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 *Tadić* 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.

Printed by Shuchona, 90 Elephant Road, Dhaka.

Published in January 2017 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: deanlaw@du.ac.bd

DHAKA UNIVERSITY STUDIES PART-F
VOL. 27 NO. 1 JUNE 2016

Directors' Duties and Breach of Duties in Bangladesh and the united Kingdom: Convergence and Diversity

Md. Khurshid Alam*

1. Introduction

A director committed to "adequately discharge its responsibilities and duties"[1] shows an indication of effective corporate governance. The directors need to be aware that they are personally subject to statutory duties in their capacity as directors of that company. In addition, the company as a separate legal entity is subject to statutory controls and the directors are responsible for ensuring that the company complies with such statutory controls. The modern day statutory duties that substitute the fiduciary or equitable duty are interpreted in accordance with the established case laws and time-tested legal principles which still remain pertinent. These statutory duties cannot be seen in isolation because in addition to these duties, a director will be subject to a wide range of regulation and legislation. In the United Kingdom,the regulation that specifies directors' duties and the breaches thereof includes inter alia the Insolvency Act 1986, the Company Directors' Disqualification Act 1986, and the Corporate Manslaughter and Corporate Homicide Act 2007.However, a director in Bangladesh follows only the duties as inserted in the company's constitution and the Companies Act 1994 and faces penalties as mentioned only in the Act. Having said this in the background, this article discusses the directors' duties and breaches thereof, takes on the laws of the United Kingdom and Bangladesh, makes a convergence and diversity, formulates recommendations on following the best practices and finally draws the conclusion.

2. Directors' Duties and Breach of Duties

One of the main statutory responsibilities falling on directors is the preparation of the accounts and the report of the directors. It is also the responsibility of the directors to ensure that the company maintains full and accurate accounting records. This includes the preparation of a balance sheet and a profit and loss account for each financial period of the company, and the presentation of these to shareholders and, subject to various exemptions, the filing of the accounts and report of the directors with the Registrar of Companies. Generally, other duties of directors "may

---

* Professor, Department of Law, University of Dhaka

1 Michael Singleton and Peter Miller, 'A preliminary investigation into Australia's registered club industry and issues of corporate governance and government review' (Graduate College of Management Papers, Southern Cross University, 2009) 6; see also John OOkpara, 'Perspectives on Corporate Governance Challenges in a Sub-Saharan African Economy' (2010) 5(1) *Journal of Business and Policy Research* 110.

include policy setting, decision making, monitoring management's performance, or corporate control."[2] Boards that meet frequently are more likely to perform their duties diligently and effectively.[3]

In *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007), the Delaware Supreme court recently summarized the duties of directors as follows:

> "It is well established that the directors owe their fiduciary obligations to the corporation and its shareholders. While shareholders rely on directors acting as fiduciaries to protect their interests, creditors are afforded protection through contractual agreements, fraud and fraudulent conveyance law, implied covenants of good faith and fair dealing, bankruptcy law, general commercial law and other sources of creditor rights. Delaware courts have traditionally been reluctant to expand existing fiduciary duties. Accordingly, "the general rule is that directors do not owe creditors duties beyond the relevant contractual terms."

Directors may be liable to penalties if the company fails to carry out its statutory duties. However, they may have a defense if they had reasonable grounds to believe that a competent person had been given the duty to see that the statutory provisions were complied with.

3. Directors' Duties and Breach of Duties in the UK Law

3.1. Directors' Duties of Skill, Care and Diligence

It is common in comparative analysis of company law systems to divide those duties into duties of loyalty and duties of care. 'The duty of loyalty is, at its core, concerned with self-dealing transactions, and requires a manager to act fairly to the company when she is self-interested.'[4] These duties are 'regulatory' legal strategies insofar as they directly constrain the actions of corporate actors.[5] Although the line between these two sets of duties is not absolutely clear, they broadly correspond to the two main risks which shareholders run when management of their company is

---

2 HomayaraLatifa Ahmed, Md. Jahangir Alam, SaeedAlamgirJafar, SawlatHilmiZaman, 'A Conceptual Review on Corporate Governance and its Effect on Firm's Performance: Bangladesh Perspective' AIUB Working Paper No. AIUB-BUS-ECON-2008-10, P. 16.

3 Pamela Kent and Jenny Stewart, 'Corporate governance and disclosures on the transition to international financial reporting standards' (Business Papers 10, Bond University, 2008) 10.

4 Martin Gelter, 'The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance' (2009) 50(1)*Harvard International Law Journal* 129, 144.

5 John Armour, Henry Hansmann, Reinierand Kraakman'Agency Problems, Legal Strategies, and Enforcement' (Discussion Paper No. 644, John M. Olin Center for Law, Economics, and Business, Harvard Law School, 2009) 1, 1.

delegated to the board. The board may be active, but not in the direction of promoting the shareholders' interests; or the board may be slack or incompetent.[6]This division is appropriate for this study, because it corresponds also to the two basic common law sources of the rules on directors' duties in English law: duties of loyalty based on fiduciary principles, developed initially by courts of equity, and duties of skill and care which rest, with some particular twists, on the principles of the law of negligence. However, it should be noted that the general duties laid out in Chapter 2 of Part 10 of the Act are not divided in this way. The duty of care appears as the fourth of the seven duties. It is with this duty that we begin.

The issue in this area which has long been debated is that of the appropriate standard of care to be required of directors. Historically, the common law was based upon a very low standard of care, because it was subjectively formulated. The judicial interpretation of the directors' duty of skill and care has historically been maintained at a low level.[7] In the US, some state laws often eliminate personal liability for breaches of the duty of care.[8] Some scholars put that:

"While countries have established the legal duties of board members to exercise care and act in the interest of the company and *all* shareholders in each region – though the origin and exact nature of board members' duties vary across countries – these legal requirements often have limited influence on actual board practices."[9]

3.2. Directors' Fiduciary Duties

Duties of loyalty as strong protective measure against the misconduct of directors help the company to attract the investors by providing a trustworthy environment.[10] Fiduciary duties of the Board has been a central theme in corporate governance literature since its inception.[11]As remarked above, the duties of loyalty which the

---

6 However, in Germany the law let off the directors from the duty to pursue the interest of shareholders. See Franklin Allen, Elena Carletti and Robert Marquez, 'Stakeholder Capitalism, Corporate Governance and
Firm Value' (UNC-Duke 2006 Corporate Finance Conference, Indian School of Business, 2006).

7 Alan Dignam and Michael Galanis, 'Corporate Governance and the Importanceof Macroeconomic Context' (2008) 28(2) *Oxford Journal of Legal Studies* 201, 224.

8 Paul Gompers, Joy Ishii and Andrew Metrick, 'Corporate Governance and Equity Prices' [2003] *Quarterly Journal of Economics* 107, 148-49.

9 FiannaJesover and Grant Kirkpatrick, 'The Revised OECD Principles of Corporate Governance and their Relevance to Non-OECD Countries' (2005) 13(2) *Corporate Governance* 127,134.

10 Andrei Shleifer and Robert WVishny, 'A Survey of Corporate Governance' (1997) 52(2) *Journal of Finance* 737, 752.

11 Marco Becht, Patrick Bolton and Ailsa Röell, 'Corporate Governance and Control' (Financial Working Paper No 02, ECGI, 2005) 2.

law requires of directors were developed by the courts by analogy with the duties of trustees.[12] The notion of loyalty is a subjective judgment with objective benchmarks.[13] It is easy to see how, historically, this came about. Prior to the Joint Stock Companies Act 1844 most joint stock companies were unincorporated and depended for their validity on a deed of settlement vesting the property of the company in trustees. Often the directors were themselves the trustees and even when a distinction was drawn between the passive trustees and the managing board of directors, the latter would quite clearly be regarded as trustees in the eyes of a court of equity in so far as they dealt with the trust property.

With directors of incorporated companies the description "trustees" was less apposite, because the assets were now held by the company, a separate legal person, rather than being vested in trustees. However, it was not unnatural that the courts should extend it to them by analogy. For one thing, the duties of the directors should obviously be the same whether the company was incorporated or not; for another, courts of equity tend to apply the label "trustee" to anyone in a fiduciary position. Nevertheless, to describe directors as trustees seems today to be neither strictly correct not invariably helpful.[14] In truth, directors are agents of the company rather than trustees of it or its property. But as agents they stand in a fiduciary relationship to their principal, the company.[15]Fiduciary duties coincide with the moral impulse to engage in other-regarding behavior, that is, to act in the beneficiaries' best interest.[16]

The duties of good faith which this fiduciary relationship imposes are virtually identical with those imposed on trustees, and to this extent the description "trustee" still has validity.[17] Moreover, when it comes to remedies for breach of duty, the trust analogy can provide a strong remedial structure, directors who dispose of the company's assets in breach of duty are regarded as committing a breach of trust, and the persons (including the directors themselves) into whose hands those assets come may find that they are under a duty to restore the value of the misapplied assets to the company.

---

12 Cally Jordan and Mike Lubrano, 'Corporate Governance and EmergingMarkets: Lessons from the Field' (Legal Studies Research PaperNo. 356, Melbourne Law School, 2007) 1, 28.

13 Angus Young,'Regulating Corporate Governance in China and Hong Kong: Do Chinese values andethics have a place in the age of Globalization?'(Proceedings of the Fifth Annual Conference : The Asian Studies
Association of Hong Kong, University of Hong Kong, 2010) 7.

14 Cit. Equitable Fire Insurance Co, Re [1925] Ch. 407 at 426, per Romer J.

15 For a more intriguing discussion, see SanjaiBhagat and Richard HJefferis 'The Econometrics of Corporate Governance Studies'.

16 Ruth V Aguilera et al, 'Corporate Governance and Social Responsibility: a comparative analysis of the UK and the US' (2006) 14(3) *Corporate Governance* 147,154.

17 See, Rafael La Porta et al, 'Investor protection and corporate governance' (2000) 58 *Journal of Financial Economics* 3.

Perhaps all that needs to be established, which is indisputable, is that directors individually owe fiduciary duties to their company and sometimes are regarded as acting in breach of trust when they deal improperly with the company's assets. In extreme cases, when directors are grossly negligent or violate their duty of loyalty to shareholders, shareholders can sue them for breach of fiduciary duty.[18]

Turning now to the main elements of the directors' fiduciary duties, it can be divided into six sub-groups, following the scheme of the Act. Three of these categories seem distinct. They are:

1. That the directors must remain within the scope of the powers which have been conferred upon them;
2. That directors must act in good faith to promote the success of the company;
3. That they must exercise independent judgment.

The final three categories are all examples of the rule against directors putting themselves in a position in which their personal interestis (or duties to others) conflict with their duty to the company. However, it is useful to sub-divide the "no conflict" principle in this way because the specific rule implementing the principle differ according to whether the conflict arises:

4. Out of a transaction with the company (self-dealing transactions);
5. Out of the director's personal exploitation of the company's property, information or opportunities; or
6. Out of the receipt from a third party of a benefit for exercising their directional functions in a particular way.

The breach of a confidentiality agreement would be considered a breach of fiduciary duty.[19]For the purposes of statutory enactment and analysis it is inevitable that the duties are separated out in some such way as that adopted in the 2006 Act. However, section 179 provides that, except where a duty is explicitly excluded by something in the statute, "more than one of the general duties may apply in any given case." This provision applies also to the duty of care. In practice, many situations will raise issues regarding more than one of the duties and, where this is so, the claimant can choose to pursue all or any of them.

3.3. Duty to Act within Powers

A duty upon the directors to remain within the powers which have been conferred upon them is a very obvious duty for the law to impose. Section 171 deals with two

---

18 Oliver Hart, 'Corporate Governance: Some Theory and Implications' 1995, 105(May) *Economic Journal* 678, n 13.

19 Victoria Ivashina et al, 'Bank Debt and Corporate Governance' (2009) 22(1) *Review of Financial Studies* 41, 44.

manifestations of this principle: the director must "act in accordance with the company's constitution" and must "only exercise powers for the purposes for which they are conferred." We shall look at each in turn.

Acting in accordance with the constitution

As we saw in Chapter 3, in contrast to many other company law jurisdiction, the main source of the directors' powers is likely to be the company's articles, and the articles, therefore, are likely also to be a source of constraints on the directors' powers. The articles may confer unlimited powers on the directors, but they are likely in fact to set some parameters within which the powers are to be exercised, even if the limits are generous, as they typically will be. So, it is perhaps not surprising that section 171 contains the obligation "to act in accordance with the company's constitution". However, it should be noted that the term "constitution" goes beyond the articles. It includes resolutions and agreements which are required to be notified to the Registrar and annexed to the articles, notably any special resolution of the company.[20] It also embraces any resolution or decision taken in accordance with the constitution and any decision by the members of the company or a class of members which is treated as equivalent to a decision of the company. Thus the duty includes an obligation to obey decisions properly taken by the shareholders in general meeting, for example, giving instructions to the directors without formally altering the articles.

Improper Purposes

The second proposition contained in section 171 is that a director must "only exercise powers for the purposes for which they are conferred."[21] Often the improper purpose will be to feather the directors' own nests or to preserve their control of the company in their own interests, in which event it will also be a breach of the duty, considered below, to act in good faith to promote the success of the company. But it is clear that, notwithstanding that directors have acted honestly to promote the success of the company, they may nevertheless be in breach of duty if they have exercised their powers for a purpose outside those for which the powers were conferred upon them. Thus, the improper purposes test, like the requirement to act in accordance with the company's constitution, is an objective test.

Where the directors act for an improper purpose, at common law their act is voidable by the company, not void, as it is in the case where the directors purport to exercise a power they do not have. Thus, third parties are safe if they act before the

---

20 Ss. 17 and 29-30

21 S. 171(b)

shareholders set aside the directors' decision; and, of course, the third party will also have the wider benefit of section 40, discussed above.

Finally, it should be noted that, although both duties stated in section 171 are, as with the other statutory duties, owed to the company, this does not necessarily mean that the shareholders cannot bring claims asserting breaches of their own rights arising out of directors' actions. Thus, a failure on the part of the directors to observe the limits on their powers contained in the company's constitution may put *the company* in breach of contract.

Other situations

Besides limitations on the directors' powers which are to be found in the company's constitution, the general law may limit what directors may do (or what companies may do, which will necessarily control the actions of the board) or the limitations may be found in the Companies Act or the common law of companies. Very often these provisions will specify the consequences of failure to abide by the relevant rules, and where this is the case, those rules will prevail and the directors' duties of loyalty have no role to play.

3.4. Duty to Promote the Success of the Company

Reformulating the common law

The duty to promote the success of the company is the modern version of the basic loyalty duty of directors. It is the core duty to which directors are subject, in the sense that it applies to every exercise of judgment which the directors undertake, whether they are pressing on the margins of their powers under the constitution or not and whether or not there is an operative conflict of interest. Together with the non-fiduciary duty to exercise care, skill and diligence, the duty to promote the success of the company expresses the law's view on how directors should discharge their functions on a day-to-day basis. Thus, it is not surprising that the proper formulation of the directors' duty of loyalty was a matter of considerable controversy,

In promoting the success of the company for the benefit of its members, the director must have regard (amongst other matters) to—

(a) the likely consequences of any decision in the long term,
(b) the interests of the company's employees,
(c) the need to foster the company's business relationships with suppliers, customers and others,
(d) the impact of the company's operations on the community and the environment,

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and
(f) the need to act fairly as between members of the company.

Interpreting the statutory formula

Defining the company's success

A number of important arise on the interpretation of the new language contained in this section. First, it is to be noted that corporate success for the benefit of the members is the word used to identify the touchstone for the exercise of the directors' discretion. Success is a more general word than, for example, "value," which it might have been thought was what the shareholders are interested in.

Failure to have regard to relevant matters

The statutory duty contains the obligation on the director to "have regard" to the list of factors set out in sub-sections 1(a) to (f). This raises a question thatwhether this requirement on the part of the directors comes in tandem with a requirement on the part of the courts to scrutinize the decisions of the directors in order to establish, on an objective basis, they have in fact taken appropriate account of the relevant factors? In common law, it is already accepted to apply the public law doctrine of *"Wednesbury*unreasonableness"[22] in the company matters, especially in the cases where the court thinks that there had been a failure by the directors in exercising their powers under the articles to take into account factors or an alternative course of action which they should have been taken into account.

3.5. Duty to Exercise Independent Judgment

At the level of principle the requirement is uncontroversial. However, there are four points relating to the practical working of this principle which need to be considered.

First, and perhaps most obviously, the principle does not prevent directors seeking and acting on advice from others. The board will frequently seek advice from outsiders (investment bankers, layers, valuers) and rely on it. Indeed, the board might well infringe its duty to take reasonable care if it proceeded to a decision without appropriate advice. However, the board will step over the mark if it treats the advice as an instruction, though in complex technical areas the advice may leave the board with little freedom of manoeuver, for example, where lawyers advise that the board's preferred course of action would be unlawful. The board must regard itself as taking responsibility for the decision reached, after taking appropriate advice.

---

[22] This principle was developed in the famous case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

Secondly, just as the duty of care does not prevent a board from delegating its functions to non-board employees (provided it has in place appropriate internal controls—see above), so the duty to exercise independent judgment does not prohibit such delegation. However, it seems that section 173 was not intended to overrule the common law rule that *delegatus non potestdelegare*, i.e. that a person to whom powers are delegated (as powers are to directors under the articles) cannot further delegate the exercise of those powers, unless the instrument of delegation itself authorizes further delegation.[23] In practice, wide powers of further delegation are conferred on the directors by the articles, and it is indeed difficult to see how the board of a large company could otherwise effectively exercise its powers of management of the company. However, this rule means that the articles may effectively prevent further delegation beyond the board by simply not providing for this.

Exercise of future discretion

Thirdly, it was debated at common law whether the non-fettering rule prevented a director from contracting with a third party as to the future exercise of his or her discretion. The answer ultimately arrived at was that this was permissible in appropriate cases. The starting point at common law, despite the paucity of reported cases on the point, seems to be that directors cannot validly contract (either with one another or with third parties) as to how they shall vote at future board meetings or otherwise conduct themselves in the future. This is so even though there is no improper motive or purpose and no personal advantage reaped but the directors under the agreement.

Section 173(2) (a) now provides that the duty to exercise independent judgment is not infringed by a director acting "in accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by its directors." Section 173(2) (b) goes on to state that no breach of the independent judgment rule arises if the director acts "in a way authorized by the company's constitution." Thus, the articles may authorize restrictions on the exercise of independent judgment, which might be a useful facility in private companies.

However, section 173(2) (a) protects the directors only from the argument that they have failed to exercise independent judgment by entering into the agreement that they have failed to exercise independent judgment by entering into the agreement which restricts their future freedom of action. Can the subsequent exercise of their powers as the contract demands be said to be a breach of their core duty of loyalty, if at the time they no longer believe it to be in accordance with their core duty to act in accordance with the contract? There are a number of cases in which, where

[23] *Cartmell's* case (1874) L.R. 9 Ch.App. 691.

shareholder consent has been required for a disposal of assets or for a takeover, the courts have been reluctant to construe agreements on the part of the directors not to co-operate with rival suitors or to recommend a rival offer to the shareholders as binding the directors, if they come to the view that the later offer is preferable from the shareholders' point of view.

Nominee directors

Finally, the independent judgment principle could cause difficulties for "nominee" directors, i.e. directors not elected by the shareholders generally but appointed but a particular class of security holder or creditor to protect their interests. English law solves such problems by requiring nominee directors to ignore the interests of the nominator, though it may be doubted how far this injunction is obeyed in practice.

3.6. Transactions with the Company (Self-Dealing)

Nineteenth-century law made all contracts in which a director was interested voidable at the instance of the corporation or shareholders no matter whether it was objectively fair. Now the law is dramatically different.[24]As fiduciaries, directors must not place themselves in a position in which there is a conflict between their duties to the company and their personal interests or duties to others.[25] Good faith must not only be done but must manifestly be seen to be done, and the law will not allow a fiduciary to place him- or herself in a position in which judgment is likely to be biased. At common law, the "no conflict" rule was probably the most important of the directors' fiduciary duties. As we have seen, the core loyalty rule is overwhelmingly subjective and so difficult to enforce, whilst, given the width of the powers conferred upon directors by the articles, the requirement that they stay within their powers under the constitution tends to have only a marginally constraining impact upon directors' activities.

Section 175 is an apparently general section dealing with, as the side-note says, "the duty to avoid conflicts of interest." However, self-dealing transactions are excluded from section 175 by section 175(3): "this duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company."

The modern rule of self-dealing has become, in principle, simply a requirement of disclosure to the board; and approval by others, whether shareholders or fellow directors, is not formally required. Unlike section 317 of the 1985 Act and earlier versions of the statutory disclosure requirement, the 2006 Act deals in separate

---

[24] Ralph K Winter, 'State Law, Shareholder Protection, and the Theory of the Corporation' (1977) 6(2) *Journal of Legal Studies* 251, 277.

[25] For further discussion, see ibid.

places with disclosure of interests in proposed transactions (section 177) and disclosure in relation to existing transactions (section 182).

Duty to declare interests in relation to proposed transactions or arrangements

The interests to be disclosed

A director who is "in any way, directly or indirectly" interested in a proposed transaction or arrangement with the company must declare to the other directors the "nature and extent" of that interest and do so before the company enters into the transaction or arrangement (section 177(1)). If the declaration, once made, becomes or proves to be inaccurate or incomplete, a further declaration must be made (section 177(3)). The term "transaction or arrangement" clearly includes a contract, which will be the paradigm example of a transaction or arrangement, but it embraces non-contractual arrangements as well. The aim of this section is to put the other directors on notice of the conflict of interest, so that they may take the necessary steps to safeguard the company's position. It should be noted that the disclosure duty applies to any transaction or arrangement with the company, whether one to be entered into by the company through its board or through a subordinate manager.

Methods of disclosure

Assuming the duty to disclose does bite, section 177(2) lays down three methods of making the disclosure. In the case of a proposed transaction, these methods are said to be non-exhaustive, whereas in the case of existing transactions, where they also apply, the list is exhaustive of the permitted methods of disclosure.[26] The three statutory methods of disclosure are:

- at a meeting of the directors;
- by written notice to the directors;
- by a general notice.

The scheme of the statute seems to be that the first two methods are methods of giving notice in relation to an identified proposed or actual transaction, whereas a general notice is not given in respect of an identified transaction. The difference between the first two methods is that notice given outside a meeting must be sent to each director and the notice is deemed to be part of the proceedings of the next directors' meeting and so must be included in the minutes of that meeting.[27] A general notice is one in which the director declares that he is to be regarded as interested in any transaction or arrangement which is subsequently entered into by the company with a specified company, fir, or individual because of the director's

[26] S. 177(2) "but need not" and s. 182(2).
[27] Ss. 184 and 248.

interest in or connection with that other person.[28] As usual, the nature and extent of the interest has to be declared. Unlike a specific notice, however, a general notice must either be given at a meeting of the directors or, if given outside a meeting, the director must take reasonable steps to ensure that it is brought up and read out at the next meeting after it is given.[29] Thus, in relation to a general notice, the board must positively be given the opportunity to discuss the notice, though there is no obligation on the board actually to do so.

Duty to declare interests in relation to existing transactions or arrangements

Section 182 applies the principle of disclosure to the board to existing transactions, unless the interest has already been declared in relation to a proposed transaction.[30] This section catches situations such as the interests of a newly appointed director in the company's existing transactions or interests in existing contracts which an established director has just acquired, for example, because he or she has become a shareholder in one of the company's suppliers. But why should a board wish to know about the interests of its directors in concluded transactions? What practical use can it make of the information? An example might be where the company has a power under an existing contract (for example, to terminate it unilaterally) to which knowledge of the director's interest is relevant. The rules applicable to proposed transactions (discussed immediately above) apply here as well, with the following amendments and exceptions. First, the disclosure must be made "as soon as is reasonably practicable."[31] Secondly, as already noted, the statutory methods of giving notice are the only ones permitted in relation to existing transactions.[32] Thirdly, a sole director is required to have more than one director but that is not the case at the time of the disclosure. That declaration must be recorded in writing and is deemed to be part of the proceedings at the next meeting of the directors after it is given.[33] Fourthly, the obligation applies explicitly to shadow directors.[34] Finally, only a criminal sanction (a fine) is provided in respect of breaches of this statutory duty to disclose.[35]

3.7. Transactions with Directors Requiring Approval of Members

The move over the years from shareholder approval of conflicted transactions (as required by the common law) to mere board disclosure amounted to a significant

---

28 S. 185.
29 S. 185(4)
30 S. 182(1).
31 S. 182(4).
32 S. 182(2).
33 S. 186.
34 S. 187(1)
35 S. 183.

dilution of the legal controls over this class of conflicts of interest. The move, which had been substantially achieved by the first quarter of the last century, was later shown to have weaknesses in those areas where the temptation to give way to conflicts of interest was high and scrutiny of the terms of the conflicted transaction by the other members of board could not be relied upon to be effective. Consequently, not only did the legislature introduce what became section 317 of the 1985 Act but it also went further and, at various times, introduced statutory provisions which restored the common law principle of shareholder approval in certain specific classes of case.

Substantial property transactions

The scope of the requirement for shareholder approval

The law governing this situation is nearly the same ass that contained in the 1985 Act, with some minor improvements recommended by the Law Commissions. Section 190 requires prior shareholder approval of a substantial property transaction between the company and its director.

A substantial property transaction is an arrangement in which the director acquires[36] from, or has acquired from him or her by, the company a substantial non-cash asset[37] of a value which exceeds £100,000 or 10 per cent of the company's net assets (section 191). The approval must be given either before the director enters into the transaction or the transaction must be conditional upon the approval being given, i.e. everything can be agreed between the parties but the transaction must not become binding on the company until the shareholders give their consent.

Remedies

Section 195 provides an extensive suite of civil remedies for breach of section 190, which at one stage looked likely to provide a template for the remedies to be made available for breach of the general duties. The transaction or arrangement is voidable at the instance of the company unless restitution of the subject-matter of the transaction is no longer possible, third party rights have intervened, an indemnity has been paid (section 195(2)) or the arrangement has been affirmed within a reasonable time by a general meeting (section 196). It should be noted that a third party is one who "is not a party to the arrangement or transaction" entered into in contravention of section 190 (section 195(2) (c)). So a connected person who is a party to the transaction will not count as a "third party" even if that person did not know of the connection with the director.

---

36 Defined in s. 1163.

37 Also defined in s. 1163

Directors' service contracts and gratuitous payment to directors

A director contracting with his or her company in relation to the remuneration to be received constitutes a paradigm example of a conflict of interest, which is likely to exist in a very strong form. However, Chapter 4 of Part 10 does not in general require shareholder approval of directors' remuneration. It does so only in two specific areas. Approval is required for directors' service contracts of more than two years' duration (section 188) and of gratuitous payments for loss of office (sections 215ff).

3.8. Conflicts of Interest and the Use of Corporate Property, Information and Opportunity

The scope and functioning of section 175

Section 175(1) states that "a director must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company."[38] Section 175 (7) makes it clear that a conflict of interests includes a conflict of duties. Self-dealing transactions are covered by section 177 discussed above, rather than by section 175. However, it should be noted that s. 175(3) has the effect of excluding self-dealing transactions even if section 177 does not apply its normal rule or disclosure to the board of the conflicted transaction in question, for example, decisions on directors' remuneration. Having excluded self-dealing transactions, section 175 applies, as is expressly stated in section 175 (2), "in particular to the exploitation of any property, information or opportunity" of the company. However, it is important to note that section 175 imposes a general obligation to avoid conflicts of interest. Any conflict situation, not excluded by section 175(3), will fall within its scope, whether or not it involves the exploitation of property, information or opportunity of the company.

Competing and multiple directorships

Section 175 is based on the existence of a conflict of duty and interest (or a conflict of duties). In the area of corporate opportunity, this conflict arises because of the conflict between the interest of the director in personal exploitation of the opportunity and his or her duty to offer the opportunity to the company. The duty to offer the opportunity to the company arises because it has been characterized as a corporate one: that is why the identification of the criteria for making the opportunity a corporate one is so central to this body of law. However, one can ask, what is the nature of this duty? It is generally accepted that if the director does not wish to exploit the opportunity personally, no breach of section 175 arises because

[38] Subject to the exception—"not reasonably regarded as likely" to give rise to a conflict—in section 175(4)(a).

there is then no personal interest conflicting with his duty to the company. In other words, a director who does nothing escapes liability under section 175.

Competing and multiple directorship

It is common for directors to hold directorships in more than one company, certainly where the companies are part of a group but also where they are independent of one another. In such cases an issue arises in relation to the compatibility of this practice with the no-conflict rule set out in section 175. There are two situations which need to be looked at: the first is where directorships are held in companies which are in business competition with one another or indeed where the director in any other way enters into competition with the company; and, secondly and more commonly, where the companies are not competitors but where nevertheless their interests may conflict from time to them.

3.9. Duty Not to Accept Benefits from Third Parties

Section 176 provides that a director "must not accept a benefit from a third party conferred by reason of (a) his being a director, or (b) his doing (or not doing) anything as a director." A "third party" means a person other than the company, an associated body corporate or a person acting on behalf of such companies. The connection of this rule with the no-conflict principle is underlined by the standard provision in this area that the duty is not infringed if the benefit "cannot reasonably be regarded as likely to give rise to a conflict of interest" (section 176(3)). This being so, it may be wondered what the purpose of section 176 is, for could not the situations it deals with be handled under the general no-conflict section (s. 175)? The answer, and it is an important one, is that there is no provision in section 176 for authorization to be given by uninvolved directors for the receipt of third-party benefits. The risk of such benefits distorting the proper performance of a director's duties is so high that it is rightly thought to be proper to require authorization from the shareholders in general meeting (even though that turns the rule into a near-ban on the receipt of third-party benefits). The fact that section 175 applies to a situation does not prevent section 176 being relied upon as well, i.e. the sections are cumulative rather than mutually exclusive in their operation.[39] Although the point is not expressly dealt with in section 176, the availability at common law of shareholder authorization is preserved by section 180(4)(a).

The common law termed such payments "bribes" though that seems a misnomer. It is enough at common law that there has been the payment of money or the conferment of another benefit upon an agent whom the payer knows is acting as an

[39] "except as otherwise provided, more than one of the general duties may apply": section 179

agent for a principal in circumstances where the payment has not been disclosed to the principal.

3.10. Remedies for Breach of Duty

Section 178 simply provides that "the consequences of a breach (or threatened breach) of section 171 to 177 are the same as would apply if the corresponding common law rule or equitable duty applied"; and that the duties contained in the sections (other than s. 174) are "enforceable in the same way as any other fiduciary duty owed to a company by its directors." It should be noted that section 178 applies only to the general duties laid out in sections 171 to 177, not to the provisions to be found in Chapter 3 of Part 10 dealing with disclosure of interests in existing transactions (for which the statute provides only criminal sanctions); nor to the provisions contained in Chapter 4 of Part 10, requiring shareholder approval for certain transactions with directors, for which a self-contained statutory civil code of remedies is provided.

The main remedies available are:

(a) injunction or declaration;
(b) damages or compensation;
(c) restoration of the company's property;
(d) rescission of the contract;
(e) account of profits; and
(f) summary dismissal.

(a) Injunction

These are primarily employed where the breach is threatened but has not yet occurred. If action can be taken in time, this is obviously the most satisfactory course. However, if the remedy is to be used effectively by an individual shareholder, suing derivatively, he or she will need to be well-informed about the proposals of the board, which in all but the smallest companies will often not be the case. An injunction may also be appropriate where the breach has already occurred but is likely to continue or if some of its consequences can thereby be avoided.

(b) Damages or compensation

Damages are the appropriate remedy for breach of a common law duty of care; compensation is the equivalent equitable remedy granted against a trustee or other fiduciary to compel restitution for the loss suffered by the breach of fiduciary duty. In practice, the distinction between the two has become blurred, and probably no useful purpose is served by seeking to keep them distinct. All the directors who

participate in the breach are jointly and severally liable with the usual rights of contribution *inter se.*

(c) Restoration of property

Although the directors are not trustees of the company's property, it has been noted that the courts sometimes treat directors as if they were such trustees. In particular, where a director disposes of the company's property in breach of fiduciary duty and in consequence the company's property comes into his or her own hands, the director will be treated as a constructive trustee of the property for the company. This means that it can be recovered *in rem* from the director, so far as traceable, either in law or in equity; and that the company's claim will have priority over those of the director's creditors.

(d) Avoidance of contracts

An agreement with the company that breaks the rules relating to contracts in which directors are interested may be avoided, provided that the company has done nothing to indicate an intention to ratify the agreement after finding out about the breach of duty, that *restitutio in integrum* is possible and that the rights of bona fide third parties have not supervened. Indeed, it may be doubted how strong a bar *restitutio in integrum* really is, in the wide powers the courts has to order financial adjustments when directing rescission. Equally, a contract entered into by the company in breach of the directors' duties to exercise their powers for a proper purpose is in principle avoidable by the company, but again subject to the rights of good faith third parties. Where, however, the directors have simply acted outside their powers, the contract will be void, not voidable.

(e) Accounting for profits

This liability may arise either out of a contract made between a director and the company or as a result of some contract or arrangement between the director and a third person. In the former case, accounting is a remedy additional to avoidance of the contrast and is normally available whether or not there is rescission. However, if a director has sold his or her own property to the company, the right to an account of profits will be lost if the company elects not to rescind or is too late to do so. When the profit arises out of a contract between the director and a third party there will be no question of rescinding that contract at the instance of the company, since the company is not a party to it. Here an account of profit will be the sole remedy.

(g) Summary dismissal

The right which an employer has at common law to dismiss an employee who has been guilty of serious misconduct has no application to the director as such.

