.

46 *State vs. Mahar Ali and Others* (2003), Case no-755/2004, GR No- 486/2003, Nari O Shishu Nirjaton Damon Tribunal, Rajshahi.

47 *State vs. Moksed* (2006), Case No-73/2006, Nari O Shishu Nirjaton Damon Tribunal, Rajshahi.

48 BNWLA, note 17, 91

49 See <*http://nation.ittefaq.com/issues/2008/04/10/news0045.htm,* last accessed on 20 March 2011

50 Moslem, above n 4, 77.

51 Monsoor, above note 18, 25

52 Moslem, above n 4, 83

4.1 Role of Police

The police is the first institution where a woman comes into contact with the CJS.[53] According to the *Code of Criminal Procedure*, 1898 (Cr.PC), the complainant of any case may go to the court or *thana* for seeking justice. The victim, if admitted into hospital after checkup, can file a suit in the *thana* with medical report. Again if the victim or complainant sues in *thana* in case of violence, she is sent to the hospital for check up by doctor. The complainant may seek justice from the court directly. In cognizable cases, the court sends the complaint to the *thana* for filing the case and orders police to investigate the matter. At the police station where most rape victims come into contact with police they are often disappointed with their lack of sensitivity.[54] As rape is a cognizable offence, the officer in charge of the *thana* takes the First Information Report (FIR) under section 154 of the Cr.PC. FIR is the foundation of a prosecution case and investigation can be termed as its pillar.[55] It is the duty of the police to record the information and send the victim for medical examination and later for the court proceeding. In case of a rape, the complaint must be made to the police concerned within twenty four hours of the incident. In the majority of cases the police are not prompt in recording the complaint and as such the evidence is lost and the case loses its standing or importance.[56] The police sometimes ask the victim or her representatives to collect the medical report and then file the FIR or sometimes send the victim to the court without filing out the FIR completely, which delays the investigation.[57] Furthermore most police stations do not have women staff to whom the victims can express themselves and confide actual facts.[58] According to the *'Odhikar'* report, nobody can file a complaint at the police station without paying money.[59] When a rape victim comes to a police station to file a case, generally the male police officers interrogate her.[60] *A woman who has been raped undergoes two crises, one the rape and the other the subsequent investigation and trial.*[61] In almost all the cases the police do not act in time and the whole process is delayed. The police unduly influence the

---

53 Shaheen Akhter Munir, *An Annual Research Report on Violence Against Women in Bangladesh 2005* (Dhaka, BNWLA, 2006) 135.

54 Duxita Mistry, 'Victims and the Criminal Justice System in South Africa' (Paper presented at the Centre for the Study of Violence and Reconciliation, Johannesburg, South Africa, 29 October 1997)

55 BNWLA, above n 17, 94.

56 Naripokkho , Bangladesh Mahila Parishad and IWRAW Asia Pacific, *'Baseline Report on Violence Against Women in Bangladesh'* 47

57 BNWLA above n 17, 84.

58 Naripokkho , Bangladesh Mahila Parishad and IWRAW Asia Pacific, 47.

59 Odhikar, *'Human Rights in Police Custody'*, (Dhaka, 2004) 11.

60 BNWLA, note 17, 53.

61 Monsoor, above note 28, 22.

process of filing the FIR.[62] In most of the cases, victims do not want to be checked by a male doctor.[63] Female doctors are not available in *thana* heath complexes. When a rape case is reported to a police station, often the police show negligence and delay in having the victim medically checked up.[64] During investigation, the officer examines the witnesses, visits the place of occurrence, seizes necessary documents, and makes a map and arrests the perpetrator, if necessary.[65] In case of rape, police often do not properly examine and evaluate the marks on the victims. Garments of rape victims are seldom seized and specimens are not collected at the scene of the crime.[66] Sometimes the police makes the two parties reach a settlement before going to court by explaining social consequences the victim would have to face and forcing the victim to a 'mutual settlement'.[67] As the accused parties are usually more solvent financially, they can "purchase" the statement of the victim and force them to come to a solution, which is profitable for them.[68] The police are also reluctant to file cases because compromise after filing of a case is a common phenomenon. A research conducted by Bangladesh National Women Lawyers Association (BNWLA) argued that the police investigation is very poor and only 20% police cases are reported to end in conviction.[69] But it is true that acquittals are given mainly due to lack of corroborative evidence and other defects, for which accused gets benefit of doubt.[70] In 90 percent of rape cases the victims do not get justice for benefit of doubt in favour of the accused.[71] To a large extent, improper investigation by the police is responsible for lack of convictions. Failure of police, in particular the investigation officers, in preparing the FIR, case docket and investigation report properly and in conducting thorough investigation or in producing witness to the court dilute a case substantially or delay the hearing of a case for an indefinite period.[72] In most cases, statements of material witnesses are almost never recorded at the relevant time and sometimes police do not properly examine and evaluate the marks on the

---

62 Baseline Report, above n 56, 47.

63 BNWLA, above n 17, 52.

64 Ibid

65 *The Code of Criminal Procedure,* 1898 s 156

66 A.T.R. Rahman and D. Solongo, *Human Security in Bangladesh: In Search of Justice and Dignity* (United Nations Development Program, Bangladesh, 2002) 108.

67 Asma Akhter Jahan, *Women Violence in Bangladesh and Legal Framework: Role of Law Implementing Institutions* (Dhaka, FOWSIA, 2005) 51

68 Rahman and Solongo, above n 66, 109.

69 BNWLA , above n 17, 94

70 Justice Md. Hamidul Haque, 'Trial of Criminal Cases: Loopholes and Deficiencies in the Existing Laws' *58 DLR (2006)* 9.

71 Kajalie Shehreen Islam, 'How Rapists Go Free', *The Daily Star(Magazine),* 2 October 2009.

72 Asif Nazrul, *'Malpractices Relating to Bail' The Daily Star,* 4 March 2006, 18.

victims in cases of rape and other torture.[73] Lack of medical experts to corroborate reports tips the prosecution in favour of the accused; post-mortems conducted by non-professionals often produce erroneous results so that the court rules in favour of the accused.[74] The absence of allegations of violence against a specific offender hinders the legal process and encourages quick acquittals. Sometimes the investigating officer deliberately, being influenced by the accused, makes unnecessary delay in starting the investigation and recording statements of the witnesses. The use of bribes and other pressure has a direct effect on police responsiveness, which only sets the stage for such persuasion tactics to continue.[75] Though it is the duty of police to produce witnesses before the court, police often does not take any proper step due to corruption or negligence and as a result, many cases run on for years. Furthermore, poor women are often pressured by police to withdraw their complaints.[76] Where the perpetrator of violence is an agent of a law enforcement agency, the police generally do not take necessary care to prepare the charge sheet and tend to treat the agent favorably. There are many cases where the police neither investigate nor arrest the accused. It was found from the judgment of the Seema Choudhury rape case[77] that the investigation was not done in a proper way. The complainant of this case was a police officer, the accused and investigation officer were also police personnel. In the judgment, the Judge opined that in this case the government party tried to make a false story without collecting necessary information and witnesses before the court. So, it cannot be proved. Efficient and timely investigation is one of the prerequisites to get fair justice in rape cases.[78] When women are raped followed by murder, if the investigating officer does not submit a well prepared charge sheet, then the whole case becomes complex and weak.[79] As a natural consequence of the political interference, many of the police officers find themselves dragged into the whole business.[80] Sometimes, police do not investigate properly due to the influence of some powerful local people or political people.[81] Sometimes police falsely implicate innocent people and make false investigation report

---

73 M Abdul Hannan, Nazrul Islam Mondol and Shahidul Islam, 'Human Rights of Accused Women in Criminal Justice in Bangladesh', *Middle East Journal of Family Medicine* (2007) 5(7)

74 Ibid.

75 *Human Security Report*, UNDP, September 2002, Dhaka, Bangladesh.

76 Ibid

77 *State vs Uttam Kumar and Others*, Case no-21/97, Raozan *Thana*; BNWLA(1999), *Op.cit*, p. 123-128.

78 Shaheen Akhter Munir, *An Annual Research Report on Violence Against Women in Bangladesh 2005*, (Dhaka, BNWLA, 2006) 137

79 Baseline Report, above n 56, 49.

80 Faiz Ud-din and Hannan, 102.

81 Masood Alam Ragib Ahsan, 'Police Impunity: Lessons learnt', in 'Investigation, *Research and Publication of Human rights Violation'* (Dhaka, Odhikar, 2003) 101.

to protect criminals.[82] Moreover, punishment of the criminal and justice of the victims depends on their unbiased, factual reports.[83] In a study it is found that police are seen to be a major problem in the process for justice.[84] Inefficiency of the police in preparing factual charge sheet is common.[85] Many police have informers who are criminal themselves or are paid off by local powerful people.[86] When rape victims are brought into police station or even to file a complaint, they are generally subjected to indecent questions, harassment and abuse, which reflects police attitude.[87] In certain cases, police do not want to file a case if the victim does not satisfy them by giving bribes.[88] Women unwilling to pay become victims and the police have also a negative approach towards women.[89] A victim of rape, named Asma,[90] commented that police behaved rudely with women kept in safe custody. According to her, when a victim of rape goes to the police to complain, the first impression the police have of her is that she is a woman of ill repute or a prostitute. The women are often treated rudely, with suspicion and as if the rape was due to some fault of theirs.

