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Legal Empowerment for Improved Access to Justice: Dominate Discourses

Dr. Sumaiya Khair*

Introduction

Access to justice and legal empowerment continue to be amongst one of the most discussed topics in the context of justice reform in many developing countries. Many regard the formal legal system as being far removed from the day-to-day struggles of the poor and the marginalised in given contexts. One of the principal reasons for this is the inability on the part of the poor and marginalised people to effectively utilise the legal and judicial process due to a variety of factors. Within the rule of law context, the notion of justice presumes an egalitarian society in which access to justice is seen as being premised on having an equal opportunity to claim recognition of certain entitlements.[1] In actual terms, access to justice has involved initiatives to expand the opportunity for poor and disadvantaged individuals and groups to settle their grievances through legal institutions, swiftly and efficiently. Where such institutions do exist, it is critical that they are deployed in an effective manner and that citizens generally are willing or able to use them.

Access to justice, however, is not simply about making state institutions deliver, it is also about rights. As Unger[2] cautions, rights are not merely resources, the exercise of which is conditioned on the resources the welfare State is prepared to allocate; claiming rights constitutes a strike against a structure of inequality and privilege. He advocates the removal of what he terms 'localized obstacles' for claiming rights and gaining equality. However, 'localized obstacles' must be understood in context. In other words, it is essential to examine the dynamics of inequality and privilege and the structures that govern the process of access and the claiming of rights, as they are often rooted in culture[3] and social values. After all, the prime concern here is not about laws and legal systems as such, but the people who are affected by the way they operate. As it is, law

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This paper has been adapted from the author's published work *titled Legal Empowerment of the Poor and the Marginalised*: *Strategies, Achievements and Challenges. Experiences from Bangladesh* (Colourline, 2008).

1 Patricia McFadden, 'Democracy: A Gendered Relation of Power. Problems of Creating a Feminist African Culture' <http://www.lolapress.org/artenglish/fadde6.htm> last accessed 31 July 2018.

2 Roberto Unger, *Democracy Realised. The Progressive Alternative* (Verso, 1998) 268.

3 Christina Jones-Pauly, 'Introduction' in Christina Jones-Pauly, and Stefanie Elbern (eds), *Access to Justice: The Role of Court Administrators and Lay Adjudicators in the African and Islamic Contexts* (Kluwer Law International, 2002) xiii, x.

for most of the world's poor is a paradox—not all laws are just, equitable, socially relevant or culturally acceptable--nonetheless, they are deemed fit to protect people's rights and ensure their well-being.

Although democratisation and the rule of law have been widely acknowledged as a major element driving pro-poor development, poor people in relatively new democracies continue to experience powerlessness in diverse ways. While economists and development experts have tended to view this powerlessness as essentially stemming from the lack of economic opportunities, there is an increasing belief that poor people's powerlessness also derives from the State's failure to provide adequate protection to its citizens, particularly when they are poor and/or marginalised and are unable to reach the judicial and legal process for vindication of their rights.

The lack of a reliable and expeditious justice system not only adversely impinges on the exercise of citizen's fundamental rights under the law and Constitution, but the inability of the poor to protect their assets and livelihoods also retards growth and development. This is why issues of rule of law, due process, judicial independence, equality and non-discrimination have increasingly transcended the confines of lawyers and courts and have become the focus of development discourse. In this newly established realm of concerns, the issue of access to justice is increasingly found bypassing formal mechanisms to create alternative sites of dispute resolution.[4] Besides, approaches are being used that are specifically aimed at empowering the poor through legal processes, both formal and informal, in obtaining access to justice and claiming that which is rightfully theirs.

This paper revisits prevailing discourses and conceptual issues that have over the years influenced and shaped the concept of legal empowerment as a tool for accessing justice. It illustrates how legal empowerment operates on the ground in Bangladesh and underpins its linkages with the rights-based approach to development.

Access to justice

The notion of justice conjures up images of the rule of law and dispute resolution mechanisms for the enforcement of laws. Intrinsic to the notion of justice is access to justice and due legal process. The phrase 'access to justice' has been termed as a 'rhetorical symbol of undeniable attractiveness and mobilizing power'.[5] The fundamental purposes of providing access to justice are two-fold:

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[4] Shahdeen Malik, 'Access to Justice: A Truncated View from Bangladesh' in Rudolf Van Puymbroeck (ed), *Comprehensive Legal and Judicial Development. Toward an Agenda for a Just and Equitable Society in the 21st Century* (The World Bank, 2001) 93, 95.

[5] Susan Silbey and Austin Sarat, 'Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject' (1989) *66 Denver University Law Review* 437, 450.

(a) to ensure that every person is able to invoke the legal process for redressal, irrespective of social or economic status or other incapacity; and

(b) to ensure that every person receives just and fair treatment within the legal system.[6]

Yet the concept of access to justice is to a great extent variable, unfixed. As Friedman observes, when people talk about 'access to justice' they mean many different things, but "every discussion assumes a goal called 'justice', and assumes further that some group or person living in a society finds the door closed.[7] This is why access to justice in developing countries has been alluded to as a fancy hotel, which has all the swanky trappings but is beyond the reach of ordinary people, particularly the poor and the downtrodden. In most instances, formal legal institutions are derived from Western models, and as such, very rarely identify with local culture and conditions. One is often struck by the existing structure of the court systems, the rules of procedure, the substantive laws and the brand of legal etiquette that are explicitly resonant of legal standards practised in the West. However, the penetration of western laws and practices into the formal legal systems of these countries have not exactly resulted in the whole-sale annihilation of the more traditional values and institutions delivering justice at local levels.

Cranston traces access to justice reforms to three distinct waves.[8]According to him, the first wave began in the early 1960s and involved the extension of legal aid; the second wave concentrated on the representation of diffuse or collective interests, for example, consumers and environmentalists, and involved standing rules, multi-party actions and so on, and the third wave, incorporating elements from the earlier waves, went on to expand legal representation and improve adjudicative procedures to accommodate different types of litigations and issues. The initiatives, in essence, were concerned with ensuring 'social access' by making individuals and groups aware of their legal rights and enabling them to obtain legal services to invoke those rights. However, since law and legal institutions are shaped by local economic and social factors, the facilitating of social access to justice through legal aid, public interest litigation and the like, is likely to have different dispositions in different environments. For example, alternative dispute resolution assumes an altogether different form when it operates from traditional sites of dispute resolution.

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6 S Muralidhar, *Law, Poverty and Legal Aid. Access to Criminal Justice*, (Lexis NexisButterworths, 2004) 1.

7 Lawrence Friedman, 'Access to Justice: Social and Historical Context' in M Cappeletti and J Weisner (eds), *Access to Justice*(Vol.2, 1978) 3, 5.

8 Ross Cranston, 'What Do Courts Do?'(1997)5 *Civil Justice Quarterly* 123, 233.

The legal process is not simply rooted in an assortment of laws, rules and regulations; it also includes the way in which these laws and rules are translated into action by relevant institutions. Therefore, a well-functioning legal apparatus is one where law is applied in a fair manner by judges and adjudicators, without undue delays or exorbitant costs, and where judicial decisions are transparent and imparted on the basis of accurate assessment of the facts and circumstances and objective application of appropriate rules.

Although, some nations, for example South Asians, are reputed for their overzealous litigiousness, the trend does not necessarily indicate a popular faith in the formal legal system. This is because while State law boasts of a wide array of rights and entitlements, there is very little evidence of effective implementation on the ground. Consequently, in practice, people are generally reluctant to take recourse to formal legal mechanisms for resolving disputes. Instead, they either leave their problems unresolved or submit to local informal methods of dispute resolution, each of which has the potential of contributing to the continuance of their sense of powerlessness. Legal ineffectiveness therefore increasingly raises questions about the suitability of legal arrangements that are in place.

Indeed, access to justice is not only central to the realisation of constitutionally guaranteed rights, but also to broader goals of development and poverty reduction.[9] Legal and regulatory frameworks are progressively being viewed as a fundamental element, not only in the realm of protecting property and contractual rights and ensuring a fair and quick settlement of disputes but also in ensuring flexibility and stability required for the investment environment.[10] This notion is also reflected in many World Bank financed projects which adopt a mixed strategy of (a) improving administration of justice and making administrative decisions accountable and affordable for ordinary citizens; (b) promoting judicial independence and accountability; (c) improving legal education; (d) improving poor people's cultural, physical and financial access to justice, and (e) public outreach and education[11]in their approach to empowerment for economic growth and poverty reduction. This approach witnesses a shift from social access to justice to economic access founded on the idea of improving the efficacy or competence of judicial systems to reduce the costs of economic transactions.[12] In other words, economic development is seen as having a legal impact. Costs incurred in litigation and

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[9] Michael R Anderson, *Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs*, (Law and Democracy Development Series, IDS Working Paper 178, 2003) 1.

[10] Ibrahim Shihata, *The World Bank in a Changing World*, (Nijhoff, 1991) 234.

[11] Deepa Narayan (ed), *Empowerment and Poverty Reduction: A Sourcebook*, (The Rawat Publications and the World Bank, reprint 2005) xix-xx, 18, 23.

[12] The World Bank, *Governance and Development*, (1992) 32.

consequent delays in developing nations may be used as an example of economic loss and/or deprivation resulting from a slack and/or ineffective judicial system.

The legal system is no longer viewed simply as a passive framework of rules, but as an instrument that can and ought to respond to the needs and demands of the poor. As has been rightly pointed out:

> Improving, facilitating and expanding individual and collective access to law and justice supports economic and social development. Legal reforms give the poor the opportunity to assert their individual and property rights; improved access to justice empowers the poor to enforce those rights. Increasing accessibility to courts lessens and overcomes the economic, psychological, informational and physical barriers faced by women, indigenous populations, and other individuals who need its services.[13]

In essence, the legal system is meant to operate as a premise from which the general populace can hold public officials and politicians to account, protect themselves from discriminatory treatment and exploitation and resolve conflicts at both individual and collective levels. The successful functioning of a legal system depends to a large extent on public awareness of the significance of the rule of law and respect for the legal process as a vanguard against deprivation and arbitrariness. However, such a positive attitude towards law and legal process cannot be expected to develop automatically; simplicity of procedures, transparency of legal processes, participation of the affected people and accountability of the public officials involved in these processes are some of the key elements that will lend legitimacy to the rules and contribute towards gaining public confidence in the system as a whole.[14]

The concept of "empowerment"

The notion of power and typologies of power and empowerment have been the focus of much discussion and debate in the study of many social sciences. Power has come to be recognised as a multi-layered and complex concept which lacks a universally acceptable definition. In the same vein, the ways in which empowerment can occur also differ in accordance with the contexts, circumstances and specific individuals or groups of people. This section revisits some of the more popular theories on power and empowerment for a clearer understanding of their use and implications in an attempt to

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[13] The World Bank, *Legal and Judicial Reform (Access to Justice) Website* (2002) quoting Ann Stewart, 'Juridifying Gender Justice: From Global Rights to Local Justice' in John Hatchard and Amanda Perry-Kessaris (eds), *Law and Development. Facing Complexity in the 21st Century*, (Cavendish Publishing Ltd., 2003)36, 43.

[14] Ibrahim Shihata 'Preface. Good Governance and the Rule of Law in Economic Development' in Ann Seidman et al (eds), *Making Development Work. Legislative Reform for Institutional Transformation and Good Governance* (Kluwer Law International, 1999) xvii, xx.

lay a foundation for discussion and analysis of 'legal empowerment' for accessing justice that follow later.

Power theorists are essentially divided into two schools of thought; one stream of thought believes that power is conflictual, that is, it is something inherently negative and prohibitive, a zero-sum game, while the other group regards power as consensual, which involves the capacity to achieve outcomes, whether they are achieved by force or they benefit only certain sections of the society. There are, however, some scholars who occupy a centre position and propose that power is constituted by both conflict as well as consensus.[15]

Given the varying dimensions associated with the understanding of power, the concept of empowerment has also been expressed and interpreted in different ways. Scholars broadly identify empowerment in terms of *power over, power with, power to* and *power within*. In a nutshell, *power over* can be characterised as controlling power, which may be met varyingly with compliance, resistance or manipulation. Empowerment in this context involves the bringing of people who are outside into the decision-making process. *Power with* indicates a collaborative initiative which enables groups to tackle problems collectively. It can help bridge different interests, transform or reduce social conflicts and promote more equitable relations within society. *Power to* create new possibilities and actions without domination of any kind. It is expressed by people's ability to recognise their interests and to realise that they have the power to shape their circumstances to achieve a favourable end. In terms of both *power with* and *power to*, empowerment involves the processes by which people become aware of their own interests and potentials and are able to negotiate and influence relationships and decision-making through a collaborative and cooperative manner. Finally, *power within* is a matter of actualising self-worth and self-respect. Empowerment in this context is concerned with the knowledge, understanding and capacity to perceive that one has the right to change one's circumstances and take part in decision-making.[16]

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[15] Some of the chief proponents of power as conflict are Robert Dahl (*Who governs? Democracy and Power in an American city* (Yale University Press, New Haven, CT, 1961), Peter Bachrach and Morton Baratz ('The Two Faces of Power' (1962) (56)*American Political Science Review*947-52, and Steven Lukes (*Power. A Radical View*, Macmillan, London, 1974). Talcott Parsons is amongst the scholars who regard power as consensual ('On the Concept of Political Power', (1963) 107 (3) *Proceedings of the American Philosophical Society*232:63. Michel Foucault (*Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, [trans. and ed.] Gordon, Colin, Harvester Press, Brighton, U.K., 1980), Anthony Giddens (*The Constitution of Society. Outline of the Theory of Structuration*. Polity Press, Cambridge, 1984) and Stewart Clegg (*Frameworks of Power*, Sage Publications, London, 1989) argue that power is conflictual as well as consensual.

[16] FruzsinaCsazar, 'Understanding the Concept of Power" in Ruth Alsop (ed), *Power, Rights and Poverty. Concepts and Connections*, (The World Bank, 2005)137, 144-45.

Row lands[17] discusses the concept of empowerment in the light of her analysis of the nature of 'power' which depends largely on both the issue and the setting. This is why less-powerful actors attempt to move conflicts from disadvantageous settings to more promising ones. According to her, power can take different forms, varyingly described as "power to", "power with" and "power within", all of which allow the construction of a different meaning or a set of meanings for 'empowerment'. Row lands posits empowerment at three levels: at a personal level which entails the development of self-confidence and capacity to undo the effects of internalised oppression, at a relational level, which involves the ability to negotiate and influence the nature of a relationship and the decisions made within it and at a collective level, which means the coming together for collective action.[18]

Some believe that both the processes of 'power within' and 'power with' are mutually reinforcing. For example, Kabeer draws upon the effects of credit facilities on Bangladeshi rural women to illustrate that individual transformation strengthens collective organisations, and collective action reinforces the individual sense of self-worth:

> A growth of women's self-confidence, in their knowledge of their rights, their willingness to participate in public action and even the reduction of domestic violence may have occurred as a result of women's participation in the new forms of social relationships embodied in credit organizations; they bore little relationship to the productivity of their loans.[19]

Sharma argues that consciousness of power, and the capacity to recognise it and contest it, is what differentiates liberating empowerment from hegemonic power. She maintains that:

> [P]ower is never total. Powerlessness is always partial. Power remains vulnerable to that which it excludes. The vitality and resistance of the forms of life it thwarts or impedes, offer the space for the powerless to acquire their own influence. This is a pull factor, on which individuals and groups come together and try to change the potential they possess.[20]

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[17] Jo Rowlands, 'A Word of the Times, but What Does it Mean? Empowerment in the Discourse and Practice of Development' in Haleh Afshar (ed), *Women and Empowerment. Illustrations from the Third World*, (MacMillan Press Ltd., 1998), 11, 11-15.

[18] Jo Rowlands, *Questioning Empowerment. Working with Women in Honduras* (Oxfam Publications, 1997) 13.

[19] NailaKabeer, 'Conflicts Over Credit: Re-Evaluating the Empowerment Potentials of Loans to Women in Rural Bangladesh' (2001) 29 *World Development* 63, 81.

[20] Mukul Sharma, 'Conclusion' in Mukul Sharma (ed), *Improving People's Lives. Lessons in Empowerment from Asia* (Sage Publications, 2003) 185, 187.

In her attempt to link power and poverty reduction, Eyben[21] revisits the concepts of "power to", "power over" and "power with" and "power within". She observes that "power to" is about agency which involves the intention or consciousness of action sometimes with the implication of choices between alternative actions. It is basically a 'capacity to have an effect'. "Power over" relates to the ability to control, in some way, the actions or options of another. "Power with" and "power within" are associated more with feminist movements and other social movements. "Power with" is often thought of as collective action in response to powerlessness and "power within" is all about the power to organise for one's self respect and dignity.

Troutner and Smith[22] define empowerment simply as a process of accumulating power. They, however, find a distinction between quest for power and actual acquisition of power —being ultimately a question of cause and effect—and acknowledge that it is not always easy to distinguish between the two. The authors also acknowledge that as a process, empowerment can have both positive and negative consequences, for example, transformation of power relations can just as well lead to disempowerment of women as their empowerment.

Based on the World Bank's agenda for empowerment, Narayan[23] identifies four key elements that contribute to the expansion of the freedom of choice, action to shape one's life and control over resources and decisions, which together constitute empowerment. These four elements, namely, access to information, inclusion/participation, accountability and local organisational capacity are considered vital for making empowerment initiatives a success. On the whole, she sees empowerment as the expansion of assets and capabilities of poor people to participate in, negotiate with, influence and control and hold accountable institutions that affect their lives.[24] In her opinion, powerlessness is about not being able to choose and act freely—a state of affairs that can occur on different levels, in households as well as within institutions. Her analysis focuses more on action by the poor at local levels rather than intervention by the State.

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[21] Rosalind Eyben, 'Linking Power and Poverty Reduction' in Ruth Alsop (ed), *Power, Rights and Poverty: Concepts and Connections* (The World Bank, 2005)15, 17-22.

[22] Jennifer L Troutner, and Peter H. Smith, 'Introduction. Empowering Women: Agency, Structure and Comparative Perspective' in Peter H. Smith et al. (eds) *Promises of Empowerment. Women in Asia and Latin America*, (Rowman and Littlefield Publishers Inc., 2004)1, 4.

[23] Narayan, above n 10, iii-iv.

[24] *Ibid.*, 14

Staudt[25] argues that empowerment is political. Empowerment, according to her, can hardly occur in contexts lacking democratic accountability relationships among those who make decisions and constituencies affected by such decisions. The challenge to empowerment in terms of both process and outcome is essentially a challenge of political engagement in accountability relationships within and across national boundaries. She strongly critiques donor/technical assistance agencies for their official grants and rhetoric that often strengthen established power relations, including relations that privilege men and dominant class. She believes that only with active political engagement can people negotiate more balance in the unequal power relations at local, national and global levels for achieving just outcomes.

Stromquist[26] believes that empowerment can be perceived as having three dimensions--cognitive, psychological and economic. The cognitive refers to an individual's understanding of the conditions and causes of subordination and oppression, the psychological relates to the development of self-respect and confidence and the economic signifies the ability of an individual to acquire a measure of economic independence and material comfort. These dimensions operate at both individual and collective levels. Thus, empowerment essentially results from a combination of consciousness development amongst and participation by disadvantaged groups.

In Cheater's[27] understanding empowerment implies that all intervening brokers should be eliminated from the consumer's capacity to choose. Adjudicators, mediators, advocates, advisers and representatives are all, by definition, irrelevant, deprived of their capacity to control empowered people and/or their interests. She cautions though that such devolution of power from State to community might increase rather than decrease the potential for brokerage. In this context, she reflects on the criticisms levelled at the outcome of devolution of development assistance to NGOs, as new brokers, in direct contact with aid recipients.