However, it could be an effective sanction against executive directors and other officers of the company, since it may involve loss of livelihood rather than simply of position and directors' fees. However, it tends to be used only in the clearest cases. Generally, the company prefers the directors to "go quietly," which means that his or her entitlements on departure are calculated as if the contract were unimpeachable, even if there is scope for arguing that the company has the unilateral right to remove the director for breach of contract.

3.11. Specific Shareholder Approval of Breach of Duty

It is a normal principle of the law relating to fiduciaries that those to whom the duties are owed may release those who owe the duties from their legal obligations. Thus, the shareholders, acting as the company, ought in principle to be able to release the directors from their duties. In principle, such approval might be given in relation to a specific breach of duty or generally i.e. where no specific breach of duty is in contemplation or has yet occurred. In the former case the release might be prospective or retrospective. In relation to general releases the proposed release is inevitably prospective, and the obvious mechanism to use to provide such *ex ante* release form a category of duties is an appropriate provision in the articles of association.

Entitlement to vote

There were two much-debated questions about ratification and authorization at common law, only one of which the statute answers, and then only in relation to ratification. However, since the two questions are at least functionally interlinked, it may be that the statute's answer to the one question will have an impact to vote on a ratification decision.

4. Directors' Duties and Breach of Duties in Bangladeshi Law

The Act of 1994 does not lay down what the duties of a director are. Formerly, compulsory regulation 71 in the First Schedule Table A to the Act of 1913 provided that 'the business of the company shall be managed by the directors' but now that the draftsman of the Act of 1994 added one number to the articles in the First Schedule but did not make the necessary amendments in numbering the regulations referred to in section 17 of the Act the provisions of regulation 72 in the First Schedule to the Act which provides that the business of the company shall be managed by the directors is no longer a compulsory provision in the articles. However, the articles of association of a company here invariably provide a similar provision in their articles of association and in that case the basic powers of

management rests with the board of directors.Directors' fiduciary duty make them responsible to work to enhance the company's performance.[40]

The directors should exercise their power and carry out their fiduciary duties with a sense of objective judgment and independence in the best interests of the company.[41] The following statement portrays the truth about directors' duties and its observance in the context of Bangladesh:

> The Companies Act, 1994 provides for many stringent rules in respect of any negligence, default, breach of duty or trust on the part of director, manager or officer of a company. But experience would appear to show that these are more honored in the breach than observance.[42]

It has been established that "clearly articulated duty of loyalty by board members to the company and to all shareholders" is a key to protect non-controlling shareholders who do not have enough safeguards against potential abuse.[43]

4.1. Statutory Provisions on Duties of Directors

The Companies Act, however, contains provisions aimed at checking reckless abandonment of duties by directors or their liabilities. Section 96 requires that board meetings be held every three months; section 97 obliges a director to hold qualification shares; section 99 prohibits a bankrupt to act as a director; section 102 provides that save as provided in this section, any provision, whether contained in the articles of a company or any contract or otherwise, for exempting any director…from or indemnifying him against any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void, provided that a company may, in pursuance of any such provision as aforesaid, indemnify any such director against any liability incurred by him in defending any proceeding against him in which judgment has been given in his favor.

Section 103 prohibits a company from making any loans to a director; section 104 prohibits a director from holding any office of profit under the company except that

---

40 MdAfzalur Rashid, *Corporate Governance in Developing Countries: A Case Study of Bangladesh* (PhD Thesis, University of Wollongong, 2009) 110.

41 ShahnawazMahmood, 'Corporate Governance and Business Ethics for SMEs in Developing Countries: Challenges and Way Forward' 14.

42 Muhammad Zahirul Islam et al, 'Agency Problem and the Role of Audit Committee: Implications for
Corporate Sector in Bangladesh' (2010) 2(3) *International Journal of Economics and Finance* 177, 184.

43 Louis Bouchez, 'Principles of Corporate Governance: The OECD Perspective' (2007) 4(3) *European Company Law* 109, 112.

of a managing director, manager, or a legal or technical adviser or banker; section 105 provides that except with the consent of the directors, a director of a company, or the firm of which he is a partner or any partner of such firm or the private company of which he is a director or member, shall not enter into any contract for the sale, purchase or supply of goods and materials of the company. Section 107 imposes restrictions on the powers of public company or the subsidiary of a public company to sell or dispose of the undertaking of the company or remit any debt due by the director except with the consent of the members in general meeting. Section 108 provides that the office of a director shall be vacated in certain circumstances most of which happen if the director acts in contravention of the statutory control mentioned earlier.

Section 109 provides restrictions on the appointment of managing directors. No public company or the subsidiary of a public company shall appoint a person as a managing director if he is the managing director of more than one other company. Further, the appointment of managing director should be sanctioned in a general meeting of the company. The government may relax the restrictions in this section. Please note that the restriction on the number of managing directorships a person may hold is not applicable in the case of a private company so that if there is a group of private companies then the same person may be the managing director of all the companies.

Section 110 provides that the appointment of a managing director shall not be for a term exceeding five years. He cannot be reappointed or his term extended for a period exceeding five years on each occasion. This will be applicable in case of all companies.

Sections 111 restricts payment of compensation for loss of office except to managing directors or directors who are managers. No payment shall be made to any other director. In an case no payment shall be made to a managing or other director where the director being in whole time employment of the company resigns his office in view of the reconstruction of the company or amalgamation of the company with any other body corporate and is appointed as any officer, including managing director or managing agent of that other company, or where the director resigns his office, or where the office of the director is vacated by virtue of any provision of the Act, or where the company is being wound up due to the negligence or default of the director, or where the office of the director has been guilty of fraud or breach of trust in relation to, or of gross negligence in, or gross mismanagement of, the conduct of the affairs of the company or any subsidiary or holding company thereof or where the director has instigated or has taken part directly or indirectly in bringing about the termination of his office. Any payment made to a director for loss of office

should not exceed the payment due for the unexpired period of his service or for three years whichever is shorter.

Section 112 provides that no director of a company shall, in connection with the transfer of the whole or any part of compensation for loss of office, or as consideration for retirement from office, or in connection with such loss or retirement from such company or from the transferee of such undertaking or property or from any other person unless particulars with respect to the payment have been disclosed to the members of the company and approved by them in general meeting.

Section 113 provides that no director shall receive any payment by way of compensation for loss of office in connection with the transfer to any person or all or any of the shares in a company, being a transfer resulting from an offer made to the general body of shareholders, or an offer made by a body corporate with a view to the company becoming a subsidiary to such body corporate, or an offer made by or on behalf of an individual with a view to obtaining the right to exercise, or control the exercise of, not less than one-third of the total voting power at any general meeting of the company. A director may have payment from the transferee but he is required to take reasonable steps to secure that particulars with respect to the payment proposed to be made by the transferees etc. be sent with the notice of the offer made for the shares. If it is not done then any payment received by him shall be in trust for any person who have sold their shares as a result of the offer made.

Section 114 makes provision so that the director concerned may not take the money indirectly in contravention of sections 111-113.Section 115 requires every company to maintain a register of directors, managers and managing directors.

Section 130 provides that every director who is directly or indirectly concerned or interested in any contract or arrangement entered into by or on behalf of the company shall disclose the nature of his interest at the meeting of the directors at which the contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest etc. A general notice that director is a director of any specified company or member of aany specified firm and is regarded to be interested in any subsequent transaction with such firm or company will be regarded as a sufficient notice for the purpose of the section.

Section 131 prohibits a director from voting on any contract or arrangement in which he is directly or indirectly concerned or interested. His presence in such a meeting shall not be counted for the purpose of a quorum nor shall his vote be counted in the proceedings.

The above provisions in the Act relating to the activities of a director and restrictions thereon have been inserted so that a director does not act improperly in dealing with other people's money.

4.2. Contracts with the company

The standard by which a director's duties in this country is evaluated, is the same as in England and other commonwealth countries. Directors are fiduciaries and must, therefore display the utmost good faith toward the company in their dealings with it or on its behalf. They must act bona fide, in what they believe to be the best interests of the company. They must exercise their powers for the particular purpose for which they were conferred and not for some extraneous purpose, even though they honestly believe that to be in the best interest of the company.

The trustee-like position of directors vitiates any contract which the board enters into on behalf of the company with one of their number. The Act of 1994, following the previous law of 1913 imposes particular restrictions on contracts between the company and the directors. Section 105 requires a director to have the consent of other directors before entering into a contract for the sale, purchase, or supply of any goods and materials with the company. Section 130 obliges a director to disclose his interest in a contract or arrangement entered into on behalf of the company at the meeting of the board in which such contract or arrangement is determined.

Section 131 prohibits voting by such interested director in such meeting. In the absence of a specific provision, a director does not lose his position if he is interested in contracts with the company. In this case the director of one company, who was managing director of another company and remunerated only by salary was held not to be disqualified on the ground that he was interested in contracts with that other company. A breach of the statutory provisions, however, automatically brings the basic equitable principle into operation and the contract is voidable by the company and the profits made by the interested director are recoverable. This case concerned breach of provisions for disclosure contained in the Articles and the consequence of a failure to observe a statutory provision can hardly be less extensive.

Section 108(e) and Regulation 78 of the First Schedule to the Act of 1994 provide that the office of a director shall be vacated if among other things, the director accepts or holds any office of profit under the company other than that of a managing director or manager or legal or technical adviser or a banker without the sanction of the company in general meeting.

4.3. Fiduciary agents

It is more than one hundred fifty years that the British judges pronounced that the trustee-like position of directors was liable to vitiate any contract which the board entered into on behalf of the company with one of their number. A corporate body

can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conduction. It is this principle that has been reflected in the enactment in the sun-continent. Sections 105, 130 and 131 of the Act of 1994 carry on the restrictions on the powers of directors while entering into contracts or arrangements which concern the company. A director, this, must disclose the nature of this interest in a contract or arrangement with the company and cannot vote when that agenda is taken up.

It appears from the language of section 131 that the word "arrangement" does not cover a general scheme of the type under which , at the time the scheme is approved by the board of directors, no right or liability accrue or are incurred by the members of the company, the directors or the company itself. The word "arrangement" contemplates transaction in which a director at once becomes interested, in that he either acquires some of a certain company only enabled members subsequently to have their dealings in future registered with the company, it was not until such registration took place that any member became interested in the scheme approved by that resolution and it was not a scheme under which any one, in his individual capacity, or any director in his capacity as such, acquired any particular interest, the scheme was not hit by the provisions of section 91B of the Act of 1913. Section 131 does not apply to a private company by virtue of sub-section (3).

4.4. Loans to directors

Section 103 prohibits loans or guarantee or securities in favor of directors. This section follows section 86D of the Act of 1913 which was introduced in the company law of our country by the amending Act of 1936. A further amendment in 1938 extended the operation of the rule to loans to private companies in which any director of the lending company was a member. Section 108(1)(g) provides that the office of a director shall be vacated if a director or any firm of which he is a partner or any private company of which he is a director accepts a loan or guarantee from the company in contravention of section 103.

A private company may give or guarantee a loan is sanctioned by the board and the general meeting and does not exceed fifty per cent of the paid up value of the shares held by the director in his own name. A contravention of section 103 may, in addition to the vacation of the office of the director, entail a fine of five thousand taka or a simple imprisonment for six months in lieu of fine for every person who is a party to such a contravention. Regulation 78 in the First Schedule to the Act also provides that the office of a director shall be vacated if the director accepts a loan from the company.

5. Convergences and Divergences

Act within powers: The UK Act of 2006 provides in section 171 that a director of a company must act in accordance with the company's constitution, and only exercise

powers for the purposes for which they are conferred. Bangladeshi law seems to be silent on this issue.

Promoting the success of the company: Under the UK law, it is also the duty of a director of a company to act in the way he considers would be most likely to promote the success of the company for the benefit of its members as a whole. The law also set some standard which the directors should maintain in promoting the success of the company. Bangladeshi law does not have any such provision.

Duty to exercise independent judgment: A director of a company is bound to exercise independent judgment under the UK law. The Act also expressly provides that this duty is not infringed by a director actingin accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by its directors, or in a way authorized by the company's constitution. There is no such express provision in Bangladeshi Act of 1994.

Duty to exercise reasonable care, skill and diligence: Directorsunder the UK company law must exercise reasonable care, skill and diligence. The law further explains it as the care, skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and the general knowledge, skill and experience that the director has. There is no such provision in Bangladeshi Act.

Duty to avoid conflicts of interest: The UK Act of 2006provides that a director of a company must avoid a situation in which he has, or can have, adirect or indirect interest that conflicts, or possibly may conflict, with theinterests of the company.Particularly, this applies to the exploitation of any property, information oropportunity, and it is immaterial whether the company could take advantageof the property, information or opportunity.This duty does not apply to a conflict of interest arising in relation to atransaction or arrangement with the company.This duty is not infringed if the situation cannot reasonably be regarded as likely to give rise to aconflict of interest; orif the matter has been authorized by the directors. There is no such provision in Bangladeshi Act.

Duty not to accept benefits from third parties:A director of a company must not accept a benefit from a third party conferredby reason of—his being a director, orhis doing (or not doing) anything as director.A "third party" means a person other than the company, an associated bodycorporate or a person acting on behalf of the company or an associated bodycorporate.Benefits received by a director from a

person by whom his services are provided to the company are not regarded asconferred by a third party. There is no such provision in Bangladeshi Act.

Duty to declare interest in proposed transaction or arrangement: If a director of a company is in any way, directly or indirectly, interested in aproposed transaction or arrangement with the company, he must declare thenature and extent of that interest to the other directors.The declaration may (but need not) be made—at a meeting of the directors, orby notice to the directors in accordance with—section 184 (notice in writing), orsection 185 (general notice).If a declaration of interest under this section proves to be, or becomes,inaccurate or incomplete, a further declaration must be made.Any declaration required by this section must be made before the companyenters into the transaction or arrangement.This section does not require a declaration of an interest of which the directoris not aware or where the director is not aware of the transaction orarrangement in question.For this purpose a director is treated as being aware of matters of which heought reasonably to be aware.

The Bangladeshi Companies Act of 1994 provides for similar regulation in section 130. The section provides that every director who is concerned in any contract or arrangement entered into by or on behalf of the company shall disclose the nature of his interest at the meeting of the directors at which the contract or arrangement is determined on. Or, in any other case, he must disclose it at the first meeting of the directors after the acquisition of his interest or the making of the contract or arrangement.

6. Recommendation

- The Bangladeshi Act should organize the sections related to the duties of directors in a single chapter.
- Bangladeshi law should provide the director's duty to act within the power defined by the company's constitution and other powers that are provided accordingly.
- It should be provided that one of the utmost duties of directors must be to promote company's success for the benefit of the company.
- It also should be provided that the directors are under a duty to exercise independent judgment while making any decision regarding company related matters.
- Bangladeshi law should provide a provision making the exercise of care, skill and diligence as the duty of a director of company.

- Bangladeshi law should also provide director's duty to avoid any conflict of interest with the company.
- The law should make new provision providing the directors' duty to have regard to the interest of employees.
- The law should provide directors' duty to exercise of powers in good faith.

7. Conclusion

Company directors are responsible for the management of their companies. They must act in a way most likely to promote the success of the business and benefit its shareholders. They also have responsibilities to the company's employees, its trading partners and the state. The UK Companies Act of 2006 codified directors' duties for the first time, as well as introduced the concept of enlightened shareholder value. The seven duties set out in Chapter 2 of Part 10 of the UK Act cover only the substantive content of the directors' duties. On the other hand, Bangladeshi Company Act of 1994 does not have any well-ordered description of directors' duties and breach of duties which causes uncertainties and ambiguities in the governance of a corporation.

Intellectual Property Perspectives of Women's Traditional Knowledge in Bangladesh

Dr. Md. Towhidul Islam*
Md. Ahsan Habib**

Introduction

Women's contribution to intellectual creativity in Bangladesh appears greatly in traditional knowledge (TK) based products. Their traditional knowledge has been passed down from generation to generation to continue and thrive the culture and heritage. By tradition, they have applied their ingenuity in different economic-cultural activities including production of foodstuffs, handicrafts,conservation of bio-genetic resources and folk songs. The neoliberal economic policy across the world has been creating new markets of apparently never ending new niche traditional products. Though, the touch of neo-liberalism has created new opportunities for the Bangladeshi marginalized women led enterprises and products, it also requires trade-offs ranging from loss of culture to non-recognition of age-old traditional ingenuity. This paper claims that, though the mass commercialization of traditional knowledge-goods have brought positive changes to the lives of millions of poor female artisans, misappropriation of traditional ingenuity by giant dealers and middlemen have also thwarted huge potentials including exploitation of economic returns of intellectual property of the traditional artists.The paper has found, through the value chain of traditional knowledge-based goods e.g. handicrafts, intermediaries ride-on the intellectual property of the female artisans on the ground.While generally giving in to the proposition that TK could not be protected under intellectual property, this paper cites some models for protection of traditional ingenuity within the rubrics of intellectual property and TK. This paper concludes with a demand of equitable benefit sharing by the intermediaries and buyers unless they acknowledge the intellectual property rights of the traditional artisans.So far as social construction of knowledge is concerned, like other forms of property, intellectual property has also male bias. In theBangladeshi society, the problem is perhaps worse due to socio-cultural stereotypes. However, the Bangladeshi women's ingenuity and entrepreunreships at small and medium enterprises (SMEs) and informal sectors could hardly be denied.Further, the Bangladeshi textile crafts, behind which more often than not women are involved, has the great market potentiality even at the global level.

---

* Professor, Department of Law, University of Dhaka
** Lecturer, Faculty of Law, Eastern University

Introducing Women's Traditional Knowledge as Intellectual Property Rights toincentivize Women

Historically, women have played the stellar role to carry the traditional knowledge of society due to their connection with nature and community. However, the age of free market have posed new challenges to the women's traditional knowledge since the unique demand of women's traditional knowledge based goods in world market gives rise to misappropriation of them. To get rid of such misappropriation of TK based goods, recognition and reward of women's TK as intellectual property right is a wayout for the economic incentivization of TK based niche products and also for ensuringgreater freedom for women.

How Traditional Knowledge qualifies as Intellectual Property Rights

Traditional knowledge is a living body of knowledge passed on from generation to generation within a community.[1] "Traditional knowledge," as a broad description of subject matter, generally includes the intellectual and intangible cultural heritage, practices and knowledge systems of traditional communities, including indigenous and local communities.[2] Protection of traditional knowledge became an issue at the international level because of misappropriation of traditional knowledge through biopiracy and other unscrupulous techniques. In response to that threat, different methods of protecting traditional knowledge-positve and defensive has been developed. Protection of traditional knowledge-as a positive form of protection has got much attention in the international discourse. Among the international platforms, Convention of Biological Diversity (CBD), WTO- TRIPS Agreement and most importly WIPO are the most prominent. The CBD has provided recognized traditional knowledge as "farmers rights" and devised mechanisms for Acess to Benefit Sharing (ABS) and Prior Informed Consent (PIC) to prevent biopiracy. WTO TRIPS Agreement has provided a wide range of IPRs and prescribed minimum requirements to be protected as such. Since TK is dynamic and living in nature, it could be protected as IPRs. Among the IPRs, Geographical Indications seems to be most relevant in terms its collective nature. WIPO-IGC has been playing the key role to find out the normative aspects to protect TK.[3]

---

1 <http://www.wipo.int/tk/en/> (10 April2016).

2 WIPO, Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions, Dec7, 2012 (WIPO/GRTKF/IC/20/INF/13)

3 <http://www.wipo.int/tk/en/igc/>(10 April2016).

How Women's Knowledge qualifies as Traditional Knowledge vis-a-vis Intellectual Property Rights

Customarily, women's traditional knowledge has been regarded as faminane or traditional "essentially due to its perceived connection to nature and instinctive, pre-modem knowing".[4] For example, due to patriarchal social structure of Bangladesh, women have histrorically been engaged themselves in household based creative works including making traditional crafts, unique culinary goods and preservation of seed varieties. In this free –market age their ingenuity based-products have got cutting edge and have been utilized by business like BRAC Aarong through the Frair Trade regime. Women's traditional knowledge-based goods could be protected under the intellectual property regime of Bangladesh by way of patents, trademarks, coyright, design, geographical indications and farmers' rights regime. In practice, however, big fashions houses are branding the goods of the women on the ground as their own. Recognizing and ensuring equitable benefit sharing for the traditional ingenuity of the women is the moot point for the policy discourse. Recognizing women's authorship and ownership of their traditionally-held knowing serves feminist imperatives of empowerment, equality, and recognition, imperatives incorporated into the United Nations Millennium Development Goals.[5]

Incentivising Women's Traditional Ingenuity through Intellectual Property Rights

Since recognition and rewarding women's traditional ingenuity would result in their empowerment by way of elimination of poverty, ensuring better bargain and insilting the power of independent decision –making, protection of their TK based ingenuity is demanding. Proper protection of their Intellectual property would aviail them to diversy their their rights by way of licensing and other tools. For example, when the women who weave *nakshikantha* would get their product registered under the Geographical Indications regime, they would be able to licence their GI tag and get revenue in return. Economic return through exploitation of IP rights would have impact on their livelihood and freedom of choice. Most importantly, IP protection would prevent misappropriation and loss of culture. Thus incentivizing through IP protection would go beyond recognition of authorship and would help to promote sustainable development of tradition.

---

4 Terra L Gearhart-Sema, 'Women's Work, Women's Knowing: Intellectual Property and the Recognition of Women's Traditional Knowledge' (2009) 21(2) *Yale Journal of Law & Feminism* 373, 382.

5 UNDept. of Econ. &Soc. Aff.[DESA], *The Millennium Development Goals Report 2009*, 20-25 (2009), *available at* http://www.un.org/millenniumgoals/ pdf/MDGReport_ 2009_ENG.pdf[hereinafter MDGs]. For information on the MDGs generally and current work being done to reachthem, see United Nations, Millennium Development Goals, http://www.un.org/millenniumgoals/ (10 April2016).

Introducing Bangladeshi Women's Traditional Ingenuity

Except the readymade garments (RMG) sector, women in Bangladesh are traditionallyengaged in the home-based cottage industries including pottery, kantha embroidery, carpet weaving and other handicrafts.[6] Given their natural and traditional expertise in handicrafts, at present 90% of the total work force involved in handicraft are women not only as a workforce but also as entreprenures and managers.[7] As the cottage-industry based products are generating revenues for the women on the ground, they also illustrate women's traditional ingenuity in artistic excellence.[8] Besides, the pecuniary value, the traditional knowledge based handicrafts or other cottage industry goods could have value as intellectual property.[9] This paper particularly focuses on the intellectual property aspects of the women's handicrafts including nakshikantha (embroidered quilts) hand-loom based textiles, carpets, rugs, terracotta and pottery, baskets and jute crafts.As a sample the paper has given a detailed account on NakshiKantha, dry fish industry and culinary goods in the following chapters.

NakshiKantha: A Foremost Example of Women's Traditional Ingenuity

Nakshikantha[10] or embroidered quilt, exclusively[11] made by women, has long been recognized as one of the foremost examples of living traditions, characterized by ingenuity, originality, texture, color, andloveliness.[12] This unique tradition could be compared with a painting in combination of fabric, pattern and color.[13] Ordinary women of Bengal (both Bangladesh and the West Bengal of India) have had been creating extraordinary patterns of mathematical intricacy in combination of color

---

6 SadiaTasnim and Md Rouf Biswas,'Role of Cottage Industry in the Economic Development of Bangladesh: An Empirical Study', (2014) 6(28) *European Journal of Business and Management* 192,198. Home-based production, simple management and small investment are the main reasons of the involvement of women in handicraft. See M MAkash, *Women Entreprenures Engaged in the Handicraft Sector of Bangladesh* (ECOTA Fair Trade Ltd., 2007)7.

7 Akash, Ibid, 8.

8 Ibid 7.

9 See, for example, Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (WIPO, Geneva, 2003).

10 It is composed of several layers of worn cloths, stitched together and embroidered. Rajshahi, Jessore, Mymenshing and Jamalpur are the main regions where kanthas are made. Though different areas have different type of designs and embroidery styles and stitches. See NiazZaman, *The Art ofKantha Embroidery* (UPL, 2000) 124-157.

11 Nomination File No. 00972 by Bangladesh for Inscription on the representative list of the Intangible Cultural Heritage of Humanity, (Intergovernmental committee for the safeguarding of intangible cultural heritage, 2014) 6.

12 Henry Glassie and FirozMahmood (eds.), *Living Traditions, in Cultural Survey of Bangladesh Series*(Volume 7, Asiatic Society of Bangladesh, 2007) 363.

13 Ibid.

and design.[14] The NakshiKantha depicts the life of a Bengali craftswoman –she thought, feelings and imagination.[15] It has also a great artistic value in terms of skill of needleart as well as socio-cultural content of designs.[16] Given that kantha has a basic design, it is liable to constant changes due to the ingenuity of neddlewomen who could make any innovation they fancied.[17] As Zaman[18] puts it: 'While most kanthas have some initial pattern, none of the finest kanthas proceeded exactly according to a set pattern.Traditional motifs are repeated, but in an endless variety of stitches and colours and shapes, and always some touch of the individual is revealed.'

Since every piece of kantha is unique in terms of design and originality[19], under traditional design or copyright legislation an individual craftswoman could claim their intellectual property rights.

Though the art and knowledge of of weaving nakshikantha may rest in the public domain, an individual craftswoman or an association of them may weave a sufficiently "new" pattern of kantha with uniquely innovative design and get up. In such cases, craftswomen may have copyright or design right in their ingenious crafts based on traditional knowledge.[20]

Women's intellectual property Rights in Culinary Goods

Rural women have played a major role in conserving indigenous varieties, and they are the ones who possess the knowledge necessary for survival.[21] Women's indigenous varieties in culinary items may include aromatic rice, turmeric, Desi Ghee etc.

---

14 Ibid.

15 Perveen Ahmed, The Aesthetics and Vocabulary of NakshiKantha (Bangladesh National Museum, 1997) ii.

16 Ibid, viii.

17 Zaman, above n 5, 19-20.

18 Ibid, 74.

19 Glassie and Mahmood, above n7, 365. According to them : '[N]o two nakshikanthas are ever alike; each is an original creation, although nakshikanthas from one region follow certain types and have more in common than those from another region.' See.

20 According to WIPO Intergovernmental Committee on TK and TCEs:
"[c]ontemporary, tradition-based expressions and representations of traditional cultures are generally protected by existing copyright and industrial designs law for which they are sufficiently "original" or "new" as required''. WIPO, "Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions", May 2, 2003, WIPO/GRTKF/IC/5/3, p.4.

21 Fabio Parasecoli, The Gender of Geographical Indications: Women, Place and Marketing of Identities, (2010) 10(6) Cultural Studies 467-478.

Aromatic rice varieties[22] like Kaligira, Kataribhog used in Bangladesh for delicious traditional foods e.g. Polau and Biriani, have been specially taken cared of by women for centuries. Women's traditional know-how in conservation of these rice varieties deserves to be protected by a biodiversity protection legislation providing provision of access to benefit sharing while commercially using those varieties. These aromatic rice varieties have a niche market in the parts of the world where the Bangladeshi diaspora live.

As a culinary item, turmeric is used in Bangladesh for culinary or other purposes like marriage rites etc. It has also medicinal value. In Bangladesh women have been playing the main role to conserve turmeric for centuries.

Desi Ghee (*Gaua Ghee* in Bengali) is another culinary item widely used in Bangladesh for preparing different types of dishes.[23] The knowledge of making ghee from the cow's milk exclusively belongs to women.[24] Though desi ghee/ asli gee is made for non-commercial purpose in rural non-organized sector because of its unique[25] taste, favour and ingredients, qualifies it as a geographical indications (GI) from Bangladesh. So, incentives for marketing and branding of desi ghee could a good source of income for the rural women with unique traditional knowledge. Like aromatic rice varieties, it would also have appeal in all Bangladeshi residing regions of the world. There is a risk that, the name desi ghee (orghaua ghee) would become generic if it is not protected by law.[26]

Intellectual property rights, biodiversity and women: The unheard victims of biopiracy

At the rural farm level especially in the tribal community,women are the key keepers and conservers in selecting and storing of seeds on the basis of their utility uses.[27] In Bangladesh, women at the community level are now becoming entrepreneurs' under the International Rice Research Institute (IRRI) 'Super Bag' initiative.[28] In a changed male out-migration scenario in Bangladesh due to climate change or other modalities, women now have to play more active role in maintaining seeds and other

---

22 T Das and M A Baqui, 'Aromatic Rices of Bangladesh' in R K Singh, US Singh and GS Khus (eds.) *Aromatic Rices* (Oxford and IBH Publising, India, 2000) 184-187.

23 <https://en.wikipedia.org/wiki/Ghee> 20 April 2016.

24 S K Soam, Analysis of Prospective Geographical indications of India, (2006) 8(5) *The Journal of World intellectual property* 679-705, 695.

25 Ibid.

26 Ibid.

27 ChozuleKikhi and kedilezokikhi, *Role of Women in Natural Resouce Management* (UNDP India, 2011) 45.

28 MG Neogi, 'Women Seed Entreprenures at Community Level', The Financial Express (online) 11 January 2015 <http://old.thefinancialexpress-bd.com/2015/01/11/75285/print> 15 January 2016.

genetic materials.[29] So, indifference and policy gaps to rural women's contribution to conserve and carry forward plant genetic resources for generations would have a great impact on food security.[30] Patenting or otherwise monopolizing of traditional biological resources predominantly hurt women's right to genetic resources, for they play the role of mother[31] of biological resources.

Refuting the limitations on the protection of traditional knowledge under the existing intellectual property rights: Arguents from Bangladesh's perspective

The general arguments against the protection of traditional knowledge under the existing intellectual property regime includes lack of novelty and originality, difficulty in identifying the creators or inventors, temporal nature of protection flouting the spirit of TK and property in the public domain. However, all these limitations could be refuted in favor of protecting TK under the existing intellectual property system. The limitation of lack of novelty, for example, could be refuted by arguing that, traditional knowledge is vertically innovative and constantly ingenious based upon the prior art of traditional knowledge. For example, traditional knowledge of basketry or stitching NakshiKantha to depict unique motifs are innovative against the whole world except the artisan community. Moreover, the art of making cushions covers for the niche European Market is innovative, though it is based on the Bangladeshi craftswomen's traditional knowledge of kantha embroidery. Does the patent law have any problem to protect the invention of a community of TK holders? The answer is no, for patent protects 'inventions' and not the 'inventor(s)'. In addition to that, an otherwise non-novel TK could be novel for the purpose of commercial exploitation. Likewise, copyright as envisaged by the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) protects 'works' and not 'authors'. Therefore, folk music or other copyrightable TKs like particular traditional designs and motifs could be protected under the *Copyright Act, 2000* as 'work of art'. Again, original designs and traditional appearance of handicrafts from a vertical perspective could be protected as 'industrial designs' under the *Patent and Design Act, 1911*. Though, the above mentioned intellectual property tools have temporal limitations, geographical indications, trademarks,

---

29 Thelma Romero Paris, *Women's Roles and Needs in Changing Rural Asia with Emphasis on Rice-Based Agriculture* (IRRI, 2009) < http://www.agnet.org/ library.php?func =view&id= 20110725165454> 15 January 2016.

30 Ibid.

31 For women's role in preserving biological resources and the impact of bipiracy on their empowerment see, for example, SumanSahai, TRIPS and biodiversity: a gender perspective, (2004) 12(2) Gender and Development 58-65; For an overview of women's contribution in homestead crop-based activity in Bangladesh see, for example, Thelma R Paris, AlamgirChowdhury and ManikLal Bose, *Changing Women's Role in Homestead management: Mainstreaming Women in Rural Development* (CPD Occasional Paper No. 42, 2004).

collective or certification marks do not have such limitations. Accordingly, protection of TK under these tools could be more culturally sustainable.

Protection of TK based products under the Existing Intellectual Property Rights: An Overview of the 'Best Practices'

In Kazakhstan, the external appearance of national outer clothes, head dresses (saykele), carpets (tuskiiz), decorations of saddles, national dwellings (yurta) and their structural elements, as well as women's apparel accessories, like bracelets (blezik), national children's cots-crib-cradles and table wares (piala, torcyk) are protected as industrial designs.[32] The designations containing elements of the Kazakh ornament are registered and protected as trademarks.[33] Venezuela and Viet Nam have referred to the mechanism of geographical indications to protect traditional knowledge ("Cocuy the Pecaya", liquor made from the agave, in Venezuela, and "PhuQuoc", fish soya sauce, and "Shan TuyetMocChau", a variety of tea, in Viet Nam).[34] In addition, Viet Nam has mentioned a patent for a traditional preparation of medicinal plants used in assisting in stopping drug-addiction, and a trademark registered for a traditional balm made of medicinal plants ("Truong Son").[35] Again, there may be some technical problems to protect pervasive TK based products like NakshiKantha, for there is a remarkable difference in design and weaving technique on the kanthas from different regions.[36]However, the problem of diversity of designs and weaving techniques of kantha could be solved by following the Indian instance of *Ikat-Pochamplly* and *OdissaIkats*have separately been provided GI registration due to the difference in their weaving technique and design.[37] The distinctiveness of kanthas from Jamalpur and Rajshahi, for example, lies in the particular way the technique is applied in a specific place and not only in the type of design.