4.2 Role of Doctor

In case of rape, the medical examination should be completed as soon as possible after the occurrence.[91] When the rape victim appears before the doctor, the doctor is supposed to give report and certificate about the occurrence.[92] Doctors like the police also consider victims as 'bad' and many of them think that the majority victims are habituated to sexual relations.[93] In the court proceedings, the certificate given by the doctor is strong evidence of the incidence.[94] Sometimes doctors give false certificate

---

82 BLAST, Seeking Effective Remedies: Prevention of Arbitrary Arrest and Freedom from Torture and Custodial Violence, Dhaka, Bangladesh Legal Aid and Services Trust (BLAST, 2005) 5.

83 Baseline Report, note 56, 49.

84 Odhikar, *'Human Rights and Police: Bangladesh Perspectives'*, (Odhikar, Dhaka, 2002).

85 Jahan, above n 67, 51.

86 Odhikar, *Human Rights and Police Custody: Dhaka Metropolitan Police* (Dhaka, Odhikar, 2004) 14

87 Hameeda Hossain, *'Accounting for Justice', Rights and Realities* (Dhaka, Ain- O-Salish Kendra, 1997) 127; Motiur Rahman, 'Human Rights in Bangladesh: Women Perspective', in *'State of Human Rights in Bangladesh: Women's Perspectives'*, (Dhaka, Women For Women, 2002) 29.

88 BNWLA above n 34, 89.

89 Rahman, above n 87, 28-29.

90 Case No-250/2004, *Nari O Shishu Nirjaton Damon Tribunal*, Rajshahi.

91 *The Nari O Shishu Nirjaton Damon Ain, 2000,* s 32(i).

92 *The Acid Crime Prevention Act 2002,* s 29

93 At an interview with a Woman Victim.

94 *The Nari O Shishu Nirjaton Damon Ain 2000,* s 23. *The Acid Crime Control Act* 2002, s 20.

in favour of the accused.[95] Police and criminals have a tendency to influence medical reports to fabricate those in their favour to cover up their misdeeds.[96] In the forensic test the doctors do not agree to touch the patient without the permission of the Magistrate. Most of the rape victims do not allow male doctors to do the test.[97] Most of the victims of rape cases are not interested to do test due to the lack of specialist doctors. Sometimes doctors are rude to their victims. According to a rape victim,[98] medical report of a doctor in case of criminal case means monetary corruption of a doctor. She also added that her incident was true, but doctor gave certificate that there was no *alamat* for rape. A research conducted by *'FOWSIA'*[99] shows that among 86 cases, 70% patients are tested by male doctors and 30% cases by female doctor.[100] Due to shortage of female doctors, some victims of such crimes are have to be tested by male doctors for filing the case, but most of the victims avoid them for which they are once again victimized under the CJS. The presence of the male doctor as an examiner is itself a trauma for the victim, especially in a country where social values and religion play an important role in their lives. According to one doctor,[101] female doctors are not interested to come to the forensic department. As a result male doctors have to be there to perform this duty in presence of either a nurse or *aya* (Nurse Assistant). There are many incidents in Bangladesh where the perpetrators guilt could not be proved due to false or defective medical report. Medical evidence is a crucial piece of information, which is required for establishing the case of rape in a court of law. It has been observed that doctors in government hospitals in many cases hesitate to give frank medical opinion in rape cases for fear of appearing as a prosecution witness and being subjected to embarrassing cross-examinations. The report of the medical examination is often cursory or is not sent in time. Therefore rape victims are being deprived of justice

4.3 Role of Lawyer

During examination and cross-examination, almost all rape victims face scandalous and attacking questions of lawyers.[102] In court, indecent questions are asked and gestures are made in the open courtroom that

---

95 Shaheen Akhter Munir, *Annual Research Report on Violence Against Women in Bangladesh 2005* (Dhaka, BNWLA, 2006) 68

96 Jahan above n 67, 66.

97 BNWLA, above n 34, 91.

98 Interview with a rape victim, named Zaheda Khatun, Case no-486/2003, *Nari O Shishu Nirjaton Damon Tribunal*, Rajshahi.

99 Forum on Women in Security and International Affairs.

100 Jahan, above n 67, 66.

101 Interview with Dr. Rosy Ara Khatun, Medical Officer, Medical Sub-dipo, Divisional Office, Rajshahi.

102 See <http://nation.ittefaq.com/issues/2008/04/10/news0045.htm, last accessed on 20 March 2011

mentally devastates a rape victim. In most cases, defence counsels intentionally ask obscene questions to get some sort of pleasure.[103] They also try to prove the victims as characterless by diverting the cases. Since the cross-examinations take place in front of many people, victims feel humiliated and get demoralized.[104] In court, efforts are made by the defence lawyer to find the sexual history of the complainant. To win the case, the defence lawyer asks irrelevant questions one after another.[105] The raped woman is asked how many men raped her, if she tried to resist at that time and if she got any pleasure. In reply to the cross-examination, asked by the defence lawyer, the witnesses feel nervous and miserably fail to give correct answers. In many cases, many victims withdraw their cases to avoid this type of unwarranted situation.[106] This is how the woman is re-raped by the court. This type of harassment in the trial proceedings is the reflection of gender insensitiveness and perversion of all concerned.[107] The defence lawyers take advantage of the situation and indulge in character assassination and comment on personal intimate matters with the approval of the court. As a result, real evidence is often suppressed.[108] The Public Prosecutors (PP) and Assistant Public Prosecutors (APP) are appointed politically; they may follow party interests and are not accountable towards the victims.[109] They may unnecessarily delay proceedings. Sometimes, the PP does not produce witnesses before the court, because he has been bribed by the accused and creates an opportunity to grant bail to the accused. Often he demands money from both the parties. Though the victims and witnesses can get opportunity to express themselves freely in camera trial under the NSNDA but this is not in practice.

4.4 Role of Judges

Judges are not only the leaders of the courtroom but also administrators of the criminal process.[110] At the trial court, Judges must ensure that the prosecution and investigation are not lax. Victims expect that they will get empathy from the courts. The process of getting justice on the ground is

---

103 Ibid

104 M Shamsul Haque, 'Anti-corruption mechanisms in Bangladesh', available at <http://www.article2.org/mainfile.php/0901/371> last accessed on 4 January 2011

105 BNWLA, above n 17, 116.

106 See <http://nation.ittefaq.com/issues/2008/04/10/news0045.htm>, Last accessed on 20 March 2011

107 Snigdha Madhuri 'Cross-examination of rape victims: A mental torture', *The Daily Star*, 29 March 2008, 23.

108 Roushan Jahan, Mahmuda Islam, *Violence against Women in Bangladesh: Analysis and Action* (Women For Women and South Asian Association For Women's Fund *Dhaka*, 1997) 43.

109 Faiz Ud-Din and Hannan, above n 2, 148.

110 Cole, above n 1, 403

long and cumbersome. NSNDA tribunals are overloaded with huge number of cases. An average of 60 cases is fixed for trial in each tribunal every day. It is impossible to make hearings of these huge cases or complete the trial process within 180 days.[111] Most of the Judges are still predominantly men and typically conservative.[112] This is reflected in judicial decisions.[113] If the Judge does not fix the next date of a case, with the permission of the Judge, *peshkar* is allowed to fix the date. In such case, it gives an opportunity to some *peshkars* to take bribe from the party for fixing the date. If complainant does not give him bribe, he may not summon witnesses; on the other hand by taking bribe from the accused party, he may abstain from sending summons to witnesses. Much of the time there is a lack or reliable witnesses, lack of eyewitnesses, lack of proper investigation, lack of proper collection of evidence and lack of submission of proper reports by experts. Due to these factors, as well as inefficiency, lack of accountability, intimidation of witnessess and complaints and so on, Judges often have no option but to acquit the accused, many of whom are actually guilty.[114] There are some cases where insensitiveness of Judges was detected. In one case[115], the Judge failed to take into account the hostile environment both in the society and in the court in which a woman has to testify against the accused for 'illicit sexual intercourse' or abduction. In another case[116], the Judge did not have the ability or the willingness to consider 'unusual' events and all the 'improbable' circumstances in which rape occurs. In another case[117], the victim's absence from the court appeared to be the principal reason for acquittal of the accused, where the court could consider the written testimony of victim. It is not merely the settlement of a dispute between two parties, but a crime against a person that was being determined. In another case[118], the Judge appeared to have given greater consideration to the concern for social legitimacy of the child than to the more technical issue of age of consent; and the accused was rewarded. In another case[119], the judgment revealed that the court never addressed the question of why Seema, the victim was detained in the first place, especially as her mother's house is located close to the outpost. The investigating officer has commented

---

111 *The Nari O Shishu Nirjatan Damon Ain 2000,* s 20

112 Jahan and Islam, above n 108, 43.

113 Ibid

114 *State vs Nur Muhammad* 38 DLR (1986) 349; UNDP *'Human Security in Bangladesh: In Search of Justice and Dignity'*, (Dhaka, United Nations Development Program, Bangladesh, 2002) 101.