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[25] Kathleen Staudt, 'Engaging Politics. Beyond Official Empowerment Discourse' in Jane L Parpart et al., (eds), *Rethinking Empowerment. Gender and Development in a Global/Local World*, (Routledge, 2002) 97, 99, 105, 109-110.

[26] Nelly Stromquist, `Women's Education in Development: From Welfare to Empowerment' (1988) 21(4) *Convergence*5, 11. See also Nelly Stromquist, 'Education as a means for empowering women' in Jane L Parpart et al (eds), *Rethinking Empowerment. Gender and Development in a Global/Local World* (Routledge, 2002) and Nelly Stromquist, 'The theoretical and practical bases for empowerment' in Carolyn Medel-Anonuevo (ed), *Women, Education and Empowerment: Paths towards Autonomy* (UNESCO Institute for Education, 1995).

[27] Angela Cheater, 'Power in the Post-Modern Era' in Angela Cheater (ed) *The Anthropology of Power, Empowerment and Disempowerment in Changing Structures* (ASA Monographs 36, Routledge, 1999) 1, 7.

Sen's[28] approach to power as freedom is derived from the perception that people are not free when they do not have the power to make choices about their own lives. According to him, utilitarian preference theory cannot be the basis for justice because especially deprived people, like women, tend to limit their preferences, which in essence constrains their freedom. Sen regards gender relations in terms of "cooperative conflicts" in which men have an advantage by playing up the demands of efficiency in particular social arrangements. He insists that there is a need to identify alternative arrangements that can be less iniquitous but no less efficient.[29]

Rethinking empowerment, Par part et al[30] contend that since most marginalised, impoverished communities are affected by global and national forces, empowerment must be analysed in global, national and local terms as global forces, while enhancing the power of some marginalise others. They argue that understanding empowerment requires a more nuanced analysis of power. Empowerment is not simply the ability to exert power over people and resources; it involves the actual exercise of rather than possession of power. This approach recognises that empowerment is enmeshed in power relations at all levels of society. Although it is a process whereby people experience as well as challenge and subvert power relations, it occurs in institutional, material and discursive contexts. Consequently, whether it is collective action, skills-development or decision-making, empowerment takes place within the structures of power that people encounter. On the whole, empowerment is both a process and an outcome. It is a process because it is fluid and unpredictable and must be seen in terms of specificities of struggles at a given time and in a particular context. It is an outcome as it can be measured against expected achievements.

Clearly, the notion of power depends on a number of factors and as such, may be conceived in different ways. A reading of some of the existing literature on 'empowerment', much of which use the term from the perspective of women's rights and development, reveals quite clearly that the concept is far from clear-cut and straightforward. The very diversity in its usage reflects the complexity of the expression. While the notion has been widely used to describe the process of strengthening people's capacity to bargain for rights and entitlements, the prevalent discourses have also dwelt upon the dynamics that essentially make it both a process and an outcome. Some authors

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[28] See Amartya Sen, 'Gender Inequality and Theories of Justice' in Martha Nussbaum and Jonathan Glover (eds), *Women, Culture and Development: A Study of Human Capabilities*, (Clarendon Press,1995) 259.

[29] *Ibid.*, 263, 270

[30] Jane L Parpart et al, 'Rethinking Em(power)ment, Gender and Development. An Introduction' in Jane L Parpart et al, (eds), *Rethinking EmpowermentGender and Development in a Global/Local World* (Routledge, 2002) 3, 3-4.

see empowerment as a means for social awakening or conscientisation for challenging social inequality. Third World feminists use the concept to address the issue of gender differentials in the control and distribution of resources. Activists involved with poverty issues view empowerment as a local-level movement designed to inspire the poor and marginalised to confront institutional status quo. Mainstream development agencies adopted the term as a means for increasing productivity within established structures for people's economic development. The focus on "power to" which began in the 1970s progressed to "power over" by the 1990s and the concept continues to be debated. Empowerment is manifested as a redistribution of power, whether between nations, classes, races, genders, or individuals and encompasses the transformation of structures and institutions that reinforce and perpetuate inequality, whether family, state institutions, political processes or development interventions. These components outline the inclusive elements of empowerment which essentially work in a complex continuum.[31]

It may be concluded therefore that in its widest possible sense, the term 'empowerment' has been used to describe a whole gamut of experiences—ranging from awareness of causes of inequality and popular consciousness of problems, the ability to articulate and influence policy, participation in decision-making, development of organisational capacity, increased literacy and income, enhanced mobility, self-reliance to control and management of resources.

Understanding "legal empowerment"

It is clear from the above discussion that empowerment does not take place in a social and legal vacuum; powerlessness is brought about through a historical and political process, a process which leads to denial of rights and subordination. While questions of power and empowerment feature significantly in discourses on rights and entitlements, it is important to recognise that power operates at many levels to prevent people's access to rights. Veneklasen et al.[32] classify three forms of power that can discriminate against and undermine the rights and participation of the poor and the disadvantaged: first, *visible power* which involves the distinctive aspects of political power, such as legislature, laws and policies, second, *hidden power* that sets the political agenda to the advantage only of privileged groups and third, *invisible power*, the most insidious, which shapes the meaning and notion of 'what is acceptable and who is worthy in society'. Indeed, the latter has the potential to instil and reinforce feelings of inferiority and powerlessness amongst vulnerable groups in ways that restrict effective participation and enforcement of their rights. This, in turn, forms the rationale for examining the issue of

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[31] RekhaDatta and Judith Kornberg, 'Introduction: Empowerment and Disempowerment' in RekhaDatta and Judith Konberg (eds), *Women in Developing Countries. Assessing Strategies for Empowerment*, (Lynne Rienner Publishers, 2002)1, 2-3.

[32] Lisa Veneklasen et al, *Rights-based Approaches and Beyond: Challenges of Linking Rights and Participation*,(IDS Working Paper 235, 2004) 8.

'legal' empowerment as a means for accessing justice and other processes and resisting inequalities that affect people's lives, particularly when they are poor and disadvantaged.

Legal activists, donor agencies and scholars are increasingly focusing on the idea of legally empowering poor and marginalised populations in order that they are able to access justice and other processes of governance to vindicate their rights, claim entitlements and reduce impoverishment. The Asian Development Bank[33] sees legal empowerment as a process and a goal that equip disadvantaged groups to use the law to take control of their lives. The practice involving education and action aims to advance good governance by ensuring that marginalised people participate in decision-making processes that directly affect their lives. The ADB emphasises on collective initiatives by marginalised groups to challenge prevalent status quo within the rights regime. A study by The Asia Foundation defines legal empowerment as, the ability of women and disadvantaged groups to use legal and administrative processes and structures to access resources, services and opportunities.[34]

Golub[35] offers a similar paradigm, essentially a manifestation of community driven and rights-based development, to State centred approach to justice reforms. According to him, legal empowerment is the "use of legal services and related development activities to increase disadvantaged groups' control over their lives", its distinctiveness evolving from the use of a diverse array of legal services for the poor to help them advance their choices and freedoms. To him, legal empowerment is both a *process* and a *goal*: as a *process*, it involves activities aimed at increasing disadvantaged people's control over their lives, and as a *goal*, it refers to the actual achievement of that control. Thus, the process can take place even if the goal is yet to be achieved.

Drawing upon experiences in the context of women, law and development, Schuler[36] emphasises on education as a major element in legal empowerment initiatives. In her understanding, knowledge of rights amongst marginalised groups supplemented by legal aid services enables them to access the formal and informal structures of justice delivery. The ultimate goal is to reform the legal culture and the content of the law so that women and marginalised groups can benefit from them in tangible ways.

Evidently, legal empowerment is distinct from other forms of empowerment in that the process involves the explicit or implicit use of the law in improving poor people's access

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[33] The Asian Development Bank, *Law and Policy Reform at the Asian Development Bank* (2001) 7,77-78.

[34] The Asia Foundation, *Legal Empowerment for Women and Disadvantaged Groups: Bangladesh Country Situation Analysis* (2006) 41.

[35] Stephen Golub, *Beyond the Law of Orthodoxy. The Legal Empowerment Alternative*, (Working Papers, Rule of Law Series, No. 41, Carnegie Endowment for International Peace, October 2003) 25-27.

[36] See Margaret Schuler (ed), *Empowerment and the Law: Strategies of Third World Women*, (OEF International, McNaughton and Gunn, 1986) 13-18.

to legal redress. In practical terms, rights and empowerment do not necessarily function in harmony despite the fact that they may complement each other and even overlap in practice. While empowerment often involves enhancing capacity, it does not operate in a void. Rather, it involves power relations in three interrelated arenas: within society, within the State, and between State and society. In this context it is useful to distinguish empowerment, in the sense of actors' capacities, from rights, in the sense of institutionally recognised opportunities. Institutions may theoretically recognise rights that actors, on account of imbalances in power relations, are unable to exercise in practice. Conversely, actors may be empowered in terms of experience and capacity to exercise rights, but may lack institutionally recognised opportunities to do so.[37] Therefore, a combination of state and non-state elements is essential for widening the parameters of access to justice and legal empowerment of the poor and marginalised.

However, there cannot be a priori assumption that legal empowerment will foster egalitarian societies or democratic processes. It may so happen that legal empowerment has worked for a select individual or group, leaving the lives of others unchanged or worse off. Discounting universal relevance, Rowland observed:

> It is [sic] completely possible that one person's empowerment process may be another person's disempowerment, either because they share some situation where their two sets of needs are incompatible, or because similar processes acting in different contexts or within different power relationships have diverse impacts.

Others, too, have expressed similar concerns. Yeatman fears that empowerment as idiom and process might reproduce the traditional hierarchy between the powerful protector as in State, the elite and the powerless, typically women, children and the poor, who are regarded as hapless, passive and disadvantaged. It is also contended that the notion of empowerment which involves ideas of capacity development through group mobilisation, articulation of demands and participation in decision-making essentially circumscribe the poor to these forms of political bargaining restricting thereby the expansion of the realm of their political struggles. In the midst of all this the State is assumed as playing the benevolent and impartial role of an arbitrator to enable poor people to pursue these forms of politics. Just as religious fundamentalists think that the imposition of their beliefs and practices on ordinary people is for their good, irrespective of the fact that they did not solicit it, advocates and implementers of legal empowerment activities who think that they are doing a world of good for the ordinary people, might fail in their mission if they are not mindful of the diverse value systems that underpin the lives of the people they are targeting.

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[37] Jonathan Fox, 'Empowerment and Institutional Change: Mapping "Virtuous Circles" of State-Society Interaction' in Ruth Alsop (ed), *Power, Rights and Poverty: Concepts and Connections*, (The World Bank, 2005) 68, 71.

Legal empowerment on the ground

The principal thrust in the legal empowerment area emerged from international development agencies and banks in their attempts to better understand the conceptual underpinnings and linkages between power, rights and poverty reduction and to use this knowledge for developing strategic objectives, focus and programmes. Since local NGOs working at the grassroots are often heavily dependent on external assistance from international development agencies in running their programmes, their mandates are to a large extent shaped and influenced by the policies and practices of their respective development partners. NGOs are thus found to engage in activities that aim to empower the poor, individually and collectively, to access State institutions and challenge inequalities. While the design and operation of many of their projects and activities may not have been grounded on a sound understanding and analysis of the jurisprudence of legal empowerment, nonetheless, the perceived outcome of these initiatives have contributed to enhanced access to justice for the poor and the marginalised.

The early years saw NGOs primarily undertaking legal awareness programmes, as absence of legal knowledge was considered to be a major obstacle to enforcement of rights. One of the most striking features in the socio-legal scenario in many developing countries including Bangladesh is the massive ignorance of the people about their constitutional and other legal rights. In most agri-based societies, whatever little legal knowledge exists, is heavily concentrated in the area of land titles and water rights, disputes over which constitute the bulk of court cases to date. However, the advent of legal and human rights NGOs has generated an appreciation and understanding amongst common people of other legal rights and entitlements, such as women's rights in the family, rights to fair wages and collective bargaining and so on. In course of their operations, mainstream development NGOs also began to recognise the fact that in the absence of legal knowledge, disadvantaged people are likely to experience powerlessness in more intense ways, particularly in the existing socio-political backdrop which is customarily biased towards those with more resources and power. By helping the poor and the disadvantaged to attain critical consciousness of their rights and inequitable power relations that shape their lives, legal literacy activities constituted one of the more progressive forms of legal empowerment strategies. This is essentially the premise from which NGOs started their legal awareness campaigns in order to educate the poor and disadvantaged, particularly women and minority groups, about their legal rights and entitlements to basic services by the state in order that they were able to challenge social and legal inequities more effectively.

While legal literacy initiatives proved effective as an essential first step towards improving poor peoples' access to justice, it soon became evident that simple dissemination of information was not, on its own, sufficient to empower poor populations in tangible ways and achieve concrete social transformation. In other words, while legal literacy activities may have helped develop a consciousness of their legal

rights amongst the poor and the disadvantaged, the extent to which they were equipped to take conscious steps towards achieving their goals remained unclear.

It follows therefore that simply knowledge of laws, without the parallel development of capacities to actualise the knowledge gained, did not enable the poor to assert themselves in meaningful and effective ways. Accordingly, NGOs began to devise integrated strategies that included other services like legal aid, litigation, social mobilisation and livelihood opportunities to assist poor people to transform, to the extent possible, the idealistic rights on paper into reality. In other words, NGOs conceived of strategies that facilitated the poor in applying the knowledge and skills acquired through legal literacy and taking practical action to secure their rights and entitlements.

Linking legal empowerment with rights-based approach to development

The practice of combining several high level interventions in the approach to legal empowerment of ordinary people has its roots in what is popularly known as the 'rights-based approach' to development. As rights-based approaches to development proliferate under the joint administration of local and international NGOs, international and bilateral agencies, they appear to demonstrate a switch from a technical to a political understanding of development. For instance, according to Save the Children

> A rights-based approach to development combines human rights, development and social activism to promote justice, equality, and freedom. It makes use of standards, principles, and approaches of human rights and social activism to address the power issues that lie at the heart of poverty and exploitation in the world.[38]

Piron encapsulates the tangible benefits of the rights-based approach. According to her, the rights-based approach provides a normative international framework that clearly sets out rights of individuals and obligations of the state which may be used to challenge inertia in governance, regulate the conduct of non-state actors and guide resource allocation; it places people at the core of development processes whereby they are regarded as active citizens with rights and entitlements; it draws attention to discrimination and exclusion of vulnerable groups from the benefits of development; its helps improve accountability mechanisms across political, judicial, governance and community structures; and finally, it can influence how aid is designed and delivered.[39]

In practice however, negotiations over rights can be conceived as arenas of contestation in which structures of power and authority are manifested.[40] The formal legal system might offer the longer term possibility of rule of law, but in the short term, it becomes

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[38] Caroline Moser, 'Rights, Power, and Poverty Reduction' in Ruth Alsop (ed), *Power, Rights and Poverty: Concerns and Connections*, (The World Bank, 2005)29, 34.

[39] Laure-Helene Piron, 'Rights-based Approaches and Bilateral Aid Agencies: More than a Metaphor' in *Developing Rights?*(2005)36(1) *IDS Bulletin* 19, 22-23.

[40] Moser,above n 37, 41.

yet another actor competing for legitimacy in matters relating to dispute resolution.[41] For example, while formal laws and legal frameworks provide an important benchmark for claiming rights to land, existing top-down legal mechanisms that demand the production of deeds, documents and witnesses in support of the claim and associated costs can pose serious challenges to the process of negotiation over rights. Alternatively, a bottom-up mobilisation and local advocacy efforts are more likely to yield better results in the contestation of such claims.[42]

Kabeer's study found that NijeraKori, a Bangladeshi NGO that works with poor and vulnerable groups to help build their collective capacities for accessing their rights, is guided by its own analysis of the problems of poverty and powerlessness. It singles out three key constraints to explain the disenfranchisement of the poor: economic, political and social. In economic terms the poor and the landless are compelled to rely on wage labour; however, they are devoid of bargaining power in the asymmetrical labour market which divests them of their just returns from their labour efforts. In political terms, the poor have no voice in national or local structures of governance and decision-making which are primarily dominated by powerful quarters with money and influence. In social terms, the poor are marginalised by unequal relationships of class and gender, backed by powerful norms that legitimise oppression of the poor and the disadvantaged. In other words, poverty is not only about lack of resources but also the absence of "voice," agency and organisation.[43] In order to overcome these obstacles Nijera Kori adopts a rights-based approach to secure rights for the poor and landless groups. Although it facilitates action by local communities to resolve their own problems, Nijera Kori often integrates the rights-based approach with delivery of legal services, for example, by providing legal aid when landless groups are unable to cover litigation costs, in order to develop collective capabilities to achieve the desired outcomes.

This line of thinking is consistent with the existing view that legal empowerment also connotes a rights-based approach to development as it uses legal services to help the poor learn, act on, and enforce their rights to alleviate poverty. In many ways, legal empowerment is more about power and freedom than it is about law. While many of the activities indeed focus on teaching poor and disadvantaged groups relevant laws, building their capacities to use those laws themselves and providing legal representation where necessary, they also contribute to group formation, community mobilisation and

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[41] Michael Woolcock, 'Empowerment at the Local Levels: Issues, Responses, Assessments' in Ruth Alsop (ed), *Power, Rights and Poverty: Concerns and Connections*, (The World Bank, 2005)111, 114.

[42] Moser, above n 37, 43.

[43] NailaKabeer, *'We Don't Do Credit'. NijeraKori Social Mobilization and the Collective Capabilities of the Poor in Rural Bangladesh* (NijeraKori, 2002) 14-15.

livelihood development towards making human rights a reality for poor people.[44]The World Bank recognises that

> Weak institutions—tangled laws, corrupt courts, deeply biased credit systems, and elaborate business registration requirements—hurt poor people and hinder development…Countries that systematically deal with such problems and create new institutions suited to local needs can dramatically increase incomes and reduce poverty. These institutions range from unwritten customs, and traditions to complex legal codes that regulate international commerce.[45]

The prevailing perception of legal empowerment, as inferred from the programme design and interventions of NGOs, the government and bilateral agencies, appears to be grounded in conventional law-based activities. The rationale seems to be located in the assumption that the State and its relevant institutions are not infallible but are, nevertheless, expected to rule in the interests of the public good. While many disputes are indeed resolved extra-judicially, courts must be there for people to fall back on when informal measures do not work. Moreover, rights proclaimed by the State must ultimately be enforceable, often through judicial mechanisms, if they are to be conceived by people as real and not simply illusory.[46] Therefore, efforts at legal empowerment through established law-oriented activities have the potential of strengthening the formal legal system, engendering a legal and political culture to implement laws in more effective ways and eliminate structural discrimination against the poor. Indeed, at the crux of legal empowerment lies the responsible exercise of legal rights.

Seen from an academic perspective, legal empowerment is meant to inculcate a critical consciousness amongst poor and marginalised populations that they are entitled to an unhindered and meaningful exercise of their rights and provide support services for the realisation of the same, irrespective of gender, age, religion, ethnicity, social class or any other criterion that may be utilised to restrict their participation as citizens of the State. The idea is premised on the philosophy that even if people do not actually utilise the available legal services to access justice, the fact that they will be able to resort to them when required provides them with a sense of security and leverage to take action at an appropriate time and on an appropriate occasion. The poor are frequently caught in a

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[44] Stephen Golub, *Beyond the Law of Orthodoxy. The Legal Empowerment Alternative* (Working Papers, Rule of Law Series, No. 41, Carnegie Endowment for International Peace, 2003) 29.

[45] World Bank, *World Development Report 2002: Building Institutions for Markets* (New York, 2002) quoted in Ann Stewart, 'Juridifying Gender Justice: From Global Rights to Local Justice' in John Hatchard and Amanda Perry Kessaris (eds), *Law and Development: Facing Complexity in the 21st Century*, (Cavendish Publishing Ltd., 2003) 36, 42.