Protection of Women's TK Based Handicrafts by Geographical Indications

Since the intellectual property rights s like patents, copyrights or designs have not generally been able to protect traditional knowledge held by a specific group of

---

32 WIPO, *Review of Existing Intellectual Property Protection of Traditional Knowledge*, WIPO/GRTKF/IC/3/7 (2002).

33 Ibid.

34 Ibid.

35 Ibid.

36 On the varieties of *kantha* design and weaving techniques, see, for example, Zaman, above note 12.

37 GI Application No.4, filed on December 15, 2003, (2006) 13 Geographical Indication J. (PochampollyIkat);40 GI Application No.22, filed on February 1, 2005, (2006) 12 Geographical Indication J. (OdissaIkat).

individuals, GI seem to be the most appropriate mechanism to do so.[38] Further, the protection of traditional knowledge by GI provides manifold benefits, including protection of the peculiar designation or other characteristics, documentation of relevant knowledge and continuation of the cultural heritage.[39] In addition to that, GIs recognize the inherent collective dynamics of community based traditional handicrafts. As Vivien puts it:

> [T]he collective nature of the know-how results from its being shared within a community located for a long time in a specific area ensures its continued existence in this place. Individuals isolated from the community, or even small groups cut off from the main community, will not be able to note of know -how execute this know-how with equalproficiency. This underlies the prominent collective dimension of GIs, resulting from a group of producers sharing their know-how and cross-controlling the quality of the product.[40]

Further, handicrafts are generally linked to a geographical area due to a combination of both human and natural factors. Jamdani, a hand-made textile from Bangladesh, for example, is manufactured with a combination of traditional know-how and geo-climatic condition on the bank of the river Shitalakhya.[41]

Existing law of geographical indications: Does it protect the interest of the traditional producers all the way?

Following the trends of the other South-Asian Countries[42], the GI regime of Bangladesh allows the traders in goods to apply for the GIs as 'producers'[43]. Accordingly, besides the actual producers, it allows traders and dealers in relevant handicrafts to become the owners of GIs.[44] This provision may facilitate the giants in traditional handicrafts business to take registration of GIs and furthering the way of perpetually divesting of the real holders of traditional knowledge.

---

38 Delphine Marie –Vivien, 'Protection of Geographical Indications for Handicrafts: How to apply the Concept of Natural and Human Factors to all Products' (2013) 4(2) *The WIPO Journal* 191-205.

39 Ibid.

40 Ibid.

41 IftekharIqbal, *Protection of jamdani as a Geographical Indication in Bangladesh* (Paper presented at CPD, 17 June 2014) 6.

42 NS Gopalakrishnan, PS Nair and A K Babu, *Exploring the Relationship between Geographical Indications and Traditional Knowledge: An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia* (Geneva: International Centre for Trade and Sustainable Development, 2007).

43 Geographical Indications (Registration and protection) Act, 2013 s.2(3).

44 Gopalakrishnan, above note 37.

Challenges for the protection of women's intellectual property rights

The vested interest groups like fashion designers are riding on the ingenuity of real craftswomen from the informal sectors, mainly due to lack of policy gaps to protect traditional knowledge and cultural expressions.[45]

In the case of protection of cultural goods under the traditional knowledge regime, the question of conflict between individual right and collective may arise.[46] For example, in case of *Jamdani* women play a significant role in processing cotton yarns and to weave hand loom design on them. Now the question is whether the women who have unique knowledge of processing cotton yarn or weaving design could separately claim intellectual property right over them, for the output itself (i.e. Jamdani) is eligible for protection under the existing intellectual property right s regime. In case of NakshiKantha, the knowledge as to the art of weaving may belong to the whole community, but an individual craftswoman may have a skill to produce a embroidered quilt of exclusive design and quality. Once again, the question of individual versus collective rights proprietorship comes in the moot. So, in these cases, traditional goods stakeholders could think about the sui generis law to protect traditional knowledge balancing the individual versus collective interest.

Branding of women's cultural goods through logo and marks is an essential marketing tool to enable the product to find its niche market. The GI management regime of Bangladesh has so far taken no initiative for the branding of GI products either through sign (logo) or labeling. Given the wide geographical spectrum of some GIs in Bangladesh like nakshikantha, the Government should specify a uniform logo for relevant GIs.[47]

Supply chain of the craft products: Identifying intellectual property rights holders

Input suppliers in the craft industry could be categorized into: independent weavers, employed weavers and contracted weavers. Legally speaking, independent and contracted weavers e.g. the women who independently works in handicrafts at the micro - level or to whom retailers or exporters outsource their orders have intellectual property rights in their creation.[48] Employed weavers, on the other hand,

---

45 RuchiraGoswami and Karubakee Nandi, 'Naming the Unnamed: Intellectual property Rights of Women Artists from India'(2008) 16(2) *Journal of Gender, Social Policy and the Law* 257-280.

46 KimberleeWeatherall, 'Culture, Autonomy Djuliyamurr: individual and Community in the Construction of Rights to Traditional Designs' (2001) 64(2) *The Modern Law Review* 215-242.

47 Mohammad Towhidul Islam and Md. Ahsan Habib, 'Introducing Geographical Indications in Bangladesh' (2013) 24(1) *Dhaka University Law Journal* 51-82, 80.

48 *SuraiyaRahman vs. SDUW* 49 DLR (1997) 222

do not have intellectual property rights in their work done for their employers.[49] In addition to that, big fashion houses like *Aarong* claims the design and trademark rights of the handmade textiles even though they buy them from the local *haats* (where wholesale goods are sold by the producers).[50] Again fair trade[51] members employ skilled or semi-skilled women artisans who make goods from jute, bamboo, cane, handloom and embroidery for export.[52] For McArdle and Thomas, the impact on gender relations within producer communities is limited, although there are benefits for some women involved in fair trade production.[53]

Exploitation in the name of 'Fair Trade'?:Doesfairtrade intermediaries protect intellectual propertyrights of the traditional artisans?

The ECOTA Fair Trade Forum (EFTF), the Bangladeshi counterpart of the World Fair Trade Forum works with over 1, 15,000 artisans (with a ratio of 80% women) through its 29 member organizations of whom over 70% are exporters.[54] Its members include famous fashion houses like Aarong, Kumudini, Dhaka Handicraftsetc.[55] The women workers employed in the fair trade organizations include center-based workers, home–based workers and permanent employees.[56] Now a question may arise as to whether these fair trade organizations equitably compensate its employees or other workers for their their physical and intellectual skill.[57] As Barkat and Maksud put it:

> 'BRAC advertise for Aarong with the slogan that Aarong is "The World of Rural Artisans". The question is whether it is really a house of rural artisan, does the rural artisan really own the equitable production share. Rural artisans' products are selling at a high price in the home and abroad but do these artisans

---

49 Ibid.

50 Arpeeta Shams Mizan and Prabir Kumar Das, 'The *Tatnees*: Traditional Knowledge and Other Intellectual Property Considerations' in Md. RahmatUllah (eds.) in *The Shadow of Death: The Tantees of Bangladesh* (ELCOP, 2012) 121.

51 According to World Fair Trade Organization (WFTO), 'Fair Trade is a trading partnership, based on dialogue, transparency and respect, that seeks greater equity in international trade. It contributes to sustainable development by offering better trading conditions to, and securing the rights of, marginalized producers and workers – especially in the South.'<http://www.wfto.com/fair-trade/definition-fair-trade> 20 April 2016.

52 Ann Le Mare, Fair Trade in Bangladesh, <https://www.rgs.org/NR/rdonlyres/A8453D5C-D59F-4A60-B7AD-F7F52D85F64E/0/110201GeographyTodayFairtrade.pdf> 20 April 2016.

53 Louise McArdle and Pete Thomas, 'Fair Enough? Women and Fair Trade' 2012 8(4) *Critical Perspectives on International Business* 277-294, 277.

54 <http://eftfbd.org/web/> 20 April 2016.

55 For details, see generally, ECOTA Fair Trade Forum, *ECOTA Member Organizations' Portfolio* (EFTF, 2006).

56 Sayeeda Sultana, *Handicraft market Chain in Bangladesh* (Ecota Fair Trade Ltd., 2007) 61.

57 Ingenious Intellectual skills, once expressed, are entitled to IPRs protection.

> getting their reasonable share of production. Though a considerable number of rural women have been able to earn cash involving themselves in theexport oriented handicrafts industry, but this process have consequently strengthened the "Metropolis and Satellite Relationship"[58].'

For Goswami and Nandi, the mass commercialization of nakshikantha only benefits the urban traders and exporters in the absence of copyright protection due to the absence of signs by the producers on the ground.[59] Under the existing value chain, the real producers are thus rendered to mere weavers producing made-to-order products.[60] Accordingly, absence of intellectual property protection of the traditional handicrafts results in poor economic returns for the traditional authors of creative works.[61] The 'Fair Trade' regime in Bangladesh is also not an exception to this scenario, for the real producers' theoretical benefits from 'fair trade' ironically depends on the 'benevolence' of the specific owners of the business concerned.[62] Accordingly, where a fair trade mechanism does not have fair distribution chains of intellectual property, "the market fails completely for small-scale designers or owners of IP who receives no revenue at all for IP that is exploited without recognition or royalty payments."[63] Other studies, elsewhere, also claims that, in the fair trade system the intermediaries are primarily benefited despite the cutting edge demand of fair trade goods.[64] The causes of such ironical results includes, non-regulation of fair-trade certification mark and absence of harmonized standards to use fair trade certifications.[65]

Legally speaking, in the absence of an employer-employee relationship, Aarong has no right to use the intellectual property rights of its artisans on their relevant goods unless Aarong got it licensed from them.[66] Now who will compel Aarong to pay for

---

58 AbulBarkat and AKM Maksud, *Impact of Globalization on Women in Bangladesh: An Exploratory Study* (HDRC, 2001) 22.

59 RuchiraGoswamiandKarubakee Nandi, 'Naming the Unnamed: Intellectual Property Rights of Women Artisans from India' (2008)16(2) *Journal of Gender, Social Policy and the Law* 257, 267

60 Ibid. See also, Mizan and Das, above note 45, 121.

61 Ibid.

62 JavedHussen, 'Basic Features of the Fair Trade Producer Groups' in ArshadSiddiqui (eds), *Fair trade Practice in Bangladesh* (Ecota Fair Trade Forum,2007) 161.

63 Ron Layton, 'Enhancing intellectual property exports through Fair trade' in J Michael Finger and Philip Schuler eds., *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (The World Bank, 2004).

64 Teshager W Dagne, *Intellectual Property and Traditional Knowledge in the Global Economy: translating Geographical Indications for Development* (Routledge, 2014) 94.

65 Ibid.

66 UNCTD and WIPO, 'Marketing Craft and Visual Arts: The Role of Intellectual Property' (ITC, WIPO, 2003).

the intellectual property rights of the poor craftswomen? Here is the real policy space for the regulatory authorities. In case of Geographical Indications, if some government authorities like Bangladesh Small & Cottage Industries Corporation (BSCIC) takes registration of GIs in the relevant product, it could proceed against intermediaries like Arong on the ground of misappropriation. In cases, when an association of producers of traditional cultural goods holds a certification or collective mark or GI (as an authorized user), they could also proceed for misappropriation. Again, TK or traditional cultural expressions (TCE) protection law incorporating Convention on Biological Diversity (CBD) principles like access to benefit sharing could solve the position in a more balanced way.

Capitalizing women's traditional ingenuity to foster empowerment: Evidence from around the World

The relationship between intellectual property and empowerment of women has been evidenced in different countries from around the world.[67] In Fiji, for example, women's traditional skills have been used to make products such as masi cloth, handmade paper, magimagi (binding material used for decorative and construction purpose) leading the way of empowering women in traditional communities thanks to an SME named 'Pure Fiji Export Ltd.'[68] Women's traditional skill of kneading and rolling the dough into a thin, round wafer has been capitalized by Lijjat[69] to manufacture papad (or pappadum) – a crispy-thin cracker or wafer that is a staple food in India having command in local, national and international food market.[70] Further, the Himalayan Bio Trade Private Limited (HBTL) based in Kathmundu, Nepal has been dominating national and international markets in handmade paper, bags, embroidery and herbal cosmetics by using traditional knowledge of rural community, especially rural women.[71] Again, the Moroccan Berber Women have relied on their traditional knowledge to prepare high quality 'Argane oil' having

---

67 For case studies on IP and empowerment of women, see generally, WIPO 'Women and IP: Case Studies on Intellectual Property' <http://www.wipo.int/ipadvantage/en/search .jsp?ins_protection_id=&focus_id=2292> 20 April 2016.

68 WIPO, 'Empowering Rural Communities in the Pacific' <http://www.wipo.int/ ipadvantage/en/details.jsp?id=3712> 20 April 2016.

69 ShriMahilaGrihaUdyogLijjatPapad (Lijjat) is a cooperative established by Indian women that has developed a unique model for development and empowerment for low income female workers.

70 WIPO, 'Pappadums and the Path to Empowerment'<http://www.wipo.int/ipad vantage/en/ details.jsp?id=3619> 20 April 2016.

71 WIPO.'Promoting Traditional Crafts in the 21st Century'.

culinary and cosmetic use.[72] To protect the niche market of the Oil, Morocco has sought GI protection of 'Agrane' in the European Union. If 'Agrane' is provided with aProtected Designation of Origin (PDO), it would help to protect traditional knowledge and collective right of the women having peculiar knowledge to extract 'Agrane'. In addition, *soleRebels*, a women-led SME has embraced the Ethiopia's craftsmen and women and capitalized their rich and environmentally sustainable manufacturing tradition for handmade products to inspire new creations for a regional and international footwear market.[73] The s*oleRebels*has been able to contribute to the fortune of the community while sharing the benefits of its success with the people at the heart of its operations.[74] This benefit sharing approach could be a model to follow by SMEs in other countries having parallel use of women's traditional ingenuity.

Conclusion

Women's stellar role in the cottage and handicraft industry of Bangladesh is as old as the patriarchal social structure. Women are the depository of traditional know-how and they have applied this in the context of a given age. In line with the development of neo-liberal state ideology, different bottom-up mechanisms like the fair trade movement have developed to commercialize women's TK based goods with a promise to do equity to the women. Though new business models and transborder niche markets are benefiting the real TK holders on the ground, they have some vivid policy gaps. Non-recognition of theintellectual property rights of the traditional holders of knowledge is a major hurdle. While it transpires that women' sintellectual property rights could be recognized within the existing regime with necessary modifications, the policy gap as to equitable reward of the TK holders is the crux for the future discourse.

---

72 WIPO,' Protecting Society and Environment with a Geographical Indications' <http://www.wipo.int/ipadvantage/en/details.jsp?id=2656> 20 April 2016.

73 WIPO, 'Treading a New Path for IP and Development in Africa' <http://www.wipo.int/ipadvantage/en/details.jsp?id=2915> 20 April 2016.

74 Ibid.

Formation of the Constitution and the legal system in Bangladesh: From 1971 to 1972: A critical legal analysis

Dr. Muhammad Ekramul Haque*

Bangladesh was born on 26 March 1971 as an independent sovereign state in the world by making the Proclamation of Independence. In the eye of international law, the Proclamation of Independence was aUnilateral Declaration of Independence (UDI). Establishment of a country by the unilateral declaration of independence is a recognized method under international law to establish a new country.[1] The first foundation stone of the legal system of Bangladesh is the Proclamation of Independence which is the first legal document of independent Bangladesh. Later, the legal system was shaped by the Laws Continuance Enforcement Order, 1971 which imported majority of the laws now existing in Bangladesh. The article will trace the legal starting point of the country, the beginning of the constitutional journey and the formation of thegovernment and the legal system of Bangladesh. The article shall examine the law making power during the continuance of the liberation war and afterwards.

The Proclamation of Independence: starting point of the constitutional journey of Bangladesh

The general perception about the constitution of Bangladesh is that Bangladesh had its first constitution in 1972, which was adopted on November 4, 1972 and became effective on December 16, 1972. However, according to the first paragraph of the preamble to the Constitution of 1972, Bangladesh was established as an independent state on March 26, 1971. The question is: did the country run without any constitution during the period between March 26, 1971 to December 16, 1972? The answer is: No. Legally speaking, Bangladesh had a constitution since its birth as an independent country. The Proclamation of Independence 1971 was the first Constitution of Bangladesh.

---

* Professor, Department of Law, University of Dhaka.

1 International Court of Justice advisory opinion on Kosovo's declaration of independence. See at http://www.icj-cij.org/docket/files/141/16010.pdf. The question before the ICJ was: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" The ICJ noted that 'general international law contains no applicable prohibition of declarations of independence.' By ten votes to four, is of the opinion that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law.

The Proclamation of Independence was a unilateral declaration of independence made by the Constituent Assembly of Bangladesh on 10 April 1971. The Proclamation of Independence constituted the Constituent Assembly which was composed of the representatives elected in the elections held in Bangladesh from 7 December, 1970 to 17 January, 1971. The Proclamation stated: 'We, the elected representatives of the people of Bangladesh, as honour bound by the mandate given to us by the people of Bangladesh whose will is supreme duly constituted ourselves into a Constituent Assembly.' Further, the Proclamation declared the establishment of Bangladesh as a state in the following words: 'We the elected representatives of the people of Bangladesh … … declare and constitute Bangladesh to be a sovereign People's Republic and thereby confirm the declaration of independence already made by Bangabandhu Sheikh Mujibur Rahman.' The Proclamation of Independence contains three important things: firstly, it constituted the constituent assembly, the first formal legal body in Bangladesh. Secondly, it constituted Bangladesh as a sovereign People's Republic. Thirdly, it has mentioned the provisions regarding thepowers and functions of different organs of the newly born state. It is submitted that because of its third function, the Proclamation of Independence must be treated as the first Constitution of Bangladesh. The Proclamation of Independence although was adopted on the 10th April, was given retrospective effect on and from the 26th March, 1971. Thus, legally speaking, Bangladesh had a constitution on the very first day of its creation, the 26thMarch of 1971.

A country is governed by a set of laws and that set of laws is treated as constitution for that country. In that sense, there is no doubt that the proclamation of Independence was a constitution. The Provisional Constitution of Bangladesh Order, 1972 has clearly mentioned that the Proclamation of Independence was made for the governance of the country. The first paragraph of the Provisional Constitution of Bangladesh Order, 1972 said that '[w]hereas by the Proclamation of Independence Order, dated the 10th April, 1971 provisional arrangements were made for the governance of the people's Republic of Bangladesh.'

Apart from setting provisions regarding powers and functions of the state, the proclamation affirmed its promise to observe international law. It added: 'We further resolve that we undertake to observe and give effect to all duties and obligations that devolve upon us as a member of the family of nations and under the Charter of the United Nations.' The proclamation started with the background of the history of establishment of Bangladesh in the following words:

> Whereas free elections were held in Bangladesh from 7th December, 1970 to 17th January, 1971 to elect representatives for the purpose of framing a Constitution, AND Whereas at these elections the people of Bangladesh elected 167 out of 169 representatives belonging to the Awami League, AND Whereas General Yahya Khan summoned the elected representatives of the people to meet on the 3rd March, 1971, for the purpose of framing a Constitution, AND Whereas the Assembly so summoned was arbitrarily and illegally postponed for indefinite period, AND Whereas instead of fulfilling their promise and while still conferring with the representatives of the people of Bangladesh, Pakistan authorities declared an unjust and treacherous war, AND

> Whereas in the facts and circumstances of such treacherous conduct Bangabandhu Sheikh Mujibur Rahman, the undisputed leader of the 75 million people of Bangladesh, in due fulfillment of the legitimate right of self-determination of the people of Bangladesh, duly made a declaration of independence at Dacca on March 26, 1971, and urged upon the people of Bangladesh to defend the honour and integrity of Bangladesh, AND Whereas in the conduct of a ruthless and savage war the Pakistani authorities committed and are still continuously committing numerous acts of genocide and unprecedented tortures, amongst others on the civilian and unarmed people of Bangladesh, AND Whereas the Pakistan Government by levying an unjust war and committing genocide and by other repressive measures made it impossible for the elected representatives of the people of Bangladesh to meet and frame a Constitution, and give to themselves a Government, AND Whereas the people of Bangladesh by their heroism, bravery and revolutionary fervour have established effective control over the territories of Bangladesh,

The constitution by which the country was governed from 26 March 1971 to 10 April 1972 was the Proclamation of Independence. However, after issuance of the Provisional Constitution of Bangladesh Order, 1972 on 11 January 1972, two documents, the Proclamation of Independence and the Provisional Constitution of Bangladesh Order, together constituted the Constitution for the country and as such they continued to be the Constitution for the period between 11 April 1972 to 15 December 1972 (both dates are inclusive). The present Constitution became effective on 16 December 1972. Interestingly, article 151 has repealed certain laws including the Provisional Constitution of Bangladesh Order. However, article 151 has not repealed the Proclamation of Independence, the first part of the first Constitution. Thus, the Proclamation of Independence has been given a curious legal status. However, article 150(2) as it stands now says that '[i]n the period between the 7th day of March, 1971 and the date of commencement of this Constitution on the 16th day of December, 1972, the historical speech delivered by Bangabandhu Sheikh Mujibur Rahman, the Father of the Nation, in the Racecourse Maidan, Dhaka on the 7th day of March, 1971, set out in the Fifth Schedule of the Constitution, the telegram of the Declaration of Independence of Bangladesh made by Bangabandhu Sheikh Mujibur Rahman, the Father of the Nation on the 26th day of March, 1971 set out in the Sixth Schedule and the Proclamation of Independence of the Mujibnagar Government on the 10th day of April, 1971 set out in the Seventh Schedule are the historical speech and instruments of the independence and the struggle of freedom of Bangladesh which shall be deemed to be the transitional and the temporary provision for the said period.'

Laws Continuance Enforcement Order: Importing laws to the legal system of Bangladesh

It has already been discussed above that the legal system of Bangladesh formally started its journey with its first Constitution, namely, the Proclamation of Independence. The Proclamation also had established a government (which was popularly known as *Mujibnagar sarkar*) for the newly born country. The first

challenge for the new government to govern the country was to make a set of laws for the country. In order to have a set of laws, on 10 April 1971, the then Acting President of Bangladesh Syed Nazrul Islam issued the order—The Laws Continuance Enforcement Order, 1971 which was given retrospective effect on and from 26 march, 1971. The Order declared that the laws that existed in the East Pakistan on 25 March of 1971 shall be treated as the laws of Bangladesh subject to the sovereignty of Bangladesh. The order reads as follows:

> I, Syed Nazrul Islam, the Vice President and Acting President of Bangladesh, in exercise of the powers conferred on me by the Proclamation of Independence dated tenth day of April, 1971 do hereby order that all laws that were in force in Bangladesh on 25th March, 1971, shall subject to the Proclamation aforesaid continue to be so in force with such consequential changes as may be necessary on account of the creation of the sovereign independent State of Bangladesh formed by the will of the people of Bangladesh and that all government officials, civil, military, judicial and diplomatic who take the oath of allegiance to Bangladesh shall continue in their offices on terms and conditions of service so long enjoyed by them and that all District Judges and District Magistrates, in the territory of Bangladesh and all diplomatic representatives elsewhere shall arrange to administer the oath of allegiance to all government officials within their jurisdiction.
>
> This order shall be deemed to have come into effect from 26th day of March, 1971.

Thus, the laws that were in force on 25 March 1971 in the territory of Bangladesh shall continue to be the laws of Bangladesh on and from 26 March 1971 subject to one condition, that is, the laws must adopt the necessary changes consequential for the creation of the sovereign independent state of Bangladesh. However, the laws were accepted as the laws of Bangladesh on a 'wholesale' basis without going for 'choose and pick'. In *M/S. Dulichand Omraolal Vs. Bangladesh*,[2] decided on 18 June 1980, the validity of the law, The Enemy Property (Continuance of Emergency Provision) Ordinance1969, was challenged. The learned senior advocate of the Supreme Court Mr. Pal argued, inter alia, that the said law was not a valid piece of law made in the then Pakistan and as such it cannot continue as a law in Bangladesh under the Laws Continuance Enforcement Order, 1971. The Court decided the case against the contention made by Mr. Pal and accepted the law as a valid law which continued as a law in independent Bangladesh. However, the court did not in fact scrutinize the validity of the law; rather the court said that it will not examine the validity of the laws passed in Bangladesh before 26 March. The Court said:

> We now turn to question of validity of Ordinance 1 of 1969 which Mr. Pal argues was not a valid piece of legislation, which could be continued by Laws Continuance Enforcement Order, 1971. The validity of the Ordinance has been impliedly so held in Abdul Majid's case aforesaid and we do not, except for the clarification already made, find any reason to dissent from it. However, the argument of Mr. Pal may be

[2] 33 DLR (AD) 30.

> considered. His contention is that, President Ayub Khan in violation of his own Constitution, instead of abdicating in favour of the Speaker of theNational Assembly handed over power illegally and unconstitutionally to General Yahya Khan, and Yahya Khan without any legal or constitutional authority abrogated the Constitution of the then Pakistan. He was an usurper and as such the Provisional Constitutional Order which provided, inter alia, continuity of ordinance which included Ordinance 1 of 1969 was without any Constitutional validity, and as such the Ordinance ceased to exist as a valid piece of legislation after the expiry of one hundred and eighty days, and so it was not an existing law on 25th March 1971 which could continue in terms of Laws Continuance Enforcement Order, 1971. The short answer to the ingenious argument is that, so far as Bangladesh is concerned, we are to look at the legitimacy of a law from the Proclamation of Independence made on 10th April, 1971 and the Laws Continuance Enforcement Order and the Constitution of Bangladesh. As regards argument of Constitutional legitimacy of Yahya Khan, all that need be said is that this is a political question which the Court should refrain from answering, if the validity or legality of the Law could otherwise be decided. In the present case, however, as we have said, we are to look for the validity of the Laws from the sources indicated earlier. A combined reading of Proclamation of Independence, Laws Continuance Enforcement Order, the Constitution of Bangladesh, President's Order No. 29 of 1972. President's Order No. 48 of 1972 and Act XLV of 1974 as amended by Act XCIII of 1976 clearly indicates, that Ordinance 1 of 1969 continued as a valid piece of legislation which has been repealed by Act XLV of 1974. No further argument or speculation is necessary, Mr. Pal's contention fails.

However, the Appellate Division of the Supreme Court of Bangladesh, in an earlier case of *Mullick Brothers Vs. Income Tax Officer and another,*[3]decided on 30November 1978, examined the validity of a law and decided that that law could not continue as a valid law in Bangladesh. In *Mullick Brothers,*the question before the Appellate Division was whether the law, Martial Law Regulation No.32 of 1969known as Income Tax (Correction of Return and False Declaration) Regulation dated 15.4.1969, was adopted as a law in Bangladesh by the Laws Continuance Enforcement Order or not. The Appellate Division examined the validity of this law and declared it as an invalid law incapable of being treated as a valid law in Bangladesh under the Laws Continuance Enforcement Order of 1971. Mr. Asrarul Hossain argued:

> 'the Martial Law Regulation came to an end and after the revocation of Martial Law, it cannot be included in the definition of "Law" or "existing Law" or "regulation" as provided in the Constitution of Bangladesh. Any action taken or proposed to be taken under the Martial Law Regulation is, therefore, illegal.'[4]

The Court said:

> The contention of the learned Counsel or the appellant raised the basic question as to the natureof the Martial Law Regulation promulgated by the then Government of

[3] 31 DLR (AD) 165.
[4] Ibid, para 7.

> Pakistan and its validity as"Law" or "existing law" in Bangladesh after the war of liberation fought against the regimeresponsible for promulgation of Martial Law in 1969 and consequent emergence of Bangladesh as asovereign and independent state. On the 16th March, 1971 Bangladesh proclaimed independenceand a Proclamation was issued to that effect on 10th day of April, 1971 from Mujib Nagar. Therelevant portion of the Proclamation reads as follows:- "In order to ensure for the people ofBangladesh equality, human dignity and social justice, declare and constitute Bangladesh to be asovereign People's Republic and thereby confirm the declaration of independence already made byBanga Bandhu Sheikh Mujibur Rahman, and do hereby affirm and resolve that till such time as aConstitution is framed, Banga Bandhu Sheikh Mujibur Rahman shall be the President of the Republicand that Syed Nazrul Islam shall be the Vice-President of the Republic, and that the President shallbe the Supreme Commander of all the Armed Forces of the Republic, shall exercise all the Executiveand Legislative powers of the Republic including the power to grant pardon." On the same day that is10th April, 1971 Laws Continuance Enforcement Order 1971 was also proclaimed in order toestablish the laws that were in force in Bangladesh on 26th March, 1971 subject to the proclamationof independence. The Laws Continuance Enforcement Order, 1971 shows that all laws that were inforce in Bangladesh on 25th March, 1971 and were subject to the proclamation continue to be inforce with such consequential changes as were necessary. The proclamation made it clear that the
>
> President shall exercise all the Executive and Legislative powers of the Republic. The Martial Law,proclaimed by the regime against whom those Proclamations were directed, promulgated MartialLaw Regulation 32 in 1969. The proclamation having been issued on the 18th April, 1971 and havingcome into existence on the 26th March, 1971 and the President of the Republic being responsible fordischarging all the executive and legislative powers and only those laws which were not inconsistentwith the proclamation of independence having been continued in force, the irresistible conclusion isthat the Regulation made by the authority against whose authority the Proclamation ofIndependence is directed could not legally legislate for Bangladesh if such legislation was inconsistent with the Proclamation of Independence. The Martial Law Regulation promulgated by the Martial Law Regime lack the trappings of law. It is issued by one person who arrogates to himself all the State powers on the basis of force of arms and commands obedience to him by the force emanating from the military power. Law as it is understood in jurisprudence draws its authority from the will of the people of a country and absence of the expression of that will or rather silensing that will of the people through the strength of military force cannot be substituted for the jural concept of law. Martial Law comes into existence under certain conditions and it rules the country by Regulation and Orders and such Regulation and Orders if are desired to be continued are saved and preserved by a protective clause by a Constitution framed by a Parliament.[5]

The Court further observed:

> Martial Law Regulations were promulgation by Chief Martial Law Administrator on the abrogation of Constitution and the Chief Martial Law Administrator assumed himself as the administrator of the country through Martial Law Regulations and other Orders. Martial Law Regulations were issued to administrate the country at a point of

[5] Ibid, para 8.

> time when the will of the people which is the authority for all laws had come to a stupor. The only safety value (sic) of these Regulations are to the extent these are preserved and saved by the Constitution. On return to the Constitutional Government, regulation as referred to in the definition clause of the General Clauses Act is a regulation made under a constitutional instrument by a person or authority empowered on that behalf in Bangladesh. Martial Law is an antithesis of any Constitutional authority. Martial Law Regulation No.32 is not anywhere in the Constitution of the People's Republic of Bangladesh been saved.[6]

The Appellate Division also said that the High Court division had wrongly treated it as a valid law:

> The learned Judges of the High Court have taken the view that although the Regulation was repealed by necessary implication in independent Bangladesh its effects continued to exist because the assessment is a matter passed and closed and is saved even after its implied repeal if there were any repeal at all by mere implication. We have already covered the premises of this observation and concluded that the question of repeal of the Regulation does not arise because repeal presupposes existence of a valid law. We have already concluded that the Regulation being a Martial Law Regulation has not been saved by any legal Instrument of the People's Republic of Bangladesh.[7]

It is submitted that the High Court Division decided *Dulichand* going against the stand taken by the Appellate Division.*Dulichand*, thus, had to examine the validity of pre 1971 laws before treating them as the valid laws in Bangladesh.

However, the Pakistani laws made during the continuance of the war (26 March 1971 to 16 December 1971) have never been treated as an existing law in Bangladesh. In *Md. Yahya Vs. Government of Bangladesh and others*,[8] decided on 03 February 1982, the Court said that the Martial Law Regulation No. 81 issued on 6 June 1971 was not an existing law in Bangladesh. Martial Law Regulation No 81 promulgated by the Chief Martial Law Administrator of Pakistan on 7.6.1971 demonetised Pakistani currency notes of the then State Bank of Pakistan of 500 and 100 rupee notes and thereunder directed all holders of such currency notes to surrender them to Commercial Banks and to the Government treasury. The Court decided that '[s]ince we have found that the Martial Law Regulation 81 is not an existing law the Government of Bangladesh has no legal obligation to process the deposits of the demonetised notes.'[9] Mr. Rafiqul Islam, the learned Advocate for the petitioner argued that 'in view of the provisions of sub clause (1) of clause 3 of 4th Schedule of the Constitution the Martial Law Regulation 81 Issued by the Chief Martial Law Administrator of Pakistan on 7th June, 1971 is an existing law and as such the respondents are bound to pay the value of the demonetised notes

---

6 Ibid, paras 9, 10.
7 Ibid, para 11.
8 35 DLR(HCD) 182.
9 Ibid, para 10.

surrendered in pursuance of Martial Law Regulation 81 to the depositor.'[10] Rejecting this contention, the Court held:

> It is seen that on 10th April, 1971 the Government of Bangladesh at Mujib Nagar issued Proclamation of Independence. In pursuance of the Proclamation of Independence and Laws Continuance Enforcement Order all laws that were in force in erstwhile East Pakistan before 25th March, 1971 should continue to be in force with such consequential changes as might he necessary on account of the creation of the State of Bangladesh. The question raised by the learned Advocate for the petitioner that Martial Law Regulation 81 is an existing law in Bangladesh require thorough examination in the background of the provisions made in the Constitution. By sub-clause 1 of clause 3 of the 4th Schedule of the Constitution it has been provided that all laws made or purported to have been made in the period between the 26th day of March, 1971 and the commencement of this Constitution, all powers exercised and all things done during that period, under authority derived or purported to have been derived from the Proclamation of Independence or any law, are hereby ratified and confirmed and are declared to have been duly made, exercised and done according to law. It appears to us from a reading of the aforesaid provision that all laws made and all things done under the authority or in pursuance of the Proclamation of Independence or any law were ratified and confirmed. This provision has been enacted in the Constitution for the purpose of ratification of things done by purported exercise of any law during that period. After promulgation of independence declaring the State of Bangladesh and waging the war of independence during the period in question it cannot be said that the Martial Law Regulation promulgated during that period by the Chief Martial Law Administrator Would acquire the status of existing law.[11]

However, the valid laws found in Bangladesh on 25 March were accepted as the laws of Bangladesh with some consequential changes for the creation of independent sovereign Bangladesh. Subsequently, Bangladesh (Adaptation of Existing Laws) Order, 1972 made necessary corrections in the laws. For example, '[w]here an existing law … contains any provision extending the law to the whole of Pakistan or to whole of East Pakistan, that provision shall be so construed as to refer to the whole of the People's Republic of Bangladesh.' In *M/s. Hazi Azam v. Singleton Binda & Co.*,[12] the High Court Division held:

> The basic concept which underlines the Proclamation of Independence is that a new State has been founded in the midst of a war with the State of Pakistan. This Proclamation as well as the Laws Continuance Enforcement Order were made at a time when the war was being waged. By the Enforcement Order, the continuance of all the laws which were in force in the territory, now Bangladesh, was enforced only subject to the Proclamation with the result that those laws which were derogation of the sovereign status of the new international personality were continued in force. The words "subject to the Proclamation and "with such consequential changes which may be necessary on account of the creation of the sovereign independent State of Bangladesh formed by the

---

10 Ibid, para 4.
11 Ibid, para 5.
12 27DLR 589.

> will of the people of Bangladesh" are very significant words which emphasise the independent and sovereign status of the new international personality. It naturally follows that all those laws which had some international implication in the sense that they involved some international agreement, commitment, obligation or relationship made, undertaken or created by the Government of India or Government of Pakistan which functioned as the administrative authorities in the past in the territories now Bangladesh, cannot be deemed to be the agreement, commitment, obligation or relationship made, undertaken or created by the new State of Bangladesh unless the same was specifically accepted by it in exercise of its sovereign will.-It is, therefore, clear that the laws which regulate the rights and obligations of the citizen Or non-citizens within the municipal sphere of the country having no international involvement have been continued in force by the said Order.