115 *State vs Israfil,* Case no. 58/95, Cantonment Thana, Dhaka; See, for details, Naripokkho, *'Gender and Judges: A Pilot Study in Bangladesh'*, Naripokkho, Dhaka, 1997.

116 *State vs Imrat and Abul Hussain,* Case No. 86/89, Motijhil P S, Dhaka.

117 *State vs. Badiuzzaman,* Case No. 10/85, Tejgaon P S, Dhaka.

118 *State vs Mithu Kazi and Zakir Hussain*, Case No. 175/95, Sabujbag P S, Dhaka.

119 State vs. *Uttam Kumar and Others,* Case No-21/97, Raozan P S, Dhaka;

during his testimony that the police investigation of Seema's antecedents had revealed that Seema is 'clever, precocious and a floating prostitute'. The Judge never questioned the truthfulness, relevance and appropriateness of such a comment. Seema's status as an adult claimed by the detaining police was never questioned nor was any medical examination orderred to determine her age although Seema herself claimed that she was a minor. The Judge did not question or bring to notice why she did not complain and or whether she was unable to complain. He simply highlighted the fact that Seema herself was not the complainant, when it was totally irrelevant to the case itself. The Judge concluded in his judgment that the weakness of the case lies in the fact that the complainant, accused and investigating officials are all police implying that there would be an inherent tendency to protect fellow workers and colleagues.

4.5 Response to Corruption

The bribe that parties have to pay to the court officials, to Judges, and even to the opposing lawyer, often becomes a deciding factor in the ultimate settlement of a case.[120] Lawyers in collusion with court officials often charge exorbitant fees from the clients or demand money from the clients for persuading court officials to change the hearing dates of cases or to seek other undue privileges from them. Amnesty International reported that corruption[121] among the police and lower judiciary results in the violation of human rights and impedes justice for those without money and political influence.[122] According to a survey on the judiciary conducted

---

120 M. Shamsul Haque, 'Anti-corruption mechanisms in Bangladesh', available at <*http://www.article2.org/mainfile.php/0901/371*>, last accessed on 4 January 2011

121 In general, Corruption means giving or obtaining advantage which are illegitimate, immoral, and/or inconsistent with one's duty or the rights of others. See more at <*http://www.businessdictionary.com/definition/corruption.html*>, last accessed on 15 March 2011; An act done with an intent to give some advantage inconsistent with official duty and the rights of others. It includes bribery, but is more comprehensive; because an act may be corruptly done, though the advantage to be derived from it be not offered by another. Sometimes corruption is understood as something against law; such as, a contract by which the borrower agreed to pay the lender usurious interest. It is said, in such case, that it was corruptly agreed, etc. See also for more details at <*http://www.lectlaw.com/def/c314.htm*>, last accessed on 15 March 2011, but in this thesis 'corruption' has been basically treated as bribery.

122 See also, Amnesty International Press Release AI Index: ASA 13/013/2003 (public), News Service No. 120; 16 May 2003, Bangladesh: 'Time for action to protect human right' available at <*http://web.amnesty.org/library/index/ENGASA130132003?open* =ENG-BGD> last accessed on 4 June 2009. The 'Higher Judiciary is not itself free from allegation of corruption'. See, for details, M R Islam and S M. Solaiman 'Public Confidence Crisis in the Judiciary and Judicial Accountability in Bangladesh' (2003) 13 *Journal of Judicial Administration* 29-50.

by Transparency International,[123] judiciary in Bangladesh ranks in the top position in terms of corruption. The findings of Transparency International indicate that the judiciary has overtaken the law enforcement agencies as the most corrupt institution in the service sector.[124] The survey report, *'Corruption in Service Sector: National Household Survey 2010'*, which was released, says about 88% of people who turned to the judiciary were victims of corruption one way or the other. Corruption, according to the report, runs through the entire judicial system—68.9 per cent had to pay bribes at Magistrates' courts, 58.4 per cent Judges' court and 73.6 per cent the High Court. Annual Report 2002 of Transparency International revealed that in Bangladesh police has obtained first position in respect of corruption. According to the report:[125]

> 'Ordinary people cannot submit FIR without giving money to police; almost 80% cases are filed by giving money and the amount of money may range from Tk. 500.00 to Tk. 50000.00'

An empirical study which explored monetary corruption of different entities of Bangladeshi criminal justice system shows: [126]

> '80% women victims gave bribe to police and only 20% were free from such type of corruption. 52% victims confessed that PP and APP demanded and took bribe from them, 08% victims said that PP and APP demanded bribe but victims did not give, and only 40% victims said that PP and APP did not demand bribe. 45% victims confessed that doctor demanded and took bribe from them, only 12% victims said that doctor demanded bribe from them and gave biased report for not getting it. 32% victims gave bribes to court official, 52% replied that court official did not demand any money, and 16% claimed that court official demanded money but did not take.'

---

123 A Survey conducted by Transparency International on the 'Corruption in South Asia: Insights and Benchmarks from citizen feedback' in five countries including Bangladesh. In Bangladesh, the survey was conducted on 3030 respondents, 2305 rural and 725 urban in December 2002,23, available at <*http://www.transparency.org/pressreleasesarchive/2002/dnld/southasiarepot.pdf*>, last accessed on 13 March 2010.

'Judiciary dwarfs police in TIB graft report', available at

<*http://www.sananews.net/english/2010/12/25/judiciary-dwarfs-police-in-tib-graft-report*>, last accessed on 4 January 2011; 'TIB puts judiciary on top of corruption list', available at

<*http://newstoday.com.bd/index.php?option=details&news_id=15591&date=2010-12-24*>, last accessed on 4 January 2011; 'TIB findings must have shaken people's faith in judiciary', available at

<*http://www.savebd.com/articles/tib-findings-must-have-shaken-people%E2%80%99s-faith-in-judiciary*>, accessed on 4 January 2011; 'Judiciary most corrupt: TIB' available at <http://*www.defence.pk/forums/bangladesh-defence/85935-judiciary-most-corrupt-tib.html*>, accessed on 4 January 2011.

125 *The Weekly Khoborer Kagoj*, 7 April 2004.

126 Md. Abdur Rahim Mia, *The Rights of Women in the Criminal Justice System of Bangladesh* (An Unpublished PhD thesis, Department of Law and Justice, Rajshahi University, Bangladesh. 2011)

A rape victim, named Shapla Khatun said that she had to give 300 taka to the PP for everyday hearing and without it no hearing were held.[127] Mukta Begum (32), a victim of rape said during interview that money was a necessary element to know the next hearing date from court officials.[128] There are several laws[129] still in force to prevent corruption. Not only are these laws in force but also there are some special courts and tribunals to try corruption cases. Corruption however continues to a common phenomenon, which hinders women's access to justice in Bangladesh.

5. Response to Safe Custody

Until 2000, there was no law directly providing for safe custody. It obtained legal status from judicial pronouncement. The concept was directed towards protecting the best interest and the welfare of victims' girl and women. When a rape victim suffered from insecurity, the state could ensure her security by providing a 'safe custody' in jail.[130] There was a practice in Bangladesh of placing women, juveniles and children in 'safe custody' in jails or prisons under certain circumstances before 2000.[131] In Bangladesh every year hundreds of women and girls were kept in prison under 'safe custody'. Although the law prohibits women in safe custody from being housed with criminals, in practice, no separate facilities existed in jail. After a FIR had been made and the medical examination concluded, the investigating officer produced the victim of rape before the court, then the Magistrate sent her to the jail without taking her consent. Human rights groups argued that there was no basis in law for safe custody and women were sent in jail solely on the discretionary power of the judge, on application from the police, for their safety.[132] For several years, human rights activists had been trying to have the practice abolished.[133] Following the rape and subsequent death of teenager Shima Chowdhury in safe custody at Chittagong jail in 1997, opposition to the practice increased.

---

127 Case No 117/2010, *Nari O Shishu Nirjaton Damon Tribunal*, Rajshahi.

128 Case No-56/2010, *Nari O Shishu Nirjaton Damon Tribunal*, Rajshahi.

129 *Anti-Corruption Commission Act, 2004*; *Money Laundering Act, 2002*; *Bangladesh Government Servants (Conduct) Rules, 1979*; *Criminal Law Amendment Act, 1958*; *Prevention of Corruption Act, 1947*; some sections of the *Income Tax Ordinance, 1984* and some sections of the *Penal Code*.