[46] Ross Cranston, 'Access to Justice in South and South-East Asia' in Julio Faundez (ed), *Good Government and Law. Legal and Institutional Reform in Developing Countries*, (MacMillan Press Ltd., 1997) 233, 255.

web of multiple and interlocking deprivations that stem from factors ranging from economic deficits to socio-cultural value systems. When these factors combine, the poor are disabled from asserting themselves in concrete ways. However, this is not to say that the poor lack grit and resilience; on the contrary, they very often bide their time before taking a stand and that is when legal empowerment comes in handy.

Assessed from the material perspective, there is a general consensus that legal empowerment is critical for poverty alleviation. It is about ensuring that laws and policies are implemented in ways that will assure the poor and disadvantaged groups that their fundamental rights and entitlements will be protected. Legal activist organisations like Ain O Shalish Kendra in Bangladesh, for example, envisage legal empowerment as a tool through which poor and disadvantaged populations are educated about their rights, assisted in asserting their rights, and finally, assured of institutional assistance from governance structures in accessing basic services and opportunities guaranteed under the law and the Constitution.

Legal empowerment therefore, comes out as a complex process of raising individual and collective consciousness of rights, identifying areas of desired transformation and building capacity to make that transformation happen. In its current form it appears to encompass elements of 'power to', 'power with' and 'power within' and to a much lesser extent, 'power over'. This is understandable given that social, religious, political and economic power relations are not constant; accordingly, legal empowerment depends to a large extent on the social and cultural construction of power and status which invariably differs across societies. There is also the issue of the conflict between universal and cultural norms and standards. For instance, the formal endorsement by States of international legal standards on equality and non-discrimination remains largely ineffectual in the face of the local customary laws which often draw validity from religious tenets and dictates. Male-female dynamics in religion are often utilised to explain unequal resource distribution, division of labour and the dichotomy between private and public spaces in order to relegate specific groups to a subordinate position in the social, legal, economic and political hierarchy. The poor, being generally God-fearing, are easily swayed by biased and often distorted interpretations of scriptural norms and fear divine reprisal if they so much as think of contesting them.

To take another example, despite legal sanctions against child marriage, the practice continues in many developing countries. Apart from cultural considerations, parents argue that economic factors compel them to arrange marriages for their daughters at an early age. In contexts where dowry in marriage is a custom, parents believe that the amount of the dowry varies according to the age of the girl—the older she is, the higher the dowry. Thus, despite the existence of formal administrative and legal structures, people's perceptions and behaviour are conditioned to a large extent by customary and social trends.

Evidently, legal empowerment is preoccupied with people and specific communities at the grassroots and as such, focuses more on the `local'. Legal empowerment approaches,

as currently applied, primarily target those who find it the hardest to gain access to justice and legal processes. The obvious constituencies that merit attention in this regard are the poor, women, rural communities and ethnic minority groups. It is, however, important to recognise that even within these various categories, powerlessness is perceived in different ways and experienced at different levels. There are also bound to be variations in the strategies that people manage to devise for coping with common problems. Accordingly, legal empowerment may also manifest itself in diverse forms. The effect of legal empowerment within the confines of the family and the household is quite likely to differ from the collective empowerment achieved at the community level. For instance, increased legal knowledge, confidence and self-esteem do not necessarily produce more power for a rural woman unless she is able to act on them. Again, what might be possible for a group of male farmers to achieve in terms of reclaiming rights to a water body as a result of legal empowerment, might not be so for a housewife in challenging inherent male biases in the family or for an ethnic minority in claiming equal employment opportunities. In other words, an inhibiting element in the environment will not always be counterbalanced successfully for everyone.[47] Therefore, it is important to recognise that men and women often have vastly different experiences in bringing the abuse of their rights to the attention of judicial institutions and even more varied experiences in interacting with the judicial system. Unless, legal empowerment initiatives address both the de facto as well as *de jure* impediments that poor people face in accessing justice, the likelihood of achieving lasting and concrete impacts is uncertain.[48]

Final thoughts

The aim of legal empowerment is to reduce to the extent possible the barriers that essentially prevent the poor and disadvantaged from gaining access to justice. It is to be remembered, however, that access to justice should not be construed simply as entry to courts; it needs to go beyond procedural access towards providing tangible social outcomes based on equity and fairness. In this context, legal empowerment activities focus on utilising local institutions and customary practices to determine entitlements and outcomes. It is equally important to guard against unforeseen consequences that may well evolve as a result of settling formal rights in informal settings. While informal dispute resolution may indeed be a cure to legal problems of the poor, there is always the risk of confining them to a particular normative space that may not be just and equitable for all people across the board. For example, the traditional *shalish* in Bangladesh, despite its wide acceptance in local communities have been known for its discriminatory treatment of women.

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[47] Jo Rowlands, above n 16, 24.

[48] Mark K. Bromley, 'The International Human Rights Law Group: Human Rights and Access to Justice in Post-Conflict Environments' in Claude E. Welch Jr (ed), *NGOs and Human Rights. Promise and Performance*, (University of Pennsylvania Press, 2001) 141, 147.

Whether or not the poor gain in philosophical or material terms as a result of legal empowerment, it is useful to remember that other levels of changes are bound to follow, as change at any one level alone is unlikely to be effective or sustainable. Action at the symbolic level, for example, electing women to local government, cannot effectively deliver the desired outcome unless the process is linked to a much broader strategy for social change.[49] Drawing upon Kabeer's[50] observation it may be said that sustainability of the impact of legal empowerment strategies will depend on the ability of recipients to go beyond acting at the project level and internalise their knowledge and experience to challenge and reverse discriminatory treatment and value systems in their most immediate and daily dealings of life.

Thus, while the role of external agents like NGOs in assisting poor people to overcome obstacles to access justice cannot be undermined, it is important to recognise that genuine empowerment cannot be conferred from the outside. Undeniably, external agents help the poor acquire a degree of confidence to mobilise for change, but in order for them to effectively exercise their rights there is a need for actual ownership of the various processes associated with legal empowerment and access to justice. The indicators of success in this area are not easily quantifiable; however, changes in attitude towards the judicial system and an increase in the willingness to approach it for rights redress represent a significant step in the direction of overcoming the dread inherently associated with the process.

In order to avoid the risk of exacerbating social divisions in terms of gender, education, religion and ethnicity and accentuating powerlessness and social inequalities, legal empowerment must be understood and assessed in its proper perspective. It requires an empirical foundation that draws upon both qualitative and qualitative information. The real challenge is to discern the ways and means in which the perceived impacts of legal empowerment processes are produced and sustained. Simply winning a court case, though important, is meaningless unless the victory is given legal effect.

It is equally important to acknowledge that while legal empowerment too, is about process and outcome, there is no single, straightforward causal relationship between the two aspects. Likewise, it is not clear 'when a change is cause and when effect, when process, and when outcome'.[51] Thus, inherent in the notion of legal empowerment should be the recognition and appraisal of practical possibilities, a sensitive understanding of existing power structures, an appreciation of socio-cultural identities and a rational application of measures geared towards making rights a reality for the poor and disadvantaged.

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[49] Sharma, above n 19,192.

[50] NailaKabeer, *Reversed Realities: Gender Hierarchies in Development Thought* (Verso, 1994) 230.

[51] Kabeer, above n 18, 81.

Multifaceted Dimensions of Human Rights

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I. Introduction

The concept of 'human rights' since its inception has had different connotations. The theological, the philosophical, the political and the legal are the most prominent perspectives from which this term has been explored. It is not the objective of this article to investigate the historical evolution of human rights from these different perspectives in detail or to analyse the different meanings of human rights. Rather the discussion will be based on an accepted meaning of the term 'human rights' under the international human rights regime that deal with it from the broader legal perspective. Of course, some discussion of philosophical and ideological perspectives is necessary, as international human rights law is founded on certain philosophical postulates, so it is inevitable that a study of international human rights law will also involve philosophical connotation to some extent. Human rights, however, received a commonly accepted meaning worldwide through the establishment of the UN and the adoption of the Universal Declaration of Human Rights (UDHR)[1] by that organization in 1948. This article will give a succinct overview of the international human rights regime with a special focus on the status of economic, social and cultural rights (ESC rights) in it.

II. Meaning and Nature of Human Rights

The rights that are reasonably required for survival as a human being maintaining a reasonable and dignified standard of life are human rights. All human beings are entitled to human rights by virtue of their human nature. Every human being attains human rights at birth as they are inherent in human beings. Thus, 'inalienability' is an important feature of human rights as they cannot be separated from the human. They exist—'by virtue of the right-holder's existence'[2]—permanently with every human being irrespective of their implementation and guarantee by any regime.

'Universality' is one of the most important features of human rights. This particular nature of human rights can be examined from two different perspectives. From a general conceptual perspective, human rights are universal as they speak about the rights of all human beings on the basis of their identity as humans. The term 'human rights' consider

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

2 John O'Manique, 'Universal and Inalienable Rights: A Search for Foundations' (1990) 12 *Human Rights Quarterly* 465, 467.

all human beings on the same plane, and thus the term is inherently universal in its canvas. '[H]uman rights, in their origin, are common to all people regardless of the role played by race, society, culture, and politics.'[3] 'If all human beings have human rights simply because they are human, then human rights are held equally by all.'[4] From the international legal perspective, 'human rights' also appear to be truly universal in the sense that the concept of human rights, as recognized by the UN in the UDHR, has never been rejected by any State member of the UN. Thus, the concept of human rights seems to be universal from both perspectives. However, universality of human rights has been disputed on the plea of cultural relativism. It is submitted that human rights are in fact universal though the forms of certain human rights may be variable. Human rights, to be treated universal, 'do not require identical human rights practices'.[5]

III. Different Types of Human Rights

'Humanity or human nature' is considered to be the source of human rights, and there are different types of human rights depending on human nature and the 'needs' of a human being.[6] Among them, civil and political (CP) rights and economic, social and cultural (ESC) rights have prominence. These are recognized by international human rights law as individual rights. There are also some other group rights that have emerged, such as the right to self determination and the right to development.

There is no fixed definition of the different categories of human rights. However, in defining CP rights, Scott Davidson said:

> While civil rights are those rights which are calculated to protect an individual's physical and mental integrity to ensure that they are not the victims of discrimination and to preserve their right to a fair trial, political rights are those which ensure that individuals are able to participate fully in civil society.[7]

The right to vote, the right to equality, the right to life and the right to a fair trial are examples of CP rights.

The rights 'related to labour and employment' are treated as economic rights.[8] Social rights can be defined as 'rights those needed to function adequately in society.'[9] Cultural

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3 *Ibid.*

4 Jack Donnelly, *International Human Rights in Theory and Practice* (Westview Press, Colarado, 3rd ed, 2007) 21.

5 *Ibid 49*. Despite its importance, cultural relativism is not relevant to my thesis so it will not be discussed further.

6 Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca, 2nd ed, 2003) 13.

7 Scott Davidson, 'Introduction' in Alex Conte, Scott Davidson and Richard Burchill, *Defining Civil and Political Rights* (Ashgate, 2004) 1, 2.

8 Sarah Joseph, *Blame it on the WTO: A Human Rights Critique* (Oxford University Press, 2011) 18.

rights include 'the right to participate in the cultural life of society and to benefit from scientific progress.'[10] The right to an adequate standard of living, the right to social security, the right to work, right to family, and the right to take part in cultural life are some examples of ESC rights.

However, human rights cannot be divided into watertight compartments. Overlapping is a common phenomenon among different types of human rights. There are certain rights that cannot strictly be confined in one category, and as such they can be included in a number of classes of human rights. For example, trade union rights are both a political right and an economic right. Article 22(1) of the International Covenant on Civil and Political Rights ('ICCPR')[11] states that '[e]very one shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.' Article 8(1) of the International Covenant on Economic Social and Cultural Rights ('ICESCR')[12] recognizes '[t]he right of everyone to form trade unions and join the trade union of his choice.' The moral fibre of indivisibility and interdependence of human rights promotes them as a common single platform. For example, the right to life is traditionally treated as a CP right. However, this right has a significant ESC rights dimension as the true exercise of this right is dependent on the implementation of many other ESC rights such as, for example, the right to food and the right to health. Indeed, indivisibility is an inherent characteristic of human rights.

IV. Origin and Development and Modern Human Rights

The concept of human rights at the international level did not emerge all of a sudden. The origin of human rights as an idea in an abstract form can be traced back to ancient man.[13] This idea arises in different religions, philosophies and early national constitutional-legal practices. Nevertheless, the concept of human rights attained a concrete dimension and specific terminological expression only during the post-world war period. Human rights have been further developed through modern international law in various phases.

However, the provisions of different national constitutions and other important legal documents at national levels formed an important basis for the emergence and development of the concept of human rights at the international level. The substantive

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9 *Ibid 19.*

10 *Ibid.*

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

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

13 Johannes Morsink, 'The Philosophy of the Universal Declaration' (1984) 6 *Human Rights Quarterly* 309, 311.

provisions of international human rights law have in fact been essentially modelled on the provisions of national constitutions. Christian Tomuschat has stated that it is clear that international protection of human rights cannot be dissociated from national protection of human rights. Human rights evolved as countervailing forces against state power. It is only at a second stage that the idea emerged to establish mechanisms at the international level in order to accommodate instances where a national system has broken down under the iron grip of a dictatorship or the assault of irrational forces of anarchy.[14]

Thus, a proper tracing back of the development of human rights at the international level should be preceded by a discussion on the development of this concept at the national levels.

The theory of 'natural rights'—developed by English philosopher John Locke, and French philosophers Montesquieu, Voltaire and Rousseau during the 17th and 18th centuries—is the main philosophical basis for modern human rights. According to John Locke, men are borne as equal with perfect freedom in a state of nature.[15] In defining the state of nature, he said:

> To properly understand political power and trace its origins, we must consider the state that all people are in naturally. That is a state of perfect freedom of acting and disposing of their own possessions and persons as they think fit within the bounds of the law of nature. People in this state do not have to ask permission to act or depend on the will of others to arrange matters on their behalf. The natural state is also one of equality in which all power and jurisdiction is reciprocal and no one has more than another. It is evident that all human beings – as creatures belonging to the same species and rank and born indiscriminately will all the same natural advantages and faculties – are equal amongst themselves.[16]

Locke named life, liberty and estates, a group of three natural rights which a man has in the state of nature, as 'property' and added that the objective of man to live under a government is to preserve such 'property':

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[14] Christian Tomuschat, *Human Right: Between Idealism and Realism* (Oxford University Press, 2nd ed, 2008) 9-10.

[15] John Locke, '*The Second Treatise of Government*' reprinted in P Laslett (ed), *John Locke, Two Treatises of Government* (Cambridge University Press, 2nd ed, 1980) 283, 287.

[16] John Locke, *Two Treatises on Government*, translated by Lewis.F Abbott (Industrial Systems Research, 2009) 70 <http://industry.books.officelive.com/twotreatises.aspx> last accessed on 31 July 2018; <http://books.google.com.au/books?id=S3eB0IgzJjoC&lpg=PP1&ots=W8kZQ16vMU&dq=9780906321478%200906321476%20Two%20Treatises%20on%20Government&pg=PP1#v=onepage&q&f=false> last accessed on 31 July 2018.

> that he seeks out, and is willing to joyn in Society with others who are already united, or have a mind to unite for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property*.[17]

The great and *chief end* therefore, of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property*.[18]

Thus, it appears that according to Locke, the role of the state is to protect certain CP rights of the people. Its role was not to help provide for the economic welfare of its people. When the Government failed to play its allocated protective role by proper execution of the laws, the government lost its right to govern.[19] The French philosophers also 'argued that such rights stemmed from the inherent rationality and virtue of man.'[20] These liberal thoughts and philosophies, which grounded CP rights far more than ESC rights, greatly influenced drafting of the early documents of rights in France, UK and the United States during the latter half of the 18th century. Modern international human rights have been built up on the philosophical foundation of natural rights.[21]

A. Development of Human Rights in the Modern State

'The contemporary system of human rights is the product of reflection and implementation over several centuries.'[22] The history of human rights in its modern sense can be dated back to the creation of modern state. The British Magna Carta of 1215 AD is regarded as one of the oldest documents of rights, which was a product of the long struggle by Barons for their rights against the King. It contained provisions regarding certain rights and privileges of the people, for example, land rights, provisions regarding debts, right to fair hearing, establishment of competent judiciary, and provisions prohibiting serious punishments, which had the eventual impact of deprivation of the livelihood, for tiny offences. The Bill of Rights of 1688, which contained rights of British peoples limiting the powers of the Monarchy, is another milestone document of rights in England. Certain CP rights, for example, freedom of speech and freedom of election, were incorporated in the above documents. Neither of these documents dealt with any ESC rights.

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17 Locke, above n 15, 368.

18 *Ibid 368-69.*

19 *Ibid 428-32.*

20 Tomuschat, above n 14.

21 Morsink, above n 13 , 310-16; Jochen von Bernstorff, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law' (2008) 19 *European Journal of International Law* 903, 919.

22 Asbjorn Eide, 'Economic, Social and Cultural Rights as Human Rights' in A. Eide et al. (eds), *Economic, Social and Cultural Rights* (Kluwer Law International, 2nd ed, 2001) 9, 12.

The Virginia Declaration of Rights of 12 June of 1776, the foundational document of the American Revolution against British oppression, 'contained clauses dealing with free elections, trial by jury, respect for property, and freedom of the press, but failed to mention any rights related to a social welfare function of the state.'[23] Section 1 of this Declaration said:

> That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

The American Declaration of Independence of 4 July 1776, which was influenced by the philosophy of the Virginia Declaration, stated 'that all men ... are endowed by their Creator with certain inalienable rights that among these are life, liberty and the pursuit of happiness.' The US Bill of Rights, which basically contains different CP rights, was introduced by constitutional amendments and came into force in 1791. That Bill of Rights was modelled on the natural rights philosophy of Locke.[24]

The Declaration of the Rights of Man and of the Citizen (popularly known as the French Declaration), promulgated on 26 August 1789 in the wake of the French Revolution which overthrew the monarchy, contained certain rights of CP nature but no ESC rights. Both the US and French Declarations were greatly influenced by the natural rights theories of Locke and the other liberal scholars of the 17th and 18th centuries. In summing up the criticisms of the one sided approach of the classical liberal philosophies which influenced the shaping of modern human rights, Erika De Wet has stated:

> The state was obliged only to protect individual freedom against the abuse of state power, in such a manner as to ensure political peace and stability. Socio-economic relationships as such were left to the self-regulation of the community (the free market). ... The fundamental flaw in this approach was that the state was 'blind" to the social and economic preconditions necessary to the actualisation of freedom and the carrying out of economic transactions. The drawback of the Classical-Liberal approach to human rights was that it also promoted great social injustice. The socio-economic processes were excluded from the control of the state, and this led to economic exploitation.[25]

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[23] Tomuschat, above n 14, 27.

[24] Erika De Wet, *The Constitutional Enforceability of Economic and Social Rights* (Butterworth, 1996) 3.

[25] *Ibid 2-4.*

Interestingly, in tracing the roots of the constitutional protection of ESC rights, Erika De Wet points out that the Jacobin Constitution of 1793,[26] which was abolished soon after its promulgation, first gave constitutional protection to economic and social rights:

In section 21 of the Jacobin Constitution of 1793, social assistance was defined as a "sacred duty". The community owes its support to those citizens who have been afflicted by misfortune, whether this support comprises supplying them with labour, or providing those who are unable to work with the means of life.[27]

After the Jacobin Constitution, the Constitution of Denmark of 1849 incorporated provisions regarding three ESC rights: right to work, (article 75(1)), right to social security (article 75(2)) and right to education (article 76).[28] However, despite the short-lived Jacobin Constitution and the Danish Constitution of 1849 ESC rights received no constitutional protection before the twentieth century. The constitutions of different countries included only CP rights in contrast to ESC rights during the 18th and 19th centuries. For example, 'the Belgian Constitution of 1831, which had a considerable influence on constitutional developments all over Europe, list[ed] the well-known freedoms in Articles 4 to 23, without embarking on new paths.'[29] The Constitution of Prussia was also modelled on the Belgian Constitution.[30] Likewise, the Constitution of the German Empire of 1871 did not contain any provision on social rights.