The Constitution of 1972 has expressly repealed the Laws Continuance Enforcement Order, 1971 by article 151(a). However, the laws imported by the Order have been protected as existing laws by article 149 of the 1972 Constitution. Article 149 says that '[s]ubject to the provisions of this Constitution all existing laws shall continue to have effect but may be amended or repealed by law made under this Constitution.' Article 152 of the Constitution has defined the term existing law used in article 149 in the following words: '"existing law" means any law in force in, or in any part of, the territory of Bangladesh immediately before the commencement of this Constitution, whether or not it has been brought into operation.'

Law making power: from President to Parliament

Bangladesh became an independent sovereign country on 26 March 1972. After its independence, the Proclamation of Independence vested the law making power to the President and the power was entrusted to the Vice-President in case of unavailability of the President. Thus, in independent Bangladesh, President got the law making power first and then the Vice-President got it. After the adoption of the 1972 Constitution, the legislative power was vested in the Parliament, according to article 65 of the Constitution, which stands till now. The Constitution also has created a limited scope for law making by some other bodies and authorities including the President (article 93) and the Supreme Court of Bangladesh (article 107). Thus, the following is the timeline of the legislative power,divided into two phases in Bangladesh since its independence:

Phase 1: Legislative power under the Proclamation of Independence

1. President under the Proclamation of Independence
2. Vice-President under the Proclamation of Independence

Phase 2: Legislative power under the Constitution of 1972

1. President under the Proclamation of Independence
2. Parliament (House of the Nation) under the Constitution
3. Delegated authorities under the Constitution

4. Supreme Court under the Constitution
5. President under the Constitution

Phase 1: Legislative power under the Proclamation of Independence

President under the Proclamation of Independence: the first law making authority in Bangladesh:

The Proclamation of Independence (which was issued on 10 April 1971 and became effective on 26 March 1971) was the first Constitution of independent Bangladesh. Apart from declaring the birth of the People's Republic of Bangladesh as an independent sovereign country, it contained, *inter alia*, the provisions regarding law making power in the People's Republic of Bangladesh. The law making power was vested to the President by the Proclamation of Independence. The Proclamation of Independence said: 'the President shall … exercise all the Executive and Legislative powers of the Republic.' The Proclamation contained the names of both the President and the Vice-President of Bangladesh, which said: '… do hereby affirm and resolve that till such time as a Constitution is framed, Bangabandhu Sheikh Mujibur Rahman shall be the President of the Republic and that Syed Nazrul Islam shall be the Vice President of the Republic.' Bangabandhu Sheikh Mujibur Rahman was imprisoned in Pakistan on and from 26 March 1971. So, he was unable to exercise the legislative power under the Proclamation till his return to Bangladesh on 10 January 1972 (popularly known as *'Bangabandhur Swadesh Prottaborton Dibosh'*). He made the first law -- 'The Provisional Constitution of Bangladesh Order, 1972' -- on the 11th January, 1972 after his return to Bangladesh. However, it was not numbered as the President's Order (P.O.) unlike other orders issued by the President before the 1972 Constitution had been effective. It is submitted that this order ought to have been numbered as a P.O. just like other POs. Because this order clearly declared that it was promulgated under the authority granted to the President by the Proclamation of Independence. Interestingly, although article 151(b) of the present Constitution has not put any number to this order, the opening sentence of this article clearly termed it as a President's order by saying: 'The following President's Orders are hereby repealed.' In Thus, it appears that 'The Provisional Constitution of Bangladesh Order, 1972' was the first order in the form of a law issued by the President Bangabandhu Sheikh Mujibur Rahman.

The nature of the President's legislative authority under the Proclamation of Independence was, however, changed its character on the 11th January, 1972 when the 'Provisional Constitution of Bangladesh Order, 1972' was issued by the President. Section 6 of the Order declared that '[t]he President shall in exercise of all his functions act in accordance with the advice of the prime Minister.' At that time the country was transformed from the presidential form of government to the

parliamentary form of government considering the fact that 'it [was] the manifest aspiration of the people of Bangladesh that a parliamentary form of government shall function in Bangladesh' [Para 4 of the Provisional Constitution of Bangladesh Order, 1972]. After this order was issued, Bangabandhu Sheikh Mujibur Rahman became the Prime Minister of Bangladesh.

Vice-President under the Proclamation of Independence: the second law making authority in Bangladesh:

The Proclamation of Independence said that in case of unavailability of the President for any reason whatsoever, the Vice-President shall exercise all powers and functions of the President: 'We the elected representatives of the people of Bangladesh do further resolve that in the event of there being no President or the President being unable to enter upon his office or being unable to exercise his powers and duties, due to any reason whatsoever, the Vice President shall have and exercise all the powers, duties and responsibilities herein conferred on the President.' At the time of adoption of the Proclamation of Independence, the President was unable to enter upon his office and as such could not exercise his powers and duties due to his imprisonment in Pakistan. So, accordingly, the Vice-President enjoyed all powers and functions of the President during the period of absence of the President. According to the Proclamation, the then Vice-President (as was declared by the Proclamation) had to exercise all 'powers' of the President. It is to be noted here that the Proclamation did not say that the Vice-President shall act as the President or Acting President either. The Proclamation also did not say that the post of the President will be vacant if he is unable to discharge the functions of the President. So, constitutionally (according to the Proclamation of Independence), Bangabandhu Sheikh Mujibur Rahman remained the President even during the period of his absence from Bangladesh. The rules of textual interpretation of the said provision of the Proclamation clearly suggest that the Vice-President shall exercise the powers of the President, not as the President but as the Vice-President. Thus, it is clear that the Vice-President was empowered to exercise the powers of the president, not to act as the President. Maybe this differentiation, legally speaking, does not have any practical significance, but it has theoretical importance. However, after the adoption of the 1972 Constitution, it is deemed that the use of the term 'Acting President' had been legal. Because, section 3(1) of the 4th schedule of the Constitution validated all laws passed in the period between March 26, 1971 and December 16, 1972, which reads as follows:

> All laws made or purported to have been made in the period between the 26th day of March, 1971 and the commencement of this Constitution, all powers exercised and all things done during that period, under authority derived or purported to have been derived from the Proclamation of Independence or any law, are hereby ratified and confirmed and are declared to have been duly made, exercised and done according to law.

However, let us now look at the legislation made during the tenure of the Vice-President Syed Nazrul Islam who discharged the functions of the President. The first law made by him was 'The Laws Continuance Enforcement Order' which was issued on 10 April 1971 and was given retrospective effect from 26 March 1971. This order started clearly by identifying him as both 'Vice-President' and the 'Acting President', as the order says: 'I, Syed Nazrul Islam, the Vice-President and Acting President of Bangladesh, in exercise of the powers conferred on me by the Proclamation of Independence … .' However, the later orders issued by him did not contain the phrase 'Vice-President'; rather the term 'Acting President' was used in all subsequent orders issued by him. The preamble of the orders contain: 'in pursuance of the Proclamation of Independence of Bangladesh and in exercise of all powers enabling him in that behalf, the Acting President is pleased to make the following Order.'

However, the main point in this discussion on the law making power is that the Vice-President was given the power in case the President was not available. The first order issued by him ('The Laws Continuance Enforcement Order') has not been numbered as the Acting President's Order No. 1 of 1971, although it was so. The database of the laws of Bangladesh prepared by the Ministry of Law shows that 'The Bangladesh (Collection of Taxes) Order, 1971' is the 'ACTING PRESIDENT'S ORDER NO. 1 OF 1971.'[13] This is in fact the second law made by the 'Acting President' (Vice President Syed Nazrul Islam). In fact, after the Proclamation of Independence, 'The Laws Continuance Enforcement Order', issued on the 10th April, 1971, was the first law made by the Government of Bangladesh established by the Proclamation of Independence and 'The Bangladesh (Collection of Taxes) Order, 1971' is the second one, issued after more than 8 months of the first Acting President's Order, on the 26th December, 1971. Interestingly, in repealing the Laws Continuance Enforcement Order of 1971, although article 151(b) of the present Constitution has not put any number to this Order, the opening sentence of this article clearly identified it as a President's order by saying: 'The following President's Orders are hereby repealed.' It is interesting to note that none of the two first orders issued by the President and the Acting President was numbered as P.O. or A.P.O.

On 5 January 1972, the then Acting President Sayed Nazrul Islam made a law as an 'ordinance.' The title of the law was: The Bangladesh (Adaptation of University Laws) Ordinance, 1972. On that day, the Vice President Syed Nazrul Islam acting as the 'Acting President' had the law making power under the Proclamation of Independence. Prior to making this law, all laws made by him were declared as 'Order.' It is submitted that this law was named as an 'ordinance' erroneously. There

[13] http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=365 last visited on 3 May 2015.

was no reason for deviating from using the term order suddenly. Thus the word 'ordinance' used in this law was misleading and confusing.

Phase 2: Legislative power under the Constitution of 1972

Continued power of the President under the Proclamation of Independence

The Constitution of 1972 vested the legislative power to the parliament. But no parliament did exist at the time the Constitution became effective. Parliament was constituted by the election held in 1973 and the first session of the parliament was held on the 7th April 1973.[14] The Constitution of 1972 made some transitional and temporary provisions in its 4th Schedule. According to section 3(2) of the 4th Schedule, in spite of the Provisional Constitution of Bangladesh order, 1972 being repealed by article 151(b) of the Constitution, the President's legislative power under the proclamation continued to exist till the first meeting of the first parliament on April 7, 1973. Thus, the President remained the sole legislative authority (of course subject to the advice of the prime Minister as was mentioned in the Provisional Constitution of Bangladesh Order) even after the 1972 Constitution became effective, during the period of December 16, 1972 to April 7, 1973 when the First Parliament met its first session. Section 3(2) of the 4th Schedule of the Constitution reads as follows:

> Until the day upon which Parliament first meets pursuant to the provisions of this Constitution, the executive and legislative powers of the Republic (including the power of the President, on the advice of the Prime Minister, to legislate by order) shall, notwithstanding the repeal of the Provisional Constitution of Bangladesh Order 1972, be exercised in all respects in the manner in which, immediately before the commencement of this Constitution, they have been exercised.

So, after the 1972 Constitution became effective, the President's Orders started saying 'in pursuance of paragraph 3 of the Fourth Schedule to the Constitution of the People's Republic of Bangladesh, and in exercise of all powers enabling him in that behalf, the President is pleased to make the following Order', instead of the referral of the power to had been derived from the Proclamation of Independence, unlike in cases of the earlier P.O.s. For example, the preamble of Bangladesh Insurance Corporation (Dissolution) Order, 1972, promulgated on December 30, 1972 reads as follows:

> 'WHEREAS it is expedient to provide for the dissolution of the Bangladesh Insurance Corporation, and for matters ancillary thereto; NOW, THEREFORE, in pursuance of paragraph 3 of the Fourth Schedule to the Constitution of the People's Republic of Bangladesh, and in exercise of all powers enabling him in that behalf, the President is pleased to make the following Order.'

[14] http://www.parliament.gov.bd/index.php/en/about-parliament/tenure-of-parliament last visited on May 03, 2015.

It is interesting to note that the section 3(2) of the 4th Schedule has mentioned about the repeal of the Provisional Constitution of Bangladesh Order 1972, but it has not said anything about the Proclamation of Independence-the main law that granted the President's legislative power-which was not repealed by article 151 of the Constitution, unlike the Provisional Constitution of Bangladesh Order 1972.

Now, I am making an important question: Could the President promulgate an ordinance under the authority of article 93 of the Constitution in the period between 16 December 1972 and 07 April 1973. In other words, could the President promulgate an ordinance under article 93 after the 1972 Constitution became effective but before the creation of the first Parliament according to article 65 of the Constitution? The answer is: No. Because, article 93 of the original Constitution of 1972 empowered the President to promulgate an ordinance only when the parliament would not be in its session. Article 65(1) made a provision for the creation of the Parliament. So, before the creation of any parliament how could the President justify its ordinance on the plea of the parliament not having its session at that moment? Thus, in my opinion, in the absence of section 3(2) of the 4th Schedule, the country would not have any legislative authority. It is pertinent to note here that the ordinance making power of the President under article 93 of the Constitution became functional only after the creation of the first parliament in 1973, not before, not even after 16 December, 1972 when the constitution became effective.

Parliament (The House of the Nation) constituted under the Constitution of 1972

Finally, the 1972 Constitution granted the legislative power to the Parliament instead of the President. Article 65(1) says:

> 'There shall be a Parliament for Bangladesh (to be known as the House of the Nation) in which, subject to the provisions of this Constitution, shall be vested the legislative powers of the Republic: Provided that nothing in this clause shall prevent Parliament from delegating to any person or authority, by Act of Parliament, power to make orders, rules, regulations, bye laws or other instruments having legislative effect.'

The legislative power of the parliament is subject to the provisions of the Constitution, according to article 65(1) of the Constitution. This article also created the scope for delegating the legislative authority by the Parliament, according to the provisio to article 65(1).However, the legislative power of the Parliament became functional only after the creation of the first parliament in 1973 and not before. Because, at the time the 1972 Constitution became effective, no parliament existed in the country. According to section 1 of the 4th Schedule, the Constituent Assembly stood dissolved at the moment the Constitution came into force that is on 16 December 1972. Section 2 of the Schedule added that the 'first general election of

members of Parliament shall be held as soon as possible after the commencement of this Constitution.'

The Constituent Assembly (GonoParishad): the Constitution making authority in Bangladesh:

The President issued the "Bangladesh Constituent Assembly Order" (P.O. No. 22) on March 23, 1972 for the creation of the Constituent Assembly for the purpose of making a constitution.[15] The Constituent Assembly met in its first session on April 10, 1972. On 11 April 1972, the Constituent Assembly formed the Constitution Drafting Committee headed by the then Minister for Law and Parliamentary Affairs.[16] The Chairman of the Drafting Committee presented the Constitution Bill in the Constituent Assembly on 12 October 1972.[17] The Assembly adopted the Constitution on 4 November 1972 which came into force on 16 December, 1972.[18]

The Constituent Assembly constituted by the Proclamation of Independence did not have any legislative power. It was given the power of making a constitution for the newly born Bangladesh. The 4th Schedule has said that the Constituent Assembly stood dissolved on 16 December 1972, the day on which the 1972 Constitution became effective. It is argued that the Assembly had the opportunity to perform the legislative functions after 16 December 1972, but no such legislative power was vested to the Assembly ever.

Form of Government: From Presidential to Parliamentary form

The proclamation of Independence, the first Constitution of Bangladesh, established a presidential form of Government. 'Mujibnagar Sarkar' established by the Proclamation was headed by the President Bangabandhu Sheikh Mujibur Rahman. The Proclamation vested all powers to the President:

> 'that the President shall be the Supreme Commander of all the Armed Forces of the Republic, shall exercise all the Executive and Legislative powers of the Republic including the power to grant pardon, shall have the power to appoint a Prime Minister and such other Ministers as he' considers necessary, shall have the power to levy taxes and expend monies [sic], shall have the power to summon and adjourn the Constituent Assembly, AND do all other things that may be necessary to give to the people of Bangladesh an orderly and just Government.'

However, a parliamentary form of Government was established on 11 January by issuing the Provisional Constitution of Bangladesh Order. Section 5 of the Order

---

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

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

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

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

said that '[t[here shall be a Cabinet of Ministers, with the Prime Minister at the head.' Section 6 added that '[t]he President shall in exercise of all his functions act in accordance with the advice of the Prime Minister.' Later, the 1972 Constitution also established a parliamentary form of Government. However, it was argued in *A.K.M. Fazlul Hoque & others Vs. State*[19] that the President could not change the form of Government exercising his legislative power under the proclamation of Independence. But it was held by the Court that the legislative power of the President under the Proclamation of Independence included all law making powers including the power to make a law changing the form of government. The Court held that—

> in addition to conferring on the President all other powers including the executive powers, the Proclamation, after having noticed the prevailing circumstances invested him with all the "Legislative powers of the Republic". Obviously, the expression "Legislative powers of the Republic" is of the widest amplitude and admits of no limitation. The Proclamation, in our view, empowered the President designated by it to make any law or legal provision, even of a constitutional nature. We looked for butfound no indication in the Proclamation to the contrary. On the other hand, assurance is lent to this view by the further provision in the Proclamation which empowered the President to do everything necessary to give the people of Bangladesh an orderly and just Government, including the power to appoint a Prime Minister and other Ministers. The impugned clauses (5) to (8) of the Provisional Constitution Order were thus authorised by the terms of the Proclamation.

Conclusion:

The Proclamation of Independence by which Bangladesh declared its independence was the first Constitution of Bangladesh. It was a well drafted declaration of independence that served as the Constitution for the newly born country. It contained necessary fundamental laws regarding governance of the country and enclosed the commitment of the state to observe the UN Charter and other obligations under international law as an independent sovereign country. The first significant legal achievement of the Mujibnagar Sarkar was the adoption of the Laws Continuance Enforcement Order, 1971 during the continuance of the liberation war. Legally speaking, the country faced no gap in constitutional or other laws necessary for the governance of the country and the regulation of other activities in the state. The adoption of the Laws Continuance Enforcement Order, 1971, which shaped up the entire legal system, reflects the political intelligence and the legal acumen of Mujibnagar Sarkar. After achieving independence, within a year after the end of the war the Constituent Assembly adopted the Constitution of 1972 which replaced the first constitution. This is the pride of the people of this nation that we have established our country and have been able to run it in a proper constitutionaland legal framework.

---

[19] 26 DLR (SC) II.

Contract and judicial review in Bangladesh: From Sharping to present

Dalia Pervin*

Abstract

The government is the biggest procurer in Bangladesh. It continues to enter into numerous contracts daily. When such contracts are entered into by the government in performance of their statutory duty as sovereign, they are actions of public nature and amenable to constitutional challenge before the Supreme Court of Bangladesh under judicial review. In other words, a citizen, who is a party to these special kinds of contracts are able to claim enforcement of these contracts in constitutional courts in addition to being enforced by civil courts only. In this article, the practice of these contracts in Bangladesh are looked into. We have tried to cover the recent case laws on the subject from the first case of it's kind. The rationales adopted by the courts are self explanatory and does not require interpretation. We have endeavored to put up a map of development on this area of law. There is no other specific research question in this article other than the mapping of the progress of the availability of judicial review in government related contracts. While the courts recognize all the other ingredients of the law of contracts to be present in these special contracts, the extraordinary remedy of judicial review and its availability in certain cases make all the difference.

Maintainability

The first case to have raised an issue of maintainability of a judicial review challenge in a contract issue was in *Sharping Matshajibi Somobaya Samity v Bangladesh*[1] where the High Court Division of the Supreme Court of Bangladesh held citing *Chittagong Pourasava v. Md. Ajmal Khan*,[2] and quoting Hossain, C.J. that:

> *"In annexure A to the Writ Petition which is the impugned order shows that the Pourashava forfeited the aforesaid money in terms of the tender notice which is a part of the contract. The question therefore is one of Jurisdiction of the High Court in Writ matters. Can the High Court pass an order to refund earnest money or security deposit made as one of the stipulations of the contract? The facts stated earlier and the clause just quoted indicate that the forfeiture of the earnest money on the basis of which the first respondent made a bid and on his failure to pay the bid money, the action of the forfeiture of earnest money was taken…… the question whether forfeiture, made in terms of the contract or not by the Chittagong Pourashava was not a matter justifiable in writ jurisdiction and so it could not be agitated before the High Court exercising its jurisdiction*

* LL.M.(Cantab), Associate Professor, Department of Law, University of Dhaka

1 (1987) 39 DLR 78

2 4 BSCR page 54 K

under Article 102 of the Constitution, commonly known as writ jurisdiction. It is well settled that disputes which arise essentially from contract are not cognizable under Writ jurisdiction."

We are in respectful agreement with the observation as above. It had settled the law in this regard by spelling out that all executive actions which are arbitrary having travelled beyond the contract by assumption of a power which they possessed neither under the contract nor under the tenor of the law, the said would be arbitrary and cannot succeed by taking refuge under the plea that is being matters of contract cannot be agitated in writ. But in case of rights and duties which are referable to contract simpliciter in the absence of any arbitrary or malafide allegation, substantiated on facts cannot be agitated in writ jurisdiction."

It appears therefore that the court did leave a window to interfere where the government action was acting arbitrarily and *malafide*. However, reversing the above decision of the High Court Division the Appellate Division settled the issue of maintainability of a writ petition or a petitioner in judicial review in contractual matters under specific circumstances. The court stated that present day governmental functions include multifarious activities. Some functions are Government functions while exercising sovereign power and again some of some functions can be described are trading functions. When the Government accepts a tender and places an order for supplying, a contract is entered into. The Government function in this case is that of a a trader. '*If there is a breach of such contract the aggrieved party can sue for damages or any other appropriate remedy. But not by way of invoking the writ Jurisdiction.' However, when the government grants lease, privilege, settlement etc., the government is "performing function in connection with affairs of the republic or the local authority."* The Government is such cases act pursuant to some statutory powers and any such contract when rooted in statute, is the sovereign function of the state. When the government is acting in its sovereign capacity if there is a breach of any statute or rule the same can be remedied by invoking writ jurisdiction. *'Even if any discretion is left in statute such discretion must be exercised in accordance with settled principles and not arbitrarily.'*

In the courts own language: "*Judicial thinking has crystallized on this subject in two clear cut ways, namely, (i) if it is a pure and simple contract, which is entered into by the Government in its trading capacity for any breach of such contract writ will not be available as remedial measure, (ii) on the other hand, the contract is entered into by Government in the capacity as sovereign then writ jurisdiction can be invoked for breach of such contract, inasmuch as, Constitution gives the power directing a person performing any function in connection with the affairs of the republic or making an order that any acts,*

> *done or proceeding taken by a person performing function in connection with the affairs of the republic then he can invoke the jurisdiction. (31)"*[3]

Facts of *Sharping* was in a nutshell are as follows: The appellant Sharping Matshajibi Samabaya Samity was granted the lease of the fishery in question for a term of six years for 389 B.S. at 50% enhanced rate over the existing rent and the lease deed was executed on payment of rent for 1389 B.S. on 22.8.81. Suddenly after three weeks, the Director of Fishery cancelled the lease whereupon the petitioner challenged the order by way of writ, namely, Writ Petition No.19 of 1982. The rule was made absolute and the High Court Division declared the cancellation order as void, whereupon the appellant was inducted into possession in September, 1982. As per stipulation that the appellant should show some development work in April, 1984, the District Fishery authorities reported that the appellant satisfactorily completed the stipulated development work of the fishery. In the meantime it was detected that in calculating rent of the fishery an error had crept in, inasmuch as the previous rent was Tk. 72,000/00 and calculating enhanced rent of 50% the total would come to Tk.1,08,000/00 and not Tk. 1,20,000/00 as was worked out. This position was accepted by the Government and the appellant was allowed to pay rent at Tk. 1, 08,000/00 per year. The government in the impugned letter informed the appellant that the balance money paid by the appellant would be adjusted for the next year's rent and the appellant was requested to pay the rest Tk 96,000/- "being the rent of 1390 B.S. immediately". This rent was paid on 25th Baisak 1390 B.S, corresponding to 9.5.83. The government later contended that as per the lease agreement the rent was due on 15th Falgoon 1389 b S. They argued that the appellant deposited the rent in Baisak, therefore, they have defaulted in payment of rent in time and that was a delay of two months. The High Court Division, however, while dealing with this aspect came to the conclusion that it was a delay of one year two months. The government initiated to cancel the lease of Chatla Beel Group Fishery granted by the Fishery Department in favour of Sharping F.C.S. for the period of 1392 to 1394 B.S. on ground of their default of rent and for not undertaking any development scheme. It had also been decided to lease out the above mentioned fishery to another Towhid F.C.S- for 3 years from 1392 B.S. to 1394 B.S. at 25% enhanced rate over that of 1391 B.S. for the 1st over of 1392 B. S. and for 1393 & 1394 B.S. the lease money shall be 10% higher than that of each proceeding year. The High Court Division while dealing with the case ultimately came to the conclusion that a contractual right could not be enforced by invoking the writ jurisdiction under Article 102 of the Constitution and in this view of the matter the rule was discharged. However, as seen above, the Appellate Division reversed the judgment of the High Court Division.

---

[3] *Sharping Matshajibi Somobaya Samity v Bangladesh & others* 39 DLR (AD) 85

The Indian Supreme Court had the same view and held that

> *We are unable to hold that merely because the source of the right which the respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of the public authority he must resort to a suit and not to a petition by way of writ. In view of the judgment of this Court in K.N. Guruswamy's case*[2] *there can he no doubt that the petition was maintainable, even if the right to relief arose out of an alleged breach of contract where the action challenged was of a public authority invested with statutory authority.*[4]

Types of contracts amenable to writ

Sharping stated that when the power of the government to enter a contract accrues from *statutory* power, it is *rooted* in the sovereign authority of the government and it amenable to writ jurisdiction. the In *Lutfu Mia v. Government of Bangladesh & Others*[5] the government leased out a fishery to the appellant for three years, but later approved the lease for one year. The appellant unsuccessfully moved the High Court Division in the writ jurisdiction. The Appellate Division found the action of the government to be arbitrary and without lawful authority. Ruhul Islam J held that " *If the fishery was advertised to be leased out for a period of three years and auction was held accordingly, and the successful bidder paid the requisite premium duly and he submitted his duly executed lease deed and the possession of the fishery was delivered to him, undoubtedly, some valuable rights of the successful bidder accrued in the fishery. It is true that until lease deed gets approval of the authority concerned and execution of the lease deed was not completed lessee's full right as such did not accrue, but the action of the approving authority cannot be sustained if it is found arbitrary and without application of mind".*

In *Sharping* the court specifically identified *matters of' settlement of hat, bazar, fisheres, khas lands. etc.* as matters wherein the government acts in pursuance of some statutory power and any such contract to exercise sovereign function of the government when rooted in statute. Thus, a contract arising out of a statute has an element of public law which makes it a suspect class to be scrutinized by the court. In *NAKM Samabaya Samity v Ministry of Land*[6] it was held by the High Court Division that when an agreement with respect to a fishery was duly executed by the government on behalf of the President by a government servant, its cancellation on the plea of a right to confirmation of the agreement on behalf of the government by a superior officer, was held to be arbitrary and illegal.

---

4 *D.F.O. South Kheri v. Ram Sanehi* AIR 1973 SC 205

5 1981 BDL (AD) 105

6 45 DLR (1993) 1

These kinds of contracts are distinct from other contracts of procurements of the government or government's commercial contracts. In *ARK Associates Ltd & Ors v The Chairman, Dhaka Water Supply*[7] K M Hasan J held that "*..the latest position laid down by our Supreme Court is that a dispute raised in an ordinary commercial contract, even though a statutory body is a party to the contract and an inchoate right is violated by executive exercise is not amenable to the writ jurisdiction under article 102 of the constitution."* Therefore, a contract would not automatically be a statutory one simply because it has been signed by or awarded by a statutory body.

In *Kerala State Electricity Board and another, v. Kurien E. Kalathil and others*[8], Y.K Sabharwal, J held that: "*A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not of itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such active ties may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil Court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have been relegated to other remedies."*

In *Chairman, BTRC v Nooruddin & others*[9] 'admittedly the writ petitioners voluntarily accepted the offer of the corporation for voluntary retirement from service and accordingly they received the major portion of their retirement benefits/entitlements. Only a minor portion of their dues on account of leave salary was not paid to them. For such dues the Corporation have written to the concerned ministry for necessary instructions and guidelines which is under consideration of the government. The appellant Corporation did never refuse to pay such benefits to the writ petitioners and they are still willing to pay such minor portion of the benefits to the writ petitioners as soon as they will receive the necessary direction from the ministry of communication, and as such, the High Court Division ought not to have declared the orders of voluntary retirement of the writ petitioners unlawful Md. Abdur Rouf J declared that "*In the facts and circumstances of the case at best*

7 19 BLD (HCD) 1999 349
8 AIR 2000 SC 2573
9 3 BLC (AD) (1998) 225

there may [be] a case of violation of contract for which proper remedy may be sought in the civil court and not under the extraordinary writ jurisdiction". In other words, a statute creating a body cooperate may confer power on a statutory body to enter contracts to enable it to discharge its functions. Issues or disputes with a citizen arising out of the terms of' these contracts are to be settled by the ordinary principles of' law of contract. Private law may involve a State, a statutory authority or a public body in contractual or tort actions. But they cannot be siphoned off into the is not jurisdiction. In *Managing Director, WASA v Mohammad Ali*[10] the court held that "*As it appears in the instant case even if for argument's sake it is conceded that there was a contract and more so, the same was not merely to supply the generators but also for installation a maintenance of the generators even then, the contract being not entered into by the appellant with the respondent in terms of any statutory provision or in exercise of statutory power of the appellant but the contract being an ordinary commercial contract it comes to that the relief granted by the High Court Division in the writ petition is not legally available to the respondent in respect of the contract allegedly entered into between the appellant and the respondent.*"

In *Meghna Vegtable oil Industries Ltd. v Pertobangla & others*[11] AM Mahmudur Rahman J citing *Radha Krishna Agarwal v State of Bihar*[12] stated that the Indian Supreme Court "..*nagatived the contention that when the state or its official purport to operate within the contractual field the grievance of the citizen could be remedied by way of writ petition under article 226 of the Indian constitution. In the instant case before us the gas line was disconnected on the unpaid bill which the petitioner states to be false and the disconnection is in terms of the agreement. Thus, when for the breach of a term and condition of an agreement an action is taken by the party the remedy lies in a properly constituted suit and not in writ jurisdiction."* It appears that the courts have been very cautious to sift through a contract and distinguish between a statutory obligation of a statutory body where there is a violation of a statutory provision and a commercial term of a contract even if entered into by a statutory body.

In that light in *Abu Mohammad v Bangladesh*[13] a division bench presided over by JR Modassir Hosain J and judgment delivered by Md. Awlad Ali J held that "*if the petitioner being one of the contracting parties can establish before a competent court of law that there had been a mutual mistake the petitioner can seek remedy for rectification of the contract or particular terms of the contract. This court in exercising jurisdiction under article 102 of the constitution cannot direct the respondents to rectify or alter the particular clause of the contract in order to make it equal to the contracts entered into with the other purchasers in respect of other tanneries."* It is submitted that this view may create a problem for a petitioner or a citizen. The civil courts while can rectify a mistake of the parties may be bound by

10 59 DLR (AD) (2007) 185
11 50 DLR (1998) 474
12 AIR 1977 (SC) 1496
13 52 DLR (2000) 352

the parol evidence rule. Further, on the point of discrimination it would be difficult for the civil courts to direct a government authority to follow the same form of contracts (meaning same terms of contract) as it has done with others since the civil courts simply lacks jurisdiction in this regard. If the fact of jurisdiction is clear to the court in any given case, it is submitted that the writ jurisdiction ought to be attracted. Otherwise, a citizen may be left with no remedy at all.

In *Fazlur Rahman & Co. (Pvt) Limited v Agrani Bank & others*[14] the court poses the question that if there is an agreement between the bank and its customer to waive interest, it is possible to enforce this agreement by a writ of mandamus? The court finds that the banks are allowed to transact banking business under the President's Order 26 of 1972. And banking business is like any other business the aim of which is to earn profit. The business of Agrani Bank owned by the government (and respondent no. 1) is not performed under any statutory power and is done in the capacity of an ordinary business organization and, as such, writ of mandamus does not lie to enforce and ordinary contract. However, when the defense savings certificates were purchased by the petitioner from the bank who was held to have acted as an agent on behalf of the government, it was found that the bank is under legal obligation to make payment according to the terms mentioned in the said certificates on presentation before the bank after those were matured.[15]

The Indian Supreme Court has devised a way of determining what is a statutory contract. In *India Thermal Power Ltd. v MP*[16] the Indian apex court held that "*Merely because a contract is entered into in exercise of power conferred by a statute, that by itself cannot render the contract a statutory contract. If entering into a contract containing prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory*".