130 A 1997 report revealed that there are 269 persons in safe custody in 54 jails of the country; Source: *The Daily Bhorer Kagoj* (A Bengali Daily), Dhaka, 5 April 1997

131 Coordinating Council for Human Rights in Bangladesh (CCHRB) *State of Human Rights in Bangladesh* (Dhaka, CCHRB, *1997*) 55-57; available at <http://www.derechos.org/omct/>, last accessed on 1 January 1998

132 *The Daily Star*, 11 November 1997. 'Safe Custody' in Jail Lacks Legal Basis: ASK', available at <http://www.dailystarnews.com>, last accessed on 25 June 1998; *Bangladesh Observer* [Dhaka] "Safe Custody: Legal Notice on Home Secy, IG, Police, Prison.' 10

133 Amnesty International (AI), *Bangladesh: Institutional Failures Protect Alleged Rapists* (Index: ASA 13/04/97, London: Amnesty International)

In February 1997 three human rights groups of Bangladesh - Ain O Shalish Kendra (ASK), Bangladesh Legal Aid and Services Trust (BLAST) and the National Legal Aid Network (NLAN) - filed a notice calling upon the home affairs secretary, the law and parliamentary affairs secretary, and the inspector generals of police and prisons to review cases of women and girls in jail for safe custody.[134] The organizations asserted that the practice was a violation of fundamental rights to liberty and equality guaranteed in the constitution. In October 1997, ASK successfully petitioned the government for the release of three girls from safe custody.[135] At a press conference in Dhaka in November 1997, ASK representatives issued a written statement again asserting that the concept of safe custody has no legal basis, as 'such a provision does not exist either in the Code of Criminal Procedure or in the Jail Code'.[136]

Before 2000, there was no term known as "safe-custody" in the wide variety of 'black and white' legal texts of Bangladesh. The term was first used in section 31 of the *Nari O Shishu Nirjatan Daman Ain*, 2000 (NSNDA) which makes it mandatory on the part of the court, if it ever decides on the need of providing "safe-custody", to keep the innocent female victims somewhere outside the ordinary prisons.[137] However, these provisions have been criticised by human rights groups on the grounds that they have merely changed the location of where women and children may be detained, from prisons to Government or approved Non-Governmental Organisation (NGO) shelters, and have 'not changed the basic paternalistic assumption that it was for the state to determine the question of a woman's safety, irrespective of her age.'[138] The High Court Division, in *Jesmin Nahar vs. the State and another*,[139] held that keeping the victim-petitioner in judicial custody against her will was illegal. In this case, the petitioner Jesmin Nahar, a young girl of 18 years, was kept in judicial custody according to an order passed by the Magistrate under the NSNDA, 2000. This judgment not only ended the illegal detention of one particular victim, but also revealed the fact that judicial custody is a place where the detainee becomes more vulnerable and lives in a hostile environment for an indefinite period. It is a precedent, which lays down that the

---

134 *Bangladesh Observer* 'Safe Custody: Legal Notice on Home Secy, IG, Police, Prison' 21 February 1997, 10

135 Amnesty International, *Children in South Asia: Securing Their Rights* (AI Index: ASA 04/01/98) (London: Amnesty International, 17)

136 *The Daily Star* 'Safe Custody' in Jail Lacks Legal Basis: ASK' (11 November 1997) available at <http://www.dailystarnews.com>, last accessed on 25 June 1998

137 Barrister Tureen Afroz, 'CEDAW and the Women's Rights in Bangladesh - a promised Silver Lining', available at <http://www.worldnewsbank.com/tureen-seminar.html>, accessed on 12 August 2012

138 'The death penalty features in 13 out of 28 provisions', ASK (2001), "Human Rights in Bangladesh" , Dhaka (2001) 131

139 Criminal Miscellaneous Case No. 7782 of 2000, HCD. Judgment delivered on 27 March 2001, and published in the *Daily Star* on 26 August 2001.

indiscriminate exercise of granting judicial custody without the consent of the victim is illegal. The provision of safe custody has been included in the NSNDA, giving absolute authority to the NSNDA tribunal to decide when and whom to keep under safe custody.[140] It was protested by women's group on the issue of consent.[141] For these reasons, in 2003, Section 20(8) of NSNDA was included.

According to section 20(8) of NSNDA, 2000 (Amended in 2003),

> 'During the trial of an offence under this Act, if the Tribunal thinks that any woman or child is needed to be kept in safe custody, the Tribunal shall take their consent in this regard.'

The Department of Social Service under the Ministry of Social Welfare of Bangladesh established seven divisional safe custody homes for women and children survivors of violence and witnesses; each home has a capacity to shelter 50 persons and provides food, shelter, health care and legal aid. Information regarding these Seven Safe Custody Homes are given below:

Particulars of Safe Custody Homes

Division	Location	Capacity
Dhaka	Mirpur, Dhaka.	50
Dhaka	Tapakhola, Faridpur	50
Chittagong	Farhadabad, Chittagong	50
Rajshahi	Baya, Rajshahi	50
Khulna	Pachadighirpar, Bagerhat	50
Barisal	Sagardi, Barisal	50
Sylhet	Bagbari, Sylhet	50

At present, there are 7 government-run and 13 privately run large shelter homes available for use by women who are victims of violence. Many women and girls in rape and abduction cases are forced to stay at local jails in the name of 'safe custody' until the commencement of the trial without any medical treatment or counselling. The government on 16 January 2008 released a nine-year old rape victim imprisoned for six months in the name of safe shelter, and transferred her to the adolescent development centre at Konabari in Gazipur. *The Daily Star* in its editorial

---

140 According to section 31 of NSNDA, 2000, 'During trial of the case, if the Tribunal is of the opinion that any woman needs to be kept in safe custody, it may order that such woman be taken out of the prison and be kept in safe custody home designated by the government or in consideration by the Tribunal be handed over to any organization or person in this regard.'

141 Sultana Kamal , 'Laws to Stop Violence Against Women: Attempts Without Vision', in *Gender Equality in Bangladesh* (Ain O Salish Kendra, Dhaka,134)

page said, 'It really sounds ironical that the girl had to be kept in custody when she needed great care and psychological support from her family, after the highly traumatic experience, or a girl of that age should have been in a shelter home. Besides, one would expect only the rapist to end up in jail, not the victim'.[142] The practice of sending rape victims to Safe Custody Homes has started. There are three rape victims in the Safe Custody Home, Baya, Rajshahi. During their interview, they all said that Magistrate sent them after taking their consent.

7. Suggestion and Conclusion

Loopholes of rape related laws discussed in this article affect women's right under the CJS. In Bangladesh, laws are not implemented properly due to corruption, poor investigation, lack of evidence and lack of resources.[143] Other factors include ignorance of the law, the inability to go to the police station to complain due to threats by the perpetrator, inability to continue court appearance due to financial or social reasons, and inefficient legal representation.[144] All the difficulties of laws should be removed in order to protect victim's rights. There is an urgency to reform some of the sections of the NSNDA, 2000. The Cr.PC must be amended to avoid lengthy procedure. Victim and witness protection Act should be enacted. The complicated court procedure, delay in disposal of cases, exorbitant costs, insincerity of the Judges, threats of offenders, exploitation by *dalals* or touts etc. create a negative impact in the mind of the victims and as a result they decline to seek remedy. The number of rape victims coming forward to demand justice is very low when compared to the total number of victims. The concept of 'child rape' under section 375 of PC and trial process of death after rape under NSNDA should be reviewed. The provision of section 155 (4)[145] of the *Evidence Act*, 1872 is grossly misused to help the culprits. Section 155(4) of the *Evidence Act* is contrary to the basic rule of evidence that bad character of parties is not relevant. This section needs amendment. The onus of proof should be vested on the police officer in custodial death cases. The police, the lawyers and the Judges' share a great portion of the blame for the inefficient implementation of the existing laws. Each of them is responsible in their own way for the docket explosion of crimes and judicial delays. In case of investigation process, there are many obstacle, such as, lack of staff, lack of materials, corruption, influence of political or influential people, lack of knowledge about law and procedure, negligence of Investigation Officer (IO), biasness etc violate the rights of rape victims. Rape victims, who had gotten involved into the legal process but have left it half way through, confided that it is very difficult to prove the charges in a court. High cost of litigation, cause of delays and corruption is a very disturbing feature. Corruption has been identified in every entity of the CJS and as it makes the law ineffective, it has a very demoralizing effect on women. To suppress corruption the *Durniti Domon Commission* (Anti

---

142 '9 yr old freed from jail after news reports', *The Daily Star*, 17 January 2008

143 Salma Khan, *The Fifty Percent- Women in Development and Policy in Bangladesh* (Dhaka, the University Press Limited, 1993) 21.