However, during the nineteenth century some strong labour movements emerged, which contributed towards a growing appreciation of the need for ESC rights:

> Although social and economic rights did not find their way into constitutions in the nineteenth century, various labour organisations strove to achieve recognition for such rights, especially in England, Germany and France.[31]

At the beginning of the twentieth century, the Russian Revolution of 1917 played a significant role towards constitutional protection of economic and social rights, which influenced many other countries to incorporate provisions regarding social and economic rights in the constitutions. The Mexican Constitution of 1917 incorporated provisions regarding ESC rights,[32] which contained 'a long list of norms relating to labour and

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[26] French Constitution of 1793, which is also known as 'The Montagnard Constitution'.

[27] De Wet, above n 24, 5.

[28] Ida Elisabeth, 'The Protection of Socio-Economic Rights as Human Rights in Denmark' in Fons Coomans (ed), *Justiciability of Economic and Social Rights: experiences from Domestic Systems* (Intersentia, 2006) 17, 20-21.

[29] Tomuschat, above n 14, 27.

[30] *Ibid.*

[31] De Wet, above n 24, 6.

[32] Henry J. Steiner et al., *International Human Rights in Context* (Oxford University Press, 3rd ed, 2008) 269.

social security issues.'[33] The Constitution of the Russian Soviet Republic of 1918 contained a provision regarding the right to education.[34]

Thus, ESC rights appeared in national constitutions after CP rights emerged in many constitutions:

> [ESC] rights appeared fairly late on the stage of constitutional developments. They are a child of the twentieth century, when societies assumed their responsibility for the 'social question'. As a novelty, they both fascinated and frightened constitution-making bodies.[35]

ESC rights subsequently appeared in the German Weimar Constitution of 1919,[36] the Constitution of Finland of 1919,[37] the Constitution of Liechtenstein of 1921,[38] the Constitution of the Spanish Republic of 1931,[39] the Constitution of Philippines of 1935.[40] The development of ESC constitutional provisions is discussed in Chapter 3. Although different states included provisions regarding ESC rights in the constitutions during the first half of the twentieth century, most states still preferred not to constitutionally guarantee them. The United States, for example, 'resolutely reject[ed] economic and social benefits as constitutional entitlements while providing such benefits without any hesitation at the level of ordinary legislation.'[41]

At this stage of the development of human rights at the domestic levels, modern human rights started its formal journey at the international level. Domestic incorporation of human rights in different national constitutions undoubtedly paved the way forward for the development of human rights at the international level. Modern international human rights law also started by favouring CP rights, as had occurred with national constitutions. CP rights received an enforcement mechanism, in the form of an individual complaints mechanism, under international human rights law earlier than

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[33] Roberto Gargarella, 'Theories of Democracy, the Judiciary and Social Rights' in Roberto Gargarella, Pilar Domingo and Theunis Roux (eds), *Courts and Social Transformation in New Democracies* (Ashgate, , 2006) 13, 32-3 n 41.

[34] Section 17 of chapter 5 of article 2 of the Constitution of 'the Russian Soviet Federated Socialist Republic' of 1918 said: 'For the purpose of guaranteeing to the workers real access to knowledge, the Russian Socialist Federated Soviet Republic sets itself the task of furnishing full and general free education to the workers and the poorest peasantry'.

[35] Tomuschat, above n 14, 28.

[36] De Wet, above n 24, 14.

[37] Amos J. Peaslee, *Constitutions of Nations* (The Rumford Press, USA, 1950) vol 1, 777-90.

[38] *Ibid vol II, 376-93.*

[39] K C Markandan, *Directive Principles in the Indian Constitution* (Allied Publishers, India, 1966) 18-9.

[40] Peaslee, above n 37, Vol. II, 793-809.

[41] Tomuschat, above n 14, 29.

economic and social rights. It shows that the line of development of human rights in the domestic levels influenced the shaping of human rights law at the international level.

B. Development of Human Rights at the International Level

1. Introduction

Certain rules regarding the rights of aliens were the earliest international human rights standards. Burns Weston sums up that[e]ver since ancient times, but especially since the emergence of the modern state system, the Age of Discovery, and the accompanying spread of industrialization and European culture throughout the world, there has developed, for economic and other reasons, a unique set of customs and conventions relative to the humane treatment of foreigners. This evolving International Law of State Responsibility for Injuries to Aliens, as these customs and conventions came to be called, may be understood to represent the beginning of active concern for human rights on the international plane.[42]

International humanitarian law, also known as the laws of war, was developed earlier than modern human rights law, and had some important human rights impacts. For example, the Geneva Convention of 1864 gave protection to medical personnel during the war and made provisions regarding taking care of wounded and sick combatants. Anti slavery laws were also developed long before the formal recognition of human rights at the international level. For example the Slave Trade Act of 1807 abolished the slave trade in the United Kingdom, while slavery was totally abolished there in 1833 by the Slavery Abolition Act. In 1817, Spain signed a treaty with England agreeing to end the Spanish slave trade north of the equator immediately, and south of the equator in 1820. The General Act of the Berlin Conference on Central Africa, 1885 affirmed that 'trading in slaves is forbidden in conformity with the principles of international law.'[43]

Apart from these discrete areas, the history of modern human rights at the international level can be traced back to the creation of the League of Nations. The League of Nations, established in 1920, did not contain general provisions regarding human rights. The Covenant of the League of Nations was the charter of the League of Nations, however contained provisions regarding a few human rights in a limited sense. For example, there were commitments regarding the maintenance of 'fair and humane conditions of labour for men, women, and children,'[44] undertakings 'to secure just treatment of the native inhabitants,'[45] provisions on prohibiting the slave trade and the administration of the then colonies ensuring freedom of conscience and religion for the

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[42] Burns H. Weston, 'Human Rights' (1984) 6 *Human Rights Quarterly* 257, 269.

[43] Paul Sieghart, *The International Law of Human Rights* (Clarendon Press, 1983) 13.

[44] *Covenant of the League of Nations* art 23.

[45] *Ibid.*

people of those colonies.[46] Though the Covenant of the League of Nations did not contain any specific provision regarding minorities, the League of Nations introduced a 'system of minority protection.'[47]

The League of Nations was dissolved after the Second World War. It was replaced by the United Nations which was established in 1945. Human rights formally came to the international plane through the establishment of the UN.

2. The United Nations Charter

'The United Nations Charter itself first gave formal and authoritative expression to the human rights movement that began at the end of the Second World War.'[48] The Charter has immense legal significance as it binds all members of the UN (currently 192 States). The UN Charter contains some significant provisions in regard to human rights, which paved the way for the development of the international human rights regime. The UN Charter in its preamble reaffirmed 'faith in fundamental human rights'. One of the main purposes of the UN is to achieve international co-operation 'in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.[49] Article 55 of the Charter declares that 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion' shall be promoted by the UN. Article 56 adds that '[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.' The Charter enabled the creation of specialist human rights bodies, such as the Commission on Human Rights in 1946, and its successor, the Human Rights Council, in 2006. These bodies have played a key role in generating international human rights standards.

3. The Universal Declaration of Human Rights:

The UDHR was the first comprehensive human rights document. It was drafted by the Commission on Human Rights (CHR), and adopted by the General Assembly of the UN on 10 December 1948. It contains both CP rights and ESC rights. The preamble of the Declaration states, inter alia:

> Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person

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[46] *Ibid.*

[47] Athanasia Spiliopoulou Åkermark, *Justifications of minority protection in international law* (Kluwer law International, 1996) 104-108.

[48] Steiner, above n 32, 134.

[49] *Charter of the United Nations* art 1(3).

> and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.

Instead of classifying human rights into different groups, the preamble used the term 'fundamental human rights' to include all human rights generally. Moreover, while the term 'freedom' used in the above paragraph may be a direct indication towards CP rights, the terms 'social progress' and 'better standards of life' are obviously indicative towards ESC rights. Arguably, the UDHR by its preamble generally referred to all human rights in a single document without officially categorizing them into different groups.

Articles 3 to 21 of the Declaration contain a range of CP rights, while a set of ESC rights is enclosed in articles 22 to 27. In contrast to a long list of CP rights, only a few articles of the Declaration deal with ESC rights. However, these few articles accommodated, in fact, all important ESC rights.

The UDHR is not an international treaty and did not create binding obligations, which is apparent from the wording used in the preamble of the UDHR, which termed it as 'a common standard of achievement for all people and all nations.'[50] Therefore, it is argued that 'however great its moral or political authority, *UDHR* cannot by itself create binding obligation under international law.'[51]

However, there is another opinion which supports the binding force of the UDHR: the UDHR has subsequently acquired the status of customary law in international law by long and consistent practice of states.[52] After all, the UDHR 'has been endorsed, regularly and repeatedly, by virtually all states.'[53] Under this view, the UDHR is binding on all states, whether members of the UN or not.

It is submitted that the claim regarding binding force of the UDHR as a part of customary international law is compelling yet controversial in respect of the entirety of the document.[54] Paul Seieghart suggested an intermediate solution between the above two opinions: UDHR is binding only on the members of the UN not as a part of customary international law but because the members of the UN accepted such an obligation.[55] That is, the UDHR has been treated 'by some as a further elaboration of the brief references to human rights in the Charter.'[56]

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50 Sieghart, above n 43, 53.

51 *Ibid.*

52 *Ibid*.

53 Donnelly, *Universal Human Rights in Theory and Practice*, above n 6, 22.

54 Sieghart, above n 43, 53; Krzysztyof Drzewicki, 'The UN Charter and the Universal Declaration of Human Rights' in Raija Hanski and Markku Suksil, (eds), *An Introduction to International Protection of Human Rights* (Institute of Human Rights, Abo Akademi University, Finland, 2nd ed, 1999) 65, 74.

55 Sieghart, above n 43, 53-4.

56 Steiner, above n 32, 137.

The UDHR was the first of its kind which accumulated all human rights in a single document. Its adoption by the UN was a milestone event in the development of the modern human rights at the international level. The issue of whether it has become a part of customary international law is undoubtedly important. However, this particular issue is beyond the scope of my thesis.

4. The two Covenants

At the time of adoption of the UDHR, it was envisaged 'that the UDHR would eventually be transformed from a non-binding resolution into a legally binding agreement.'[57] But, ultimately two different legally binding treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), were enacted.

After completion of the work on the UDHR, the CHR began the task of drafting a legally binding convention on human rights. At that early stage, the Commission was 'split on the question of whether there should be one or two covenants'.[58] The General Assembly initially settled on the adoption of a single convention on human rights,[59] but it subsequently reversed its stand and decided that two different conventions on human rights would be drafted.[60] Despite the initial plan in favour of enacting a single treaty covering all human rights,

during the years of drafting—years in which the Cold War took harsher and more rigid form, ... [this matter] became more contentious. The human rights movement was buffeted by ideological conflict and the formal differences of approach in a polarized world. One consequence was the decision in 1952 to build on the UDHR by dividing its provisions between two treaties, one on civil and political rights, the other on economic, social and cultural rights.[61]

However, it was further recognized by the General Assembly in that same Resolution that all human rights were interrelated and indivisible. In the introduction of the Resolution regarding the enactment of the two Covenants, the General Assembly added:

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[57] Davidson, above n 7, 2.

[58] Asbjorn Eide and Allan Rosas, 'Economic, Social and Cultural Rights: A Universal Challenge' in A. Eide et al (eds), *Economic, Social and Cultural Rights* (Kluwer Law International, 2nd ed, 2001) 1, 3.

[59] *Draft International Covenant on Human Rights and Measures of implementation: Future Work of the Commission on Human Rights*, GA Res 421 (V), UN GAOR, 5th sess, 317th Plen mtg, Agenda Item 63, UN Doc A/RES/421(V) (4 December 1950).

[60] *Preparation of two Drafts International Covenants on Human Rights*, GA Res 543(VI), UN GAOR, 6th sess, 375th Plen mtg, Agenda Item 29, UN Doc A/RES/543(VI) (5 February 1952).

[61] Steiner, above n 32, 136.

> Whereas the General Assembly affirmed, in its resolution 421 E (V) of 4 December 1950, that "the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent" and that "when deprived of economic, social and cultural rights, man does not represent the human person whom the universal Declaration regards as the ideal of the free man".[62]

Thus, 'the existence of the two Covenants was not intended to weaken the indivisibility and interdependence of the different sets of human rights.'[63]

The two Covenants were eventually adopted in 1966. Together with the UDHR, these three documents comprise the International Bill of Rights. Since the adoption of the UN Charter, many declarations and treaties, apart from the International Bill of Rights, have been adopted by the UN on different aspects of human rights. The International Convention on the Elimination of All Forms of Racial Discrimination,[64] the Convention on the Elimination of All Forms of Discrimination against Women,[65] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[66] the Convention on the Rights of the Child,[67] International Convention on the Protection of the Rights of All Migrant Workers and Members of their families,[68] Convention on the Rights of Persons with Disabilities,[69] International Convention for the Protection of All Persons from Enforced Disappearance,[70] along with the two Covenants of 1966, ICCPR

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[62] *Preparation of two Drafts International Covenants on Human Rights*, GA Res 543(VI), UN GAOR, 6th Sess, 375th Plen mtg, Agenda Item 29, UN Doc A/RES/543(VI) (5 February 1952).

[63] Rolf Kunnemann, 'A Coherent Approach to Human Rights' (1995) 17 *Human Rights Quarterly* 323, 332. Footnote omitted.

[64] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

[65] *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

[66] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

[67] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

[68] *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* opened for signature 18 December 1990, 2220 UNTS 93 (entered into force 1 July 2003).

[69] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

[70] *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 6 February 2007, (entered into force on 23 December 2010), UN Human Rights Council, 1st sess, Annex, Agenda Item 4, UN Doc A/HRC/1/L.2 (23 June 2006).

and ICESCR, are the core nine treaties on human rights.[71] However, the International Bill of Rights remains at the core of the international human rights treaty system.

5. Conclusion

The UDHR, the first component of the International Bill of Rights, contained all human rights in a single declaration. The subsequent Covenants drew a sharp line between the two sets of human rights by providing for different obligations and enforcement mechanisms on the basis of the alleged differing nature of the two sets of human rights. With the growing realisation of the idea that the nature of the two sets of human rights is not in fact so different, the gaps between the Covenants have gradually diminished.

[71] The UN adopted many other declarations and treaties, for example, *Declaration on the Granting of Independence to Colonial Countries and Peoples* (adopted on 14 December 1960 by the General Assembly Resolution 1514 (XV)), *Declaration on Social Progress and Development* (adopted on 11 December 1969 by General Assembly Resolution 2542 (XXIV)), *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* (opened for signature 7 November 1962, entered into force 9 December 1964).

Judicial Review of State Contracts: Piercing the Narrow Divide between 'Pure and Simple' and 'Statutory or Sovereign' Contracts

Dr. Ridwanul Hoque[♦]
Emraan Azad[♣]

1. Introduction

To develop an inclusive process of judicial review *vis-à-vis* government contracts has been a recent challenge of public law across the world. Modern governments often contract with private companies and individuals to procure goods or services, or to contract out to them certain state services or public largesse. This practice by governments of contracting or 'contracting out' (also known as 'internal contract'), which is often seen as an efficient means of governance, is so common and pervasive that it has led to a phenomenon called 'government by contract', a term that by itself bespeaks the need for effective control over government contracts.[1] There are arguments that these contracts are 'private' affairs of the State and hence governable either by ordinary contract law or by special government contract law, and not by the administrative and constitutional law. This line of argument invariably undermines the overarching constitutional principle of public accountability and transparency in all state actions, and is un-conducive for justice.

The primary task of judicial review in any jurisdiction is effectively to extend constitutional control over government actions and/or omissions, or to achieve good 'enough' governance. In order for judicial review to be an effective means of good governance, it should essentially embrace all government contracts, public or private. Set in this context, this article aims to examine the issue of reviewability of government contracts in Bangladesh, and in this process to critique the judicially crafted divide between 'pure' contracts and 'statutory' contracts as subject matters of judicial review.

Judicial review's scope to embrace state or public contracts has been a contested issue in Bangladesh. Both divisions of the Supreme Court of Bangladesh, until recently,

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1 See, for details, Anne C L Davies, *Accountability: A Public Law Analysis of Government by Contract* (Oxford University Press, 2001) (arguing that government contracts can be viewed as mechanisms of accountability, from provider to purchaser, or from the government to contactor). See also Jody Freeman and Martha Minow (eds), *Government by Contract: Outsourcing and American Democracy* (Harvard University Press, 2009).

remained persistently reluctant in entertaining judicial review proceedings challenging the legality of contracts by government agencies. The Court's reluctance was partially based on the argumentation that contracts by government agencies belonged to the private, as opposed to public, domain of the government, thereby precluding judicial intervention. Recent developments in this area show that the higher courts have shown increasing willingness to review 'public' contracts. The courts, however, are largely reluctant in reviewing 'private' contracts or 'pure and simple' contracts, to borrow the language of the courts.

The article begins, in section 2, by conveniently providing a brief note on Bangladeshi judicial review as well as how the concept of public authorities received a liberal definition from the Court for the purpose of judicial review. This discussion helps the reader appreciate the jurisprudence of judicial review of state contracts in a proper perspective. In section 3 we discuss leading Supreme Court decisions on judicial review of government contracts in which the Court developed certain standards for review. The fourth section presents and critically analyses a few cases in which judicial review was refused because the contracts were commercial contracts of 'pure and simple' nature. Next, we enter a critical appraisal of the jurisprudence of judicial review of state contracts. The paper concludes, in section 6, by arguing that without developing an effective theory of reviewability of contracts involving public functionaries, the Court will remain a deficient institution to promote good and just governance involving government largesse and resource allocations. The central thesis of the paper is that all contracts by the state, whether or not rooted in an enabling statute or executed in the government's sovereign capacity, should be judicially reviewable in the context of constitutional imperatives of rule of law and public accountability.

2. Judicial review in Bangladesh and the changing nature of 'public authorities'

Judicial review

The judiciary in Bangladesh is considered the repository of the people's judicial power.[2] The source of constitutional judicial review is article 102 of the Constitution,[3] although pre-Constitution judicial review in Bangladesh had a firm common law base.[4] Judicial review is available through what is commonly known as the "writ jurisdiction" of the

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[2] *Mujibur Rahman v Bangladesh* (1992) 44 DLR (AD) 111.

[3] The Constitution of the People's Republic of Bangladesh (adopted on 4 November 1972 and effective from 16 December 1972). The Constitution does not, however, mention anywhere the term 'judicial review'. It is interesting to note that before the formal adoption of the Constitution of 1972, the Supreme Court was temporarily deprived of judicial review power. See art. 4 of the High Court of Bangladesh Order 1972.

[4] Thus, although the Pakistani Constitution did not specifically provide for judicial review of legislation, it was established through judicial activism in e.g. *Jibendra Kishore v East Pakistan* (1957) 9 DLR (SC) 21, and *Mustafa Ansari v Deputy Commissioner* (1965) 17 DLR (Dacca) 553 (striking down a provision of the Chittagong Hill Tracts (Regulation) Rules 1960).