Therefore, it appears that for a claim in under contract to be successful in a writ jurisdiction the (i) contract has to be entered into by a statutory authority (ii) pursuant to a statutory provision and (iii) it has to be established that there was a violation of a statutory provision. In *Bangladesh Telecom (Pvt) Ltd v Bangladesh Telegraph and Telephone Board and another*[17] the Supreme Court of Bangladesh per Mustafa Kamal J (as his Lordship was then) held that the agreement dated 26.7.89 between BTL and BTTB was only a Memorandum of Understanding, executory in nature. This agreement merged with the licence dated 25.3.90, because BTTB, being empowered by section 3 of the Bangladesh Telegraph and Telephone Board Ordinance, 1979 (Ordinance No. XII of 1979), granted a licence to BTL under section 4 of the Telegraph Act. As a result the terms and conditions of the

14 51 DLR (1999) 350
15 *Abdus Salam v Manager, Agrani Bank and others*, 47 DLR (1995) 175
16 AIR 2000 SC 1005
17 48 DLR (AD) 20

agreement dated 26.7.89 became the terms and conditions of the licence itself. BTTB is now able to cancel only the licence and not the agreement as the agreement has already merged into the licence. Therefore, when the agreement was sought to be cancelled by the BTTB, it was in fact the licence which stood cancelled by the impugned order dated 31.3.92. Hence it was not a cancellation of a contract, far less a commercial contract. The impugned order was meant to be a cancellation of BTL's licence. As the licence was granted to BTL in exercise of a statutory power and as the cancellation thereof was also made in exercise of a statutory power, it was no longer a case of cancellation of a commercial contract and could attract the writ jurisdiction of the High Court Division. By merging the agreement into the licence, its terms and conditions no longer remained the terms and conditions of a commercial contract. It became the terms and conditions of the licence itself. Therefore, writ was maintainable.

Looking into the development in this area of law, the Appellate Division decided to frame a guideline for easier reference and held in *Power Development Board v, Asaduzzaman Sikdar*[18] that writ jurisdiction can be invoked in case of breach of contract when —

"*(a) the contract is entered into by the government in the capacity as sovereign:*

(b) Where the contractual obligation sought to be enforced in writ jurisdiction arises out of statutory duty or sovereign obligation or public function of a public authority:

(c) where contract is entered into in exercise of an enacting power conferred by a statute that by itself does not render the contract a statutory contract, but "if entering into a contract containing prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporate certain terms and conditions in it which are statutory then the said contract to that extent is statutory":

(d) where a statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions and the contract so entered by the statutory body is not an exercise of statutory power then merely because one of the parties to the contract is a statutory or public body such contract is not a statutory contract;

(e) when the contract is entered into by a public authority invested with the statutory power, in case of breach thereof relief in writ jurisdiction may be sought as against such on the plea that the contract was entered into by the public authority invested with statutory power:

(f) where the contract has been entered into in exercise of statutory power by a public authority in terms of the statutory provisions and then breach thereof gives right to the aggrieved party to invoke the writ jurisdiction because the relief is against breach of statutory obligation."

---

[18] (2004) 9 BLC (AD) 1

In *Ananda Builders Ltd. v BIWTA*[19] Mohamad Fazlul Karim J (as his lordship was then) held that a "*contract does not become a statutory contract simply because a public functionary entered into the contract unless a statute stipulates terms which have been incorporated into the contract."*

In *Superintendent Engineer RHR, Sylhet & Others v Ohiduzzaman Chowdhury*[20] Appellate Division per Mohammad Fazlul Karim J discussed two Indian cases. In *Kulchhinder Singh and others-vs Hardayal Singh Brar and others*[21] it has been held that the remedy of Article 226 of writ under the Indian constitution is unavailable to enforce a contract qua contract. What is immediately relevant is not whether the respondent is State or Public Authority but whether what is '*enforced is a statutory duty or sovereign obligation or public function of a public authority*.' Private law may involve a State, a statutory body, or a public body in contractual or tortuous actions. But they cannot be siphoned off into the writ jurisdiction. And in *Verigamto Naveen-vs-Govt of AP and others*[22] it has been held that; in cases where the decision making authority exceeded its statutory power or committed breach of rules or principles of natural justice in exercise of such power or its decision is perverse or passed an irrational order the Court has interceded even after the contract was entered into between the parties and the Government and its agencies where the breach of contract involves breach of statutory obligation when the order complained of was made in exercise of statutory power by a statutory authority, though cause of action arises out of or pertains to contract, brings if within the sphere of public law because the power exercised is apart from contract. The freedom of the Government to enter into business with anybody it likes is subject to the condition of reasonableness and fair play as well as public interest. After entering into a contract, in cancelling the contract which is subject to terms of the statutory provisions, as in the present case, it cannot be said that the matter falls purely in a contractual field.

After referring these cases the court also referred to the case of *Assaduzzaman Sikder* mentioned above and determined that unless a case falls within one the categories fixed by the court in that case, no claim of contract is in generally to be entertained in writ jurisdiction.

Discrimination, malafide and arbitrariness

It must be noted that *Ramana Shetty v. Airport Authority* referred to in Sharping is a case where the equality clause was invoked. When discrimination is alleged and enforcement of fundamental right is sought, the distinction between contracts having root in statutes and trading contracts is of no consequence as art.102(l) will be available even in case of an ordinary trading contract.

---

19 57 DLR (AD)(2005) 31
20 VI ADC (2009) 736
21 AIR 1976 SC 2216
22 (2001) 8 SCC 344

In a separate judgment S. Ahmed J observed in Sharping. in case of breach of any obligation under a contract between government and a private party, proper remedy lies in a civil suit and not in a writ petition under the extra-ordinary jurisdiction given by the Constitution. But this principle will not apply when the government violates the terms of the contract with a mala fide intention or acts arbitrarily or in a discriminatory manner.

Mala fide as a concept is applicable when an exercise of statutory power is in question and not in respect of contract performance generally, but the observation of S. Ahmed J is right inasmuch as when the government acts malafide the action in respect of a contract, whether entered in the exercise of statutory power or not, is, at the minimum, arbitrary and is, therefore, violative of art.27.

However, mere allegation of malafide is not enough. It has to be proved before the court. In *Managing Director, WASA v Mohammad Ali*[23] the court held that "*The question of malafide, being a question of fact, has to be alleged specifically. As it appears the respondent merely stated that he has come to learn that some interested quarters in order to frustrate the work and the contract at the instance of some corrupt party with malafide intention and without any committee evaluation or recommendation and without any reasonable cause or ground arbitrarily withdrawn the letter of intent which is interference with respondent's freedom of trade or business and the said letter disclosing no reason is malafide, arbitrary and against the principle of fair plav*." These allegations without substance was not enough for the court to accede to a claim of malafide.

In *Shahadat Hossain v Executive Engineer, City PWD Dhaka & others*[24] the High Court division considered the question of *malafiide* in the cancellation of a lease[25]. In this case after accepting the bid and royalty from the petitioner, the respondents had negotiated with Bangladesh Parjatan Corporation, which had in previous instances after taking such lease from the government had sub-leased to others. The petitioner also alleged grudge and spite. There was not formal denial of these allegations by the respondent. The long delay in making the transaction in question and also sudden cancellation of the lease was enough in this case to substantiate the petitioner's allegation of *malafide.*

In *Breen v Amalgamated Engineering Union*[26] Lord Denning observed that "*it is now well settled that a statutory body, which is entrusted by statute with discretion*

---

23 59 DLR(AD)(2007) 185

24 44 DLR (1992) 420

25 This was a well discussed case of time involving the Ramna Cafeteria in Dhaka. The court found that the lease of the café was akin to a lease of a fishery or other government owned properties.

26 (1971) 1 All ER 1148

must act fairly. It does not matter whether its functions are described a s judicial or quasi-judicial on the one hand or as administrative on the other hand."

Tender issues

In *M/S Hossain Ahmed v M/S HD Hossain and Brothers*[27] The Appellate Division held that "*The upshot of the discussions show that by submitting a tender the tenderer is not invested with any legal right not the quotation by the lowest bidder entitled him to the right of a contract because such contract is always subject to acceptance and approval of the authority concerned and invariably the tender form contains stipulations that the authority reserves the right to reject any bid without assigning any reason and is not bound to accept the lowest bid. Had it been the case that the tender was accepted in violation of a condition which had been mentioned in the tender form, then an argument could be advanced for seeking the protection of the inchoate right of the tenderer…"*

Following this line in *Shafiq Ahmed v Chairman, BCIC*[28] Anwarul Hoque Chowdhury J in robust language held that "*No provision for acting fairly and justly should be super added to any instrument, rules, laws or by-laws empowering an executive authority exercising a power whether giving a right or taking away a privilege as enjoined by law and any act or exercise of power even if it arises out of a contract, executed by the government executive authorities, must be presumed to be exercised fairly and not arbitrarily."* It is submitted that the author is not in complete agreement with the observation of his Lordship in that when it comes to the question of scrutinizing the government machinery vis a vis a citizen's right, the government action must be always seen to be a suspect rather than the opposite. It appears that the court may have been influence by the English court's judgments in *Tamside Case*[29] wherein it was observed that "*No one can be properly labeled as being unreasonable unless he is not only wrong but so unreasonably wrong that no reasonable person could sensibly take that view."* And in *Notinghamshire County Council v Secretary of State*[30] where it was observed by the Court of Appeal that "*unreasonableness must prima facie show that the official behaved absurdly or must have taken leave of his senses."* His lordship however softened and continued to refer to the Appellate Division judgment in *M/S Hossain Ahmed* and further added that *"..though a tender would not create a right immediately to be protected by a court of law, it would be subject matter of protection if it can be proved that there was a refusal of acceptance of a tender arbitrarily and in violation of a condition of the tender."*

In contrast to the above judgment, *Sumikin Busan Corporation v Chittagong Port Authority & others*[31] can be considered where Kazi AT Monowaruddin J held that as

---

27 32 DLR (AD) 223
28 45 DLR (1993) 95
29 1976(3) All ER 665
30 1986(1) All ER 199
31 6 MLR (HC) (2001) 251

soon as the tenders are submitted pursuant to notice inviting the same, both the bidders and purchasers become under the obligation of the terms and conditions of the tender documents. Since the rights of the parties accrue under the tender documents mutually agreed upon, the violation of such terms and conditions renders the action illegal. Writ jurisdiction can well be invoked in order to prevent the colorable exercise of the power and authority of the purchaser and protect the valuable rights of the parties so accrued thereunder. *"It cannot be said that the Board has no power to review or revise its own decision. But they cannot take a decision violating the terms and conditions of the tender document."*

In *Shri Harminder Singh Arora v. Union of India and others*[32], the Indian Supreme Court held that the Government may enter into a contract with any person but in so doing the State or its instrumentalities cannot act arbitrarily. It is open to the State to adopt a policy different from the one in question, but once the authority or the State Government chooses to invite tenders then it must abide by the result of the tender. The High Court was not justified in dismissing the writ petition in *limine* by saying that the question relates to the contractual obligation and the policy decision cannot be termed as unfair or arbitrary. There was no question of any policy decision in the instant case. The notification dated August 13, 1985 laying down the policy came in after July 16, 1985 when respondent No. 2 issued tender notice. The instrumentalities of the State having invited tenders for the supply of fresh buffalo and cow milk, these were to be adjudged on their intrinsic merits in accordance with the terms and conditions of the tender notice. The contract for the supply of milk was to be given to the lowest bidder under the terms of the tender notice and the appellant being the lowest bidder, it should have been granted to him. The authority acted capriciously in accepting a bid which was much higher and to the detriment of the State. Where the tender form submitted by any party is not in conformity with the conditions of the tender notice the same should not be accepted. So also, where the original terms of the tender notice are changed the parties should be given an opportunity to submit their tenders in conformity with the changed terms. The authority acted arbitrarily in allowing 10 per cent price preference to respondent No. 4. The terms and conditions of the tender had been incorporated in the tender notice itself and that did not indicate any such price preference to government undertakings. The only concession available to Central/State Government or to the purely government concerns was under para 13 of the notice, that is, that they need not pay tender form fee and earnest money. No other concession or benefit was contemplated under the terms of the tender notice.

---

[32] AIR 1986 SC 1527

In contrast in *Ataur Rahman v Bangladesh*[33] the High Court Division decided that "*In this case there is hardly any scope to apply the principles of equity when terms and conditions of the tender documents are there to provide for legal and proper dispensation. Propensity to go by discretion in such a case should be carefully avoided particularly when there are specific terms and conditions spelt out in the bilateral documents like the tender documents"* Thus, from a strict contractual point of view, the parties to the contract will be held responsible for the bargain they make. While the writ jurisdiction may be attracted for improper action or inaction or omission of the government or a public authority that may be termed as malafide or arbitrary or unreasonable in the wednesbury sense, a party cannot hold a public authority responsible for a bad bargain that it makes. In other words, the parties must make every effort to make a contract viable for them when entering into it.[34]

Licenses do not create absolute rights

In ***Sekendar Ali v. Chairman B.I.W.T.A***[35] the Appellate Division per M H Rahman J (as his Lordship was then) held that "*Contractual right, based on the Licence, is not amenable to the writ jurisdiction of the High Court. The appellants have failed to point out any violation of any statutory rule or breach of any statutory obligation. They could not also point out any ill motive on the part of the licencing authority in cancelling the licences*." In this case a licence granted to operate launch ghats for a limited period was cancelled to grant it to Muktijoddha Sangsad. In terms of the licence no notice or compensation for cancellation was given to the licensees. There is a contractual element in the grant of the licence, but the authority granted the licence in terms of authority contained under s. 15(l)(iv) of the Inland Water Transport Authority Ordinance 1958 and as such the case has similarity with Sharping and it cannot be said to be an ordinary commercial contract. Mr. Mahmudul Islam[36] questions this decision and concludes that "even though no statutory or contractual provision was violated, the question remains whether a State authority under obligation to act reasonably and not arbitrarily as mandated by art.31 in dealing with a monopoly can secure by contract a power to cancel the contract without notice and without compensation (after receiving money from the licensee on the basis highest bid in auction) when Parliament cannot in view of the protection of art.31 exclude the requirement of notice and hearing. Furthermore, there is also the question of arbitrariness when a licence for a very limited period is sought to be cancelled for no other reason than to grant it to another, may be more deserving, and

---

33 47 DLR (1997) 331

34 However, the question remains with regard to the standard form contracts issued by the government or public bodies where there is no scope of negotiation and the parties are given a choice of take it or leave it – will the writ court intervene in such cases?

35 40 DLR (AD) 262

36 Islam, Mahmudul, The Constitution of Bangladesh, Third edition, p 811

that too without paying any compensation. Has not the power been exercised for improper purpose? Is not the right to operate the launch ghats, being a franchise or a right under a contract, a property within the meaning ofart.31 or 42?" However, it appears that M H Rahman J based his decision on the license term 12 wherein it was stated that 'the licensor shall not pay any compensation whatsoever, for cancellation of the license, removal of property and vacation of premises as mentioned in para 11 above. He further continued to state that "*knowing fully the import of the aforementioned terms the appellants entered into the agreement for license."* It appears that his lordship was looking into the issue more in terms of contract theories and the doctrine of freedom of contract and holding the appellants responsible for the bargain they have entered into rather than considering it a matter of public law.

Legitimate expectation and contracts

In ***M.D. WASA v. Superior Builders & Engrs Ltd a*** commercial contract was involved. WASA illegally terminated the contract. The High Court Division held the writ petition maintainable to give relief. The doctrine of fairness was introduced to give aggrieved persons a right to a hearing. "*Basically the principle is that, a writ petition cannot be founded merely on contract, but when a contract is concluded the contractor has a legitimate expectation a that he will be dealt with fairly, The petitioner could have asked the respondent to supply the water tanks and generator according to specification and could have given him an opportunity to complete the work according to specification taking the anomaly during reexamination to be correct; but to cancel the contract unilaterally without regard to subsequent developments is a high feat of arbitrariness which rightly attracts the writ jurisdiction."*

In ***Director General BWDB v BJ Geo Textiles Ltd***.[37] the court followed the WASA case above and after quoting from the *WASA* further added the following observations and held *"In Hyundai Corporation vs Sumikin Bussan Corporation and others, reported in 54 DLR (AD) 88, where a bid was found not responsive, but later found responsive, the Appellate Division held that transparency in the decision making as well as in the functioning of the public bodies is desired and it is most important when the financial interest of the State is involved and a writ petition was filed challenging the tender evaluation process to check the unbridled executive functioning. The Appellate Division quoted with approval the observation of the Indian Supreme Court in Tata Cellular vs Union of India, AIR (1996) SC 11, "It cannot be denied that the principles of judicial review would apply to the exercise of*

[37] 57 DLR(AD)(2005)1

contractual powers by Government bodies in order to prevent arbitrariness or favoritism."

Mohammad Fazlul Karim J (as his Lordship was then) continued further citing *Ekushey Television Ltd vs Dr Chowdhurv Mahmood Hasan*[38], wherein it was held that: "*The Court under constitutional mandate is duty bound to preserve and protect the rule of law and that the cutting edge of law is remedial and the art of justice has to respond so that transparency wins over opaqueness but the writ petitioner must show lack of transparency in the activities of the executive authority or other public functionaries which was held to be a ground for interference in writ jurisdiction. Thus a writ petition will lie when there has been violation of the tender terms or the tender evaluation process lacks transparency*." In the end, the court found that there has not been any decision contrary to the tender terms, nor the evaluation of the Tender Committee on the basis of which contract in respect of all the four lots has been awarded in favor of writ respondent No.4 lacked transparency or any ground was set forth establishing any malafide detailing any material to that effect and, as such, apart from the merit as discussed above, the writ petition was also not maintainable.

It appears that the court is continuing to bring home the point that while the government has a duty to be fair, when one party wants the courts to intervene in the extraordinary judicial review jurisdiction of the courts and claims malafide as a ground, such claims have to be substantiated.

The doctrine of legitimate expectation is a further extension of the fairness doctrine to give a right to hearing. The doctrine of legitimate expectation is not meant to confer additional remedy where the law has already provided a remedy. For a breach of contract the remedy in law is an action for damages. If legitimate expectation can give a person a right to maintain a writ petition in contractual matter, the distinction between commercial contract and statutory contract made in *Sharping* will be obliterated inasmuch as in every case of breach of contract the contractor can press in aid the doctrine of legitimate expectation to maintain his petition under art.102 of the Constitution.[39]

In terms of legitimate expectation the Indian decision of *Indian Aluminium Co Ltd. v Karnataka Electricity Bd.*[40] may be referred to. In this case the Indian Supreme Court per GN Ray J stated that the issue of legitimate expectation is absent in a dispute arising out of contract *qua* contract.

---

38 54 DLR (AD) 130

39 Islam, Mahmudul, The Constitution of Bangladesh, Third edition, p 812

40 AIR (1992) SC 2169

International obligations of the government

Mr. Mahmudul Islam[41] observes quoting two unreported cases that "an international obligation is a matter between a State and another State or an international agency with which the individual seeking the award of the contract has no concern. It is submitted that there is no public law element present in the instant case and the contract may not be put outside the category of pure and simple contract. The court further observed[42] when there is a concluded contract in exercise of an international obligation of the Government and the contract is partly performed the principle of fairness in Government action comes into play and the government cannot be allowed to play the role of a private litigant driving the aggrieved party to sue for compensation. If the principle of fairness is the determining factor then every ordinary commercial transaction with the governmental authority evincing unfairness would attract the writ jurisdiction.' The Appellate Division has extended the boundary of contracts amenable to the writ jurisdiction by adding contracts to fulfill international obligation to the former category.

Dispossession of a citizen by government

In *Bangladesh and another Petitioners v M/S A.T.J Industries Ltd. And Others Respondents*[43] the Supreme Court of Bangladesh[44] held that even if a lease deed is terminated, a lessee cannot be forcibly evicted from the premises. The court observed that the reasoning of the High Court on the question whether the respondent company, was an unauthorized occupant or not was evident from record. "It is manifest that the original lessee which was a proprietorship concern, converted itself into a private limited company, and from 1959 till dispossession, the company made many constructions, ran the factory and held various correspondences with the Government and paid many dues, including those of the land. The dispute, if at all, is a fine question of law, as to whether the conversion of a proprietorship concern into a private limited company, is a case of succession or a transfer of the title. No doubt this is a question of title, and the High Court rightly did not decide it. The real issue before the High Court was whether the Respondent in the aforesaid circumstances could be held to be an unauthorized occupant. and the Court was justified in holding that the Company cannot be termed an unauthorized occupant."

---

41 Ibid 37

42 *Purhcichal Drillers Ltd. v Mesbahuddin* W.P. No.111 of 1993 and (P.1 A. No.230 of 1993 (Unreported) *Birds Bangladesh Agencies Ltd. and three others v Secy. Ministry of Food W.P.* Nos.405-408 and 431 of 1994 (Unreported)

43 29 DLR (SC) (1977) 181

44 At that time the Appellate Division was known as the Supreme Court and the High Court Division was known as the High Court

"On the question of the cancellation of the lease deed in terms of clauses 16(1), we find that the High Court has held it invalid as no notice was served on the Respondent company. We should in this regard like to emphasize, that mere cancellation of the lease deed on the breach of a covenant for re-entry, does not authorize the lessor to take forcible possession of the property from the lessee without recourse to a Court of law, if the lessee does not voluntarily surrender possession. Except for the power contained in clause 16(l) of the lease deed, which is insufficient to authorize forceful dispossession, the Government has failed to show any lawful authority to dispossess the Respondent by force."

Thus, an occupier of a government property who entered possession legally cannot be ousted even after termination of lease without following due process of law.

In *Mrs. Hasna Mansur and others v secretary, Ministry of Public works and urban development public works division govt. of Bangladesh and others*[45] the Supreme Court of Bangladesh held that the Government does not poses any power under the lease deed in question to enter in the premises and demolish the construction made by the lessee when the lessee does not voluntarily vacate the land. It is evident that the entry of the Government was unauthorized and no authority originated in the lease deed or to any statute. In that view of the mater, the act of Government so far as the entry into the land goes was by a public authority without any statutory and so the writ was maintainable. The court referred to the contention of the writ petitioner that the learned judges at the High Court Division were not well founded in holding that there is no provision for the Government to enter into the land on the termination or determination of the lease. Rather section 3 of the East Pakistan Government and Local Authority Lands and Buildings (recovery of possession) Ordinance 1970, stipulates that the Deputy Commissioner has been given authority to take possession on such determination of the lease and by demolishing structures, if any, and the Deputy Commissioner before taking any step is to issue in the prescribed manner a notice on the lessee calling upon him within the period of 30 days from the date of notice to comply and then to take further steps. The Government had power under this statutory provision to take possession of the property on the determination of the lease, if the determination was lawful and the provisions of Section 3 of the Ordinance were fully complied with. The court found that none of these were satisfied and as such the writ was maintainable. Further, the court held that "*it has already been observed that the learned judges of the high Court Division have found that the allotment was made of the new lessee prior to the cancellation of the lease and that the allegation of malafide in the cancellation of the lease was justified.*

---

45 34 DLR (AD) (1982) 34

Thus, it appears that even in cases where the lease period ends, the government cannot enter possession without following proper course of law. In the Indian decision *State of UP v Maharaj Dharmender Prasad Singh* and *Lucknow Dev. Authority v Maharani Rajlaxmi Kumari Devi and othes*[46] it was held per Venkatachaliah J that a "*lessor, with best of title has no right to resume possession extra judicially by use of force, from a lessee even after the expiry or earlier termination of the lease by forfeiture or otherwise."* The use of the expression 're-entry' in the lease deed does not allow extrajudicial methods to resume possession. Due process must be followed to disposes a lessee. In the present case, the fact that the lessor is the State does not place it in any higher or better position. On the contrary, it is under an additional inhibition stemming from the requirement that all actions of Government and Governmental authorities should have a legal pedigree. Possession can be resumed by government only in a manner known to or recognized by law.

Employment issues

Normally in a dispute of employment contract between the government and its employees Article 117 proving for the administrative tribunal to deal with such cases comes into play. In the cases where the administrative tribunals do not come into play (e.g. employees of public authorities) writ may lie under certain circumstances as decided by the Appellate Division.

In *Bangladesh Small Industries Corporation, Dacca v Mahbub Hossain Chowdhury*[47] Mahmud Hossain CJ has elaborated the various situation that may occur in case of a government employee. The judgment is exhaustive and self explanatory and no other clarification or interpretation is required and the judgment despite being in 1977, is still good law. It was held that "*review of all these decisions, as have been referred to above shows that preponderance of judicial authorities have helped the formulation of certain well-reasoned principles as to the law relating to the employees of a statutory corporation as administered by the Superior Courts their writ Jurisdiction as well as by the ordinary civil courts. The court held that the law governing the employees of government corporations may be briefly stated as follows:*

(a) If an employee is dismissed or his service is terminated in contravention of a mandatory statutory provision, the employee has a right of action either before the Supreme Court in its writ jurisdiction or in a Civil Court.
(b) If the service of its employee is terminated in violation of the principle of natural justice, the employee has a similar right of action as in (a).

---

46 AIR 1989 SC 997, 1004
47 29 DLR (SC)(1977) 41

(c) If the office is a statutory one, the holder of the office has similar right of action as in (a) in case of termination of the said office not in accordance with the law, under the law the said office has been created.
(d) in spite of the office being a statutory one or of public character, terms and conditions of the office may be regulated by a contract, and termination of service in contravention of such contract, but otherwise than in the manner mentioned in (a) and (b) is not actionable for the purpose of reinstatement in the office.
(e) Terms and conditions of service prescribed by rules, regulations or any other form of delegated legislation made by a body under statutory powers are not contractual, but have statutory force and the dismissal or termination of service in substantial disregard of them will entitle the employee to a right of action as in (a).

An employee of a statutory corporation cannot claim the status of one in the service of the Republic (in which case one has to avail the remedies available before the administrative tribunals), but the public character of such an employee has been recognized in a number of legislative enactments where such an employee has been given—although for the purposes of the said enactments—the status of a 'Government Servant' or a 'Public Servant'. For example, certain categories of officers of statutory corporations are appointed on the recommendations of the Public Service Commission set up under the constitution. Furthermore, all statutory corporations are now local authorities. Such a definition' unmistakably underlines the public character of these corporations.

The Court continued, "To approach the question whether a dismissed employee of a statutory corporation is entitled to declaration of nullity from a court it is first to be seen what is the character of the corporation, secondly what is the statutory provision with regard to' the post the employee is holding, whether it is created by the statute or created under the statutory power. The holder of the former is a person holding a statutory post but not the latter. Thirdly, whether any statutory status has been conferred on the employee though the post held by him is created under a statuary power. Fourthly whether there is any statutory restriction on the corporation as to the kind of contract it can make or the grounds on which it can dismiss. Where therefore the post of an employee of a statutory corporation has some public character or he holds or enjoys a statutory post or status, he cannot be dismissed without a precedent hearing no matter whether there is any other statutory rule or regulation in the behalf."

Precedent hearing or compliance of the principles of the natural justice is implicit in the dismissal of employee enjoying some statutory status or holding a statutory post or a post of a public character. If there be any justice rule framed by the corporation

under statutory powers substantial compliance of justice rule is mandatory because that will supply the natural justice rule and dismissal of such an employee without precedent hearing will entitle him to declaration of nullity from a Court of law.

It was further found that an employee of a statutory corporation of public character, who does not hold any statutory post or status can nevertheless maintain an action in a Court of law, on a limited ground, that of violation of any mandatory statutory provision as to the kind of contract or the statutory ground of dismissal, or on the document of ultra vires or the violation of rule of natural justice.

Conclusion

From the above cases, it appears that to succeed in a claim of contract in the judicial remedy the following points are to be remembered:

Firstly: If a contract is a simple contract of commercial transaction between the government and a citizen, no writ will lie – unless it falls within any category of the *Sharping* exception i.e. the dealing of the government are malafide or unfair and the government was acting in its capacity as a sovereign;

Secondly: In cases of contracts in which statutory provision is breached and the contract was entered into on the basis of the statute, writ will lie.

Thirdly: Where the contracts are statutory meaning that the government has entered into the contract under statutory power and the violation is that of the terms of the contract and not of statute, judicial review will be accepted.

Fourthly: In cases of international contracts between Bangladesh and a private party, a writ will lie when the obligation of the government falls in the category of fulfilling it's international obligation.

Fifthly: In employment issues, in the corporation cases, we need to follow the decision discussed above of the BSCI.

Thus, it can be concluded that the *Sharping* guideline is still good law for judicial review of contract issues in Bangladesh. The later guidelines the Supreme Court of Bangladesh has provided are more narrow and specific. These guidelines have made public contracts more transparent. As a result, anyone entering into a contract with the government can know beforehand their remedy should there be any breach of contract.

Denouncing Torture: From Universal Prohibition to National Eradication

Dr. Raushan Ara*

1. Introduction

The global movement of 'universalism' and the campaign for 'promoting and protecting all human rights' represents the world's commitment to universal ideals of 'human dignity' and a unique mandate from the international community to 'respect and protect' all internationally recognized human rights enshrined in the Universal Declaration of Human Rights and the other international human rights standards through the United Nations (UN).[1] Despite the problems encountered by the League of Nations, UN was founded in 1945, aiming at 'to facilitate cooperation in international law, security, human rights, social progress, economic development and the achievement of world peace and, making it a key step in the advancement of human rights in order to stop wars between countries, and to provide a platform for dialogue'.[2] This creation represented an effort to specifically prescribe certain obligations on States. These revolutionary obligations implicitly recognized that the idea of state and sovereignty are not unlimited. The international human rights instruments developed in the aftermath of the War were designed to forestall abuses by states affirming absolute prohibitions and obligations, instituting safeguards and providing for effective remedies.[3] And the United Nations, from its beginning, has taken a leading role in this movement as well as continued to work on the adaption of universally applicable standards to prevent abuses of individuals including torture.[4]

However, from the penal reformers of the eighteenth century, to the debates over the "war on terror," the fight against torture has been associated with the values of a 'seemingly enlightened modernity'.[5] The international community has developed

---

* Assistant Professor, Department of Law, University of Dhaka.
This article is a modified version of Chapter -2 of the author's Ph.D. thesis titled "Normative and Institutional Responses to Torture in Bangladesh".

1 Conor Foley, *Combating Torture: A Manual for Judges and Prosecutors* (Human Rights Centre, University of Essex, 1st ed, 2003) 7-8.

2 Wikipedia, *United Nations* (2012) <http://en.wikipedia.org/wiki/United_Nations> accessed 3rd November 2012.

3 P Winston Nagan and Lucie Atkins, 'The International Law of Torture: From Universal Proscription to Effective Application and Enforcement' (2001) 14 *Harvard Human Rights Journal* 88, 87.

4 Foley, above n 1.

5 Tobias Kelly, 'The UN Committee Against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty' (2009) 31(3) *Human Rights Quarterly*, 777, 782.

standards to protect people against torture that apply to all legal systems in the world. The standards take into account 'the diversity of legal systems' that exist and set out minimum guarantees that every system should provide. These standards are having different legal status. Some are contained in treaties that are legally binding on those states that have signed and ratified or acceded to them. And many of the more detailed safeguards against torture are contained in 'soft law' instruments; such as, 'declarations, resolutions, bodies of principles or in the reports of international monitoring bodies and institutions'. While not directly binding, these standards have the persuasive power of having been negotiated by governments or adopted by political bodies such as the UN General Assembly. Sometimes they affirm principles that are already considered to be legally binding as principles of 'general or customary international law'. And sometimes they also spell out in more detail the 'necessary steps to be taken' in order to safeguard the fundamental rights of all people to be protected against torture. A number of 'UN bodies' have been created by particular conventions to 'monitor compliance with these standards and provide guidance' on how they should be interpreted. These bodies generally issue general comments and recommendations, review reports by States parties and issue concluding observations on the compliance of a State with the relevant convention. Some also consider complaints from individuals who claim to have suffered violations. In this way they are providing authoritative interpretations of the treaty provisions and the obligations that these are placing on State parties. The UN has also set up a number of extra-conventional mechanisms to examine particular issues of special concern to the international community or the situation in specific countries. These monitor all States, irrespective of whether they have ratified a particular convention, and can draw attention to particular violations.[6] And, this article is all about focusing the international standards in denouncing torture along with a specific discussion on State obligations derived from it.

2. An Overview of International Standards

The aim of the prohibition of torture and ill treatment is to protect both the dignity and the physical and mental integrity of individual. Since avowing the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world',[7] this article at first provides all the instruments and guidelines combating torture, how torture appears in the customary international law and then there is a discussion about the measures and mechanisms resisting torture. The part 'instruments and guidelines' specifically provides the international standards against torture through the United Nations and its subsidiary organs. 'Torture in its customary form' here is providing the other standards and principles regarding the universal nature of the prohibition. Also the part 'measures and mechanisms resisting torture', provides the

6 Foley, above n 1.

7 Amnesty International, *Combating torture: A Manual for Action* (2003).

monitoring measures on torture activities; being it be through the United Nations or according to the treaty provisions or the others.