144 Saira Rahman Khan *'the more laws, the less justice: When it comes to women'*, *The Daily Star* 4 November 2010, 23.

145 *Evidence Act 1872*, s 155 (4)

Corruption Commission)[146] should be strengthened and made independent from the government. The shadow whip of the opposition should be made chairman of the Commission and other members should also be from the opposition party. This will help balance the political bias of both ruling and opposition parties thus gradually rooting out corruption from the society. A serious problem that unfolds during the conduct of criminal cases, particularly rape cases, is that in most cases male doctors medically examine women. The reality is that the majority of women feel shy and reluctant to be examined by male doctors. They can not be free to speak out the exact condition of their incident to a male doctor, even after being violated or repressed.[147] Consequently, the merit of litigation is destroyed during the medical tests.[148] Worse, many women do not go for medical examination only due to absence of a female doctor in the clinic or the government hospitals. Sometimes doctors do not give the certificates at the right time and sometimes they do not give correct certificates and for this the investigation is hampered. Doctors are often lured by the greed of making money through providing false and fabricated medical certificates confirming allegations of causing simple or grievous hurt.[149] Sometimes the doctors show their reluctance to give medical certificates, as they have to face much harassment to give testimony at the court. Sometimes PPs do not provide proper legal support if they do not get money from the victims and there are also accusations that some of public prosecutors take money from the accused and work against the victims. Law should be made to specify the role of public prosecutors. An independent investigation agency should be made to investigate crimes against women. The law should include provisions to ensure security of witnesses. In rape cases, the victim's testimony should be considered as sufficient evidence to criminalize the perpetrators. Law should be enacted by making provisions to take disciplinary and punitive action against the doctors who are liable for delay in filing medical report and also for filing false medical report. Doctor's statement in rape case should be made relevant and admissible. The medical examination should be permitted without the recommendations from the Magistrate. The report of the medical officer should be treated as proof. There should be summary, time bound trial of such cases. The provision of camera trial should be implemented in all rape cases strictly.

A women's cell should be established in every police station to deal with crime against women. It is suggested that once a rape case is registered under this head it must be carried to its logical end. Even if the victim is not willing to testify, her previous statement and the circumstantial evidence must be fully utilized to establish the guilt of the accused and to punish him. A greater number of women police investigating officers, specialized in area of investigating crimes against women should be appointed. This will definitely restore the lost confidence of the women, by

---

146 Anti Corruption Commission was created in 2004 to prevent and check the corruption from the administration and the society.

147 BNWLA, above n 34, 91.

148 BNWLA, above n 17, 52.

149 BNWLA, *Violence against Women in Bangladesh 2008-2009* (Dhaka, BNWLA, 2010) 44.

solving their cases. Each and every police station must have a women police officer to attend to the rape victims. Women police should be present to record complaints made by women. In most rape incidents, it becomes extremely difficult to prove the case in the courts.[150] Therefore, a separate and well-equipped investigation department needs to be set up. If there is a complaint against the police, it should be seriously investigated. There should be a judicial enquiry on its own motion. A post of administrator should be created in court under the Ministry of Law and Justice. He will supervise over bench assistant's work and take necessary action against the corruption of *sherestader* or *peshkar.* He will also supervise whether summon has been properly issued or not. The court should exercise its discretion to prohibit scandalous and attacking questions. The number of female Judges, Magistrates, and advocates should be increased. Separate Public Prosecutor Service should be set up under the Director of Public Prosecution and the PP should be appointed only on the basis of merit. Government should appoint at least one female doctor to look after women repression cases in every governmental hospital. Safe custody must be outside of the jail in a place where adequate living standard facilities will be available for the victims. 'Safe homes' or 'Shelter homes' should be set up in every district and it must be located outside the prison.

Women in Bangladesh remain in a subordinate position in society. The rape victims have to undergo severe mental and social problems. Strong social stigmas and lack of means to obtain legal assistance frequently kept women from seeking redress in the courts. Though rape is a crime of perpetrator, Bangladeshi society construes it to be the victim's crime and the survivor undergoes a humiliating and strenuous trauma while various steps such as police interrogation, medical test, court proceedings etc. go on. After being raped, a woman develops a number of psychological problems along with physical problems. She loses her confidence all together. She is embarrassed when she is asked filthy questions in court. In such a situation, a victim may even try to commit suicide. The effects of rape are not limited to the victims only; rather it is the entire family of the victim that endures the consequences of the physical and psychological complexity of the victim. There is a rising trend in rape related violence incidents in Bangladesh. It should be stopped. If the mentioned steps are taken seriously in order to protect victims' rights, justice is sure to be served.

---

150 Ibid

The State of Juvenile Justice System in Bangladesh: Time for Re-thinking

Dr Nahid Ferdousi*

1. Introduction

Juvenile justice is a key component of the child rights in the aspects of upholding their best interests. Children need to be treated separately from the adults in the matters of investigation, trial and correctional process.[1] It is regarded that throughout the process of justice for juveniles they must have the support of the state, family and the community in achieving their rights of protection and prevention.[2] But the children frequently face threats to their individual rights while entering the juvenile justice system, yet their plight is commonly ignored in Bangladesh. Since independence of Bangladesh in 1971, the first expression of concern about the protection of children came through *the Children Act 1974* along with *the Children Rules 1976* which had been promulgated before many international instruments on children's rights came into existence and had not been consistent with the international mandate set by those instruments. There was hardly any focus on remarkable judicial attention for juveniles before 1990.[3]

Despite the ratification of *the Convention on the Rights of the Child (CRC), 1989* in 1990,[4] the government did not undertake any comprehensive review of its legislation regarding children until 2012. Due to insufficiency of juvenile courts in divisional levels in Bangladesh most of the time juveniles are treated under the ordinary courts along with adult criminals. As a result, children are sent to jails instead of their correctional institutions. Moreover, children who are arrested often face violence during the period of arrest and imprisonment. The provisions treat the children separately after arrest and submit separate charge-sheet and conduct separate trial which often are not maintained due to the avoidance of law and are accompanied by the improper attitude of the

---

* Associate Professor of Law, School of Social Sciences, Humanities and Languages, Bangladesh Open University. Email: nahid329@yahoo.com.

1 Marilyn D, McShane and Frank P, Williams (eds.), *Encyclopedia of Juvenile Justice*, Sage Publication, London, 2003, p. 119.

2 Khair, Sumaiya, "Juvenile Justice Administration and Correctional Services in Bangladesh: A Critical Review", *Journal of the Faculty of Law*, The Dhaka University Studies, Part-F Vol. 16, No.2, University of Dhaka, December, 2005, p. 2.

3 *Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law*, UNICEF, 2006, p. 39.

4 *The Convention on the Rights of the Child (CRC)* adopted by the United Nations, General Assembly, 20 November 1989, The Convention came into force on 2 September 1990 in Bangladesh.

concerned authority.[5] Consequently, juveniles are deprived of their right to return to normal life.

In this context, the government has enacted the new *Children Act 2013*[6] on the basis of *CRC* which has repealed *the Children Act of 1974*[7]. In practice, due to lack of new Children Rules or guidelines and lack of coordination among concerned agencies; the mandates of *Children Act 2013* are not implemented yet. It is necessary to bring them back in society as decent law-abiding citizens through a specialized judicial process. This article assesses the existing laws along with the activities of concerned agencies and thereby offering some suggestions ponder the way-out for a comprehensive justice system for the children in Bangladesh.

2. Critical Review of Related Laws

2.1 Domestic Legal Measures

Since the independence of Bangladesh in 1971, protections are ensured for children by its Constitution.[8] In particular, Articles 27, 28 and 31 of the Constitution lay down the general principles regarding the protection of children and others from all forms of discrimination.[9] Thus, children have the right to be treated with human dignity in all situations including those which involve arrest, detention and trial for offences. Though *the Children Act, 1974*[10]and *the Children Rules, 1976*[11]contained the seeds of the juvenile justice system[12] but in practice most of the provisions were not being implemented or applied and as a result children received the

---

5 Report of a Training Workshop on *Modern Trends of Juvenile Justice*, Juvenile Justice Roundtable, BRAC Centre for Development Management, Rajendrapur, Gazipur, April 2007.

6 *The Children Act, 2013* (Act No 26).

7 Now repealed by *the Children Act, 2013*. By a subsequent Gazette notification dated 18 August 2013 *the Children Act* was made effective from 21 August 2013.

8 *The Constitution of the People's Republic of Bangladesh, 1972.*

9 Article 27 of *the Constitution of Bangladesh, 1972* declares that all citizens are equal before law and are entitled to equal protection of law. So, children being the integral part of the citizens are no exception to the constitutional guarantee. Article 28 of the *Constitution* provides that (i) the state shall not discriminate against any citizen only on grounds of religion, race, caste, sex or place of birth, (ii) women shall have equal rights with men in all spheres of the state and public life, and (iii) no citizen shall only on grounds of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort or admission to any educational institution. Article 31 also guarantees everyone the right to life, liberty and freedom from arbitrary detention.

10 *The Children Act, 1974* (Act No. XXXIX of 1974).

11 *The Children Rules, 1976* (Rules No. S.R.0.103-L76).