High Court Division (hereafter 'HCD'), the primary court for this extraordinary judicial power.[5] While clause (1) of art. 102 authorises the HCD to issue appropriate orders and directions against "any person" including the government or its departments in order to enforce fundamental constitutional rights,[6] clause (2) of art. 102 envisages judicial review only against a person or authority in charge of state affairs on the grounds of illegality or unconstitutionality and injustice.[7] In the former case (art. 102(1)), since remedies can be sought against "any person or authority", there arguably is a court power for the 'horizontal' enforcement of constitutional rights, that is, against private persons. In practice, however, this has not been the case.[8] In the latter case (art. 102(2)), judicial review can be directed against "a person performing any functions in connection with the affairs of the Republic or of a local authority," – a phrase that has long been interpreted as excluding private entities from the scope of judicial review.[9]

The breadth of the Bangladeshi judicial review cannot be fully understood without a reference to the core constitutional values such as social, economic and political justice, the rule of law, democracy, and respect for human dignity and human rights.[10] Article 7 of the Constitution proclaims the majesty of the Constitution, categorically declaring

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5 The Appellate Division of the Supreme Court hears appeals from any order or judgment of the High Court Division. As such, the Appellate Division is the appellate forum of judicial review power. See art. 103 of the Constitution.

6 It reads: "102(1): The High Court Division […] may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution".

7 The relevant part of article 102(2) reads: "(2) The High Court Division may, […]

(a) on the application of any person aggrieved, make an order-

(i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or

(ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect; or […]".

8 See *Mainul Hosein v Anwar Hossain* (2006) 58 DLR (HCD) 117 & 157, in which the HCD held that fundamental rights could be enforced through writs even against private persons. This decision was, however, technically overruled by the Appellate Division in *Anwar Hossain v Mainul Hosein* (2006) 58 DLR (AD) 229, without brushing aside in clear words the availability of judicial review under art. 102(1) against private persons. In such a context, the HCD in *Moulana Md. Abdul Hakim*, below note 9, relevantly observed that when issues of fundamental rights are raised, "the sanction under article 102(1) is clearly of availability" for redress against anyone or "any authority" including statutory or public authority.

9 But now see *Moulana Md. Abdul Hakim v Bangladesh* (2014) 34 BLD (HCD) 129. For a brief review on this case see Ridwanul Hoque, 'The "Datafin" Turn in Bangladesh: Opening up Judicial Review of Private Bodies', *Admin Law Blog*, 25 October 2017 <https://adminlawblog.org/2017/10/25/ridwanul-hoque-the-datafin-turn-in-bangladesh-opening-up-judicial-review-of-private-bodies/#_ftn9> accessed 29 May 2018.

10 See the Preamble of the Constitution.

that any other law inconsistent with the Constitution shall be void, while art. 26 enjoins the State not to legislate in derogation of fundamental rights, providing that any law (excepting constitutional amendments[11]) that is inconsistent with the fundamental rights provisions shall be void. It thus appears that the constitutional scheme clearly envisages an active or effective judicial review as the protector of constitutional goods and justice, the scope of which embraces not only administrative actions and legislative acts, but also constitutional amendments.[12]

Despite the Constitution's leverage for a robust judicial review, judicial review in Bangladesh followed a conservative trail for many years. Among others, a vital reason has been the absence of democracy in Bangladesh for a long period of time (1975-1990). Since the early 1990s, however, the trajectory of Bangladeshi judicial review began to change. With the entrenchment of the concept of public interest litigation (PIL), in particular, judicial review's territory is gradually expanding, with newer subject matters and grounds of challenges having come along its way. By now, abstract judicial review has turned out to be a common phenomenon and a very liberal regime of *locus standi* to challenge government largesse under PIL-jurisdiction is in place. Importantly, apart from arbitrary and irrational actions, a wider range of governmental inactions including those in the sphere of foreign affairs are recognised as justiciable.[13]

Despite these promising developments, however, some rigidity vis-à-vis judicial review is quite apparent. The Court still often refuses to expand remedies in constitutional litigations under art. 102[14] and seems to cherish a stance that it would be far exceeding its proper functions if it were to enforce "all" public statutory duties without insisting upon the claimant's proven legal right to a public duty.[15] Thus, a clearer recognition of the need for a public law jurisprudence targeting greater public accountability and much

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[11] See art. 26(3) as introduced by the Constitution (Second Amendment) Act 1973. Constitutionality of this type of wholesale ouster of judicial review of a particular class of constitutional amendments is doubtful in light of the basic structure doctrine established in *Anwar Hossain Chowdhury*, below note 12.

[12] Judicial review of constitutional amendments has been established by the Supreme Court in 1989 when the Appellate Division in *Anwar Hossain Chowdhury v Bangladesh* (1989) BLD (Spl.) (AD) 1 held that Parliament lacked power to amend the Constitution in a way that demolished any of its basic structures or fundamental features.

[13] For example, in *Abdul Gafur v Secretary, Ministry of Foreign Affairs* (1997) 17 BLD (HCD) 453, the Court, in pursuance of the right to life and legal protection of a girl-victim of an international abduction interned in Calcutta, directed diplomatic assistance for her rescue and repatriation. It also directed actions to bring back other female victims of human trafficking.

[14] See e.g. *Bangladesh v Mahbubuddin Ahmed* (1998) 18 BLD (AD) 87, declaring unlawful a public official's dismissal from service but refusing to order his reinstatement, reasoning that in a judicial review it can only declare something unlawful and do "nothing more" (at p. 92).

[15] *Hazerullah v Assistant Commissioner, Board of Management of Abandoned Property* (2002) 22 BLD (AD) 155. Innocuous at first sight, this axiomatic assertion reveals the Court's remaining conservatism in opening itself to public interest challenges to governmental illegalities.

work to that end are wanting in Bangladesh. Public law refers to a system of constitutional or/and administrative law that aims at greater public good, piercing the narrow divide between the private and public activity when the enforcement of public responsibilities and constitutional values is an issue. It is in this context that one needs to address the question of whether 'purely' commercial contracts by public agencies or the so-called trade activities of the government authorities are amenable to the higher judiciary's constitutional audit.

To fully appreciate the developments regarding judicial review of state contracts, it is important to have a glance of the developments concerning the availability of judicial review on the ground of the principle of legality (art. 102(2)) against entities whose statutory character is not that clear. In the next following section, we analyse a few decisions to portray the interpretation of the meaning of 'public authority' for the purpose of judicial review.

The changing nature of 'public authorities'

In *M. H. Chowdhury v Titas Gas Transmission and Distribution Company Ltd* (1981),[16] the question of maintainability of a writ petition under art. 102(2) against a company was raised. The specific question was whether the respondent company (*Titas Gas*) could be considered as a statutory public authority. The bulk of the company's shares were held by the government and it was placed under the management of a statutory corporation, *the Bangladesh Minerals, Oil and Gas Corporation.* The Court found that following the post-independence nationalisation process, the respondent company had lost its corporate entity and merged into a state-owned statutory entity. As such, *Titas Gas*, though an entity registered as a company, was found to be an instrumentality of the government and hence amenable to judicial review. The ratio in *MH Chowdhury*, however, suggests that writ petitions will not lie even against such a nationalised company placed under the administrative set-up of a statutory corporation, if the independent corporate character of the company is maintained. The Court was of the view that if such a company runs its affairs according to its Memorandum and Articles of Association, then there would be no writs issuable against it.

The Court was inclined to exercise its writ jurisdiction in *Chowdhury* after taking into consideration the degree and extent of control by a public agency on *Titas Gas* and the nature of its ownership and functional autonomy. The *Chowdhury* court thus basically established that a company may be amenable to constitutional judicial review if it is found to be identifiable with any public agency or an instrumentality of the government irrespective of its corporate costume.[17]

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[16] (1981) 33 DLR (AD) 186.

[17] The same principle was subsequently followed in *Arif Sultan v DESA* (2008) 60 DLR (HCD) 431 and *Mohammad Mahbubur Rahman v Bangladesh* (2017) 37 BLD (HCD) 104, while in *Conforce Limited v Titas Gas Company Limited* (1992) 42 DLR (HCD) 33 the HCD once again held that any company under the control of a public corporation or any licensee of any government ministry would be considered a "public authority".

The territory of judicial review on the ground of the breach of the principle of legality has come to be significantly broadened in a recent landmark decision of the High Court Division in *Moulana Md. Abdul Hakim v Bangladesh* (2014).[18] In this case, the HCD held unlawful a dismissal decision by a management committee of a private educational institute. Mr. Abdul Hakim was a principal of a *madrasah,* a non-government religious educational institute, who was sacked in February 2011 by a decision of the madrasah management committee.[19] Mr. Hakim applied for judicial review of this decision. The respondent opposed the constitutional petition on the basis that since the impugned dismissal emanated from a private body's decision, the litigation could not be maintained under art. 102(2). The Court resolved the question of jurisdiction by employing a liberal interpretation to the term "a person performing any functions in connection with the affairs of the Republic" in art. 102(2). It held that a body does not necessarily have to have its powers derived from statute to be amenable to judicial review under art. 102(2). It will suffice if the functions of that body are "in connection with the affairs" of the State, the Court reasoned. In other words, one needs to consider the nature of the functions of the body concerned, not exclusively the source of its power. The Court took cognizance of the reality that in certain sectors such as education and health, activities of private bodies are essentially functions belonging to the public domain.[20] By invoking one of the approaches from *Datafin,*[21] that is the test of whether the impugned body has been "woven into the fabric of public regulation", the Court concluded that the managing committee of Mr. Hakim's madrasah was discharging a public function.

In *Hakim*, Mr. Mahmudul Islam, a leading jurist of the country and who served as an amicus curiae, argued that acts of private entities which are not statutory or local authorities are not judicially reviewable.[22] Another amicus curiae, however, differed from this view and argued that the derivative authority of the body whose actions are impugned is of little concern as to the reviewability of its actions that are of a public

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[18] (2014) 34 BLD (HCD) 129 (*per* Syed Refaat Ahmed, J).

[19] In Bangladesh, private schools and colleges are governed by managing committees, which are private bodies composed of local social leaders and parents of students. These private institutions are partly funded by the government, which also has a regulatory role in overseeing the management of non-governmental educational institutions. The formation and the modus operandi of such school committees are provided by statutes.

[20] It appears that the Court's reasoning was in line with the developments in other jurisdictions including, for example, the UK with regard to the growing definition of public authorities for the purpose of judicial review. The Court indeed cited a series of English cases, most notably *R v Panel on Takeovers and Mergers, ex parte Datafin* [1987] QB 815 and *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909). See for more details, Hoque, above n 9.

[21] *R v Panel on Takeovers and Mergers, ex parte Datafin* [1987] QB 815.

[22] (2014) 34 BLD (HCD) 129, 131.

nature.[23] This argument with which the *Hakim* court agreed is premised on the public-law rationales that aim at a greater public accountability of such bodies.

It needs to be noted that in a 2002 decision, the HCD in *Zakir Hossain Munshi v Grameen Phone Ltd*[24] entertained a writ petition against the country's leading private cellular phones provider, *Grameen Phone*, to prevent it from unlawfully levying extra charges on subscribers. Although the Court felt empowered to ensure transparency in the activities of the company since it was a licensee of the government, its reasoning was based on an inadequate doctrinal analysis and lacked articulation of public law elements involved therein.[25] When seen in the light of deficient reasoning of the *Munshi* court, *Abdul Hakim* appears to be the first decision clearly to hold that a private body's actions may qualify as public functions for judicial review's purpose. In this sense, *Hakim* marked the beginning of the expansion of traditional frontiers of judicial review of administrative actions, on a public interest *raison d'être*.[26] Nonetheless, this newfound territory of judicial review should be viewed with caution, since the HCD's welcome decision has yet to be affirmed by the Appellate Division that still seems to remain swayed by the thought that writs do not lie against private bodies.

3. Public contracts and judicial review: in search of principles

As seen above, while the higher courts have clarified the meaning of public authority under article 102(2) to consider relatively new public agencies as subjects of judicial review,[27] they are yet to adopt a public law model of judicial review as a tool to effectively enforce principles of legality in all government actions including actions arising from or in deviation of government contracts.[28]

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[23] Ibid (argument of Rokanuddin Mahmud).

[24] (2002) 22 BLD (HCD) 483.

[25] Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* (Cambridge Scholars Publishing, 2011) 131.

[26] Without an authoritative ruling of this sort from the apex court, the HCD might remain hesitant in taking the *Hakim* ruling further forward. For example, the HCD in *Freight Management Limited v Bangladesh Bank* (2016) 68 DLR (HCD) 493 relevantly observed that there has to be a breach of "statutory duty" by a public body for the issue of a writ of mandamus. Conversely, in *UTI Pership (Private) Limited v Bangladesh*, Writ Petition No. 3519 of 2013 (10 August 2015, *per* Md. Habibul Gani, J), the HCD relied on the ratio of *Hakim* in holding that a business organisation incorporated as a private company was amenable to judicial review. See Justice Syed Refaat Ahmed, 'The Case of Moulana Abdul Hakim and Judicial Review: A Move Towards the Right Direction?' (2016) 2(1) *UAP Journal of Law and Policy* 1-12.

[27] See e.g. *Mrs. Farzana Muazzem v SEC* (2002) 54 DLR (HCD) 66; *Zakir Hossain Munshi v Government of Bangladesh* (2002) 22 BLD (HCD) 483; and *Conforce Limited v Titas Gas* (1992) 42 DLR (HCD) 33.

[28] On this, a weighty principle seems to be highlighted in the High Court Division's observation (as in note 39 below) that any right created by a public body even through a commercial contract is enforceable through constitutional review, which was unfortunately overruled by the Appellate Division in *Birds Bangladesh Agencies Limited v Secretary, Ministry of Food*

Before we enter an analysis of judicial interpretations concerning the field, the Court's reluctance to engage with public law reasoning in judicial review actions involving public contracts can be illustrated by reference to a case of a contractual appointment to a public office. In *Abdul Bari Sarker v Bangladesh* (1994),[29] a retired Judge of the High Court Division, who was by virtue of a contract appointed to the Settlement Court, challenged his early dismissal through cancellation of the contract. The applicant argued that the termination of his service contract was not for his fault, but for a continued disagreement between him and the Secretary of the Ministry of Law, i.e., his employer. Nevertheless, the Court was unwilling to review the legality of terminating this contract, reasoning that the action resulted from a contract. The Court's refusal to address a public wrong because the source of the challenged authority was a contract between the government and the petitioner resulted not only in judicial failure to enforce administrative accountability, but also occasioned a deleterious impact on the independence of the judiciary.[30]

Until the late 1980s, the Supreme Court used to routinely refuse to entertain judicial review challenges against government contracts, thus pushing the justice-seekers to seek remedies in ordinary courts where procedures have been rather tardy and remedies largely inefficacious.[31] It was often argued that contracts by government agencies were to squarely fall under the contract law and within the jurisdiction of ordinary civil courts. In support of this exclusionary approach, the Court would also refer to a technical rule of judicial review to the effect that this constitutional remedy could be sought if and only if there was no other equally efficacious remedy for the concerned grievance. A pattern of any modern-day contract is to contain an arbitration or dispute-resolution clause. As a result, contracts involving the government or a public agency can almost always be seen as having provided for alternative remedies such as settlement or resolution in ordinary civil courts.

Since the late 1980s, the Court began gradually to open itself to justiciability of government contracts. In *Sharping Matshayajibi Samabaya Samity v Bangladesh* (1987),[32] the Appellate Division held that a public contract could be reviewed only "when the government violates the terms of the contract with a *mala fide* intention" or

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(unreported), note 36 below. For rigid views, see *Al-Amin Construction Company v Bangladesh* (2003) 55 DLR (HCD) 510 and *Ananda Builders Limited v BIWTC* (2005) 57 DLR (AD) 31.

29 (1994) 46 DLR (AD) 37.

30 This decision also departed from a 1977 positive decision of the then Supreme Court (replaced for Appellate Division) in *BSCIC v Mahbub Hossain* (1977) 29 DLR (SC) 41 where the Court was willing to review public contracts of employment on a 'natural justice' ground.

31 However, in some cases the Court refused to exercise its writ jurisdiction over public contracts when the petitioners did not exhaust the option of arbitration first. For example, the Appellate Division in *Bangladesh Power Development Board v Md. Assaduzzaman Sikder* (2003) 8 MLR (AD) 241 held the challenge to be not maintainable for non-exhaustion of the remedy of arbitration provided in the disputed contract.

32 (1987) 39 DLR (AD) 85.

when it acts arbitrarily or discriminatorily.[33] In this case, the appellant was a cooperative society (the Co-Op) of fisherman which was granted a Fishery on a lease of six years by an order of the government in 1982. Before the expiry of the lease, the government in 1985 cancelled the lease on the ground of breach by the Co-Op of conditions of the lease. The Co-Op challenged the government's decision cancelling the lease, arguing that the government's action was *mala fide* as they did not breach the conditions of the lease. It was also argued that unilateral cancellation of the lease was a breach of the principle of natural justice on the part of the government. The HCD refused to entertain the petition on the argument that any alleged illegality arising out of a contract between the government and a private entity was not amenable to its writ-jurisdiction under art. 102(2) of the Constitution.

On appeal, the Appellate Division overruled the HCD, saying that the impugned contract was a contract in the state's public capacity. It held that judicial review of a contract by the government could be availed of only when the government acts as a "sovereign" entity and not in its trading capacity. This meant that judicial review is not available vis-à-vis a "pure and simple" contract entered into by the government or any of its agencies. As the Appellate Division explained, some governmental functions such as leasing out state property are rooted in the State's "sovereign power", while other functions such as the award of a procurement contract are the State's "trading function[s]". If there is any breach of obligation by the government in the latter case, the aggrieved party can sue the government in ordinary courts but cannot invoke judicial review under art. 102, the Court reasoned.

The above classification of governmental functions is not wholly satisfactory. The ratio decidendi of the Court, however, is worth quoting. The Court explained as follows:

> [W]hen the government deals with [state property] for the welfare of the citizens and regulates the distribution of such wealth by way of settlement or lease, the government acts in its sovereign capacity. […]. Here the government discharges its sovereign functions because the wealth is vested in it. […]. When such authority oversteps or commits breach of rule or [acts] in breach of [the] principle of natural justice, certainly such lapses and breaches can be challenged by invoking writ jurisdiction under Article 102.[34]

The above statement beholds a significant *ratio* since the Court in effect established that a contract by the government is reviewable on the ground of fairness or reasonableness of the state action relating to the contract. It cannot be denied, however, that the test of *mala fides* or arbitrariness was a hard test to apply, and there was hardly any subsequent challenge of any contract-tied action of the government that was successful on the

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[33] *Ibid.* See also *MH Chowdhury v Titas Gas* (1981) 33 DLR (AD) 186.

[34] (1987) 39 DLR (AD) 85, 91 (*per* B.H. Chowdhury, J).

ground of its ill-motive or arbitrariness/discrimination.[35] That the above test is difficult to invoke is evident also in the Court's creation of a 'pure'/'sovereign' divide with regard to government contracts.

A slightly broader reasoning was drawn in a 1995 decision in *BIWTC v Birds Bangladesh Agencies Limited*,[36] where the Appellate Division refused to enforce a contract by a state agency but held that a "pure and simple" government contract was judicially reviewable if it was concluded in pursuance of the government's international obligation. In the Court's view, "the principle of fairness in Government actions"[37] comes into play in respect of such contracts, and hence the government should not be treated as a private actor, with the effect of getting the defendant driven to an ordinary civil suit. This dictum leads to a welcome yet insufficient clarification of the meaning of 'pure and simple' contracts by the government. On a positive note, therefore, the above dictum can be regarded as having established the reviewability of a simple contract (as opposed to a sovereign contract) on the ground of unfairness on the part of the government. The above decision nonetheless appears ambivalent, since the Court was willing to review a 'private' or 'trading' contract only when it is concluded with, or under the auspices of, international organisations or pursuant to an international obligation. Again, contracts of such type are few and far between.[38]

It is important to note that the HCD in *BIWTC* agreed to review the impugned contract and developed a better-sounding principle that a right created by a public body even through a commercial contract is amenable to judicial constitutional review.[39] It is submitted that this argument is more in line with the emerging modern principles of public law adjudication that seek to impose a wider judicial control over public dealings. The HCD's observation that a right created even by a contract signed by the government should be enforceable through judicial review is in close affinity with Ronald Dworkin's 'rights theory' which rejects the centrality of 'rules' in judicial decision-making and urges that 'rights' should be taken seriously.[40] Working theorised that when adjudicating a dispute, a judge may draw decisional legitimacy from 'principles', especially when existing rules do not provide answers but there is an existing right in favour of a party that needs to be enforced. For Dworkin, if judges do not take rights seriously and go

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35 See *Hyundai Corporation*, below note 45, where the HCD termed the government action pursuant to a contract as mala fide and arbitrary (quoted in the Appellate Division's judgment, at p.18).