2.1 Instruments and Guidelines to Combat Torture

Particularly, in case of the part 'instruments and guidelines' the article's focus is not for all the international standards but firstly for the Bill of Rights discussing the UN Charter, Universal Declaration of Human Rights and the ICCPR provisions only even if it is known that the Bill of Rights includes the ICESCR also. The second part covers the torture declaration, conventions and its optional protocols. It is generally known that the General Assembly played in this sector its innovative role, both in the development of legal standards and in enforcement of the prohibition of torture. Later on there is a discussion about the International Humanitarian Law with the Geneva Conventions and their three additional Protocols applicable in armed conflicts and obviously focusing specially the torture prohibition. However, in case of 'treatment of prisoners and detained persons' there is a long lasting connectivity of torture issues throughout histories and the next but not the last issue of this part is about standards that are providing a strong basis for protecting 'those people' in various situations along with a special focus on the basic principles and the code of conduct for the law enforcement officials. The last issue of this part is all about the medical ethics relating to the role of health professionals regarding anti-torture activity and the Rome Statute of the International Criminal Court with additional focuses on the other general standards and professional principles which materialize a lot about the universality of the torture prohibition.

2.1.1 The Bill of Rights

Among the Bill of Rights the UN Charter since, is a constituent treaty, all members of it are bound by its articles and obligations to the United Nations. It prevails over all other treaty obligations.[8] The Charter makes repeated references to human rights and created the 'Economic and Social Council' (ECOSOC) that established in turn the 'UN Commission on Human Rights'. It is the main human rights intergovernmental body within the United Nations, in 1946. The Commission's 'first major task'[9] and the UN human rights program's 'first major effort' was the drafting of the 'Universal Declaration of Human Rights'.[10] This Declaration defined the concept of human rights stated in the 'UN Charter'[11] and was the first global

---

8 Wikipedia, above n 2.

9 The International Rehabilitation Council for Torture Victims (IRCT), *International Instruments and Mechanisms for the Fight against Torture: A Compilation of Legal Instruments and Standards on Torture* (2007).

10 Wikipedia, *United Nations Charter* (2012) <http://en.wikipedia.org/wiki/United_Nations_Charter> accessed 3rd November 2012.

11 IRCT, above n 9.

statement of 'the inherent dignity and equality of all human beings'.[12] By adopting it, the governments of the world, represented at the General Assembly, agreed that 'everyone is entitled to fundamental human rights, they apply everywhere and not just in those countries whose governments may choose to respect them'. It follows from this principle that all governments must protect the rights of people under their jurisdiction, and victims have claims against those governments which violates them. Furthermore, the fact that governments together adopted the Universal Declaration implies that violations of human rights are of concern to all governments.[13] And as one of the most fundamental aspects of human rights law is the universal proscription of torture,[14] freedom from torture and ill-treatment must be upheld everywhere.[15] However, the UDHR constituted the beginning of an important and ongoing process toward the abolition of torture. An article prohibiting torture and ill-treatment was regarded as an essential element in the Universal Declaration of Human Rights. This convention was prompted by the atrocities committed by the World War II and the Nazi regimes systematic practice of torture in Germany and the occupied countries, there was widespread feeling among the founders of the United Nations that effective measures had to be taken in order to prevent this from recurring. And the development of international legal instruments providing protection for individuals and prescribing basic rules of behavior for governments and authorities was one of such measures. The prohibition against torture and ill treatment was also a natural component of these efforts.[16] The explicit formulation of the prohibition of torture as stated in the United Nations documents, starting with the Universal Declaration of Human Rights (UDHR), was followed by many subsequent instruments in human rights, humanitarian law and administration of justice. These instruments oblige governments and their officials to refrain from torturing or ill-treating anyone and to protect people against such abuses when these are carried out by private individuals. Many of the instruments which set out these standards have been adopted 'without a vote': a 'sign of strong agreement in that no member state represented at the body which adopted them wished to go on record as opposing them'. And one of the instruments that followed UDHR in 1966 was the adoption of the 'International Covenant on Civil and Political Rights', which is the

---

12 UNA Putney, *Celebration of the 60th Anniversary of the adoption of the Universal Declaration of Human Rights: A Magna Carta for All Humanity* (2008) < http://unitingforpeace.com/resources/speeches/Celebration%20of%20the%2060th%20Anniversary.pdf> accessed 07 April 2012.

13 AI, above n 7.

14 P Winston Nagan and Lucie Atkins, 'The International Law of Torture: From Universal Proscription to Effective Application and Enforcement (2001) 14 *Harvard Human Rights Journal* 88, 87.

15 AI, above n 7.

16 Gudmundur Alfredsson and Asbjorn Eide, *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Kluwer Law International,1999) 121-123.

paramount worldwide treaty on civil and political rights. However, the prohibition of torture and ill-treatment of the ICCPR is devised in absolute terms, envisaging no exception to the rule. It is a non-derogable right involving obligation from which no derogation is permitted. On becoming a party to the ICCPR, a state is legally bound to respect the prohibition and to ensure to all individuals under its jurisdiction the right not to be subjected to torture or ill-treatment.[17] It defends the 'right to life' and stipulates that no individual can be subjected to 'torture, enslavement, forced labor and arbitrary detention or be restricted from such freedoms as movement, expression and association'. The treaty also provides for a Human Rights Committee to monitor how states comply with the treaty. All countries that are party to the ICCPR must report to the Human Rights Committee every five years on what they have done to promote these human rights and about the progress made. The Committee reviews these reports in public meetings, including representatives of the state whose report is being reviewed.[18] Other articles of the ICCPR which are relevant to the elimination of torture include 'obligation to respect and ensure human rights', 'right to life', 'right to liberty and security of person', 'right of persons deprived of liberty to be treated with humanity and respect for human dignity and 'right to a fair trial'.[19]

2.1.2 Torture Declaration, Convention and Optional Protocol

The United Nations from its beginning played an important role in case of torture prevention and the period when it performed its most 'creative and innovative role',[20] is from 1973 to 1977 and specifically in 1975, responded to vigorous activities by non-governmental organizations (NGOs).[21] This response resulted in the adoption of landmark 'Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' making it a fundamental event in a process which started in 1973 and continues for some fifteen years.[22] By adopting resolution 3059 (XXVIII) unanimously, the General Assembly may be seen to have come out of its 'first skirmish' with the problem of torture and other ill-treatment ready to reaffirm its clear objection to the practices and its support for the existing human rights treaties

---

17 AI, above n 7.

18 United Nations, *International Covenant on Civil and Political Rights* (1966) <http://www.un.org/millennium/law/iv-4.htm> accessed 3rd November 2012.

19 AI, above n 7.

20 Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (Oxford University Press, 2011) 9.

21 UN Fact Sheets, No. 4, *Combating Torture (Rev.1), Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975)* <http://www.humanrights.is/the-human-rights project/humanright scasesand materials/generalcomments/unfactsheets/combatingtorture/> accessed 09 May 2012.

22 Nigel Rodley and Matt Pollard, above n 20, 20.

prohibiting them.[23] It defines torture and constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment in article 1 with a specific stipulation of 'no justification of torture' in article 3,[24] which are similar with the wording of the 'Torture Convention' that is the 'United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment'. The torture Convention was the result of many years' work initiated after the adoption of the Declaration[25] and was adopted on 10 December 1984. The adoption and ratification of this Convention by numerous governments[26] represents a significant achievement in the continuing effort by the United Nations to protect the right of an individual to be free from torture and other forms of ill-treatment[27] along with the unique legal obligations to prevent torture and ill-treatment, to bring perpetrators of torture to justice and to assist victims of torture.[28] The principle aim of the Convention is to strengthen the existing prohibition of practices of torture, cruel, inhuman or degrading treatment or punishment by a number of supportive measures.[29] It contains a series of important provisions in relation to the absolute prohibition of torture.[30] The most innovative aspect of the Convention is the obligation of States to combat impunity of perpetrators of torture by criminalizing it in domestic criminal legislation with appropriate penalties. State parties need to establish universal jurisdiction for perpetrators of torture crimes worldwide. There has to be prompt, *ex officio* investigation and examination of the accusation by competent and impartial domestic authorities providing adequate reparation, including compensation and rehabilitation. There is also obligation on the state parties to provide human rights training to law enforcement officials and refrain from expelling, returning or extraditing a person to another State where there is a

---

23 Ibid, 23.

24 Office of the High Commissioner for Human Rights, *Fact Sheet No. 4 (Rev. 1) Combating Torture* <http://www.ohchr.org/Documents/Publications/FactSheet4rev.1en.pdf> accessed 15 May 2012.

25 Hans Danelius, *United Nations Convention Against Torture* (2008) <http://untreaty.un.org/cod/avl/ha/catcidtp/catcidtp.html> accessed 31 March 2012.

26 Association for the Prevention of Torture, Asia Pacific Forum of National Human Rights Institutions, Office of the United Nations High Commissioner for Human Rights, *Preventing Torture: An Operational Guide for National Human Rights Institutions* (2010).

27 David Weissbrodt, Paul Hoffman, James S. Reynolds, Robert E. Dalton and Joan Fitzpatrick, 'Prospects for U.S. Ratification of the Convention against Torture' (1989) 83 *Proceedings of the Annual Meeting (American Society of International Law)* 529, 529.

28 Atlas of Torture, *Convention against Torture (CAT)* (2009) <http://www.univie.ac.at/bimtor/glossary/478> accessed 31 October 2012.

29 J. Herman Burgers and Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff Publishers, 1988) 1.

30 APT, APF and OHCHR, above n 26.

substantial risk of being subjected to torture.[31] The Convention does not deal with cases of ill-treatment which occur in an 'exclusively non-governmental' setting. It only relates to practices which occur under some sort of responsibilities of 'public officials or other persons acting in an official capacity'. For effective elimination of torture the convention focuses on influencing the behavior of persons who may become involved in situations in which such practices might occur.[32]

This Convention against Torture, however, later on, complemented by an 'Optional Protocol', which was adopted in 2002 and entered into force in 2006. This Protocol reinforces specific obligations for prevention of torture starting from articles 2 and 16. It establishes 'system of regular visits' to places of detention by international and national bodies[33] to be overseen by a 'Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment'.[34] The Committee examines reports of States parties and individual complaints through concluding observations and views that assist in interpreting the Convention.[35]

2.1.3 The Geneva Conventions and their Additional Protocols

In order to transmit the sentiment of the time from 1939 to 1945 and the tragedy of the Second World War the decision to draft the Geneva Conventions of 1949 was sealed. These Conventions were intended to fill gaps in international humanitarian law that were exposed by those conflicts.[36] The Geneva Conventions are the essential basis of international humanitarian law applicable in armed conflicts and evolved from rules of customary international law binding on the entire international community.[37] As humane treatment is the fundamental theme running throughout the Conventions,[38] 'torture' is proscribed by all the four of the Geneva Conventions and their additional Protocols.[39] Under the Geneva Conventions, protection entails

---

31 Atlas of Torture, above n 28.

32 Burgers and Danelius, above n 29, 17.

33 Ibid, 20.

34 Wikipedia, *United Nations Convention Against Torture* (2012) < http://en.wikipedia.org/wiki/United_Nations_Convention_Against_Torture> accessed 3rd November 2012.

35 Burgers and Danelius, above n 29, 17.

36 Philip Spoerri, *The Geneva Conventions of 1949: Origins and Current Significance* (2009) <http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-120809.htm> accessed 12 August 2009.

37 eNotes, *Geneva Conventions on the Protection of Victims of War* (7th May 2012) <http://www.enotes.com/geneva-conventions-protection-victims-war-reference/geneva-conventions-protection-victims-war> accessed 7th May 2012.

38 Jennifer K. Elsea, 'Lawfulness of Interrogation Techniques under the Geneva Conventions', [CRS: 18 *Congressional Research Service, The Library of Congress,* Received through the CRS Web and International Committee of the Red Cross, 3 Commentary on the Geneva Conventions of 12 August 1949 (Jean Pictet, ed. 1960) 2004] 140. See also <http://www.fas.org/irp/crs/RL32567.pdf> accessed 04th May 2012.

39 Ibid, CRS: 09.

not only torture but also against treatments that are cruel, inhumane, and degrading even if such treatment does not amount to torture.[40] Torture or inhuman treatment of prisoners-of-war[41] or protected persons[42] are 'grave breaches' of the Geneva Conventions, and are considered 'war crimes'.[43] War crimes create an obligation on any state to prosecute the alleged perpetrators or turn them over to another state for prosecution. And this obligation applies regardless of the nationality of the perpetrator, the victim or the place where the act of torture or inhuman treatment was committed.[44] Detainees in an armed conflict or military occupation are also protected by common article 3 to the Geneva Conventions. Even persons, who are not entitled to the protections of the 1949 Geneva Conventions such as, detainees from third countries, are protected by the 'fundamental guarantees' of article 75 of Protocol I of 1977 to the Geneva Conventions. This article prohibits 'murder, torture of all kinds, corporal punishment, and outrages upon personal dignity, in particular humiliating and degrading treatment, and any form of indecent assault'.[45]

2.1.4 Standards for the Treatment of Prisoners and Detained Personnel

In addition to international human rights law there are other rules and standards concerning the protection against torture and other forms of ill-treatment.[46] One of these standards is the 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988'. This standard provides safeguards and the rights of persons under any form of arrest and detention along with the 'legal assistance, medical care and access to records of their detention, arrest, interrogation and medical treatment'.[47] The principles state, among others, that a person held in prison or detention of any kind shall not be exposed to any type of torture or

---

40 Ibid, CRS: 13.

41 Geneva Conventions III of 1949, arts. 17 and 87.

42 Ibid, art. 32.

43 Ibid, art. 130 and Geneva Conventions IV of 1949 art. 147.

44 Ibid, art. 129 and Geneva Conventions IV of 1949 art. 146.

45 Human Rights Watch, *Summary of International and U.S. Law Prohibiting Torture and other Ill-treatment of Persons in Custody* (2004) <http://www.unponteper.it/liberatelapace/dossier/contributi/0504HRW.pdf> accessed 04 May 2012.

46 Foley, above n 1.

47 UN Fact Sheets, No. 4, *Combating Torture (Rev.1), Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975)* <http://www.humanrights.is/the-human-rights project/humanrights casesandmaterials/generalcomments/unfactsheets/combatingtorture/> accessed 31 October 2012. See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988, Principles 16, 21, 22, and 24.

degrading treatment.[48] The term 'cruel, inhuman or degrading treatment or punishment' under this principle should be interpreted 'so as to extend to the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time'. Complaints of torture should be dealt with, investigated and replied to without undue delay. No complainant should suffer prejudice for lodging a complaint.[49] And States should prohibit act contrary to the Principles and provide appropriate sanctions for that. Regular visits of places of detention should be conducted by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the place of detention. Detainees should have the right 'to communicate freely and in full confidentiality' with the persons concerned.[50]

However, with the increased concern for human rights and a time of growing interest in the promise of rehabilitation, the international community is providing special Rules that are linked to an era of 'injecting the humanitarian spirit of the Universal Declaration of Human Rights into the correctional system without compromising public safety or prison security'. To accomplish this humanitarian goal, the 'United Nations Standard Minimum Rules for the Treatment of Prisoners' was adopted in 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Geneva and approved by the Economic and Social Council Resolutions[51] of 31 July 1957 and 13 May 1977.[52] It was adopted to establish 'what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions'. These standards emphasize humane treatment and rehabilitation. They affirm that the only justification for imprisonment is 'to ensure, so far as possible, that the offender upon his return to society is not only willing but also able to lead a law-abiding and self-

---

48 HAMOKED, Centre for the Defence of the Individual, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988) < http://www.hamoked.org/Document.aspx?dID=6480> accessed 01 June 2012.

49 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988, Principles 7 and 33.

50 UN Fact Sheets, above n 47. See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988, Principle 29.

51 OHCHR Fact sheet No. 4, (Rev.1), *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment* <http://www.ohchr.org/Documents/Publications/FactSheet4rev.1en.pdf> accessed 15 May 2012.

52 Wikipedia, *Standard Minimum Rules for the Treatment of Prisoners* (2012) < http://en.wikipedia.org/wiki/Standard_Minimum_Rules_for_the_Treatment_of_Prisoners> accessed 28 May 2012.

supporting life'.[53] Since the SMRs[54] embody a greater level of practical details about how prisoners should be treated and have become an important point of reference for defining what constitutes 'humane treatment in the prison settings'.[55]

And with this the 'Basic Principles for the Treatment of Prisoners' regulating prison conditions and treatment of prisoners was adopted by General Assembly in 1990 has to be linked with. This international document effectively requires that prisoners should be treated with respect for their inherent dignity as human beings[56] except for those limitations that are obviously required by the fact of incarceration. It also spells out that and all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights and other United Nations Covenants.[57]

2.1.5 Basic Principles and the Code of Conduct for Law Enforcement Officials

The General Assembly of the United Nations having explicitly concerned with setting standards to eliminate human rights abuses by law enforcement officials[58] adopted, without a vote, the **'**Code of Conduct for Law Enforcement Officials' in 1979. The most comprehensive portion of the Code of Conduct is the provision of article 5 stating 'no law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment' nor may any law enforcement official invoke any ground whatsoever as a justification of torture. It also stressed the important task that law enforcement officials perform in the defense of public order, and noted the risk of abuses that the discharge of their duties entails. There are also guidelines for the effective implementation of the Code focusing further promotion of the use and application of the Code of Conduct for Law Enforcement Officials.[59]

---

53 Sara A. Rodriguez, 'Impotence of Being Earnest: Status of the United Nations Standard Minimum Rules for the Treatment of Prisoners in Europe and the United States'(Working Paper 1627, The Berkeley Electronic Press (bepress) Legal Series, 2006). See also <http://law.bepress.com/expresso/eps/1627> accessed 30 October 2012.

54 United Nations Standard Minimum Rules for the Treatment of Prisoners, in short SMRs.

55 Correctional Service Canada, *United Nations Standard Minimum Rules For the Treatment of Prisoners 1975* (2012) <http://www.csc-scc.gc.ca/text/pblct/rht-drt/07-eng.shtml> accessed 30 October, 2012.

56 OHCHR, above n 51.

57 United Nations Office on Drugs and Crime, *The Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (United Nations, 2006) ch I, 3, 42-43.

58 G.A. Res. 169, U.N. GAOR, 44th Sess., Supp. No. 46, at 185, U.N. Doc. A/34/46 (1980), particularly preambular paragraphs 5 and 6.

59 United Nations Office on Drugs and Crime, *Use and Application of the Code of Conduct for Law Enforcement Officials, Including the Basic Principles on the Use of Force and Firearms*

Thereafter, on 7 September 1990, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Havana, Cuba, the 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials' were adopted. It states in Principles 7 and 8 that the 'arbitrary or abusive use of force and firearms' by law enforcement officials should be punished as a 'criminal offence' under domestic law with no justification for any departure from the principles. Force and firearms under Principle 4 and 5 may be used as a last resort and law enforcement officials should act in proportion to the seriousness of the offence with the legitimate object to be achieved. And when damage or injury occurs medical assistance should be rendered to injure persons and at the earliest possible moment the relatives or close friends of the victim has to be informed.[60]

2.1.6 Principles of Medical Ethics

Following the 1975 Declaration of Tokyo, at the request of the United Nations General Assembly, the World Health Organization (WHO) drafted a set of guidelines for health personnel who are confronted with cases of torture or ill treatment. And on December 18, 1982, after three years of debate and revision, the General Assembly adopted the 'Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment'. It provides that all medical staff, including nurses, can find themselves treating a prisoner and faced with similar issues.[61] The instrument consists of six principles designed to prevent complicity of health professionals in torture with non-derogability.[62] In the preamble, the General Assembly expresses alarm that 'not infrequently members of the medical profession or other health personnel are engaged in activities which are difficult to reconcile with medical ethics'. States, professional associations and other bodies are recommended to take actions against any attempt to subject health personnel or members of their families to threats or reprisals for snubbing to condone the use of torture or other inhuman or degrading treatment or punishment. On the other hand, it also states that health personnel,

---

(2006) <http://www.uncjin.org/Standards/Conduct/conduct.html> accessed 31 October 2012. This study has been administered by the Crime Prevention and Criminal Justice Division, United Nations Office at Vienna, pursuant to Economic and Social Council resolution 1993/34, adopted on the recommendation of the United Nations Commission on Crime Prevention and Criminal Justice.

60 OHCHR, above n 51.

61 Noam Lubell, *Health Professionals within the Prison System: Their Role in Protecting the Right to Health and Other Human Rights* (2004) <www.nuigalway.ie/sites/eu-china.../noam%20lubell-eng.doc> accessed 30 May 2012.

62 Summer Volkmer, *International Ethics Applicable to Health Care Professionals* (2010) <http://www.law.berkeley.edu/files/IntlMedlEthicspaper%28final%2911June10.pdf> accessed 31 October 2012.

particularly physicians, should be held accountable for contraventions of medical ethics.[63]

And though the 'Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', commonly known as the 'Istanbul Protocol', is the first set of international guidelines for documentation of torture and its consequences, it became an official United Nations document in 1999. The Istanbul Protocol is designed to serve as international guidelines for the assessment of persons who allege torture and ill treatment in investigation of cases of torture and for reporting the findings to the judiciary or any other investigative body. This Manual contains principles and procedures on how to 'recognize and document symptoms of torture' so that such documentation may be served as valid evidence in various relevant proceedings.[64] Victims of torture, witnesses, persons conducting investigation and their families have to be sheltered from any type of control or power, violence, threats or any form of intimidation arises pursuant to the investigation under Principle 3(b) of the Manual. And lastly the findings of the investigation should be made public [Principle 5(b)].[65]

2.1.7 The Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court is one of the most versatile international instruments ever negotiated and establishes an international tribunal to try perpetrators of 'genocide, crimes against humanity and war crimes'. It was adopted by a United Nations Diplomatic Conference of Plenipotentiaries on 17 July 1998.[66] From a diffident commitment in 1945, to a striving Universal Declaration of Human Rights in 1948, international community arrived at a point where individual criminal liability is established for those responsible for serious human rights violations.[67] The Rome Statute of the International Criminal Court prohibits 'the infliction of severe physical or mental pain or suffering including for such purposes as obtaining information'. These violations are considered to be 'war crimes' and in case of torture and of inhuman treatment (article 8) its 'crimes against humanity' when it is committed as part of a 'widespread or systematic attack' directed against civilian population (article 7).[68]

---

63 UN Fact Sheets, above n 47.

64 Wikipedia, *Istanbul Protocol* (2012) <http://en.wikipedia.org/wiki/Istanbul_Protocol> accessed 3rd November 2012.

65 OHCHR, above n 51.

66 Id.

67 William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: New York, 2nd ed, 2001) 25.

68 Anthony Lewis, 'Introduction' in Karen J. Greenberg and Joshua L. Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge: New York, 2005) 339.

2.1.8 Other General Standards and Professional Principles

Moreover, in addition to these United Nations standards, there are other general standards and professional principles that are highly relevant to the prevention of torture.[69] Among them the 'Convention on the Rights of the Child' having a specific provision in relation to torture and ill-treatment of children in article 37 as does the 'Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families' provides that in article 10. The 'Convention on the Rights of Persons with Disabilities' provides anti-torture provision in article 15. Although there is no specific provision on torture included in the Convention on the Elimination of All Forms of Discrimination against Women, the United Nations specified treaty body has adopted a 'General Recommendation on Violence against Women' that deals with torture.[70] Moreover 'International Refugee Law' also provides an important source of international human rights law that is highly relevant to the issue of torture. The 'right to seek asylum' in another country is one of the elemental protections for anyone who faces the danger of persecution and Governments are prohibited totally to return a person to a state where they may face danger of serious human rights violations and torture in particular.[71]

2.2 Torture in Customary International Law

Since international customary law has been often equated with "general international law", it is in fact, the fundamental source of public international law and international treaties. In the Statute of the International Court of Justice, international custom is stated as evidence of a general practice accepted as law and is cited among the sources of international law to be applied by the Court (Article 38.b). It is really hard to envisage the validity and binding force of written international law without relying on the principles of '*pacta sunt servanda* and *bona fides*', which are obviously customary. When the UN Charter was adopted, with its references to human rights in its Preamble and articles 1.3 and 55.c, there was 'not much substance in the commitments taken' if one could not rely on some sources of non-conventional laws.[72] And, as customary human rights prohibitions, proscription of torture also apply universally in all social contexts as part of the legal obligation of all members of the United Nations under the United Nations Charter since it is

---

69 APT, APF and OHCHR, above n 26.

70 Convention on the Elimination of All Forms of Discrimination Against Women 1992, General Recommendation 19.

71 APT, APF and OHCHR, above n 26.

72 Vojin Dimitrijevic, *Customary Law as an Instrument for the Protection of Human Rights* (2006) < http://www.ispionline.it/it/documents/wp_7_2006.pdf> accessed 1st November 2012.

committed to ensure 'universal respect for, and observance of, human rights'.[73] In December 2007, the United Nations General Assembly reaffirmed nearly unanimous and consistent patterns of legal expectation or *opinion juris*, stating that 'no one shall be subjected to torture or to other cruel, inhuman or degrading treatment or punishment' and that freedom from such unlawful treatment 'is a non-derogable right which must be protected under all circumstances, including in times of international or internal armed conflict or disturbance'.[74] Additionally, each form of ill-treatment constitutes a violation of peremptory right and can never constitute lawful public acts by any state or public official.[75] Therefore it is deemed fundamental enough to preclude any State contravention.[76] A Trail Chamber of International Criminal Tribunal for the former Yugoslavia recently stated about the universal jurisdiction of torture. This legitimate basis bears out and strengthens the legal foundation for such jurisdiction that is found by other courts in the inherently universal character of the crime.[77] So, the principal consequence of its higher rank as a *jus cogens* norm is its non-derogability. No practice or act committed in contravention of a *jus cogens* may be 'legitimated by means of consent, acquiescence or recognition' and any norm conflicting with such a provision is therefore void.[78] And it is evident from the fact that to date, no State Party to CAT has made a reservation to Article 15, which reflects the 'universal acceptance of the exclusionary rule and its status as a rule of customary international law'.[79] Both the HRC and CAT have concluded that the exclusionary rule forms a part of the general and absolute prohibition of torture.[80] The obligations outlined above therefore create

---

73 *See, e.g.*, U.N. Charter, arts. 55(c), 56.

74 Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 62/148, prmbl. (18 Dec. 2007).

75 Jordan J. Paust, 'The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions' (2009) 43 (4) *Valparaiso University Law Review* 1535, 1535-1537.

76 Louis-Philippe F. Rouillard, *Misinterpreting the prohibition of torture under international law: the office of legal counsel memorandum* (2002) <http://www.auilr.org/pdf/21/21-1-3.pdf> accessed 1st November 2012.

77 Lene Wendland, *A Hand Book on State Obligations under the UN Convention against Torture* (APT, 2002) 64-65.

78 Vienna Convention on the Law of Treaties 1969, art 53.

79 UNHCHR, *Treaty Body Database, Status by Country* <http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet> accessed 1st November 2012.

80 General Comment 20; *P.E. v France*, (CAT 193/01); *G.K. v Switzerland*, (CAT 219/02). For further detailed analysis of the history, scope and application of the exclusionary rule, see Appendix 13, Written submissions to the UK House of Lords by Third Party Interveners in the case of *A. and Others v Secretary of State for the Home Department* and *A and Others (FC) and another v Secretary of State for the Home Department* [2004] EWCA Civ 1123; [2005] 1 WLR 414, pp. 35-59. See also Report of the Special Rapporteur on Torture (2006) UN doc. A/61/259, on the significance of Article 15 of CAT and having concern that the absolute prohibition to use evidence extracted by torture has recently […] come into question in the global fight against terrorism, 10.

international interest and standing against acts of torture and other forms of ill-treatment and make certain complaints mechanisms of various Treaty Bodies a 'powerful tool' for enforcement of this universal right in situations where domestic courts have failed to give it an effect.[81]

2.3 Measures and Mechanisms Resisting Torture

The development of international human rights within the UN system must be seen in perspective. All celebrate the seminal date of 10 December 1948 when the Universal Declaration[82] was adopted as a 'symbol of the nascence of international human rights'.[83] It is therefore no wonder that a wide array of instruments, bodies, and mechanisms dealing with the protection of universal human rights including torture have been put in place under the auspices of the United Nations. However, there are two broad cluster of the United Nations human rights machinery[84] i.e. those established under human rights treaties[85] and those set up by the UN Commission on

---

81 Sarah Joseph, Katie Mitchell and Linda Gyorki, 'Overview of the Human Rights Committee and the Committee against Torture' in Boris Wijkström (ed), *Seeking Remedies for Torture Victims*: *A handbook on the Individual Complaints Procedures of the UN Treaty Bodies* Geneva: [World Organisation Against Torture (OMCT), 2006] 29, 32-34.

82 Universal Declaration of Human Rights, General Assembly Res. 21 7(111) 1948, 2 in D.J. Djonovich (ed) *United Nations Resolutions (Series 1)* 135.

83 Yoram Dinstein, 'Human Rights: Implementation through the UN System' (1995) 89 *Proceedings of the Annual Meeting (American Society of International Law)* 242, 242.

84 Viljoen, Frans. 2005. "The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and Possibilities", Vol. 27, No. 1 *Human Rights Quarterly*, pp.125-171, at pp. 125-127.

85 The treaties and treaty bodies are: International Convention on the Elimination of All Forms of Racial Discrimination (*adopted* 1965 *and entered into force* 1969), /Committee on the Elimination of Racial Discrimination (CERD); International Covenant on Civil and Political Rights, (*adopted* 1966, *entered into force* 1976) (ICESCR)/Committee on Economic, Social and Cultural Rights (CESCR); International Covenant on Civil and Political Rights, (*adopted* 1966, *entered into force* 1976) (ICCPR)/Human Rights Committee (HRC); Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* 1979, *entered into force* 1981), (CEDAW)/Committee on the Elimination of Discrimination Against Women (CEDAW Committee); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 1984, *entered into force* 1987), /Committee Against Torture (CAT Committee); and Convention on the Rights of the Child, *adopted* 1989, *entered into force* 1990), (CRQ/Committee on the Rights of the Child (CRC Committee). International Convention on Protection of the Rights of All Migrant Workers and Members of their Families, *adopted* 1990 *entered into force* on 1 July 2003. It too has a Committee, bearing the same title. See also Philip Alston & James Crawford (eds), 'The Future of UN Human Rights Treaty Monitoring' (Cambridge University Press, 2000); Anne F. Bayefsky (ed), 'The UN Human Rights System in the 21st Century' (Kluwer Law International, 2000); Anne F. Bayefsky, 'The UN Human Rights Treaty System: Universality at the Crossroads' [Report conducted in collaboration with the Office of the High Commissioner for Human Rights (OHCHR), 2001].

Human Rights, variously called 'special procedures' or 'extra-conventional mechanisms', or 'Charter-based bodies'[86]. The latter may be divided into country specific and thematic mechanisms.[87] Though, the current Charter-based bodies are the 'Human Rights Council' and 'its subsidiaries', including the 'Universal Periodic Review, Working Group and the Advisory Committee',[88] there is a focus in this article on the 'Human Rights Council and the UN Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment'. And within the treaty bodies the article focuses on the 'Human Rights Committee, Committee against Torture, and the Sub-Committee to the Committee against Torture'. There is also a brief discussion on the other monitoring mechanisms like the 'International Criminal Courts and Tribunals, the International Committee of the Red Cross (ICRC) and the UN Fund for Torture Victims'.

2.3.1 Charter–based Bodies

Among the Charter-based bodies 'the Human Rights Council' is an inter-governmental body within the UN system responsible for 'strengthening the promotion and protection of human rights around the globe'. The Council was created by the UN General Assembly in 2006 with the main purpose of addressing situations of human rights violations and make recommendations on them. One year after holding its first meeting in 2007, the Council adopted its 'Institution-building package' providing elements to guide it in its future work. Among the elements is the new 'Universal Periodic Review' mechanism which assesses the human rights situations in all 192 UN Member States. Other features include a new 'Advisory Committee' serves as the Council's 'think tank' providing it with expertise and advice on thematic human rights issues and the revised 'Complaints Procedure' mechanism allows individuals and organizations to bring complaints about human rights violations to the attention of the Council. The Human Rights Council also continues to work closely with the UN 'Special Procedures' established by the former Commission on Human Rights and assumed by the Council. [89] The purpose of these special procedures is to look at specific types of human rights violations wherever in the world they occur. These country-specific and thematic mechanisms include 'Special Rapporteurs, Representatives and Independent Experts or Working

---

86 Various thematic mandates are presently in existence like Working Groups, Special Rapporteurs, Special Representatives, Independent Experts etc.

87 Frans Viljoen, 'The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and Possibilities' (2005) 27 (1) *Human Rights Quarterly* 125, 125-127.

88 Previously, the Charter-based bodies were the Commission on Human Rights and its subsidiaries, including the Sub-commission on the Promotion and Protection of Human Rights.

89 OHCHR, *Background Information on the Human Rights Council* <http://www2.ohchr.org/english/bodies/hrcouncil/> accessed 1st November 2012.