12 These laws provide a wide scope for the custody, protection and treatment of the juvenile delinquents under the age of 16 years which was in conformity with the *CRC* and the other *UN rules, guidelines.*

same treatment as received by the adults. Apart from those, few provisions of several laws[13] were incorporated to deal with the juvenile delinquents in Bangladesh. These provisions were scattered in various laws, which treated juveniles like adults. These penal laws did not provide for the best interest of the juveniles in a uniform way.[14]

The age of penal responsibility is most important factor to treat the children as a juvenile delinquent. *The Penal Code, 1860*[15] deals with the presumption of innocence with respect to juveniles, subject to certain qualifications of age in sections 82 and 83. Section 82 provided that the children under the age of 7 years are immune from any trial for offence committed by them and subsequent punishment. According to section 83, an offence is not to be tried if done by a child above 7 years of age and under 12, who has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion. Once the child has attained the age of 12, he or she is fully responsible for his or her actions.[16] Thereafter, in 2004, the government has amended the *Penal Code, 1860* and raised the minimum age of criminal responsibility of a child from 7 to 9 years.[17]

Some significant loopholes having been there in *the Children Act, 1974* and the other laws, the government amended *the Children Act 2013* and is aimed to protect the best interests of children during all kind of judicial processes related to them. In the *Act*, the age of the childhood has been increased from 16 to 18 years within which a delinquent will be treated as a juvenile. As a result of this development, children will have the opportunities to be treated fairly both under the national and international laws.

In addition, the *Act* has established specific duties for the new appointments and offices like separate children's court, child affairs police officer, national child welfare boards, child development centers, probation officers etc. However, the ultimate success of the *Act* will depend on the proper awareness and great amount of financial support as well as the promulgation of the Children Rules as soon as possible.

---

13 Such as, *the Special Powers Act 1974*; *the Anti-Terrorism Act 1992*; *the Arms Act 1878*; *the Explosive Substances Act 1908*; *the Women and Children Repression Prevention Act 2000*; *the Code of Criminal Procedure 1898* and *the Metropolitan Police Ordinances*. Provisions regarding juveniles are spotted in various laws and unfortunately, most of these laws are non child-friendly in nature.

14 Subhan, K. M. "Juvenile Justice Administration in Bangladesh: Laws and their Implementation", *Judicial Training in the New Millennium: An Anatomy of BILIA Judicial Training with Difference*, Dhaka: Bangladesh Institute of Law and International Affairs BILIA 2005, 215.

15 *The Penal Code, 1860* (Act No. XLV of 1860).

16 *Introduction to a Juvenile Justice System Facilitator's Guide*, Module One, Department of Social Services, Ministry of Social Welfare, 2008, p. 3.

17 *The Penal Code (Amendment) Act, 2004* (Act No. XLV of 2004).

2.2 National Plans and Policies

In 1990, after signing the *CRC*, child development issue had been focused in plans and policies. The government, as a follow up to the *CRC*, had quickly formulated *the National Plan of Action (NPA) for Children. The First NPA* (1997-2002) had been recognized as a tool for establishing children's rights in Bangladesh. It provided the assessment and monitoring of the progress concerning the well-being and rights of children. Subsequently, *the National Children Policy* was drawn up by the Ministry of Women Affairs in 1994. The Ministry of Women Affairs was turned into Ministry of Women and Children Affairs (MoWCA) in 1994 and was assigned to monitor the status of the implementation of the *CRC* in Bangladesh.

In 1995, the government established *the National Council for Children* which was the highest body to make the policies, ensure the enforcement of all laws relating to the interest of the child, work on enacting new laws and ensure the enforcement of the *CRC*. Thereafter, *the Second NPA* (1997-2002) started monitoring system concerning the implementation of *the Children Act, 1974*. An *Inter-ministerial Committee on Improving the Conditions of Children Confined in Jails* was established for the protection of children. The best interests of the child were given priority in the *Third NPA for Children (2005-2010)*. It recognized that all children, particularly those who are vulnerable, have the right to be protected from abuse, exploitation and violence.

In 2003, *National Task Force* (NTF) committee was set up for the proper enforcement of *Suo Moto* Order of High Court Division. But due to the lack of monitoring, lots of children are still locked away in many jails in our country. In 2011, the government approved *the National Children Policy, 2011* aiming to provide more facilities for children in Bangladesh. According to the policy, all up to 18 years of age are treated as children with their rights to be ensured indiscriminately.

Since 1991, children issues were incorporated into the national planning process. But juvenile protection issues are not properly addressed in these policies. Even there is no separate policy for juvenile welfare and rehabilitation. Thus, the state of the juvenile justice system suffers enormously and does not conform to international standards.

2.3 International Standards

The international instruments which have important bearing and significant relevance to the concept of juvenile justice administration are: *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (The Beijing Rules); The United Nations Convention on the Rights of the Child, 1989 (The CRC); The United Nations Guidelines for the Prevention of Juvenile Delinquency, 1990 (The Riyadh Guidelines); The United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990 (JDL Rules); Guidelines on Justice Matters involving Child Victims and Witnesses of Crime,2005; General Comment No.10 Children's rights in juvenile justice,2007; Guidelines for the Alternative Care of*

Children,2009. But there is no mechanism in the legal system of Bangladesh to incorporate the principles of international conventions and rules at national levels. According to Article 145A of the Constitution, all ratified international treaties must be laid before Parliament by the President.[18] To make the *CRC* effective, it has to be a part of the domestic law as well. However, the development of the children laws, international treaties, covenants and conventions have been considered in the case of *State vs. Md Roushan Mondal* in Bangladesh.[19] After seven years of the case Bangladesh has reflected the *CRC* in the Children Act 2013 including child-friendly concepts and settings.

3. The Assessment of the Institutional Set-up of Juvenile Justice System

In the juvenile justice system, the major components are: the law enforcing agencies, courts and correctional institutions that deal with juvenile delinquents.[20] The essential element of a juvenile justice system is the attitude of the personnel of the concerned agencies towards the juvenile offenders.[21] The process of juvenile justice not only includes the treatment, but also involves the major causes of the delinquent behaviours and the measures to prevent them.[22] In practice, they do not provide adequate child-friendly services that reflect the juveniles' best interest. Moreover, the services are not consistent with the international rules and lack in the aspect of considering the child psychology.

3.1 Functions of Law Enforcing Agencies

The role of police officers is a vital factor for creating a child-friendly justice system. During the inquiry of a crime, the police officer decides that whom and when to arrest. The power of the police officer comes from law and it allows the police officers to proceed with arrest and most of the time, to carry out the investigation without any supervision of the judicial magistrate.[23] There are some limitations of the law enforcing agencies in the country. Majority of the children are arrested under special laws, such as *the Special Powers Act, 1974, the Arms Act, 1887, the Drugs Act, 1992* and section 54 of *the Code of Criminal Procedure, 1898* and section 86 of

---

18 *The Constitution of the People's Republic of Bangladesh, 1972,* Article 145A. This Article was inserted by the Second Proclamation (Fifteen Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978).

19 59 DLR 2007 72.

20 Hoque, M Enamul., *Best Interest of the Children,* Academic Press and Publishers Library, Dhaka, 2009, p. 13.

21 Chowdhury R. N., *Law Relating to Juvenile Justice in India,* Orient Publishing Company, New Delhi, 2009, p. 3.

22 Eldefonso, Edward and Coffey, Alan R., *Process and Impact of the Juvenile Justice System,* Glencoe Press, 1976, London, p.13.

23 Huda, Muhammad Nurul, *Bangladesh Police: Issues and Challenges,* The University Press Limited, 2009, p. 27.

the Metropolitan Police Ordinances. Furthermore, many juveniles are picked up by the police officers from the street as suspects of various cases.

When juveniles are arrested by the police officers, often the ages of the juvenile delinquents are not mentioned in the First Information Report (FIR) or anywhere else in the case record. Often they do not maintain birth certificate and increase a child's age, as per their requirement, and send it to court with a forwarding letter. As per the children law a police officer must inform the probation officer and the child's parents or guardian immediately after arresting the child. This provision is rarely applied in practice. Most of them do not inform the probation officers to avoid extra hazard and responsibility. [24]

In police custody, there is no separate cubicle for children. In most of the cases adults and children are detained together in the general lock-up, both in police station and jail, due to the absence of separate lock-ups. Often arrested juveniles are locked-up in police custody for a long time. In many cases, even physical abuse, force and torture are applied to the children during arrest and interrogation.[25] Also in practice, the courts often detain children prior to trial for minor offences, or set bail bond requirements that their guardian cannot afford to pay. There is no limitation on the duration of detention. So, the majority of the children who are detained awaiting trial are sent to the regular prisons. [26]

3.2 Judicial Intervention and the Justice Process

Juvenile court is a key component of the juvenile justice system and is meant exclusively for the children.[27] But Juvenile justice did not attract legal attention until the early 1980s. The *Children Act* was passed in 1974 but the *Act* was enforced on 01 June 1980.[28] From 1980 to 1990, the people in general and the people in concern were adequately aware of *the Children Act.* After the enforcement of the said *Act,* the concept of trying them under a separate court was introduced. In 1993, the first major case involving juvenile delinquents was *State vs Deputy Commissioner,*

---

[24] Chowdhury. Afsan. *et al.*, "Our Daughters in Safe Custody", *Year Book on the State of Juvenile Justice and Violence against Children in Bangladesh,* Save the Children UK. Services Plus, Dhaka, 2002, p. 6.