36 *BIWTC v Birds Bangladesh Agencies Limited*, Leave to Appeal Petition (CLAP) Nos. 405-8 of 1994 (unreported) (BIWTC = Bangladesh Inland Water Transport Authority).

37 Ibid.

38 See *Ananda Builders Ltd. v BIWTA*, above note 28, in which the Court found that a World Bank Project-driven contract was not a contract by the government in furtherance of international obligations.

39 *Birds Bangladesh Agencies Limited v Secretary, Ministry of Food*, Writ Petition Nos. 198, 278, and 537 of 1994 (unreported).

40 Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 2nd edn, 1977).

beyond 'rules' (to be read as black-letter, rigid laws) they would end up failing to ensure justice.

In another landmark 1995 case, *Managing Director, Dhaka WASA v Superior Builders and Engineers Ltd,*[41] the Appellate Division agreed to depart from the "basic" rule of no judicial review of public contracts when the contractor's legitimate expectation as to fair dealing is breached. It held that the cancellation by the government agency of a contract unilaterally without considering all circumstances is a high feat of arbitrariness which rightly attracts writ-jurisdiction. In its own words,

> 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 that he will be dealt with fairly.

The doctrine of legitimate expectation as an allied but not yet a stand-alone ground of judicial review is of recent usage in Bangladesh.[42] The use of the doctrine of legitimate expectation in recent times has significantly increased, and the Court seems to link it with the boarder principles of the rule of law, and open and fair governance.[43] In essence, the doctrine of legitimate expectation is an extension of the principle of natural justice, and hence not that novel. The adoption of this doctrine nonetheless symbolises the Court's new preparedness to give due attention to the overriding importance of transparency in public decision-making particularly when public financial interests are involved.[44] In *Superior Builders*, thus, the Court held for the application of the doctrine of legitimate expectation in the event of unfair actions by the government pursuant to or under any contract.

At this juncture, two significant Appellate Division decisions (of 2001 and 2003) involving the application of principles of fairness, reasonableness and legitimate expectation regarding judicial review of pre-contract processes (bidding/tender process) merits a discussion. In *M/s Hyundai Corporation v Sumikin Bussan Corporation*

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41 (1999) 51 DLR (AD) 565.

42 In *North Pole (BD) Ltd. v BEPZA* (2005) 57 DLR (AD) 631, the Court held that "inaction" on the part of the government in clear breach of legitimate expectations is judicially reviewable. This suggests that the Court did not recognise 'substantive legitimate expectation' as a ground, as it relied actually on culpable 'inaction' of the government. On the growth of the doctrine of legitimate expectation, see, among others, Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (Hart Publishing, 2000). On the doctrine's application in Bangladesh, see Rumana Islam, 'Doctrine of Legitimate Expectation: An Overview' in Mizanur Rahman (ed), *Human Rights and Domestic Implementation Mechanism* (ELCOP, 2006) 221-244; and Zahidul Islam, 'Legitimate Expectation: How a View Turned to a Principle' (2005) 9(1&2) *Bangladesh Journal of Law* 69-84.

43 See *SAS Bangladesh Limited v Engineer Mahmudul Islam* (2004) 24 BLD (AD) 92; *Chairman, BTMC v Nasir Ahmed Chowdhury* (2002) 22 BLD (AD) 199; *North Pole (BD) Limited*, above note 42; and *Selim Reza v Government of Bangladesh* (2006) 58 DLR (HCD) 1.

44 *DG, BWDB v BJ Geo Textiles*, below note 49 (*per* F. Karim, J).

(2002),[45] during the process of inviting and evaluating bids for the supply of cranes for the Chittagong Port, a bidder was first declared to be a non-responsive bidder but was subsequently considered a responsive bidder. This meant that the competition-scenario changed in the context of which one of the bidders challenged the decision of the Chittagong Port Authority on the ground of breach of transparency. The HCD quashed the impugned decision and held that the Port Authority was not acting in its simple trading capacity since it floated the tenders in exercise of its statutory power. Relying on the ratio of *Sharping*, the HCD held that the impugned decision not only violated terms of the Bidding Document, it also was a result of a *mala fide*, arbitrary, and colourable exercise of power on the part of the Port Authority. On appeal, the Appellate Division affirmed the HCD's review of the process of awarding a public contract or state largesse as it found lack of transparency on the part of the concerned agency. As the Court observed, transparency in policymaking by government bodies including in contractual functions, especially when financial interest of the State is involved, is of high importance and hence needs to be ensured.[46] In this regard, the Court approvingly cited the following observation by the Indian Supreme Court:

> It cannot be denied that […] judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. […]. The right to refuse the lowest or any other tender is always available to the Government. But the principles laid down in Article 14 of the Constitution[47] have to be kept in view while accepting or refusing a tender.[48]

In its 2003 decision in *Director General, BWDB v BJ Geo Textiles*,[49] the Appellate Division endorsed the view that the breach of 'legitimate expectation' of the concerned party of being fairly dealt with by the government vis-à-vis a contract can attract judicial review. In this case, a public agency, Bangladesh Water Development Board (BWDB), floated a tender invitation bids for the purpose of procuring geo-textile bags to be used in a river erosion mitigation project funded by an international development agency. BJ Geo Textiles Ltd., although the lowest-cost bidder, was not awarded the contract.

Before the HCD, BJ Geo Textiles Ltd. argued that the BWDB violated the terms of the tender document or Instructions to Bidders (or the advertisement or invitation for bids in the language of the contract law). Interestingly, the petitioner argued that it took the matter to the court to save public money as well as in realisation of its constitutional duty to protect public property (under art. 21). The respondents argued that the claim being based on 'purely a commercial contract' (or a 'private law contract'[50]) was not

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[45] (2002) 22 BLD (AD) 16.

[46] *Ibid*, 21 (*per* Md. Ruhul Amin, J).

[47] Equivalent to art. 27 of the Bangladeshi Constitution (equality before law and legal protection).

[48] *Tata Cellular v Union of India* (1966) AIR (SC) 11.

[49] (2005) 57 DLR (AD) 1.

[50] *Ibid*, noted at p. 5 (arguments put forward by Mr. Mahmudul Islam, the respondents' counsel).

amenable to judicial review. It was also argued that the authorities in finalising the bids strictly followed the relevant rules and hence the cancellation of the contract to the successful bidder would put an ADB-financed project in jeopardy, ultimately hampering the public interest. The Court cancelled the award of contract to the successful bidder on the ground of lack of transparency on the part of the agency. On appeal, the Appellate Division overruled the HCD because arbitrariness or lack of transparency was not found in the decision of the BWDB, but affirmed the existing jurisprudence of judicial review of state contracts. Interestingly, the Appellate Division distinguished this case from a case of enforcement of contracts by the government. In its view, *BJ Geo Textiles* involved a tender-process and not a contract *per se*.[51]

A more assertive judicial stance against unfairness involved in granting state largesse or licences through processes that are similar to awarding contracts to private entities (or outsourcing) is to be found in two remarkable decisions that came about at the same time, early 2000s. In *Ekushey Television Limited & others v Dr. Chowdhury Mahmood Hasan*[52] and *Engineer Mahmud-ul-Islam v Bangladesh,*[53] the Court respectively invalidated a public license in favour of a private television operator and a government decision allowing a foreign private company to construct container terminals at the Chittagong Port on the ground of opaqueness and non-transparency in public functioning. As a result, the most popular television channel faced a sudden closure, and the construction of a private port terminal became abandoned. It might seem that the Court stood somewhat in the way of economic development of Bangladesh, since a huge amount of foreign investment was at stake in the latter case. But the Court indeed took a step with farsighted positive implications for good governance. It was indeed by the higher principle of constitutionalism, that is, a just and honest system of governance.[54]

In *Ekushey Television*, the Court offered the following reasoning, highlighting the need to check public corruption:

> There are some essentials in the legal realm that are of monumental importance. One of them is the duty of the Court to protect the ordinary citizens from executive excess and corrupt practice. The Court is always under tremendous pressure to locate and address the question of executive accountability since *a citizen has a right to clean administration.*[55] […]

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51 *Ibid,* 13 (*per* Md. Fazlul Karim, J).

52 54 (2002) DLR (AD) 130 (confirming the HCD's decision in *Chowdhury M. Hasan v Bangladesh* (2002) 22 BLD (HCD) 459).

53 (2003) 23 BLD (HCD) 80 (*per* S. A. N. Mominur Rahman, J).

54 For a criticism of this decision see M. Rafiqul Islam and S. M. Solaiman, 'Public Confidence Crisis in the Judiciary and Judicial Accountability in Bangladesh' (2003) 13 *Journal of Judicial Administration* 29, 45-48 (considering the decision as lacking "community perspective").

55 (2002) 54 DLR (AD) 130, 140.

> This Court […] is duty bound to preserve and protect the *rule of law*. The cutting edge of law is remedial and the art of justice has to respond here so that transparency wins over opaqueness. […] Unless this Court responds […], governmental agencies would be left free to subvert the *rule of law* to the detriment of the *public interest.*[56] (Emphasis added).

In the same vein, the HCD's rationale in the latter case was to play a "vital" role "not only in preventing and remedying abuse and misuse of public power, but also [in] eliminat[ing] injustice".[57] Sitting on appeal in this case, the Appellate Division sought to honour the people's "legitimate expectation" as to honest governance, to "protect" public interest and to "zealously" guard against government's unlawful dealing with public property.[58]

The promising aspect of these two cases is that members of civil society and the "concerned" citizens could challenge the breach of 'law' in greater public interest although they were not personally affected. This strategy of 'public interest litigation' can also arguably be used in challenging government actions under any public contract with private individuals.

The above positive developments notwithstanding, the jurisprudence of reviewability of state contracts remains obsessed with the Court's notion of statutory versus 'pure and simple' commercial contracts. For the Court, statutory contracts are those that are concluded under the authority of any statute.[59] This definition of 'statutory contracts' mooted in *Sharping* (1987) was later further illustrated by the Appellate Division in *Bangladesh Power Development Board v Md. Asaduzzaman Sikder* (2003),[60] holding that in order to qualify as a statutory contract, the contract must incorporate 'certain terms and conditions that are statutory' in nature in addition to being a contract entered into by a public functionary or statutory authority pursuant to an enabling statutory power.[61] The test that was developed was the one of a contract executed by (i) a *public agency*, (ii) in exercise of its *authority under a statute* and (iii) *containing terms and conditions that are rooted in the statute*.[62]

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[56] *Ibid,* 144.

[57] (2003) 23 BLD (HCD) 80, 99.

[58] *SAS Bangladesh Limited v Engineer Mahmud-ul Islam* (2004) 24 BLD (AD) 92, 112.

[59] See *Ananda Builders*, above n 28.

[60] (2003) 8 MLR (AD) 241.

[61] This view was taken also in *Ananda Builders*, above n 28.

[62] For the application of this test see *Conforce Limited*, above note 17 (where the HCD found the impugned contract to be executed by the state in its sovereign capacity, the executor, Titas Gas, being authorised to exercise governmental power under the Bangladesh Petroleum Act 1974) and *Md. Abdul Malek v Bangladesh* (2007) 59 DLR (HCD) 284 (where a contract between the government and a government-appointed dealer in fertiliser was held to be a statutory contract amenable to judicial review).

Above clarifications of the meaning of statutory contracts notwithstanding, it remains unclear why, for the purpose of judicial review, there should always be a statute to authorise a government agency to make contracts. In the above governing test, the Court laid much more importance to the exercise of statutory power than the presence of statutory body as one of the parties to a contract. In fact, almost all contracts by government agencies or ministries are concluded in exercise of executive prerogatives and not always under statutory authorisation in the sense of the term that the Court used. The above line of reasoning in fact skillfully avoids public law arguments and the need in a constitutional order to hold the executive accountable for unfairness and injustice.

4. Inapplicability of judicial review to 'pure and simple' state contracts

Set in the backdrop of the above principles or standards of review vis-à-vis state contracts, this section presents an analysis of some decisions in which judicial review of state contracts was unsuccessful because the disputes involved 'pure and simple' contracts by the State or its agencies.

Ananda Builders Ltd. v BIWTA (2005)[63]

While dealing with the issue of judicial review of a contract, the Appellate Division in this case set out to address the question of whether a contract somewhat tied with an international obligation of the government pursuant to a project financed by the World Bank can be considered an extra-ordinary commercial contract, especially when one of the parties involved has its sovereign capacity. The Court ignored the 'international obligation' argument and held that the contract was not factually entered into with any international agency. Rather, the Court said, a private company engaged with a local authority, BIWTA, which obtained funds from the World Bank for its certain development projects. The Court found the contract to be an ordinary commercial contract because the contract had no roots in any statute or because it was not concluded by the concerned agency in its sovereign capacity.

Mark Construction Ltd v Chief Engineer, REB (2015)[64]

In this case, *Mark Construction* participated in a tender and obtained a work-order from the Rural Electrification Board (REB) for the construction of some buildings in Dhaka by virtue of a contract. The petitioner company paid the security money (performance guarantee) but could not start the work even after nine months of the contract as the construction site was not made available by REB for the work. Eventually, the construction company refused to work for REB on the ground that it would incur financial loss for the fault of REB because the price of construction materials had already grown up. The government agency then reportedly initiated measures to nullify the security deposit made by the petitioner. The company in a judicial review brought the matter to the HCD and asked for a refund of the security money. Without providing a

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[63] (2005) 57 DLR (AD) 31.

[64] (2015) 3 SCOB (HCD) 37 (*per* Zinat Ara, J).

detailed explanation the Court treated the contract as a case of a simple commercial contract and hence non-reviewable, although it appreciably relied on an arbitration clause in the contract. In the backdrop of the facts of the case, the Court was probably not incorrect. In quite a contradictory fashion, however, the HCD observed that the acts of REB were unlawful. The Court was probably indicating at unfairness on the part of the agency, but thought that judicial review would not still be available.

***Shahjibazar Power Company Limited v Secretary, Ministry of Energy and Mineral Resources* (2016)**[65]

In 2007, Bangladesh Power Development Board (PDB) invited potential electricity supply companies to participate in tenders for the design, construction, operation and maintenance of a power plant to be located at Shahjibazar, Hobiganj. *Shahjibazar Power Company Ltd* participated in the bidding in response to the invitation and eventually entered into a contract with PDB in 2008. In 2008, the company opened five *Letters of Credit* to import necessary equipment for the construction and setting up of a power generation station as agreed. When the imported equipment reached the port in Bangladesh, the Customs House refused to release the goods unless the required customs duties were paid. The company approached PDB requesting a statutory certificate by dint of which the equipment could be released free of customs and other duties. The PDB refused to issue such an exemption certificate for the company. Being aggrieved, the company filed a writ petition under art. 102 and sought for a mandamus. Citing *BPDB v Md. Assaduzzaman Sikder*,[66] the HCD refused to issue a writ reasoning that the contract was not concluded in exercise of the BPDB's 'statutory' or 'sovereign' authority.[67]

***Bangladesh v Zafar Brothers Ltd.* (2017)**[68]

The facts of this case involved two contracts that were concluded in 2000 between a Bangladeshi joint-venture company named *Zafar Brothers Ltd* and the Roads and Highways Department (RHD) for the construction of two roads. The finance was to be channeled from a foreign fund of the International Development Agency (IDA). The work was agreed to be completed by 2003, a deadline that could not be met because of the delay by the Department in handing over the site to the contractor. Meanwhile, the construction company made some variations in the work plan on two occasions. Seeing the delay, the Ministry of Communication, the supervising ministry of the RHD, asked

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65 (2016) 8 SCOB (HCD) 1.

66 (2003) 8 MLR (AD) 241.

67 A similar decision in the context of similar facts can be found in *Barakatullah Electro Dynamics Limited v Bangladesh Power Development Board* (2016) 6 SCOB (HCD) 56. Interestingly, in this case, the HCD refused to see BPDB at par with the government. It is submitted that, refusing to extend judicial review over a contract by BPDB is one thing and it is altogether a different thing to refuse to consider BPDB as a government agency for the purpose of judicial review.

68 (2017) 69 DLR (AD) 52.

for explanations from the Chief Engineer and the Project Manager. Pending the resolution of this communication, however, the Ministry passed an order terminating the contract with the construction company.

In the HCD, the company successfully challenged the legality of this decision of the Ministry. On appeal, however, the Appellate Division dealt with the question of maintainability of the challenge under writ jurisdiction of the HCD and held that the disputes under those contracts could not be adjudicated under art. 102. Relying upon *Sharping* (above),[69] the Court observed that the contracts in question were admittedly 'pure and simple' commercial contracts and hence not constitutionally reviewable. A closer consideration of the facts, however, would reveal that the Ministry acted apparently arbitrarily and unfairly. On this ground, the judicial review could well be exercised. It seems, therefore, that although the Appellate Division in this case relied on its earlier decision in *Sharping*, the case of *Zafar Brothers Ltd* is in derogation of the *Sharping* principles.

A conservative Appellate Division held that the HCD was not a 'Court of Equity' under art. 102 so as to be able to extend its judicial review power to public contracts involving private interests. The Court explained that the HCD must not apply the principles of equity (by invoking concepts like fairness, equality, and ends of justice) in judicial review, but must follow strictly the "black letters" of the law, art. 102. Again, the Appellate Division left it unclear how art. 102 would prevent the HCD from reviewing a contract by a public agency on the ground of breach of the constitutional principle of fairness.

5. A critique of the jurisprudence of judicial review of state contracts

It appears from the above that although the Court has shown preparedness to review public contracts on the ground of breach of public interest, transparency and rule of law, its activity is mostly limited to some high profile public interest litigations involving mega government projects. What seemingly influenced the Court in showing this kind of liberalism as in *Ekushey Television* or *the Chittagong Port Terminal* cases (above) was considerable pressure from the civil society actors and national politics. This is not to say that the Court was altogether unwilling to review state contracts in ordinary challenges. In *Hyundai Corporation* and *BJ Geo Textiles*, for example, the Court reviewed the public procurement processes. It remains, however, a fact that, with regard to judicial review of state contracts, judicial willingness resides on a low threshold.

In ordinary cases, the Court continues to see contracts by state agencies as private acts of the State, causing the victims to seek remedies against omnipotent government agencies in ordinary civil courts, which in most cases means that they have no remedies at all. As

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[69] The Appellate Division also cited several other cases: *Bangladesh v Excellent Corporation* (2015) 20 BLC (AD) 355; *Superintendent Engineer, RHD v Md. Younus and Brothers (Private) Ltd.* (2011) 31 BLD (AD) 1; *Gems International, Dhaka v Gramsieco Ltd.* (2010) 7 ADC (AD) 685; *Managing Director, WASA v Md. Ali* (2007) 27 BLD (AD) 298; and *BPDB v Md. Assaduzzaman Sikder*, above note 66.

shown in the cases of judicial refusal to review 'pure and simple' commercial contracts, for example, the principles and standards developed by the Appellate Division were not followed. As a result, the claimants did not get justice and the executive functions went beyond the scrutiny of the court. In *Zafar Brothers Ltd* (above), for example, a case in which international financing was involved, a contract between a company and the Roads and Highways Department was suddenly and arbitrarily cancelled by the supervising Ministry, but the aggrieved party did not get any remedy. The Appellate Division, departing from its earlier reasoning, considered the contract to be a purely commercial contract un-amenable to judicial review.