Groups'. They are created by resolutions in response to situations that are considered to be of sufficient concern to require an in-depth study. These procedures report publicly to the Commission on Human Rights each year and some also report to the UN General Assembly. However, for the article purpose, the focus is just on the 'UN Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment'. This mandate was established in 1985 by the UN Commission on Human Rights. It is a non-treaty, 'UN Charter-based' body, the purpose of which is to examine international practice relating to torture in any state regardless of any treaty the state may be bound by. On the basis of information received, the Special Rapporteur can communicate with governments and request them to act on cases observed by them. He or she can also make use of an 'urgent action' procedure, requesting a government to ensure that a particular person or group of persons, are treated humanely. The Special Rapporteur can also conduct visits if invited, or given permission, by a state to do so. The reports may also include general observations about the problem of torture in specific countries.[90]

2.3.2 Treaty–based Bodies

There are also several UN human rights conventions that establish monitoring bodies to oversee the implementation of the treaty provisions. The treaty bodies are composed of independent experts and meet to consider States parties' reports as well as individual complaints or communications. They may also publish general comments on the treaties they oversee. The treaty-based bodies tend to follow similar patterns of documentation.[91] Among them the **'**Human Rights Committee' established by the International Covenant on Civil and Political Rights (ICCPR; article 28) examines reports which states parties are obliged to submit periodically and issues concluding observations that draw attention to 'points of concern and make specific recommendations' to the state. The Committee can also consider communications from individuals who claim to have been the victims of violations of the Covenant by a state party. For this procedure to apply, the state must also have become a party to the first Optional Protocol to the Covenant. The Committee has also issued a series of 'General Comments' to elaborate on the meaning of various articles of the Covenant and the requirements that these place on states parties.[92] There is a formal follow-up mechanism which has indeed been the Human Rights Committee and at its 39th session in 1990 instituted the mandate of a 'special Rapporteur for the Follow-Up on Views', i.e. the decisions on the merits adopted

---

90 United Nations Documentation: Research Guide, *Human Rights* (1995-2012) <http://www.hrcbm.org/NEWLOOK/research.html> accessed 1st November 2012.

91 Id.

92 Foley, above n 1.

under the Optional Protocol.[93] Also the Committee against Torture was established pursuant to Article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It considers reports of States Parties regarding their implementation of the provisions of the Convention and issues concluding observations. It may examine communications from individuals, if the state concerned has agreed to this procedure by making a declaration under Article 22 of the Convention. There is also a procedure, under Article 20, by which the Committee may initiate an investigation if it considers there to be 'well-founded indications that torture is being systematically practised in the territory of a State Party'. However, a new Optional Protocol was adopted by the UN General Assembly in December 2002 which established a complementary dual system of regular visits to places of detention in order to prevent torture and ill-treatment under article 1. The first of these is an 'International Visiting Mechanism', or a 'Sub-Committee' which will conduct periodic visits to places of detention. The second involves an obligation on states parties to set up, designate or maintain one or several national visiting mechanisms, which can conduct more regular visits. And the international and national mechanisms will make recommendations to the authorities concerned with a view to improving the treatment of persons deprived of their liberty and the conditions of detention.[94] The OPCAT also foresees the establishment of a special voluntary fund for supporting implementation of the recommendations. If States refuse to co-operate, then the Sub-Committee can propose to the UN Committee against Torture to adopt a public statement or to publish the report.[95]

2.3.3 Other Monitoring Mechanisms

A number of '*ad hoc* international criminal tribunals' have been established in recent years including the 'International Criminal Tribunal for the former Yugoslavia (ICTY)' and the 'International Criminal Tribunal for Rwanda (ICTR)' even though national criminal courts are primarily responsible for the investigation and prosecution of crimes of torture and other criminal forms of ill-treatment. Crimes of torture as 'crimes against humanity and war crimes' are included in the Statute of ICTY, ICTR and the Rome Statute of the International Criminal Court (ICC). The Statute of the ICC was agreed in 1998 and received the 60 ratifications necessary for it to come into effect in 2002. The ICC will, in future, be able to prosecute some crimes of torture when national courts are unable or unwilling to do

---

93 Markus G. Schmidt, 'Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform' (1992) 41(3) *The International and Comparative Law Quarterly* 645, 651.

94 Foley, above n 1.

95 Association for the Prevention of Torture (APT), *Monitoring Places of Detention: A Practical Guide* (2004).

so.[96] 'International Committee of the Red Cross' is an independent and impartial humanitarian body with a specific mandate assigned to it under international humanitarian law, particularly the four Geneva Conventions is authorized to visit all places of internment, imprisonment and labor where prisoners of war or civilian internees are held. In cases of non-international armed conflicts, or situations of internal strife and tensions, it may offer its services to the conflicting parties and, with their consent, be granted access to places of detention. Delegates visit detainees with the aim of assessing and, if necessary, improving the material and psychological conditions of detention and preventing torture and ill-treatment. The visit procedures require access to all detainees and places of detention. There should not be any limit placed on the duration and frequency of visits, and that the delegates are able to talk freely and without witness to any detainee. Individual follow-up of the detainees' whereabouts is also part of ICRC standard visiting procedures. Visits and the reports made on them are confidential although the ICRC may publish its own comments if a state publicly comments on a report or visit.[97]

However, in recent years, there has been a growing awareness of the problem of bringing torture victims back to normal life which is a very difficult task owing to lack of financial resources and expert knowledge. With this aim in hand human rights groups, organizations, specified authorities, medical doctors and staffs have developed programs to aid victims of torture.[98] Along with them the United Nations in 1981 also set up a 'Voluntary Fund for Victims of Torture'. The Fund supplements the existing international machinery for the protection of human rights. It solicits voluntary contributions from governments, non-governmental organizations, and individuals to distribute these in humanitarian, legal, and financial aid to torture victims and their families. In various countries the Fund also supported human rights organizations that provide medical, psychological, psychiatric, and economic assistance. [99]

2.3.4 Implementation and Monitoring Mechanisms: Revealing the Grim Reality

Although international human rights law takes in a 'high moral standard', its fundamental power lies in holding states accountable for policy and practice. States are under an obligation to arrive at 'voluntarily' legal obligations since legal obligations lay down formal parameters for the promotion and protection of human

---

96 United Nations Documentation, above n 90.
United Nations Documentation: Research Guide, *Human Rights* (1995-2012) <http://www.hrcbm.org/NEWLOOK/research.html> accessed 1st November 2012.

97 Id.

98 Such as, Belgium, Canada, Denmark, France, the Netherlands, Sweden, and the United States.

99 Hans Danelius, 'The United Nations Fund for Torture Victims: The First Years of Activity' (1986) 8 (2) *Human Rights Quarterly* 296, 303.

security and dignity.[100] In addition to international human rights law and the laws of armed conflict, a considerable range of other rules and standards have been developed to safeguard the right of all people, to protect against torture and other forms of ill-treatment. Although not legally binding, those represent 'agreed principles' which should be adhered to by all states and provides important guidance for international and domestic laws[101] and for judges and prosecutors.[102] Certain treaties established various 'systems' to be overseen by a variety of Committees and Sub-committees who examine reports of States parties and individual complaints ensuing 'aid in interpreting Conventions through concluding observations and views'.[103] Moreover, in addition to these various treaties, there are a number of 'general standards and professional principles' that are highly relevant to the prevention of torture. These 'soft law' standards 'cannot be legally enforced' in the same way as treaty obligations. Sometimes they provide exhaustive and useful guidelines for interpreting terms such as 'cruel, inhuman or degrading treatment or punishment'. Those also provide for effective implementation the treaty obligations[104] aiming at further promotion of the 'use and application' of those.[105] There are also standards that recommended 'favorable considerations' of their use within the framework of national legislation or practice.[106] However, certain Conventions that became essential basis of international law evolved from rules of 'customary international law' which is binding on the entire international community.[107] And, as customary human rights prohibitions, proscriptions of torture also apply universally without any 'attempted limitations in reservations' with respect to a particular treaty.[108] It becomes part of the legal obligations to ensure 'universal respect for, and observance of, human rights' of all members of the United Nations.[109] This peremptory legal norm is deemed fundamental enough to prevent State contravention.[110] The corollary of *jus cogens* status of the prohibition of torture is that state parties are warranted in exercising 'universal jurisdiction' over the crime of torture irrespective of whether they are parties to the particular

---

100 Rita Maran, 'Detention and Torture in Guantanamo' (2006) 33 (4) (106) *Social Justice* 151, 156.

101 Sara A. Rodriguez, above n 53.

102 Foley, above n 1.

103 J. Herman Burgers and Hans Danelius, above n 29.

104 APT, APF and OHCHR, above n 26.

105 United Nations Office on Drugs and Crime, above n 59.

106 G.A. Res. Above n 58.

107 eNotes, above n 37.

108 Jordan J. Paust, 'The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions' (2009) 43 (4) *Valparaiso University Law Review* 1535, -1576, 1535-1537.

109 See, U.N. Charter, arts. 55(c), 56.

110 Louis-Philippe F. Rouillard, Misinterpreting the prohibition of torture under international law: the office of legal counsel memorandum (2002) <http://www.auilr.org/pdf/21/21-1-3.pdf> accessed 1st November 2012.

Convention or not.[111] Those provide non-derogable principles and treaties cannot be made or law cannot be enacted that conflict with a *jus cogens* norm. Not only practice but also act committed in contravention of a *jus cogens* may not be 'legitimated by means of consent, acquiescence or recognition' and any norm conflicting with such a provision is therefore void.[112] Even no interpretation of treaty obligations inconsistent with the absolute prohibition of torture is valid in international law.[113] Certain Treaty Bodies also establish 'powerful tools' and create inclusive interest and standing via 'individual complaints mechanisms' for universal enforcement of this where municipal law or courts have failed to give it effect.[114] There are certain inter-governmental bodies within the UN system that adopted 'Institution-building package' having elements to guide it their future work and assess the human rights situations in all 192 UN Member States. Sometimes it makes recommendations, supports with expertise and advice on thematic human rights issues.[115] It can also communicate with governments and 'request to implement' its comments on cases that are raised. There are also urgent action procedure and visiting mechanisms that conduct visits if 'invited, or given permission' by a state to do so. [116] These recommendations are 'not binding'. States only have an obligation to 'examine them and enter into dialogue' on implementation measures. Where States refuse to co-operate, UN Committee against Torture can adopt a public statement or to publish the report.[117] Certain mechanism solicits 'voluntary' contributions from governments, non-governmental organizations, individuals and distributes those as various aids to torture victims and their families.[118]

Although the 'human rights treaties' are at the heart of the international system to promote and protect international human rights, the problem of implementation of those treaties is that when these standards were drafted, effective international

---

111 Lene Wendland, above n 77.

112 Vienna Convention on the Law of Treaties 1969, art. 53.

113 See ILC Draft Articles (40 and 41 on *jus cogens*; and Articles 42 and 48 on *erga omnes)*; see also Advisory Opinion of the ICJ on the *Legal Consequences of the Constructions of a Wall in the Occupied Palestinian Territory*, General List No. 131, ICJ (9 July 2004). In respect of the *erga omnes* character of the obligations arising under the ICCPR thereof, see General Comment 31.

114 Sarah Joseph, Katie Mitchell and Linda Gyorki, above n 81.

115 OHCHR, *Background Information on the Human Rights Council* (2012) <http://www2.ohchr.org/english/bodies/hrcouncil/> accessed 1st November 2012.

116 United Nations Documentation, above n 90.

117 APT, above n 95.

118 Hans Danelius, above n 99.

monitoring of those was neither 'intended nor achievable'.[119] And presently there are various major problem areas in the 'effective implementation which started with the restricted political support focusing the tapered will of the state parties to improve the system. There are also 'questionable reservations, overdue or inadequate reports or even to failure of compliance' with the reports raise questions about their underlying rationales of implementation. Huge backlog in state reports, resource, secretariat or personnel constraints, other financial constraints, limited technology, problems in communications procedures,[120] failure to create national vehicles for implementation etc. all are needed to be considered and are 'sensitive enough to demonstrate the standing of these treaties in the world of monitoring and implementation'. [121]

3. Assessing National Obligations: Bringing the International Standards Home

Under international law states are having an obligation to respect the fundamental rights of all people including torture within the framework of their own legal systems. And where a country has not ratified particular treaties prohibiting torture, in all purpose she is in any event bound by the general international law.[122] At present the Convention against Torture (CAT) assumes increasing importance as a tool which has pragmatic prospects for eliminating torture through state policy.[123] Under this Convention there are substantive provisions starting from articles 1to16 which State Parties must implement in their national laws with non-derogable obligation of the state parties without any justification in time of peace and war.[124]

3.1 Obligations in Ensuring Laws

Among all other national obligations, the obligation to ensure the incorporation of international standards in the domestic laws of the country dividing it in various issues like prevention, non-derogability, no justification on the basis of superior orders, duty not to expel individuals at risk of torture, criminalization and appropriate punishment, universal jurisdiction, extradition or prosecution, protection for individuals and groups made vulnerable by discrimination or marginalization are

---

[119] Professor Anne F. Bayefsky, 'The UN Human Rights Treaty System: Universality at the Crossroads' (Report conducted in collaboration with the Office of the High Commissioner for Human Rights, 2001) 1.

[120] Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000) 1.

[121] Bayefsky, above n 119, 6-7.

[122] Article 38 of the Statute of the International Court of Justice provides that customary international law consists of norms derived from international conventions, customs, principles, judicial decisions and teaching of eminent publicists.

[123] Lene Wendland, above n 77, 54.

[124] Ahcene Boulesbaa, 'The Nature of the Obligations Incurred by States under Article 2 of the UN Convention against Torture' (1990) 12 (1) *Human Rights Quarterly* 53, 53.

included in this part. In order to find out the Bangladesh's responses of torture, a very brief statement of the implementation of those obligations are included in this part. However, the obligations and the brief implementation regarding this are stated in the following:

3.1.1 Criminal Enforcement and Appropriate Penalties

As for the substantive content, the core provisions concern criminal enforcement. These require state parties to punish torture committed on their territory as well as outside territory by their nationals with appropriate penalties taken into account the grave nature of the offence. States are obliged to prevent torture through various effective means and provide victims with the right to complain against torture.[125] The nature of effective measures is on the discretion of the concerned state, but includes 'making whatever changes that is necessary' in order to complement their internal order with international standards on prevention. In case of failure, state party may not cite her own laws which are incompatible with the Convention to justify its policy of torture or its failure to prevent it.[126] Also in case of penalties of torture under the domestic law it must not be disproportionate considering the grave nature of the offence. This means that torture must be punishable by severe penalties[127] which should be in proportion to other penalties imposed under national legislation for similar crimes.[128]

In pursuance of these obligations, the first obligation of Bangladesh under Article 4 of the CAT is to ensure that 'all acts of torture, attempt to it and complicity or participation in torture' are offences under its criminal law with proper penalties. There are numerous sources of law in Bangladesh, ranging from the highest law of the land, the Constitution all the way down to case laws. Constitution of the People's Republic of Bangladesh has the prohibition of torture in absolute terms in various articles with an anti-torture spirit in the whole. Aside from public law, there is also the possibility to bring civil proceedings for damages in private law. Within the procedural laws even if there are certain controversial sections existing but following those in totality give no scope of abusing it for the purpose of torture. Penal legislations of Bangladesh with the current 'Torture and Custodial Death (Prevention) Act, 2013 defines and prescribes punishments including life imprisonment for torture and other conducts that may amount to torture in line with article 1 of the Convention against Torture. In Bangladesh, the Judiciary is enforcing the corresponding duties of the State in order to promote, protect and implement of

---

125 Ibid, 15.
126 Ibid, 50.
127 Chris Ingelse, *The UN Committee against Torture: An Assessment* (Kluwer Law International, 2001) 340.
128 Lene Wendland, above n 77, 35-36.

the rights of torture survivors both in law and in practice. It also takes a leading role in providing justice and reparation to victims of torture by developing a consistent jurisprudence for it.

3.1.2 Universal Jurisdiction and Extradition

Article 5 of the Convention against Torture requires and facilitates jurisdiction by states over acts of torture including instances of non-nationals in third State when the alleged offender is present in territories on the basis of universal jurisdiction.[129] The provision entails an obligation on each state party to have jurisdiction in its domestic national legislation over any alleged torturer within its territory and not extradited but does not prescribe the establishment of universal jurisdiction *in absentia*.[130] Therefore the purpose of the Convention is that suspects of torture must fear 'prosecution[131] always and everywhere'.[132] However, States are also obliged to refrain from transferring persons to another State where they are at personal risk of torture. Article 3 of the Convention overrides conflicting provisions of any extradition treaty which may have been concluded between the states. It is not necessary for the other State also to be a party to the Convention. And upcoming extradition treaties concluded between States would contravene the Convention if those contained provisions conflicting with it.[133] This simplifies that subjecting to a risk of torture cannot be justified on the ground of anything that person may or may not be done which is an exception to the rule of non-refoulement.[134]

From Bangladesh's perspective the country signed the UN Convention against Torture and Cruel, Inhumane or Degrading Treatment or Punishment on October 5, 1998 and in pursuance of obligations provided by it a tough new law with almost similar wordings of CAT named the 'Torture and Custodial Death (Prevention) Act, 2013' has been passed by Bangladesh's Parliament. Under this act all offences of torture are extraditable offences and will be regulated by the Extradition Treaty of 1974 of Bangladesh.[135] This Act also provides that the aggrieved person and any third party can lodge a complaint of torture domestically in the specified court i.e. the Court of Sessions in Bangladesh.[136]

3.1.3 Protection for Marginalized Groups and Individuals

Protection of certain minority or marginalized individuals especially from the risk of torture is part of the obligation to prevent torture or ill-treatment under the

---

129 Ibid, 131.
130 See Ingelse, above n 127, 320.
131 Nigel S. Rodley, *The Treatment of Prisoners under International Law* (Oxford University Press, 2nd ed, 2000) 130.
132 Lene Wendland, above n 77, 37-38.
133 See *G.E.T. Paez v Sweden*, Communication no.39/1996, CAT/C/18/D/39/1996.
134 Lene Wendland, above n 77, 33.
135 See *Torture and Custodial Death (Prevention) Act 2013*, s 18.
136 Ibid, ss 6, 7.

Convention against Torture included within the definition of torture itself in article 1, paragraph 1, of the Convention. State Parties therefore, should, guarantee the protection of members of marginalized groups especially at risk of being tortured through fully prosecuting and punishing all acts of violence and abuse against these individuals.[137]

However, in Bangladesh the principle of non-discrimination a basic and general principle in the protection of human rights and it is fundamental also to the interpretation and application of the recent torture law.[138]

3.2 Obligations in Providing Procedural Safeguards

Under the Convention against Torture, every country is having an obligation not only to incorporate the standards in domestic laws but also to provide the procedural safeguards furnishing a strong base to implement the laws in its full context which are discussed in the following:

3.2.1 Custody, Prosecution and other Measures

State Parties are obliged to ensure that alleged offenders are handed over to the competent authorities for the purpose of prosecution. Articles 6 and 7 oblige State Parties to take specific measures in this regard. States have a wide range of freedom in assessing the circumstances that justify pre-trial detention. Here, Parties are obliged immediately to initiate a preliminary investigation into the facts and notify States where offences are committed when the alleged offender is a national of such State or when the victim is a national of such State. [139] State Parties are also under an obligation either to prosecute or extradite suspected torturers failure of which is a violation of International Law.[140] In case of impunity and amnesties the provisions of the Convention must prevail over national laws resulting impunity from criminal prosecution elsewhere.[141] In the issue of standard of evidence, it is in all cases be the same. [142] Appropriate process guarantees implemented by the State also apply to a suspect of torture. And it includes the right 'not to be arbitrarily detained', 'to a fair trial', and 'to have the case heard before an independent tribunal'[143] with a 'presumption of innocence until proven guilty'.[144]

---

137 Committee against Torture, *Convention against torture and other cruel, inhuman or Degrading treatment or punishment, General comment no. 2: Implementation of article 2 by states parties* (2008) < http://www.unhcr.org/refworld/pdfid/47ac78ce2.pdf> accessed 3rd November 2012.

138 *Torture and Custodial Death (Prevention) Act 2013,* s 2(6).

139 Lene Wendland, above n 77, 42-43.

140 J. Herman Burgers and Hans Danelius, above n 29, 6.

141 Ingelse, above n 127, 330.

142 J. Herman Burgers and Hans Danelius, above n 29, 138.

143 Ibid, 133.

144 Lene Wendland, above n 77, 45-46.

However, in Bangladesh under the newly enacted legislation the Court of Sessions[145] is the trial court and provisions of the Code of Criminal Procedure, 1898 is applicable unless anything contrary appears in this Act.[146] After the complaint is lodged, there are provisions for immediate recording of the statement of the aggrieved person, ordering medical treatment of the victim if required.[147] There are also provisions for sending to the Superintendent of Police the recorded statement of torture by the court, order for filing of the case and with this statement in hand the Superintendent of Police will start the investigation of the case according to the law with the statement in hand send to the Superintendent of Police by the court.[148] It also addresses delays in investigation and adjudication of the cases of custodial violence.[149] The Act also provides access to Court when the police could not carry out any investigation of torture and court could instruct judicial inquiry in this situation.[150] Within the Evidence Act the use of any 'inducement, influence, and force' in making a person to confess is not permitted.[151]

3.2.2 Right to Complain and Recourse

State Parties are obliged to ensure that any individual who claims to have been subjected to torture has a right to lodge a complaint and of the right to have the complaint investigated by the authorities promptly and impartially under article 13 of the CAT. There is also protection of the complainant from victimization and reprisals. [152] Furthermore, victim must be informed of his right to recourse.[153] State Parties are also obliged to guarantee in their national laws that a victim of an acts of torture obtains redress and has an enforceable right to fair and adequate compensation.[154]

As a matter of Constitutional law, in Bangladesh torture victims may seek relief through a writ application[155] to the High Court Division of the Supreme Court.[156]

---

145 *Torture and Custodial Death (Prevention) Act 2013*, ss 6, 7.

146 Ibid, s 9.

147 Ibid, s 4.

148 Ibid, s 5.

149 Ibid, s 8.

150 Ibid, s 5(2).

151 Farzana Akhi, *Confession in police remand* (2008) <http://farzanaakhi.blogspot.com/2008/02/remand-and-confession-are-most.html> accessed 12 June 2013.

152 Lene Wendland, above n 77, 48-52.

153 Ingelse, above n 127, 380.

154 Convention against Torture 1984, arts. 12-14.

155 'Writ petition under the Constitution is maintainable in case of a violation of any fundamental right of the citizens, affecting particularly the weak and downtrodden or deprived section of the community, or if there is a public cause involving public wrong or public injury, any member of the public or an organization whether being a sufferer himself/itself or not may become a person aggrieved if it is for the realization of the

The High Court Division has the power to provide appropriate relief for violations of fundamental rights, including a violation of the prohibition of torture.[157] Torture survivors may invoke common law remedies in civil courts. The State is vicariously liable for damages caused by its officials, so that both may be held jointly liable.[158] Under the new torture law, about reparation in torture cases, the legislation provides a fine up to 50, 000 taka and additional compensation of 25,000 taka to the victim. And in case of death in custody[159] the custodian would be awarded a fine of Tk100,000 and additional compensation of Tk 200,000 to the aggrieved person.[160]

3.2.3 Systematic Review and Supervision

It is an obligation under Article 11 of the Convention against Torture that States are to keep their interrogation 'rules, instructions, methods, practices and arrangements' under persistent review for the custody and treatment of arrestee, detainee and imprisoned persons in any territory under its jurisdiction. The CAT has also emphasized supervision of all places of detention and deprivation of liberty as well as of all regulations to which they are subject by the concerned Government. All these review and supervision must be done systematically. Prison inspection must be carried out if possible, without prior notice and the supervision must be separate from 'police and judiciary'.[161]

The Government Bangladesh regarding this obligation is reviewing its policies and practices within the 'Police Reform Program'. It provides 'Service Delivery Centers and Victim Support Centers' in order to co-operate the overall prevention of crimes including torture in Bangladesh. It also established various 'commissions and organizations' that made arrangements for checking abusive exercise of power and ensures justice. There are also arrangements for review and monitor legislations, upgrading the entire judicial system which will ultimately help in preventing torture.

3.2.4 Respect for other Protection Mechanisms

All persons who are involved in and come into contact with any persons being subjected to any form of 'arrest, detention or imprisonment' should have the

---

objectives and purposes of the Constitution', see Justice Muhammad Habibur Rahman, 'Our Experience with Constitutionalism' (1998) 2 (2) *Bangladesh Journal of Law* 115, 123.

156 *Constitution of People's Republic of Bangladesh 1972,* arts 44 (1) and 102 (1).

157 REDRESS, *Torture in Bangladesh 1971-2004 Making International Commitments a Reality and Providing Justice and Reparations to Victims* (2004).

158 Mahmudul Islam, *Constitutional Law of Bangladesh*, (Mullick Brothers, 3rd ed, 2012) 279.

159 Custodial death means 'death in custody of a public servant, death at the time of arrest or illegal arrest by law enforcing agencies, death in investigation, quarries or remand'. See *Torture and Custodial Death (Prevention) Act 2013,* s 2(7).

160 Ibid, s 15.

161 Ingelse, above n 127, 272.

'education and information' regarding the prohibition of torture. And State Parties are obliged to ensure that these are fully included in the training of them. All through the training instructions should include the non-derogable provisions of torture without any justification of it.[162]

From Bangladesh's perspective the non-derogable provision is included in the newly enacted legislation termed 'Torture and Custodial Death (Prevention) Act, 2013 under section 12 of the Act. For improving torture survivors access to justice the Government is trying to support legal assistance projects providing 'legal reform, capacity building, good governance and justice sector facility' etc.

4. Conclusion

International community has developed standards to respect and protect all internationally recognized human rights through the United Nations. In case of denouncing torture be it in the form of universal prohibition or national eradication; there is a complete *de jure* eradication of torture. Though these standards considered the diversity of various legal systems of the world, complete eradication of them vary according to *de facto* situations of various countries. Other than the customary human rights prohibition that is universal in nature, many limitations in the form of 'voluntary obligation', 'request to governments', 'permission from concerned states', 'useful guidelines', 'providing non-binding recommendations' 'favorable use in national legislation or practice' etc. appear in the lane of implementation that may eventually impede the complete proscription of torture worldwide. In national eradication and specially Bangladesh's perspective the proscription of torture is absolute from the supreme law to the others. The state is trying hard through norms and the institutions to fulfill their international obligations. Government of Bangladesh is considering all assorted loopholes and trying to make it up with reform initiatives. But there is still much to be done to achieve a complete *de facto* ban on torture. But then also Bangladesh is extremely optimistic about that accomplishment in future.

---

[162] Lene Wendland, above n 77, 56-58.

Revisiting theRelationship between Human Rights and Bioethics: Supportive or Counteractive?

Md. Jobair Alam*

Abstract:

Modern bioethics is unequivocally founded on the pedestal of the values consecrated in the Universal Declaration of Human Rights. The Universal Declaration on Bioethics and Human rights, on the other hand, practicallypays heed on the need to harmonize bioethics and human rights in reorienting bioethical discourse towards a broader basis and symbolically, reminds that the mere rhetoric of rights is insufficient to protect those who are most vulnerable in the world. Hence, at a point human rights and bioethics acts and counteracts in reaching their respective goals.The object of the study is to critically analyze the relationship between human rights and bioethics. A pluralistic methodology is followed in this regard. In order to achieve the objective the study after certain conceptual clarity, asked one question- to what extent human rights and bioethics assist, counteract and overlap each other in reaching their respective and shared goals? The study concludes that although at a certain point, human rights and bioethics merge, still there are good differences between them and a significant substratum must be carried out, to clarify exactly how the respective claims and conflicts of both of them can be mitigated, before they can reinstate their expedition in the similar way.

Key Words: Human Rights, Bioethics, Nuremburg Code, Universal Declaration of Human Rights, Universal Declaration on Bioethics and Human Rights.

Introduction

> *I do think that merging bioethics and human rights is not just worthwhile, it is essential. For one thing, it is not clear what constitutes human rights, and their scope remains controversial—for instance, whether embryos have human rights. Whereas, human-rights debates normally take a legal form, bioethics arguments tend to take a philosophical form, so they argue in different and sometimes conflicting ways. Human-rights statements are positive declarations of what is obligatory, whereas bioethics documents are frequently exploratory or speculative in nature, arguing about what may or may not be permissible or necessary.*
>
> *...Richard E. Ashcroft*

* Assistant Professor of Law, University of Dhaka and currently pursuing his Ph.D at Macquarie Law School, Macquarie University, Sydney, Australia. He can be reached at: jobairalam@du.ac.bd

Human rights are generally defined as the fundamental rights that humans have by virtue of being human, and that are neither created nor can be abrogated by any government. These are the interrelated, interdependent and indivisible rights inherent to all human beings. Bioethics, on the other hand, which covers the ethical, legal, social and cultural dimensions of the medical and life sciences, as well as the technologies associated with them, plays a predominant role in ensuring respect for human dignity and the protection of human rights and fundamental freedoms. In fact, both bioethics and human rights stem from the same fundamental axiom: all human beings are born free and equal and possess 'dignity and worth'. Therefore,at least on the basis of this fundamental aphorism, there is an innate relationship between human rights and bioethics.[1]

There are certain and significant consequences that ensue from this relationship in more areas than one. One important consequence of this close relationship is that: "A global bioethics that envisions principles as mechanisms for protecting human rights will….inherit an internationally accepted ethical discourse, rights discourse is the best means available for achieving the shared goal of both bioethics and human rights theory…."[2] Modern bioethics is unequivocally founded on the pedestal of the values consecrated in the Universal Declaration of Human Rights (hereinafter UDHR). The Universal Declaration on Bioethics and Human rights, 2005 (hereinafter UDBHR) on the other hand, practically pays heed on the need to harmonize bioethics and human rights in reorienting bioethical discourse towards a broader basis and symbolically, reminds that the mere rhetoric of rights is insufficient to protect those who are most vulnerable in the world. Hence, at a point human rights and bioethics acts and counteracts in reaching their respective goals.

It is noticeable that quite a few contemporary bioethicists argue that human rights frameworks prove a more useful approach for analyzing and responding to the modern bioethics challenges than any framework and therefore, bioethics intends to apply human rights approach more often than not. This argument leads to deepen the relationship between human rights and bioethics which has been reflected in the writings of many. John-Stewart Gordon for example, in his analysis[3] note certain reasons- why bioethics tend to apply a human rights approach, *firstly*, the language of human rights has a great rhetorical, moral and popular force and violations of human rights are seen as serious incidents that call for immediate action;[4]*secondly*, human rights instruments already exists within the established framework of international law, i.e., treaties, agreements, conventions and thus can help solve

---

1 UNESCO, *UNESCO IBC Report of the IBC on the Possibility of Elaborating a Universal Instrument on Bioethics* (Paris, 2003) 2.

2 Robert Baker, 'Bioethics and Human Rights: A Historical Perspective' (2001) 10 *Cambridge Quarterly of Healthcare Ethics* 241, 250.

3 John-Stewart Gordon, 'Human Rights in Bioethics-Theoretical and Applied' (2012) 15(3)*Ethical Theory and Moral Practice*.

4 Baker, above n 2.

ethical conflicts in international and national levels;[5]*thirdly*, the universality of human rights facilitates the establishment of universal moral norms in bioethics;[6] *fourthly*, the notions of human dignity are sometimes unable to provide clear answers in bioethics such as privacy and human rights may come into play then since these are usually formulated in terms of rights.[7] To be mentioned John acknowledged that some scholars might be less enthusiastic about applying human rights *without stint* because of their unresolved justification, the complexity of their application, and the problem of relativism.[8]

However, it will not be an exaggeration to state that the corpus of international human rights developed after the Second World War as an expression of the commitment of governments and the peoples they represented to principles sustaining certain great social virtues, for instance, justice, equity, and most importantly respect for human dignity.[9] Bioethics, on the other hand, arose as an academic discipline in roughly the same period.[10]Bioethics unlike human rights, as the application of moral philosophy to ethical problems in the life sciences[11] came to apply in controversial areas for example, reproductive and end of life issues, genetic testing, manipulation, and data storage[12] and so forth. Norms of bioethics have also been devised to regulate the conduct of scientific research, access to, and quality and safety of technology, medical services, essential medicines, and other preconditions for health.[13] A close analysis thus evidences that the bioethical discourses are also for ensuring the human dignity on which the whole human rights edifice is erected. Thus, although human rights and bioethics came to ensure human dignity in their ultimate goal and end but the means they follow are certainly not similar rather conflicting in some cases.

The object of the study is to critically spell out, the relationship between human rights and bioethics.A pluralistic methodology combining a wide array of primary and secondary materials, without any endeavor to independent factual investigation or to collect primary statistical data, is brought under analytical appreciation. In order to achieve the objective the study after certain conceptual clarity, asked one question- to what extent human rights and bioethics assist, counteract and overlap each other in reaching their respective and shared goals? This is mainly done through a critical examination of some of the dominant instruments in the fields of

---

5 L. P. Knowles, 'The Lingua Franca of Human Rights and the Rise of Global Bioethics' (2001) 10(3) *Cambridge Quarterly of Healthcare Ethics* 253.

6 Mann J (ed), *Health and human rights* (BMJ, 1996).

7 Gordon J.S., Poverty, human rights and just distribution. In: Boylan M (ed), *International public health policy and ethics* (Springer, 2008).

8 Ibid.

9 Thomas Faunce, *Bioethics and Human Rights*<https://law.anu. edu.au/sites/all/files/users/u9705219/bioethics_and_human_rights_2014_1.pdf>accessed 21 February, 2016.

10 Ibid.

11 J. Harris, *Bioethics* (Oxford University Press, 2001) 1-4.

12 A. R. Jonsen, *A Short History of Medical Ethics* (Oxford University Press, 2000).

13 Harris, above n 11.

human rights and bioethics like, the *Nuremburg Declaration*, the *UDHR*, the *Helsinki Declaration*, and the *UDBHR*. The study consulted further certain other relevant concepts and examples of implementation, both textually and contextually, for better understanding in this regard. The study concludes that although at a certain point human rights and bioethics merge, still there are good differences between them and a significant substratum must be carried out to clarify exactly how the respective claims and conflicts of both of them can be mitigated, before they can reinstate their expedition in the similar way.