[25] Ghuznavi, Ruby. *et al.*, Child Rights: Reality and Challenges, Shishu Adhikar Sangjog, Dhaka, 2001, p. 128.

[26] Hoque, M Enamul *et al., Under-Aged Prison Inmates in Bangladesh: A sample situation of youthful offenders in greater Dhaka,* Action Aid Bangladesh and Retired Police Officers Welfare Association Bangladesh, 2008, p.11.

[27] *Siddique, Ahmad, Criminology: Problems and Perspectives,* Eastern Book Company, Lucknow, 1997, p. 240.

[28] Initially the *Children Act, 1974* was enforced in the whole of the district Dhaka vide notification no.- 315- L/ 76 dated 11th September, 1976 which was subsequently extended throughout the country vide no S.R. no 127-L/E 9/80 dated on May 20, 1980.

Satkhira.[29] In 2003, for the first time, judicial intervention had been emphasized by the case and a *Suo Moto* Order was issued. Thereafter, a small number of cases involving juveniles were reported in the law reports. But often the verdicts were not executed properly by the subordinate ordinary courts due to insufficient implementation process.

It should be noted that before the separation of the judiciary, magistrates were responsible for trying the juvenile cases. At that time, magistrates who administered juvenile court had little knowledge about *the Children Act* and related laws. Most of them had no background of law education. So, a lot of juveniles suffered and were deprived of their rights. Since the separation of judiciary, judicial magistrates administered juvenile court in the country. As per the *Children Act, 1974*, three juvenile courts have been established in Tongi, Jessore and Konabari correctional institutions in the country. There was no juvenile court in any other district. Consequently, most of juvenile offenders tried with adult criminals through the ordinary courts. It needs to be mentioned here that government has decided to set up the "Children Court" in every district across the country in compliance with the newly enacted the Children Act 2013, said a notification issued by the Ministry of Law, Justice and Parliamentary Affairs dated 24 April 2014.[30] In practice it is not implemented accordingly.

3.2.1 Juvenile Court in Correctional Institutions

The juvenile court plays a role of judicial measure and rehabilitation of juveniles. Prior to 2013 an offender below 16 years of age was allowed for trial under the juvenile court in Bangladesh. But the jurisdictions and power of the juvenile courts are alarmingly restricted. For this reason, these courts cannot consider the cases of juveniles who are convicted of serious offences; for example, the case of robbery, theft and murder etc. are under the jurisdiction of judges of the session courts. Judges of the juvenile courts usually conduct petty offences and guardian cases. They also conduct cases of those delinquents whose files are sent from the ordinary court to juvenile court of correctional institutions.

In addition, there is no full time judge in the juvenile courts located in the correctional institutions. The scheduled days for sittings of judges of juvenile courts are Monday and Wednesday. The timing of weekly sitting of juvenile court at correctional institutions is from 3 p.m. to 5 p.m., which is quite inadequate in comparison to the necessity. Moreover, often the judges in the juvenile courts do not appear regularly in correctional institutions.

---

29 45 DLR 1993 643; 14 BLD 1994 266.

30 24 April 2014, notification issued on Children Court. See more at: http://www.bdchronicle.com/detail/news/32/6352#sthash.trhltDTR.dpuf

According to the Gazette Notification,[31] the juvenile court situated in Tongi, Gazipur will cover Dhaka, Chittagong and Sylhet divisions for male child while the juvenile court situated in Pulerhat, Jessore will cover Khulna, Rajshahi and Barisal divisions for male child. So, the jurisdiction of juvenile court of Jessore covers 32 districts of Khulna, Rajshahi and Barisal Divisions, and juvenile court of Tongi covers 32 districts of Dhaka, Chittagong and Sylhet divisions. The Konabari juvenile court covers all divisions of Bangladesh for girl child. In fact, this is insufficient in comparison with the requirement.

3.2.2 The Environment of the Ordinary Courts

In 2007, after the separation of judiciary from executive an amendment was made to the effect that a Chief Judicial Magistrate and a Metropolitan Magistrate were empowered to exercise powers of a juvenile court instead of a Sub-Divisional Magistrate and a Magistrate of the First Class by Gazette Notification of the Ministry of Law, Justice and Parliamentary Affairs.[32] However, except in the three juvenile courts, the homely atmosphere is absent in the ordinary courts. There is no facility of camera trial for the juveniles in the ordinary court. The trial of juveniles is usually conducted along with the adults and under *the Code of Criminal Procedure.* In ordinary courts children cases are not recorded under specific headings but are classified together with all other cases. The court room is usually overcrowded and the judgment is delivered under non child-friendly surroundings. The accused juveniles are herded together and detained in the court until their cases are heard. During trial period, proper meals are not provided and the sanitation facilities are inadequate.

Practically, the judges of the ordinary courts execute the trials of children as an additional responsibility or as a secondary duty. Beside their regular duty, it is their additional responsibility to hold trial of the juveniles separately. Often they cannot pay attention or hardly have any time for additional responsibilities. Having heard too many cases in a day, a judge is usually too exhausted to show any kind of extra skill and care in discharging his judicial duties for a juvenile's case. Consequently, juvenile offenders have to wait for their hearing and judgment for a long time.[33] Most of the times, juveniles are sentenced to imprisonment by ordinary courts.

3.2.3 Intervention of the Higher Court

In the first decade (1971-1980), juvenile cases were fully ignored by the higher court because *the Children Act, 1974* was not enforced in the whole

---

31 Gazette Notification dated 23rd June 1999, the memorandum previously issued by the Labour and Social Welfare Ministry (Memorandum no S. R. O 319. L/76/S-LV/E-16/76 dated 16th September 1976)

32 Gazette Notification vide No- justice-4/5C-1/2005/1242 dated 20.11.2007.

33 Hossian, Hameeda and Hossain, Sara (eds.), "Rights of Children", *Human Rights in Bangladesh 2006,* Ain O Salish Kendra, Dhaka, 2007, p. 195.

country. In the second decade (1981-1990) only three cases were reported.[34] It was due to the absence of proper awareness regarding *the Children Act* among the concerned authorities. After signing the *CRC* in 1990, from the next decade (1991 to 2000), juvenile justice issue was focused by the government and by the non-government organizations. Juvenile cases started to intervene in the higher court from that period. It is noticeable that during this time ten cases were reported in the higher court.[35] Thereafter, from 2001 to 2010, thirteen cases were reported.[36] So, it is evident that gradually the issues regarding juvenile justice are being emphasized in the country.

From 2003, the benches of the High Court Division issued some landmark judgments in which it declared that if the accused is a child under the *Children Act, 1974,* s/he must be tried in a juvenile court and not in any other court irrespective of the offence alleged.[37] These landmark judgments established the fact that no children should be tried in the ordinary court or in any special tribunal. The child must be tried separately in the juvenile court and not in the ordinary court. The verdict of the case of *Md. Nasir Ahmed vs The State* [38] is relevant in this context. The High Court Division held:

> A child offender below 16 years of age shall be tried by juvenile court under Children Act, 1974 and not by the ordinary court. In view of this position of law joint trial of a child offender with adult is not permissible. Conviction of a child offender in joint trial is not sustainable in law for want of jurisdiction.

---

34 *Bablu* vs *The State* 1 BLD 1981 454, *Md. Nasir @ Nasir Ahmed* vs *State* 42 DLR 1990 89, *Kadu and others* vs *The State* 10 BLD 1990 236.

35 *Sumati Begum* vs *Rafiqueullah* 44 DLR 1992 500, *State* vs *Deputy Commissioner Satkhira and others* 45 DLR 1993 643, *Bimal Das* vs *The State* 46 DLR 1994 460, *Baktear Hosain* vs *The State* 14 BLD 1994 381, *Forkan alias Farhad and another* vs *The State* 15 BLD 1995 163, *Abdul Munem Chowdhury @ Momen* vs *State* 47 DLR 1995 96, *Kashem alias Md Abul Kashem* vs *State* 47 DLR 1995 438, *Kawsarun Nessa and others* vs *State* 48 DLR 1996 196, *Saiful Islam* vs *State* 2 BLC 1997 297, *Hossain and others* vs *State and another* 50 DLR 1998 494, *Shamim(Md)* vs *The State* 5 MLR 2000 37.