It appears that the division of contracts into statutory/public and purely commercial/private contacts shows the Court's preference for the so-called public-private divide which modern public law jurisprudence validly refutes.[70] Especially, when public duties and the issue of executive responsibilities are concerned, the public-law-model of judicial review pierces the subtle and narrow divide between 'public' and 'private'. A Court charged with the task of dispensing justice must realise that an effective theory of judicial review would not contemplate 'private affairs' by the State. Indeed, no state actions, whether based on statute or not, can ever be private actions, but must necessarily be actions for public good, calling for judicial constitutional review.

Not that there cannot be any contract that could stay beyond judicial review. But there must be certain reasonable criteria for keeping such contracts out of judicial review. The Court developed certain definitions for 'statutory contracts', but they were too broad standards to rely on for cohesion in judicial reviewability of state contracts. We argue that judicial reviewability of all contracts should be a norm, and the non-reviewability of a closely defined category of state contracts should rather be an exception. According to a public law reasoning, commercial activity of the state has an inherently public character. Therefore, even purely commercial contracts should be judicially reviewable in a constitutional litigation when the breach of a public law duty of fairness or transparency in the management of state property is an issue.

On a different note, the notion that non-sovereign or non-statutory contracts are not judicially reviewable is attributable to western jurisprudence and culture of non-justiciability of state contracts such as the practice in the UK. Similarly, the Court's insistence on the exhaustion by the petitioner of other available remedies (in civil courts) has a link with its fondness for judicial review principles elsewhere. It is to be noted that self-restraining judicial maxims like the rule that ordinary remedies should be exhausted before invoking judicial review were developed as pro-establishment judicial review

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[70] See, among others, Dawn Oliver, 'Common values in public and private law and the public/private divide' (1997) *Public Law* (Winter) 630-646; and Michel Rosenfeld, 'Rethinking the boundaries between public law and private law for the twenty first century: An introduction' (2013) 11(1) *International Journal of Constitutional Law* 125-128 (introducing a symposium on debates about the public/private divide, and asking (at p. 127) the question of whether it is "time to reexamine, rethink, revamp, redesign, or even perhaps to discard the traditional distinction between public law and private law".

principles by Western judiciaries, with a view to preserving order in the legal system by ensuring that public officers perform without being delayed by irresponsible or protracted lawsuits.[71] It remains, therefore, seriously questionable if such a pro-establishment approach to judicial review is appropriate in a jurisdiction like Bangladesh where public accountability is at a very low level and the existing conventional mechanisms to ensure it are largely flawed and inactive.[72] While there is undoubtedly a need for checking irresponsible legal challenges against public functionaries in every jurisdiction, the need for a more intensive legal control on public power is imperative in Bangladesh. In this backdrop, hence, the judiciary must adopt a public law model of judicial review effectively to enforce principles of legality, transparency and accountability, and indeed to foster a "new era of a liberal and progressive constitutional order"[73] in all government actions including those under contracts by government agencies.

Further, in Western jurisdictions one often finds a separate branch of contract law called 'public contract law' that enforces public law principles into the regime of state contracts.[74] Moreover, the regime in such a jurisdiction is almost always possessed of prompt and effective remedies against government entities that may be found to be defaulted under contracts. By contrast, ensuring transparency and efficiency in public contracts is a daunting governance challenge in Bangladesh, while remedies in ordinary civil courts are extremely hard to avail of. Put simply, the rule of inapplicability of judicial review to public contracting is a country-specific norm that is deeply tied with the legal culture and the governance specificities of the given country. Under the constitutional scheme of Bangladesh, which is premised on the principles of rule of law, legal equality, and administrative accountability, the existing statutory/commercial divide vis-à-vis state contracts does not fit into imperatives of constitutional good governance.

As the administrative functions and their nature are rapidly growing in this age of globalisation, the Government in future will more likely increasingly out-source its functions to private bodies. Private bodies which might indeed exercise public powers or discharge public functions by virtue of a contract should necessarily be amenable to judicial review. As noted above in passing, an opening of judicial review of this type has just begun to occur. Judicial review of private bodies discharging public functions and the judicial review of state contracts are deeply interconnected and mutually influential

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71 *O'Reilly v Mackman* [1982] 3 All ER 456.

72 Encouragingly, in *Dr. Mohiuddin Farooque v Bangladesh* (1998) 50 DLR (HCD) 84, 111, the Court noted the public interest function of judicial review by highlighting its role in ensuring the protection of law for the citizens and the administration's compliance with the laws of the land, a realisation that needs further and continuous judicial reinforcement.

73 Syed Ishtiaq Ahmed, *Certiorari: An Administrative Law Remedy* (Mullick Brothers, 2011) 148.

74 See, for example, Public Contracts Regulations 2006 (UK).

matters. As such, without taking the concept of judicial review of state contracts further ahead, the progress of judicial review of private bodies will but be truncated.

6. Conclusions

Despite the inspiring development in the jurisprudence of judicial review of state contracts, both divisions of the Supreme Court still seem to be heavily leaned to a divide between "pure and simple" trading contracts by the State and "statutory" contracts, with a risk that public actions pursuant to contracts may conveniently be placed out of constitutional review. As seen above, the Appellate Division has ruled in favour of reviewability of statutory contracts on the grounds of unfairness, arbitrariness, *mala fides*, lack of transparency, and the breach of legitimate expectation of fair treatment. Though laudable, these judicially developed standards for judicial review of state contracts are deficient in any real bite as evident in the paucity of case-law in which state contracts were reviewed. Moreover, with regard to what the courts call 'pure and simple' commercial contracts, the Court seems to be unwilling altogether to exercise its judicial review power.

This article argues that the private/public divide in the field of government contracts continues to be a clog on judicial capacity to ensure transparency and accountability in state actions. The higher courts' ducking of state contracts on procedural grounds affects the judicial authority to ensure good governance in public procurements and the allocation of state largesse.[75] Sadly, corruption, which is a major source of mal-governance in Bangladesh, permeates the whole spectrum of public institutions. Until recently, the country had allegedly the worst record of corruption in the public sector in the world.[76] At the higher level of the administration, nepotism and lack of transparency in allocating public contracts or state largesse has been one of the major sources of corruption by state bureaucracy and political high-ups. Arguably, this scenario indicates that without adopting a public law-style of judicial review *vis-à-vis* all state contracts, the Court's role as a promoter of justice and good governance will remain under-realised.

We argue that public sector contracting should essentially be amenable to judicial constitutional review, and this is the requirement of constitutional principles of rule of law and public accountability. As such, the pure/statutory divide regarding state contracts is incompatible with the notion of an effective judicial review and hence not conducive to justice. We further argue that even what is called a purely commercial contract by the State should be subject to judicial review on the ground of breach of the principle of fairness and legality.

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[75] For further criticisms of this line, see M Amir-Ul Islam, 'Governance and the Judiciary' in Hasnat A Hye (ed), *Governance: South Asian Perspectives* (University Press Limited, 2000) 117-36.

[76] According to the Corruption Perceptions Index 2017 reported by Transparency International (TI), Bangladesh ranks the 143rd position among 180 countries reported. In the 2016 Index, Bangladesh's position was 145th. See for details <https://www.transparency.org/country/BGD> accessed 20 March 2018.

Moral Philosophies and Ideologies Relevant for Life Sciences Research and their Regulation

Dr. Arif Jamil[*]

1. Introduction

Certain principles of moral philosophies[1] have been examined in this article to examine how they connect with the life sciences' research and invention in a country. Some of the principles, doctrines and works of the philosophers of 18th and 19th century were revisited to find the justification for and against the life sciences' experimentation. Different moral philosophies, political and economic ideologies have application at different junctures of life sciences' research. No "one" principle can justify all actions. Therefore, this paper talks about the application, connection and presence of selected moral philosophies, such as, existentialism, pragmatism, utilitarianism and deontology in the contemporary "life sciences' research and experimentation". This paper also shows how these moral philosophies can justify or negate the validity of an action in biomedical (relating to life sciences) research and practice.

All ideologies are emanated from a certain philosophy; philosophy is the objective analysis of life and earth. Classical utilitarianism is a form of consequentialism. If consequentialism in the origin is a philosophy, the utilitarianism is a political ideology, as it serves the justification of an action in terms of ratio of the outcome. Pragmatism as a contemporary philosophy can also be seen as an ideology when it is translated into biopolicy. Deontology might be a philosophy because, it does not consider the gain or outcome; rather the action itself is judged.

It should be mentioned here that, this article is not a comprehensive examination of ethics and philosophy. All of the western moral philosophies have not been revisited in this paper; *only some* of the moral philosophies, and ideologies have been revisited from among the innumerable associated branches.

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1 Arif Jamil wrote: ""Ethics" is a general term reflective of the societal/collective perception towards an action. "Morality" is the individualistic embodiment of a virtue; differs between individuals." Arif Jamil, *Patent Framework for the Human Stem Cells in Europe and the USA: Innovation, Ethics and Access to Therapy* (PhD thesis, UNIBO, 2016) 3.

Moral philosophies are some of the oriesdeveloped to evaluate an action, e.g., deontology is an example of moral philosophy. Ideology is the adopted policy of economic and political theories that may find some support among the individuals/actors/stakeholders. An example of political and economic ideology is "liberalism" and "neoliberal ideologies."

2. Conceptualisation of Moral Philosophies and Establishing their Connection with the Life Sciences Research

This part of the paper explains the moral philosophies and ideologies in relation to life sciences' research and this demonstrate how certain kinds of "biomedical research" or "life sciences research" relate to moral philosophies, school of ethics and ideologies. Instead of judging a particular practice as "good or bad", an attempt is made to present an objective evaluation of the issues. Moreover, a biomedical law in Bangladesh is examined to see which moral philosophy might have influenced the languages and provisions of the Act.

A. Existentialism

This section high lights the concepts and observations of French philosopher Jean-Paul Sartre on existentialism.[2] Here the paper sheds light upon *human and human embryo related research* through the lens of existentialism.

Similar to Jean-Paul Sartre 'sclaim that "existence comes before essence"[3], existentialism precedes the moral philosophy the man would group himself into. A person makes his choices, determines his identity,[4] and in the process learns what is best for him. The *information*, *knowledge* and *ability for making the choice*are in the heart of an individual's autonomy. With greater autonomy comes higher degree of freedom. This endowment of the ability of making individual choice is a pre-requisite to proclaim a modern society. A legal framework accommodating an ambitious and futuristic contribution of science needs to be tolerant of diversity and greater individual autonomy. Freedom for *responsible research* and freedom of *choice of the patients* are the ultimate results and gradual effects of such advanced regulatory frameworks.

Despite Sartre's allusion to existentialism as an *ideology*,[5]existentialism as a means of reconstruction of man, offers certain basic flavors similar to philosophy. Sartre finds philosophy as an ephemeral abstraction which does not exist in its singular form but recurs and survives in its multiplicity or plurality.[6] Therefore, it may be reasonable to say that with the progress of science, the boundaries of moral philosophies need to be re-examined to see if they are adequate to serve societal needs. As expectation of man (human) changes, man himself do not remain where he was a few centuries back. The philosophical reconstruction can offer moral justification of *science* and *human needs* and prove to be complementary. The above discussion focused on the existing humans

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[2] Wikipedia, *Jean-Paul Sartre*, <https://en.wikipedia.org/wiki/Jean-Paul_Sartre#Literature> accessed 11 May 2018.

[3] Walter Kaufman (ed), *Existentialism from Dostoyevsky to Sartre* (New York: Meridian Books, 1956) 290—91.

[4] *Ibid*, 291.

[5] Walter Kaufman (ed), *Existentialism from Dostoyevsky to Sartre*(VintageBooks, 1960).

[6] *Ibid*.

and the relevance of existentialism for them. But if the discussion switches to "embryo related research"[7] and tries to explore if "human embryo" existed as "human" before realizing its "existence", then according to Sartre man exists only when it realizes its existence and has to attain it by achieving the self-consciousness and by making his decision.[8] In Sartre's opinion, "man will only attain existence when he is what he purposes to be".[9] In other words, even if embryos existed in life forms, they will not attain the status of human until such process of making "himself" has begun.

B. Pragmatism

Pragmatism as a moral philosophy may find relevance in a wide range of experiments in life sciences research.[10]This section briefly discusses the philosophy of pragmatism, in terms of its relevance, role and importance in shaping justification for scientific experiments.

Human civilization is an aggregation of continuous modernization. The newer scientific approach and research protocol shall require *recognition* and *adaptability* of and by the people living in that age. The ethical framework has to offer *fluidity*,[11] also for itself to be able to cope with the scientific progress. The context of the individual cases may vary, and hence, the universal application of any "one" moral philosophy might be very difficult to imagine. Pragmatism may be able to address, offer and allow, for an applied level of ethics, the need of *human adaptability*, *fluidity of the theoretical perception* and *contextual decision making*.[12]

Pragmatism was born in the United States at the end of the 18th century.[13] The American philosopher John Dewey is a notable name which is associated with the school of pragmatism.[14] Dewey's works, though did not lay down the foundation of

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[7] Embryo related research in life sciences encompasses multiple areas, such as, gene modification, stem cell derivation process, pre-implantation genetic diagnosis and human reproductive technologies.

[8] Above n3, 4—5.

[9] Above n 3, 5.

[10] "Pragmatism is a philosophical movement that includes those who claim that an ideology or proposition is true if it works satisfactorily, that the meaning of a proposition is to be found in the practical consequences of accepting it, and that unpractical ideas are to be rejected." "Pragmatism" by Chase B. Wrenn, *The Internet Encyclopedia of Philosophy*, <https://www.iep.utm.edu/pragmati> accessed 12 May 2018.

[11] See generally Arif Jamil, *Patent Framework for the Human Stem Cells in Europe and the USA: Innovation, Ethics and Access to Therapy* (PhD thesis, UNIBO, 2016) 54, 150.

[12] See generally *ibid*.

[13] Stanford Encyclopedia of Philosophy, *Pragmatism*,<http://plato.stanford.edu/entries/pragmatism> accessed 17June 2014.

[14] Wikipedia, *John Dewey*, <https://en.wikipedia.org/wiki/John_Dewey#Pragmatism,_instrumentalism,_consequentialism > accessed 12 May 2018.

bioethics, have great implications for the applied level of bioethics.[15] John Dewey's comment that, "life is a moving affair in which old moral truth ceases to apply", [16] reminds of the necessity of reconstruction of ideology. Therefore, laws embodying the moral philosophies cannot be specific to "words," and they must also offer some "flexibility" to enable new interpretations. There is a necessity to find the balance between "specification" and "vagueness" during the "framing of law and legal interpretation" in ethically controversial areas of research which has context-specific application.

Walter B. Kennedy said that, "[a]s a practical science, law requires an appreciable degree of uniformity, stability and certainty" and he thought that pragmatism as a philosophy of law may lack the required coherence[17], and hence, might not be the perfect choice when implemented through legal courses. Law itself is often a response to scientific developments. Hardly ever a law is framed by predicting the course of science. Evaluation of an action as "ethical" or "unethical" and "legitimizing or nullifying" it may also be *subsequent* to the scientific progress that has already taken place. All that is needed is that the "scientific claims" are based on solid and justifiable grounds, so that irrespective of the fact of being framed "shortly afterwards" or "ahead" of scientific accomplishments, the legislators can find a moral justification for framing of a law. The *fluidity* pragmatism offers as a "philosophy", does not have to become the characteristics of "law" itself; rather can be the justification for the "use of law". However, Kennedy acknowledged the limitation of pragmatism and observes: "Demands of humankind are many and diverse, good and bad, moral and immoral, and it is difficult to perceive how the magic of pragmatism can make them all "good."".[18]

C. Normative Ethics and Applied Ethics

Normative ethics suggests the rules and moral standards for justifying actions. Both Utilitarianism [19] and Deontological ethics are examples of normative ethics. The

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[15] Bioethics brings law, ethics and science under one roof. Bioethical norms are developed either as a "response" to the scientific experiments conducted in ethically controversial fields or as a "preventative measure" to protect the human subject exploitation in biomedical research. The discipline of bioethics takes into account multiple subjects and matters, e.g., law (regulation), biomedical research (medicine), State practice/policy, individual cases (context and cultural background), philosophical foundation, standard ethical practices. See Arif Jamil, *Patent Framework for the Human Stem Cells in Europe and the USA: Innovation, Ethics and Access to Therapy* (PhD thesis, UNIBO, 2016) 53.

[16] Quoted in Franklin G Miller, Joseph J. Fins and Matthew D. Bacchetta, 'Clinical Pragmatism: John Dewey and Clinical Ethics' (1996—97) 13*Journal of Contemporary Health Law and Policy*27, 39.

[17] Walter B Kennedy, 'Pragmatism as a Philosophy of Law'(1925) 9(2) *Marquette Law Review* 63, 71.

[18] *Ibid*, 75.

[19] Utilitarianism is also a form of the Consequentialism. The notable advocates are Jeremy Bentham and John Stuart Mill.

normative ethics when translated, tested and fitted into a practical example, becomes the concern for *applied ethics*. Bioethics that addresses and captures the ethical issues in the new developments of medicine and lifescience is essentially an *applied ethics*, when the moral justification of action is asked for an devaluated.

I. Deontism

This section discusses Deontology based on the writings of several scholars and critics, and attempts to identify to what extent Deontological ethics offers the philosophical foundation for biomedical (life sciences) research and invention.

Irene Van Staveren has aptly described the true features of the deontology as she states:"Deontological ethics is about following universal norms that prescribe what people ought to do, how they should behave, and what is right or wrong".[20] There is not much room in deontology to justify the overwhelming benefits an action might bring in comparison to the trivial sacrifices made or losses incurred. It is also not about preferential choices of a person, rather it is more about being right or wrong in an action. The action itself cannot cross the limit of the universal virtuousness that is prescribed by the belief. In innovative and experimental science, obligation to the humanity and virtue is highly important but measuring the practical effects of actions may also be necessary. The high merits of deontology lies in the fact that it asks the action to be *prima facie*ethical but the constraint lies in its inability to consider the long run outcome of the actions. Deontology may find itself a misfit when the "science" reaches the "market" as a product. Therefore, when the biomedical innovations are IPR (intellectual property right) protected goods in a health care market, there is likelihood of "political and economic ideologies" to maneuver the "moral philosophies" and make the beliefs of "goodness" less significant/important than the desired "goals" of the inventions. Virtue ethics stemming from Aristotle seemed to have gained attention in the writings of scholars like Martha Nussbaum and Irene Van Staveren and appeared to offer more balanced and "contextual" solutions as "motives and reasons" in a given context are more important for that "ethics".[21] However, it has been criticized for its application through an individual' sdetermination of right and wrong,[22] and hence, may not offer perfect solution in a highly diverse, pluralistic and conflicting society.

Among others, Immanuel Kant made significant contribution in shaping the deontological ethics through his scholarly philosophical interpretations. Susan M. Shell examined human dignity from the perspective of Immanuel Kant and observed: "The most clear-cut cases of Kantian "respect" for humanity involve not using others in ways whose ends they cannot formally share—i.e., by not acting on them without their own

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[20] Irene Van Staveren, 'Beyond Utilitarianism and Deontology: Ethics in Economics'(2007) 19(1) *Review of Political Economy* 21, 23.

[21] *Ibid*, 26—27.

[22] *Ibid*, 28.

consent".[23]Martha Nussbaum captured the Kantian philosophy in the context of human dignity and stated that, "what respect for human dignity requires is to treat the human being as an end, rather than merely as a means to one' sown purposes".[24]If human life is considered to have commenced at the moment of fertilization and they are end owed with the human dignity, destruction of human embryos for biomedical (life sciences) research would not be acceptable, according to this school.