Conceptualizations of Human Rights and Bioethics

The normative convergence between the fields of bioethics and human rights is not the same and the distinction can be drawn from a variety of aspects. Following this, bioethics is not regarded as automatically transferable to human rights, not even in a codified form or the *vice versa*. But it is more common that the bioethical norms take over legal expressions or even concrete legal techniques used in human rights instruments.[14] In spite of this, in our days, the two domains cannot be considered entirely distinct any longer- since various legal issues have become organic part of both and so intertwined that any effort to segregate them would turn into vain.[15]

The foregoing discussion, apart from the general conceptualizations of both will focus on the philosophical values on which human rights and bioethics are centered. To be mentioned that the conceptualization is deliberately directed in order to assess the relationship between human rights and bioethics.

Conceptualization of Human Rights

The history of human rights is as old as the human civilization itself. It has come across a long way following an unpleasant journey. Human rights, as we do understand today indicate a wide variety of values and capabilities reflecting various circumstances of human history and human circumstances. In general understanding, human rights are those rights which a person can claim because he is a human being. Human rights literally mean the rights of man. They are also called natural rights. *Thomas Paine* may have been the first to use the term human rights,[16] in his English translation of the 'French Declaration of the Rights of Man' adopted by the National Assembly of France in 1789 which prefaced the Constitution of 1791. Later on, the term 'human rights' has been used in the English text of the *Universal Declaration of Human Rights, 1948*[17] and such usage continues in this day.

---

14 Judith Sandar, 'Human Rights and Bioethics: Competitors or Allies? The Role of International Law in Sharping the Contours of a New Discipline' (2008) 27(1) *Med Law*15, 16.

15 Ibid.

16 Thomas Paine, *The Rights of Man* (Gutenberg, 1789).

17 Alan S. Rosenbaum, *The Philosophy of Human Rights: International Perspective* (Greenwood Press, 1980) 9.

Human rights are commonly understood as inalienable fundamental rights backed up by state obligations and are essential for the existence of human beings themselves.[18] They are intrinsic to every human being, simply because of being human. They include all, and only, human persons. Around the world, people and nations have recognized the importance of human rights as a fundamental part of social justice.[19] They represent the minimal moral standards for human society.[20] The possession of human rights is the principal means for maintaining a notion of human dignity. Human rights are concerned with the dignity and self-esteem of the individual that are essential for securing personal identity and promoting human community.[21]

To be mentioned the term 'human dignity' may convey a multiplicity of understanding, it may even be referring to different meaning.[22] Dignity's intrinsic meaning is left to an intuitive understanding or an assumed shared understanding.[23] For human rights theorists, human dignity refers to the intrinsic worth of all human beings and the requirement that all human beings should be treated with appropriate respect, although work on human rights has not yet defined the contents and requirements of human dignity.[24] Therefore, there is an obvious need to develop a meaningful concept of human dignity, and preferably with specific criteria that could be used for evaluative purposes.[25]

However, dignity in whatever way is explained or contextualized has appeal to many field like, philosophy, bioethics or even legal discourse. The insistence on the universality of human dignity is one of the significant contributions of the human rights paradigm. In this regard the observation of Chapman is worth to mention:

> Commitment to human dignity is a widely shared value. Concept to human dignity reach back to the seminal writings of Immanuel Kant and arguably to the Stoic tradition in ancient Greece and Rome as well. Appeals to human dignity are common in bioethics, philosophy, and legal discourse. Human dignity also serves as the grounding for human rights. In recent years, protection of human dignity has also emerged has a central criterion for the evaluation of controversial technologies, like cloning and embryonic stem cells.[26]

---

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

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

20 Abram, Morris B. Abram, 'Freedom from Thought, Conscience and Religion' (1967) 2 *Journal of the International Commission of Jurists* 40.

21 Abdul Aziz Said,*Human Rights and World Order* (Praeger Publisher Inc., 1978).

22 Audrey R. Chapman, 'Human Dignity, Bioethics, and Human Rights', (2011) 3 *Amsterdam L.F* 3.

23 Ibid, 4.

24 Ibid, 3.

25 Ibid, 10.

26 Ibid, 3.

Human rights inhere universally in all human beings and the principal means for preserving the notion of human dignity, and they, unlike other 'possessions', cannot normally be traded off. 'Universal inherence' and 'inalienability' are the two principal characteristics which distinguished human rights from other rights. Some of the universal human rights having global applications are, among others: right to life, liberty and personal security,[27] right to equality before the law,[28] right to freedom from arbitrary arrest and detention;[29] right to freedom of movement;[30] right to own property;[31] right to social security;[32] right to education;[33] right to a standard of living;[34] right to health;[35] right to housing;[36] right to freedom from discrimination;[37] etc.

Human rights, to be further added are a global vision backed by state obligations and are essential for the existence of human being itself. Promotion and protection of human rights thus, are legal obligations of all states in national and international sphere, as is clearly stated in articles 55 & 56 of the UN charter.[38] The obligation becomes bold, when the states extend their respect to the same by ratifying other binding international human rights instruments i.e., the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966, etc.

Another thing needs to mention here that human rights discussions and deliberations are always meant in almost similar way unless it is connected to any other topical issue. Thus, if a connection is made with bioethics, human rights get a new connotation that might require additional and precise concentration, confusion and argument. For example, the idea of human dignity so long as explained as single idea of human rights, no debate arose but if connected to bioethics, may lead to several unresolved questions[39], like, is human dignity a useful concept in bioethics

---

27 *The Universal Declaration of Human Rights, 1948*, Art 2.

28 Ibid, art 7.

29 Ibid, art 9.

30 Ibid, art 13.

31 Ibid, art 17.

32 Ibid, art 22.

33 Ibid, art 26.

34 Ibid, art 25.

35 *The International Covenant on Economic, Social and Cultural Rights, 1966*, art 12.

36 Ibid, art 11.

37 Ibid, art 2.

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

39 D. Beyleveld and R. Brownsworth, *Human Dignity in Bioethics and Bio law*, (Oxford University Press, 2001); R. Brownsword, 'Bioethics Today, Bioethics Tomorrow: Steam Cell Research and the "Dignitarian Alliance" '(2003) 17 *Notre Dame Journal of Law*, 15.

that sheds important light on a wide range or bioethical issue or, the contrary, is it a useless concept or at best a vague substitute for other more precise notions?[40] Hence, to determine the relationship for example, between human rights and bioethics at a certain point becomes controversial perhaps, difficult in drawing any conclusion. In my study, I shall always ascribe to human rights in the legal sense, as a set of internationally legally binding norms based on international treaties and customs as well as the authorized interpretations of those instruments.

Conceptualization of Bioethics

In the English language bioethics was amplified by Potter in 1970, yet the concept comes from human heritage thousands of years old.[41] This heritage can be found in all cultures, religions, and in ancient writings from around the world.[42] The need for bioethics has continued to be re-emphasized internationally in United Nations declarations,[43] in statements of scientists, teachers and the view of ordinary people and as a response to the decay in moral fabric of societies.

The emergence of the bioethics and the subsequent elongation evidences that there are at least three ways to view bioethics, *firstly*, descriptive bioethics, which is the way people view life, their moral interactions and responsibilities with living organisms in their life; *secondly*, prescriptive bioethics, which is to tell others what is ethically good or bad, or what principle are most important in making such decisions; and *thirdly*, interactive bioethics, which is the discussion and the debate about descriptive and prescriptive bioethics.[44]

Bioethics is multidisciplinary and blends philosophy, theology, history, and law with medicine, nursing, health policy, and the medical humanities.[45] Insights from various disciplines are brought to bear on the complex interaction of human life, science, and technology with the broader aim and promise to uphold the dignity and worth of human being.[46] Although its questions are as old as humankind, the origins of bioethics as a field are more recent and difficult to capture in a single view.

However, now-a-days bioethics, both as an academic discipline and as a professional activity, has evolved from the domain of medical ethics. It is a multidisciplinary field that extends far beyond the spheres of healthcare and medical ethics which encompasses a wide range of ethical problems in the life sciences.[47] These include but are not confined to the issues related to genetics, theories of human

---

40 Chapman, above n 22.

41 Darryl R J Macer, *Bioethics is Love of Life: An Alternative Textbook* (Eubios Ethics Institution, 2015) 6.

42 Ibid.

43 UNESCO, 1997, 2005.

44 Ibid, 7-8.

45 <https://www.practicalbioethics.org/what-is-bioethics> accessed 22 February, 2016.

46 Ibid.

47 *International Encyclopedia of the Social &Behavioral Sciences*<http://www.udo-schuklenk.org/files/bioethics.pdf> accessed 22 February, 2015.

development, behavioral psychology, and resource allocation in healthcare management and so forth.

That noted, bioethics is ascribed as the study of ethical dilemma strictly in biological sciences and generally in all aspects of life. It is the application of considered right action, the determination of the "ought" in the "can". It is argued that bioethics emerged today, does not merely describe ethically good or bad conduct, along with the presentation of underlying arguments and analysis but also uses the language of rights and frequently formulates norms very similarly to human rights.[48] To quote JuditSandor:

> Bioethics and human rights are two different systems of norms but bioethics can enrich human rights by extending the traditional catalogue of rights in certain new fields. The theory of human rights nevertheless dictates some discipline in formulating new and new rights. Therefore, it offers to bioethics, as an exchange, a more sufficient enforcement mechanism and international recognition.[49]

Bioethics as a discipline engages in the discussion, deliberation and decision of typically controversial ethical issues which arise from new situations and possibilities. It is also moral discernment as it relates to medical policy and practice. Its scope is the analysis and development of norms for conduct and policy relating to the variety of practices that is related to ethical questions and basic human values[50] such as the rights to life and health, and the rightness or wrongness of certain developments in healthcare institutions, life technology, medicine and so forth. Since, the pursuit of any of the values results in either an accordance with one another or a conflict with at least, one other value, bioethics tend to resolve them.[51] Therefore, bioethics has an impact on a wide array of human life-which is easy to indicate but difficult to ascertain.

The linkage between Human Rights and Bioethics

At least two major reasons encumber the determination of the relationship between human rights and bioethics. They are, *firstly*, the significant overlaps and common objectives between them; and *secondly*, b) the distinct intersecting endeavors they pursue. The unparalleled journey of bioethics and human rights as argued by many, since the former is more practical oriented and daily life ethics- subsequently been condensed by those two reasons in many cases. Taking this into forehead the

---

48 Sandar, above n 14.

49 Ibid.

50 TsutomuSawai, 'The moral value of induced pluripotent stem cells: a Japanese bioethics perspective on human embryo research', (2014) 40(11) *Journal of Medical Ethics* 766.

51 <http://www.bioethics.org.au/Resources/Bioethical%20Issues.html> accessed 22 February, 2016.

critiques sometimes argue not to assess the relationship between them, but to allow serving their respective goals and objects. In contrast others put forward their contention that although they have chosen their respective streams- which might be different but they have a common historical origin- which help them to be common, at least, in the attainment of some objectives and goals. They go far by saying that:

> …it is not surprising that both modern bioethics and international human rights were born from the same historical events: the Second World War, the Holocaust, and the Nuremberg tribunals that condemned the Nazi doctors. The common origin of both systems makes even more understandable the recourse to the existing human rights framework to protect individuals from harm in the biomedical field.[52]

However, the foregoing discussion will put light on those historical instruments along with some examples of implementation, in order to re-assess the intricate relationship- both positive and negative between human rights and bioethics.

The Nuremburg Code and the UDHR

International human rights and bioethics share a common historical beginning and a common ideological basis.[53] Both human rights and bioethics trace their ancestry to the Nuremberg trials of Nazi war criminals following World War II.[54] The Nuremberg Trials, and, in particular the case of *US v Brandt*,[55] focused the world's attention on the atrocities committed by physicians and scientists, and in some cases in the purported interests of medical and scientific progress. Not only did they participate in the 'final solution', but they also conducted non-consensual experiments, commonly with inmates of concentration camps.[56] It is pertinent to mention some of the experiments they conducted are, how long individuals immersed in freezing water could survive, how well they functioned at pressure levels existing at high altitudes, the viability of various sterilization techniques, the development of vaccines for a variety of diseases, including jaundice, malaria,

---

52 Roberto Andorno, 'Human dignity and human rights as a common ground for a global bioethics', (2009) 34(3) *Journal of Medicine and Philosophy* 223.

53 In contrast there are reverse opinion, for example, George Annas and others have recently observed, human rights and bioethics have since grown apart. For decades, each has developed independently from the other. See <http://www.bu.edu/experts/profiles/george-annas-jd-mph/> accessed on 22 February, 2016.

54 Thaddeus Mason Pope, *Reuniting Human Rights and Bioethics to address Medical Futility and End of Life Treatment*<http://www.thaddeuspope.com/ images/Pope_ abstract_for_ NYC_AALS. pdf> accessed on 5 February, 2015.

55 The Medical Case, U.S.A. v Karl Brandt, et al. (also known as the Doctors' Trial), was prosecuted in 1946-47 against twenty-three doctors and administrators accused of organizing and participating in war crimes and crimes against humanity in the form of medical experiments and medical procedures inflicted on prisoners and civilians.

56 Sheila A.M. McLean,*Human Rights and Bioethics*<http://www.unesco.org/new/ fileadmin/MULTIMEDIA/HQ/SHS/pdf/Bioethics-Human-Rights-McLean.pdf> accessed on 21 February, 2016.

diphtheria and typhus, which involved directly injecting subjects with infectious agents, and experimentation with novel surgical techniques and so forth.[57]

As a direct outcome of this heinous event, following the subsequent Nuremberg trials, the Nuremberg Code was promulgated as a set of research ethics principles for human experimentation in 1947. Although the Code was specific to human research and experimentation, areas of medicine, but it can well be described as the 'grandmother' of modern bioethics.[58] Katz says that:

> The Nuremberg Code is a remarkable document. Never before in the history of human experimentation, and never since, has any code or any regulation of research declared in such relentless and uncompromising a fashion that the psychological integrity of research subjects must be protected absolutely.[59]

One year after the Nuremberg Code was promulgated the most significant event in the arena of human rights occurred – the adoption of the UDHR by the United Nations as a " as a common standard of achievement for all peoples and all nations to the end that every individual and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education . . . and by progressive measures, national and international, to secure their universal and effective recognition and observance .. . "[60] This perhaps, inaugurated the era of modern human rights movement.

The declaration has been compared by Professor R. Cassin, one of its principal authors, to the vast portico of a temple of which the forecourt is the preamble affirming the unity of the human family and the foundations are the general principles of freedom, equality, nondiscrimination and brotherhood proclaimed therein.[61] However, according to Baker, the most important impact of the UN declaration was, as he claims, to rectify the problem that until then ''the nature of "human rights" was left unspecified….'[62] In the 1948 declaration, on the other hand, the world was given both 'an agenda and a philosophy[63] and the numerous international declarations that have proliferated since 1948 have striven to follow that agenda.[64]

---

57 Ibid.

58 McLean, above n 56.

59 J. Katz., 'The Consent Principle of the Nuremberg Code: its Significance The and Now'. In Annas, G.J. and Grodin, M.A. (eds), *The Nazi Doctors and the Nuremberg Code (*OUP, 1992) 227.

60 Preamble to the Declaration.

61 Albert Verdoodt, 'The Significance of the Universal Declaration of Human Rights: The record so far and future prospects', (1966) 6 *International Review of the Red Cross* 287.

62 Ibid.

63 Annas, G.J., 'American bioethics and Human Rights: The End of All Our Exploring', (2004) Winter *Journal of Law, Medicine & Ethics* 658, 660.

64 McLean, above n 56.

That noted, the UDHR was in part informed by the revelations that led to the adoption of the Nuremberg Code. Therefore, the details revealed at Nuremberg and also in the UDHR evidenced that not only both of them erected their foundation on the same philosophy of human dignity, but also they shared some contents equally found in the code and also to the rights recognized by Articles 4 through 20 of the declaration.'[65] For example, some contents common both in the UDHR and Nuremburg Code are, free consent, welfare of the society, avoidance of physical and mental suffering and injury, absence of coercion, properly formulated experimentation and so forth.

Medical Ethics and Helsinki Declaration

Between Nuremberg and modern times, came the development of what is generally referred to as 'medical ethics' which seeks to provide a set of principles designed to inform the way in which doctors relate to their patients. Irrespective of the ethical model used, however, medical ethics arguably hinges on the duties of physicians to their patients, and has a correspondingly limited – *albeit* not negligible - emphasis on human rights, since right to health is a fundamental human right among all other significant rights.[66]

However, the question of human research can usefully be returned to as a template of the relationship between medical ethics and human rights, by addressing the World Medical Association's Declaration of Helsinki. The aim of the declaration was to provide an ethical framework for human experimentation and research. The basic principles of the declaration includes: respect for the individual;[67] right to self-determination and the right to make informed decisions regarding participation- both initially and during the course of the research; [68] investigator's sole duty to the patient and volunteer;[69] the subject's welfare in precedence over the interests of science and society;[70] the superiority of ethical considerations over laws and regulations;[71] the recognition of the increased vulnerability of individuals and groups and calling special vigilance for them;[72] the obligation of obtaining the surrogate consent form an individual acting in the subjects best interest, where the research participant is incompetent, physically or mentally incapable to giving consent, or is a minor.[73]

---

65 R. Baker, 'Bioethics and Human Rights: A Historical Perspective', (2001) 10 *Cambridge Quarterly of Healthcare Ethics* 241, 242.

66 McLean, above n 56.

67 *The Helsinki Declaration 1964*, art 8.

68 Ibid, art 20-2.

69 Ibid, art 2, 3, 10, 16, 18.

70 Ibid, art 5.

71 Ibid, art 9.

72 Ibid, art 8.

73 Ibid, art 23-5.

Those important provisions, since its adoption in the declaration have become embedded in national and international codes, laws and court judgments in cases involving allegations of abuse in clinical trials[74] and thus a major shield for the promotion and protection of human rights. The fundamental human rights set out in human rights instruments are of a general nature, and do not detail the obligations entailed by a right or the means of ensuring its protection. Therefore, far from being a superfluous addition to human rights instruments, ethical codes of practice are essential. These codes elaborate detailed ethical standards which are developed and maintained by discipline-specific professionals like medical practitioners.[75]

However, it is important to note that the declaration of Helsinki, rather than fully endorsing the human rights focused in the Nuremberg Code, in fact, moves away from its first, and most fundamental, principle; namely, that research is only permissible with the free and informed consent of the individual subject. The Helsinki Declaration's concession that research can be conducted on non-competent individuals could be said to be a response to changing political and social regimes. Childress describes the declaration's two major deviations from the Nuremberg Code in the following words:

> ….it offers a less stringent requirement of the research subject's own voluntary, informed consent: it allows some incompetent subjects to be enrolled in some research protocols on the basis of a legal guardian's consent or permission.[76]

While this no doubt assists in the development and progress of medicine and healthcare, it also shows the 'bioethical drift' the 'drift' which may also be politically generated or responsive. Since one of the major promise of human rights is to uphold the right to life and personal liberty, such kind of drift may come to contradict with the human rights regime, unless it is rigorously tested.

The Universal Declaration on Bioethics and Human Rights

In the past the United Nations Educational Scientific and Cultural Organization (UNESCO) has adopted two declarations in the field of bioethics: the *Universal Declaration on the Human Genome and Human Rights* (1997) and the *International Declaration on Human Genetic Data* (2003). The previous declarations had focused on the specialized area of genetics and genomics. But the global nature of science and technology implies the need for a global approach and expansion to bioethics. Member states have mandated UNESCO to set universal ethical benchmarks covering issues raised within the field of bioethics.[77] And the ultimate outcome was the *Universal Declaration on Bioethics and Human Rights*.

---

74 A Plomer, 'In Defence of Helsinki and Human Rights', (2012) 5(2) *The South African Journal of Bioethics and Law* 83.

75 Ibid.

76 J.F. Childress, 'Nuremberg's Legacy: Some Ethical Reflections: Perspectives in Biology and Medicine', (2000) 43(3) *Spring* 347, 351.

77 <http://unesdoc.unesco.org/images/0014/001461/146180E.pdf> accessed 22 February, 2016.

The scope of the adopted text of the declaration is an obvious compromise between these views like, medicine and health care, access to health and environment. It addresses "ethical issues related to medicine, life sciences and associated technologies as applied to human beings, taking into account their social, legal and environmental dimensions".[78]

Although the aims of the declaration are multiple, the most important one is to provide "a universal framework of principles and procedures to guide States in the formulation of their legislation, policies or other instruments in the field of bioethics".[79] The declaration primarily addresses States. But at the same time, since the bioethical principles identified are founded on human rights and fundamental freedoms, every individual is involved in bioethics. The declaration, therefore, also aims "to guide the actions of individuals, groups, communities, institutions and corporations, public and private."[80]

The heart of the declaration is found in the 15 principles that are listed. The principles determine the different obligations and responsibilities of the moral subject in relation to different categories of moral objects. The principles are arranged according to a gradual widening of the range of moral objects: the individual human being itself, other human beings, human communities, humankind as a whole and all living beings and their environment. The declaration recognizes the principle of autonomy[81] as well as the principle of solidarity[82]. It emphasizes the principle of social responsibility and health[83] which aims at re-orienting bioethical decision-making towards issues urgent to many countries. Finally, the declaration anchors the bioethical principles firmly in the rules governing human dignity, human rights and fundamental freedoms.

A critical analysis of these core principles reveal that the declaration has not invented new bioethical principles or to has not provided the definitive solutions to the growing list of bioethical dilemmas. Its main goal is much more modest: to assemble some basic standards to help states in their efforts to promote responsible biomedical research and clinical practice, in conformity with the principles of international human rights law.[84]

---

78 *The Declaration on Bioethics and Human Rights*, art 1(a).
79 Ibid, art 2 (i).
80 Ibid, art 2.
81 Ibid, art 5.
82 Ibid, art 13.
83 Ibid, art 14.
84 R Andorno, 'Global Bioethics at UNESCO: in Defence of the Universal Declaration on Bioethics and Human Rights', (2007) 33 *J Med Ethics* 150.

To be mentioned that the declaration is also not free from several criticisms. Some of the criticisms put forwarded are, for example, *firstly*, the bioethical norms are not properly elaborated; *secondly*, the UNESCO is not the proper authority to articulate such norms; *thirdly*, the contents of the document are too vague or general to be useful; and *fourthly*, some regards the document as a clog in the effort of like-minded cosmopolitans to codify their particular moral intuitions in international law.[85]

Evaluating the Linkage of Human Rights and Bioethics

The linkage between human rights and bioethics was historically strong and has become stronger through the affirmation of that relationship by different international instruments notably, the *Nuremberg Code* and the *UDHR*, the *Helsinki Declaration* and the *UDBHR*, as mentioned above and their acquiescence by the global community in their respective subsequent progress. The rise of bioethics also regarded as a political and, to the extent that it advocates a coherent system of values, ideological phenomenon capable of acting in opposition to the economic regulatory dynamic.'[86] For Annas, '[t]he disciplines of bioethics, health law, and human rights are….all members of the broad human rights community, although at times none of them may be able to see the homologies, even when responding to a specific health challenge.'[87] It was further added by him that the boundaries between bioethics, health law and human rights are permeable, and border crossings, including crossings by blind practitioners, are common.[88]Gostin agrees, but laments that '[b]ioethics scholars are only beginning to go beyond individual interests to explore the fundamental importance of a population's health and well-being.'[89]

To be mentioned that the linkage of human rights and bioethics should not, however, be taken for granted. Although both seem to seek similar, if not the same, outcomes, some deviations or differences can be identified which could arguably be a matter of concern.[90] As McLean remarked:

> 'It must be remembered that much of bioethics has concerned itself not with human rights in general, but rather has focused on medicine and healthcare. While it is more philosophically based than medical ethics, it is nonetheless driven – in large part - by the same, or similar, concerns. Further, it is arguable that the technological 'revolution' that resulted, amongst other things, in the

---

85 Griffin Trotter, 'The UNESCO Declaration on Bioethics and Human Rights: A Canon for the Ages', (2009) 34 *Journal of Medicine and Philosophy* 195.

86 B. Salter, M. Jones, 'Regulating Human Genetics: the Changing Politics of Biotechnology Governance in the European Union', (2002) 4(3) *Health, Risk & Society* 325, 328.

87 G. J. Annas, 'American Bioethics and Human Rights: The End of All Our Exploring', (2004) 32 *Journal of Law, Medicine & Ethics* 658, 658.

88 Ibid.

89 L.O. Gostin, 'Public Health, Ethics, and Human Rights: A Tribute to the Late Jonathan Mann', (2001) 29 *Journal of Law, Medicine & Ethics* 121.

90 McLean, above n 56.

> birth of Dolly, hijacked bioethics, and pointed it towards a more narrow focus than a human rights agenda might seem to require.' [91]

In addition to that, the fast moving scientific research and the tremendous progress can outstrip the ability of its lines of social, ethical and regulatory support to keep up.'[92] Bioethics seeks to fill that gap. It is also true that the interests of a particular and powerful social enterprise, like medicine, can drive the agenda to which its partner discipline – in this case bioethics – subscribes.[93]

Baker says that 'originally, the principles of bioethics were a means for protecting human rights, but through a historical accident bioethical principles came to be considered as fundamental.'[94] He identifies the 'accidental divorce of bioethics and human rights',[95] while Pope pleads for 'bioethics and human rights to be 'be reunited and harmonized.'[96] For Knowles: Adopting the language of human rights means moving toward a more expansive understanding of the relationships between human health, medicine and the environment, socioeconomic and civil and political rights, and public health initiatives and human rights.[97] The distinguished commentator, David Thomasma, further believes that there is a lesson that bioethics can learn from human rights, saying that,

> 'Human rights are grounded in the community and in nature itself. They cannot be isolated from economic and social rights. This is what bioethicists will have to explore internationally and inter-culturally.[98]

If so, then the agenda and scope of bioethics needs to be expanded into arenas beyond the medical, and into environment, poverty and other important social questions. This is a position which, of course, now getting support and given to the wider context, the scope and applicability of bioethics is getting multiple, mixed and complex.

Further, since science and medicine and the goals pursued by them, are not value-free enterprises, bioethics can be tempted by an agenda set by an individual 'society's priorities and interests.'[99] Moreover, since '….bioethics has been to a

---

91 Ibid.
92 Salter and Jones, above n 86.
93 McLean, above n 56.
94 Ibid, 24.
95 Ibid.
96 T. M. Pope, *Reuniting Human Rights and Bioethics to Address Medical Futility and End-of-Life Treatment*<available at http://www.thaddeuspope.com/images/ Pope_abstract_for_ NYC_AALS.pdf> (accessed 23 February 2016.
97 Knowles, above n 5, 260.
98 D.C. Thomasma, 'Bioethics and International Human Rights', (1997) 25 *Journal of Law, Medicine* 295, 303.
99 P. Farmer, N. Gastineau Campos, 'New Malaise: Bioethics and Human Rights in the Global Era', (2004) 32 *Journal of Law, Medicine & Ethics* 243.

large extent a phenomenon of industrialized nations….',[100] according to Farmer and Gastineau Campos, this has meant that 'the great majority of the world's ethical dilemmas – and, in our opinion, the most serious ones – are not discussed at all by the very discipline claiming expertise in such matters.'[101] While conceding that 'bioethics has, for too long, focused on a too-narrow range of high-technology issues affecting few people….',[102] Pope argues that bioethics and human right can usefully learn from each other. For example, he argues that 'human rights' focus on globalization and public health can be used to beneficially reorient bioethics to address broader issues.'[103] In addition, since human rights commentators, he argues, lack experience in health related issues, 'human rights law can gain a rich vocabulary and conceptual toolkit from bioethics.'[104]

Of course, like all human rights endeavors, bioethics confronts the accusation that it is culturally relativistic; in other words, that – as some of the commentators already referred to have suggested – some bioethical (and human rights) norms which are aspirational for the western or rich world, may be ill suited to other countries and their interests. The importance of respect for cultural diversity is, of course, specifically referred to in article 12 of the UDBHR, which mandates that 'the importance of cultural diversity and pluralism should be given due regard.'[105] However, and importantly, this same article goes on to insist that nonetheless, 'such considerations are not to be invoked to infringe upon human dignity, human rights and fundamental freedoms, nor upon the principles set out in this declaration, nor to limit their scope.' This is a clear spirit of the fundamental principles of the UDHR.

Veatch argues that it is necessary to identify principles which are 'sufficiently abstract to identify general norms.'[106] He urges what he calls 'universalism' on bioethics, and claims that 'for ethical judgments this universalism makes sense.'[107] This, of course, is not to ignore cultural diversity, but rather, as Thomasma puts it, the 'relativistic challenges' faced by both human rights and bioethics require that 'attention is paid to those features of human existence and culture that unite human beings without overruling the very real differences.'[108]

In this regard it is to be noted here, that Jonathan Mann famously theorized that public health, ethics, and human rights are complementary fields motivated by the paramount value of human well being. He felt that people could not be healthy if

---

100 Ibid, 245.
101 Ibid.
102 Pope, above n 96.
103 Ibid.
104 Ibid.
105 *The Universal Declaration on Bioethics and Human Rights*, 19 October 2005.
106 R. M. Veatch, 'The Foundations of Bioethics', (1999) 13 *Bioethics* 206, 216.
107 Ibid, 208.
108 Thomasma, above n 98, 307.

governments did not respect their rights and dignity as well as engage in health policies guided by sound ethical values. Nor could people have their rights and dignity if they were not healthy. Mann and his colleagues argued the public health and human rights are integrally connected: Human rights violations adversely affect the community's health, coercive public health policies violate human rights, and advancement of human rights and public heath reinforce one another. Despite the deep traditions in public health, ethics, and human rights, they have rarely cross-fertilized-although there exists an important emerging literature. For the most part, each of these fields had adopted its own terminology and forms of reasoning. Consequently, Mann advocated the creation of a public health ethics and the adoption of a vocabulary or taxonomy of 'dignity violations.'[109]

So, from the above discussion, it is crystallized that in spite of different arguments, counter arguments there is an innate relationship between bioethics and human rights, for example, *firstly*, Human dignity serves as the grounding for human rights that refers to the intrinsic worth of all human beings and the requirement that all human beings should be treated with appropriate respect. Appeals to human dignity are common in bioethics, philosophy and legal discourse;[110]*secondly*, human person is the central subject of human rights, bioethics on the other hand, relates to all forms of life including the human beings themselves; *thirdly*, in the human rights discourse human person is regarded as the principal beneficiary and active participant, whereas bioethics although speak about the benefits of all forms of life spheres including the environment itself but the human person is conceived as the main actor for the ethical application of value judgment and decision; *fourthly*, human rights are the universal and inalienable rights to the members of the human community, bioethics, particularly, after the UNESCO declaration on bioethics and human rights it got an identity of global application although the declaration contains the provisions of cultural diversity and pluralism; *fifthly*, both have the common object of human development, although the concept of bioethics tends to apply the ethical principles and concepts for the well-being of not only human person but also others having the intricacies of ethical dilemmas connected to the everyday life of people, society and their interactions.

Conclusion

It is difficult to ascertain the precise moment, when the human rights history began its journey. Although it is undisputed that the human rights history has come across a good number of ordeals and it is as old as the human civilization itself. The corpus of international human rights developed after the World War II as an expression of the commitment of governments and the peoples they represented to the principles

109 Gostin, above n 89.

110 Chapman, above n 22.

sustaining three major social virtues: justice, equity, and respect for human dignity.[111] It was also, a profound reaffirmation of an idealist view of reality and the norms human create to function within it. Nations incorporated judicially enforceable human rights in their constitutions that provided, for example guarantees about access to health services and medicines as well as civil and political freedoms of speech, association and prohibitions in torture or unlawful death and certain other significant rights. Such commitments mark the start of a process whereby governments would not only provide physical security but maintain social structures that allowed their citizen to flourish in good health, which is a precondition for the proper enjoyment of a number of other human rights.[112]

Bioethics, on the other hand, arose as an academic discipline in roughly the same period which may usefully be described as the application of moral philosophy to ethical problems in the life sciences.[113]The ethical issues we face in healthcare, justice, and human rights extend beyond national boundaries—they are global and cross-cultural in scope. It has expanded its purview to accommodate issues of trans boundary significance in areas like,academics, international drug trials, physician, human genetic engineering, population control, and access to pharmaceuticals, to name but a few.

In response to this expansion perhaps, shift, human rights regime calls for a legally sanctioned, universal moral framework—to serve as the *lingua franca* of the new global bioethics order. Claiming that traditional bioethical principles are excessively focused on the individual and lack universal traction, proponents of this movement argue that human rights can provide much-needed guidance on difficult health-related issues that affect whole nations, populations, and even humanity itself.

Therefore, the unequivocal historical journey started both by the human rights and bioethics through the *Nuremburg Declaration*, the *UDHR*, the *Helsinki Declaration*, and the *UDBHR*, at this stage may have to combat and go through a new challenge, which may in turn lead their archival linkage to face a new paradigm, for example, human rights may need to importthe principles of bioethicsinto it or *vice versa*. And following that, any imbalance importation would lead the mutual relationship between human rights and bioethics to be counteractive rather than supportive. In this regard, a significant philosophical groundwork must be carried out, at least, for two reasons, since that (a) will clarify exactly how human rights or bioethics claims should be understood in their subsequent expansion and contextualization; and (b) will help obtain their reciprocal goals. And this is, perhaps, the point that we need to recognize in these days in order to meet the major promises of bioethics and human rights relating to their effective relation with each other for the promotion and protection of human dignity.

---

111 Faunce, above n 9.
112 Ibid.
113 Ibid.