36 *Monir Hossain (Md) @ Monir Hossain* vs *State* 53 DLR 2001 411, *Munna and others* vs *State* 7 BLC 2002 409, *Anwarul Islam* vs *The State* 8 MLR 2003 18, *State* vs *Shukur Ali* 9 BLC 2004 238, *Bangladesh Legal Aid and Services Trust* vs *Bangladesh and others* 57 DLR 2005 11, *Ismail Howlader and other* vs *State* 58 DLR 2006 335, *Solaman* vs *State* 58 DLR 2006 429, *The State* vs *Md Roushan Mondal @ Hashem* 59 DLR 2007 72, *Raahamatullah (Md)* vs *State* 59 DLR 2007 520, *State* vs *Metropolitan Police Commissioner* 60 DLR 2008 660, *Fahima Nasrin* vs *Bangladesh* 61 DLR 2009 232, *State* vs *Md Fazlur Rahman Tonmoy* 61 DLR 2009 169, *Jaibar Ali Fakir* vs *State* 61 DLR 2009 208.

37 *Suo Moto* Order No.248, 2003; 11 BLT 2003 HCD 281.

38 42 DLR 1990 89.

In juvenile justice matter, the first reported case of *the State vs Deputy Commissioner, Satkhira and others,* [39] it was held:

> No child is to be charged with or tried for any offences together with an adult. The child must be tried in the juvenile court and not in the ordinary court. Only the adult can be committed to the Court of Session and the juvenile court will take cognizance of juvenile offenders.

In *Shiplu and another vs State,*[40] the High Court Division held that a child will not be tried jointly with an adult. *Md Shamim vs The State,*[41] was a case under the *Arms Act* which had culminated in conviction and sentence upon trial by the Special Tribunal. The High Court held:

> A child below 16 years of age must be tried by the juvenile court under *the Children Act, 1974* and by no other court. When the accused is found by the court to be of 14 years of age the Special Tribunal had no jurisdiction to try the accused and convict him under *the Special Powers Act, 1974*. The trial is being illegal and without jurisdiction, the conviction and sentence is set aside with the direction for fresh trial by juvenile court.

In the case of *Bangladesh Legal Aid and Services Trust vs Bangladesh and others,*[42] it was noted that children are entitled to be tried by the juvenile court and not to be tried jointly with adults.

Furthermore in *Ismail Howlader and others vs State,*[43] the High Court Division held:

> Children Act requiring separate trial of a child is to ensure a special procedure and to secure certain legal rights for the accused child. An adult is not entitled to those rights and the adult accused in this case, has not been prejudiced because of the joint trial.

Thus, the High Court determined that a juvenile court has the executive jurisdiction over cases concerning children.

It is only in the case of *State vs Md. Roushan Mondal Alias Hashem,*[44] that the aspects of juvenile justice and role of the juvenile court have been clearly demarcated. The High Court Division held:

> Juveniles charged with offences falling under special law will have to be dealt with by the juvenile court in accordance with provisions of *the Children Act,* which, in our view, is of universal application and approach, irrespective of the offence alleged.

In 2008, in the case of *State vs The Metropolitan Police Commissioner, Khulna and others,*[45] the High Court Division issued an important *Suo*

---

39 45 DLR 1993 643.

40 49 DLR 1997 53.

41 19 BLD 1999 542; 5 MLR 2000 37.

42 57 DLR 2005 11.

43 58 DLR 2006 335.

44 26 BLD 2006 549.

Moto Rule with some directions. In the *Suo Moto* Rule, the authorities concerned were directed to take appropriate steps for training up their officials on the compliance with the legal provisions relating to children.

In *Fahima Nasrin vs Government of Bangladesh and other,*[46] the High Court Division held:

> Sentence passed by the judge of the juvenile court does not reflect a correct interpretation of the provisions of the Act and the sentence of imprisonment passed in respect of accused children is erroneous. Children are not liable to be sent to prison upon attaining the age of 18 years and the impugned order of the Ministry of Social Welfare is erroneous and without lawful authority.

Hence, when the directions of higher court are executed in the real sense of the term, there will bring an epoch making development in the juvenile justice system of the country.

3.3 Existing Services and Challenges for Correctional Institutions

Correctional institution is responsible for the delinquent child's counseling, rehabilitation, education, recreation, daily activities and reintegration. At present, there are three correctional institutions /Child Development Centers (CDCs) in Bangladesh for the rectification and rehabilitation of the juveniles. Two of them were established at Tongi in 1978 for 200 boys and Jessore in 1995 for 150 boys respectively and one was established at Konabari, Gazipur in 2003 for 150 girls. Each institution consists of one remand home, one juvenile court and one training institute. But they are yet to show any significant success on rehabilitation and social reintegration of the juveniles.

Presently, the CDCs face some administrative complexities which are considered to be the major constraints in the children justice system in Bangladesh. There is no sufficient financial support to provide correctional services as well as development for the delinquent children. The yearly financial plans regarding the inmates are very poor compared to the needs of the CDCs.[47] The condition of educational facilities is underprivileged in all CDCs. Though vocational training of inmates as may be suitable for their rehabilitation but those programs are not standardized. Even there is no follow-up mechanism after the release of the children from the CDCs. Thus, the roles of CDCs are not adequate for the prevention of delinquency as well as rehabilitation of delinquents.

Moreover, children are frequently abused or ill-treated in CDCs. Often they protest against the unfriendly attitude of the authority and staffs and elope from CDCs. For example, on 12 February and 4 May in the year of 2014 the inmates in Tongi CDC and Jessore CDC protested the torture by

---

[45] 60 DLR 2008 660.

[46] 61 DLR 2009 232.

[47] The monthly allotted budget for each inmates of CDC is Tk. 2000 only. With this minute budget inmates do not get proper foods, clothes, toiletries, medicine, books, training instruments etc.

their supervisor.[48]After the horrific incident, the High Court division of Bangladesh formed a committee to probe into the allegations of abuse and mismanagement at the correction centres.[49] In fact, it is the sign of non-systematic situation of CDCs.

4. Comprehensive Reforms of the Juvenile Justice System

The following suggestions are made to improve the child-friendly justice system in Bangladesh.

a) Legislative and Judicial Reforms

- The Children Rules should be formulated as per the section 100 of the Children Act 2013
- The Age of criminal responsibility should be increased (from 9 to 12 years) as per the recommendation of the committee of CRC.
- Separate children/juvenile courts with wide jurisdiction should be established in different buildings away from the criminal courts in district levels.
- The trial and punishment of juveniles with adults should be strictly prohibited.
- Alternative measures should be introduced instead of punishment.

b) Improvement of Law Enforcing Agencies

- The child affairs desks should be setup and child-friendly police officers should be appointed in each police station in the country.
- Separate register books should be opened in every police station where police officers would correctly record the age and biographical data of the children.
- The prosecution process for the release of the innocent delinquents should be established.
- Juvenile bail system should be enacted in juvenile justice system.
- Separate prison cubicles should be provided for children in police stations.
- The quality and quantity of the logistic support for transferring children from police stations to other places should be ameliorated.

c) Modernization of Correctional Institutions

- Sufficient number of certified institutes with standard budget should be established in district levels.
- Adequate number of probation officers with handsome salary should be appointed permanently in local level for speeding up the probation system.
- The quality of technical and education of the institution's inmates should be ensured.

---

[48] The Daily Star, *Torture on the young: correctional centres need corrective steps: Body to probe correction centre's misconduct*, 16 February 2014, p. 6.

[49] The Daily Prothom Alo, *"Probe juvenile protest: High Court"*, 14 February, 2013.

- Relationship with business organizations and juvenile development programs should be established in order to initiate more pragmatic steps for community-based reintegration services

d) Strengthening of Monitoring System

- Supervisory or monitoring committees should be established in district and sub-district levels for preserving the yearly juvenile justice records.
- Independent mechanisms to monitor child detention centers by establishing national child welfare boards should be developed.
- A strategy should be developed to ensure effective co-ordination among the major components who are working with the juvenile justice system.

e) Enhancement of Advocacy and Awareness

- Series of trainings on child psychology and justice system should be provided to the concerned agencies who directly deal with juvenile delinquents.
- Media should focus on the impacts or consequences of children's getting involved in criminal activities and should also create awareness among the concerned agencies as well as the family members and community in this regard.
- Birth registration practice must be ensured by the media as a most effective system for the verification of age of a child.

5. Conclusion

It is a universal truth that owing to physical frailty and mental immaturity, the rights and interests of the children demand special attention for protection from the sharp claws of maljudgment and misuse. The governments on behalf of the States exercise their authorities concerning the protection of child interests. The *CRC* and other international instruments provide a comprehensive set of legal framework to protect the rights of children within the justice delivery mechanism. In Bangladesh after 24 years of ratification, the government baring on the *CRC,* has enacted *the Children Act 2013.* The government should take necessary measures in accordance with the *Act* for ensuring special protection, care and development of offender children. It is also important to train up the people concerned in the juvenile justice system so that the proper implementation of the *Act* can be ensured. Many of the aspects dealt with in the *Act* are inter-linked. Therefore, a holistic approach must be followed by all concerned that the children of Bangladesh achieve the fulfilment of their rights.