II. Consequentialism/Utilitarianism

The Stanford Encyclopedia of Philosophy defines "utilitarianism" as "[t]he paradigm case of consequentialism"[25] and provides an explanation of "consequentialism":

> In actual usage, the term 'consequentialism' seems to be used as a family resemblance term to refer to any descendant of classicutilitarianism that remains close enough to its ancestor in the important respects. Of course, different philosophers see different respects as the important ones. Hence, there is no agreement on which theories countas consequentialist under this definition. [26]

The classical utilitarian[27] approach to an action is to measure the gains and losses in terms of quantity or quality. Infliction of small harm can be justified if the gains are overwhelming, according to this ideology. Richard Norman's criticism of utilitarianism saying that, "[t]here are some things which, morally, you cannot do to people for the sake of the greater good",[28] is a morally sound observation yet realistic. However, no breakthrough in biomedical knowledge has ever been gained without making human and animal sacrifices. Hence, reduction or minimization of human and animal sufferings in biomedical research (and/or life sciences research) has time and again come to the fore in quest of a fair regulatory approach.

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[23] Susan M Shell, 'Kant's Concept of Human Dignity as a Resource for Bioethics' (In Human Dignity and Bioethics, Essays Commissioned by the President's Council on Bioethics, Washington D.C., 2008) 333, 336.

[24] Martha Nussbaum, 'Human Dignity and Political Entitlements' (In Human Dignity and Bioethics, Essays Commissioned by the President's Council on Bioethics, Washington, D.C. 2008) 351, 353.

[25] Stanford Encyclopedia of Philosophy, *Classic Utilitarianism*<https://plato.stanford.edu/entries/consequentialism/>accessed 22 May 2018.

[26] Stanford Encyclopedia of Philosophy, *What is Consequentialism?*<https://plato.stanford.edu/entries/consequentialism/>accessed 22 May 2018.

[27] Notable figures identified as proponents of this school were Jeremy Bentham, John Stuart Mill and Henry Sidgwick. Above n 25.

[28] Quoted in Michael Head, and Scott Mann, *Law in Perspective: Ethics, Society and Critical Thinking* (University of New South Wales Press Ltd, 2005) 171.

Glen Mcgee's writing captured the justification of the consequentialist's approach towards the stemcell research.[29] With reference to the embryonic stem cell research, he wrote:

> For the consequentialist, an action's moral status is determined by the ends it serves and good ends justify the means necessary to achieve those ends. Embryos can be experimented on or even destroyed, consequentialists have argued, because the ends of embryo research outweigh whatever damage is done to embryos-including the destruction of embryos-as long as it is clear that the embryo's suffering or death is not more morally undesirable (to itself or to others, understood in a variety of ways) than is the suffering of the patient or community or family affected by a treatable or potentially treatabledisease under investigation, which uses stem cells that require the destruction of embryos.[30]

Therefore, the destruction of the embryos for the human Embryonic Stem Cell research can be viewed as *minimum harm*inflicted on ethical/mor[31]standards (perceptions/beliefs) for the *maximum gain* in health care, form a consequentialist or classical utilitarian approach. The typical practice of derivation of embryonic stem cells from the IVF (In-Vitro Fertilisation) redundant embryos are conducted in embryos that are "donated or redundant" and destined to be destroyed. Many countries have practice of using IVF redundant embryos for the human stem cell research. The consequentialist/utilitarian argumentsmay vary, depending on the manner of derivation of Embryonic Stem Cells.

However, John Rawls has critiqued utilitarianism, but his arguments were inspired by Kantian spirits.[32] His "justice as fairness" notion has advantageous implications for higher patient autonomy and exercising informed consent.[33] Rawls also found different ways of interpreting "hedonism" than it is viewed traditionally.[34] In his words, conventionally "hedonism is interpreted in one of the two ways: either as the contention that the sole intrinsic good is pleasurable feeling, or as the psychological thesis that the only thing individuals strive for is pleasure".[35] But for a patient, it is normal that he gives preferences to pleasure over pain, comfort over discomfort and physical perfection over physical disgust. It is very easy to be the *hedonist* for a patient who has a choice. A patient living in an affordable health care environment shall be less likely to be evaluating his actions as amoral, when the option he is exercising is legal. Therefore, in

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29 Glenn Mcgee, 'Trading Lives or Changing Human Nature: The Strange Dilemma of Embryo-Based Regenerative Medicine' in King – TakIp (ed), *The Bioethics of Regenerative Medicine* (Springer, 2009) 93, 102.

30 *Ibid*.

31 The way of *understanding and application* of the words "ethics" and "morality" are different.

32 John Rawls, *A Theory of Justice*, (Harvard University Press, Revised Edition, 1971) xi-xii.

33 *Ibid*.

34 *Ibid*, 486.

35 *Ibid*.

health care application, *moral philosophy as an applied ethics needs* to be more *flexible and realistic*, instead of judging the intrinsic value of the action in a strict and narrow way.

Jean-Paul Sartre gives an example of a lonely old mother and her only son during the war in whichh is country needs him to fight.[36] Sartre criticised Kantian ethics and showed how bewildering it can be for the son to be ethical and make a moral choice between *going to war* and *staying with the mother*.[37] In his [Jean-Paul Sartre]words:

> The Kantian ethic says, Never regard another as a means, but always a san end. Very well; if I remain with my mother, I shall be regarding her as the end and not as a means: but by the same token I am in danger of treating as means those who are fighting on my behalf; and the converse is also true, that if I go to the aid of the combatants I shall be treating them as the end at the risk of treating my mother as a means.[38]

In such situations, motives, ultimate goal and greater interests need to be considered. It may be necessary to measure the consequences, maximize the utility and minimize the harm for taking arealistic course of action, when neither of the choices offers easy answers.

In Bangladesh, section 3 of the law on Transplantation of Human Organs 1999 (as amended in 2018) allows a living person to donate a transplantable human organ, if it (the act of transplant) does not affect his/her normal life. [39] Section 6(2) of the same law prescribed the age of the recipient of the organ and he/she (the recipient) must be between 2 (two) to 70 (seventy) years of age.[40] Section 7 of the same Act speaks about the composition of a medical board for the purpose of organ transplant and the board does not have a bioethicist or a legal professional (lawyer/judge) trained in biomedical laws.[41] Section 9 of the law on Transplantation of Human Organs 1999 categorically prohibits the trade of human organs.[42]From the perspective of protection of vulnerable group of people from becoming victims of human organ trading, this law may seem to be influenced by the deontological ethics. This law limits the age of the recipient of organ donation and it implies that it is not utilitarianist in nature.

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[36] *Supra* note 3,296--97.

[37] *Ibid.*

[38] *Ibid*, 296.

[39] <http://legislativediv.portal.gov.bd/sites/default/files/files/legislativediv.portal.gov.bd/page/e2340c30_8874_46d6_8f03_8ece5692f5dc/Act%20No%201%20of%202018.pdf/>accessed 3 July 2018.

[40] *Ibid.*

[41] *Ibid.*

[42] <http://bdlaws.minlaw.gov.bd/bangla_all_sections.php?id=828/>accessed 3 July 2018.

3. Summing Up

Drawing on the various scholarly thinking, it may be summed up that:

- Sartre's existentialism may offer moral justification and large freedom to conduct research on human embryo. As a cellular entity "gradually gaining the status of living being", the scientific experiment on that "living being" during the embryonic development can be morally acceptable until a particular stage. As the ensoulment [43] occurs at an undetermined [44] stage of embryonic development, the existentialist view may find that "essence" (meaning realization of its (embryo) existence by itself) does not occur at the early stage of the embryonic development, when "existence" (the physical existence) can be clearly found. Law influenced by existentialist ideology/philosophy may find itself "liberal" in life science's experiments and allow a large array of researches.
- Dewey's pragmatism may inspire us to opt for a holistic approach to keep diversity alive and consider the context of individual cases while interplaying the "law, ethics and science". But the "features and essence" of pragmatism may be found, at times, to be in conflict with the "rigidness" of a law.
- Deontology clearly does not offer legitimacy for research involving human embryo, if that research is not intended for the good of the embryo itself. Development of therapies for "living humans (patients)" by using human embryo may be seen as an offensive exercise (if that exercise does not serve any purpose for the embryo used) in the light of the views of many scholars subscribing to this philosophy. PGD (Pre-Implantation Genetic Diagnosis) may be both "acceptable and unacceptable" to this school of ethics, depending on how essential the procedure is for assuring the good health of the embryo and "resulting child". Biopolicy and regulation subscribing (influenced by) Deotology may find "human subject and animal sufferings" for clinical trial during the drug development disturbing, if the research protocol is heavily influenced by the economic realities of research and invention.[45]

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[43] As the cellular stage's progression continues during the embryonic development, the science does not clearly know at which moment that entity (zygote/embryo/fetus) "becomes able to sense its own existence", or if we want to say, "have got the soul". The arguments that commonly exist surrounding the "brain development (claiming that with the development of brain the entity becomes aware of its existence)" also needs more scientific studies.

[44] No scientific consensus exist at the moment.

[45] The economic reality of drug development is that the industry is more influenced by the alluring greed of "return of the investment" (which the pharmaceutical industry understands as "incentives"). When the drug development within a time-frame is targeted to ensure the gains from intellectual property rights of the medicine (as for example), the well-being of the research participants in the clinical trial may be given less importance in a jurisdiction having poorly "regulated bioethical framework".

- To some actors and stakeholders, risks and benefits may be perfectly measurable and overwhelming benefits may outweigh the ethical sacrifices. To them, Utilitarianism may offer a perfect justification or explanation for a biomedical research and invention.
- Since there are variations in biological, philosophical and theological definition and understanding of the human life at the moment of commencement and through subsequent stages, one single school of ethics does not possess enough force (philosophical foundation) to enunciate "justification or rejection" for all kinds of life sciences research.
- After examining the law on Transplantation of Human Organs 1999, it seems that legislators do not consider that moral philosophies have significant role in shaping biomedical laws.

4. Conclusion by way of Recommendation

A country has to know what it is intending to achieve from the life science researches conducted within its territory. If the country aspire to be a pathfinder in such inventions, their biopolicy has to be liberal, thereby, influencing the regulatory framework to be expansive. If a country's biopolicy is predominantly controlled by ideologies and moral philosophies of restrictive in nature, they will have to give up many researches in life sciences, because their regulatory (legal) framework will be restrictive and hence, rejecting incentives for the scientists. Therefore, the article recommends that:

- a country decides first, what it intends to achieve from the life sciences researches;
- ensure that it's legal framework rightly represents the biopolicy reflective of its ground realities; and
- a bioethicist and/or a legal professional trained in biomedical law and ethics should be part of the regulatory bodies/committees.

It is essential that the regulators understand the philosophical rationale behind making a particular "ethical choice" in a given circumstance. As this discipline of science is fast growing, there will be a little room for complete isolation for a country. Any country has to be able to adapt and be prepared about its actions with regard to the scientific inventions taking place abroad.

Further research can be conducted to see how society can be actively involved in "adapting to" and "make fully informed choices" in ethically controversial life sciences research and invention.

Ensuring Access to Justice for the Poor: The Need to Establish Organized *Pro Bono* in Bangladesh

Dr. Farzana Akter*

1. Introduction

The constitution of Bangladesh has guaranteed all citizens equality before the law and equal protection of the law.[1] Yet various barriers restrict the ability of the poor to access the formal legal system.[2] The most common and controlling barrier is lawyers' fees.[3]Their fees depend on hours spent, intricacy of the case, claim value and the service offered by them.[4]According to Khair, lawyers are more interested in money-making commercial briefs rather than representing the poor to enable them to pursue their rights and entitlements.[5]In this context, the purpose of the present article is to examine the standard of involvement of Bangladeshi lawyers in *pro bono* practice. The author, therefore, explains whether providing *pro bono* is a professional responsibility of lawyers from an international human rights perspective. The article then looks at the current practice of Bangladeshi lawyers and finally makes recommendations.

2. Obligations of Lawyers to Provide *Pro bono* under the International Human Rights Instruments

The term '*pro bono*,' is a short form of *pro bono public*o which means 'for the public good.'[6]However, the term is currently used to mean uncompensated legal services

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1 *Constitution of Bangladesh*, Art. 27.

2 The barriers include cost and delay of the proceedings, complexity of law and legal institutions, incapacity toperceive a claim with a view to pursuing or defending it, judicial corruption, lack of information and others. Sumaiya Khair, *Legal Empowerment for the Poor and the Disadvantaged: Strategies Achievements and Challenges. Experiences from Bangladesh* (Department of Justice Canada's CIDA Legal Reform Project in Bangladesh, 2008)41-52.

3 Sumaiya Khair, *Access to Justice, Best Practices under the Democracy Partnership*(the Asia Foundation, 2002) 7.

4 Daniel Vandekoolwyk, 'Threshold Obstacles to Justice: The Interaction of Procedural and Substantive Law in the United States, France and China'(2010) 23 *Pacific McGeorgeGlobal Business and Development Law Journal* 187, 191; A A S Zuckerman, 'Lord Woolf's Access to Justice: Plus Ça Change…' (1996) 59 *Modern Law Review*773, 775.

5 See above n 2, 50.

6 *Black's Law Dictionary* (9th ed. 2009) 1323.

provided to indigent persons.[7]Being members of the bar, providing*pro bono* services is commonly considered a moral duty of lawyers.[8] However, such obligation arises not only from the moral principle; it is also closely linked to the professional responsibility of lawyers due to several reasons. First, lawyers learn a unique skill to practice law, and therefore, the profession has a monopoly on the provision of legal services.[9]This makes lawyers responsible to provide legal services to the poor.[10] Moreover, access to legal services is essential because it is a fundamental need[11] and lawyers have a responsibility to redress injustice and to help those in need.[12]In addition, involvement in public-interest or charitable activities helps lawyers to widen their perspectives and earn reputations.[13] This also helps to draw the attention of paying clients.[14]Therefore, *pro bono*is a way to improve the public perception about lawyers and their role in the society.[15] In brief, *pro bono* service is not merely a moral or charitable exercise; it is a part of the professional responsibility of lawyers.[16]

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[7] Gary A. Munnekeand Eileen Eck,'Re-Defining Pro Bono: Professional Commitment to Public Service' (2008) 1 *Charlotte Law Review*21, 23.

[8] Michelle S. Jacobs, 'Pro Bono Work and Access to Justice for the Poor: Real Change or Imagined Change?'(1996) 48 *FloridaLaw Review* 509, 511-512; Suzanne Bretz, 'Why Mandatory Pro Bono is a Bad Idea' (1990) 3*Georgetown Journal of Legal Ethics*623.

[9] Lorne Sossin, 'The Public Interest, Professionalism and Pro bono Publico' (2008) 46*Osgoode Hall Law Journal*131, 140, 147; Deborah L. Rhode,'Cultures of Commitment: Pro bono for Lawyers and Law Students '(1999) 67*Fordham Law Review*2415, 2419.

[10] Rhode, see above n 9, 2419; JeffGiddings**, '**Legal Aid Services, Quality and Competence: Is Near Enough Good Enough and How Can We Tell What's What?'(1996) 1 *Newcastle Law Review* 67-68.

[11] Deborah L Rhode, 'Pro Bono in Principle and in Practice' (2003), 53*Journal of Legal Education* 413 430-431; Rhode, see above n 9,2418.

[12] See above n 7, 24; Rhode, see above n 9,2415; Scott L Cummings, 'The Politics of Pro Bono' (2004) 52 *UCLA Law Review*1, 7.

[13] Deborah L Rhode, *In the Interests of Justice: Reforming the Legal Profession* (Oxford University Press,2000) 204.

[14] Jack W.Londen, 'The Impact of Pro Bono Work on Law Firm Economics' (1996)9 *GeorgetownJournal ofLegal Ethics* 925,926; RonaldJTabak, 'Integration of Pro Bono into Law FirmPractice' (1996)9 *Georgetown Journal of Legal Ethics* 931.

[15] Rhode, see above n 9, 2420. It is said, "Strong public service programmes can produce tangible, although hard to qualify, organisational benefits in terms of retention, recruitment, reputation, morale and job performance."Rhode, see above n 11, 432.

[16] Rhode, see above n 11, 433.

Various international human rights involving United Nations (UN) General Assembly resolutions and other standards of behavior contain provisions concerning lawyer's responsibility to provide free legal services to the weaker sections of the community. According to Wilson, the UN documents are of considerable authority and comprehensive in nature.[17]States take resort to them for the purpose of interpreting and understanding their international legal obligations. The UN documents are also effective in assisting policy makers to implement rights at the domestic level.[18]Among the above-noted instruments, Article 99(e) of the UN Draft Declaration on the Independence of Justice (the Singh vi Declaration) states that bar associations are required to promote free and equal access of the public to the system of justice. The Declaration, thus, calls on the members of the bar associations to make their services available to all sectors of society and particularly to its weaker sections, so that free legal aid is provided in appropriate cases in order to ensure that no one is denied justice.[19] This enables the bar to promote the cause of justice by protecting economic, social, cultural, civil, and political human rights of individuals and groups.[20] According to the Basic Principles on the Role of Lawyers, professional associations of lawyers are required to ensure that lawyers are made aware of the ideals and ethical duties of them and of human rights and fundamental freedoms recognized by national and international law.[21] Moreover, lawyers have the obligation to uphold human rights and fundamental freedoms recognized by national and international law in protecting the rights of their clients and in promoting the cause of justice.[22]The Basic Principles on the Role of Lawyers also require the professional associations of lawyers to cooperate with governments in order to ensure that everyone has effective and equal access to legal services.[23] Thus, the obligation of lawyers to work for the cause of justice as well as to ensure equal and effective access to legal services clearly indicate the provision of uncompensated service of lawyers to those who are in need of it.

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[17] R J Wilson, 'Principles, Sources and Remedies for Violation of the Right to Legal Assistance in International Human Rights Law', in *International Legal Aid and Defender System Development Manual* (National Legal Aid and Defender Association 2010) 21.

[18] C Chinkin, 'Sources', in D Moeckli, S Shah, S Sivakumaran and D Harris (eds), *International Human Rights Law* (Oxford University Press 2013) 92.

[19] *The UN Draft Declaration on the Independence of Justice (the Singhvi Declaration*), Art. 94.

[20] *Ibid*.

[21] *The Basic Principles on the Role of Lawyers*, Principle 9.

[22] *Ibid*, Principle 14.

[23] *Ibid*, Principle 25.

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice System[24] (hereinafter the Principles and Guidelines), the most comprehensive instrument to date in the area of legal aid,[25] call on States to establish a nationwide legal aid system involving a wide range of stakeholders as legal aid service providers. This approach seeks to integrate a variety of service providers with a view to increasing outreach, quality and impact, and facilitate access to legal aid across the country.[26] The Principles and Guidelines candidly acknowledge *pro bono* schemes as a realistic and cost effective model for the provision of legal services to the poor.[27] Such arrangement is able to ensure access to legal services for those living in poverty and thus, can provide maximum coverage of the potential beneficiaries.[28]

The above exposition indicates that providing *pro bono*is not only an ethical exercise, it constitutes a component of lawyer's professional obligations. International human rights instruments also recognize the role of *pro bono* schemes in ensuring access to justice for those who are in need of the service and, therefore, require lawyers to provide the same. In addition, *pro bono* scheme is able to ensure equal access to legal services for all.

2. Current Standard of *Pro Bono* Service in Bangladesh

The adversarial nature of court proceedings makes lawyers an indispensable part of the legal proceedings in Bangladesh. However, there is no specific legal provision in the Bar Council Rules[29] that obligates lawyers to provide free legal services to the poor. Even the Canons of Professional Conduct and Etiquette for Advocates (hereinafter the Canons) offers an unsatisfying moral exhortation regarding legal services for the poor. While referring to the duties of an advocate towards his clients, the Canons have been

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[24] General Assembly Resolution, A/RES/67/187(28 March 2013).

[25] Gabriela Knaul,'*Report of the Special Rapporteur on the Independence of Judges and Lawyers'*A/HRC/23/43 (15 March 2013), para. 25. <http://dag.un.org/bitstream/handle/11176/304661/A_HRC_23_43-EN.pdf?sequence=3&isAllowed=y> accessed 21 August 2016.

[26] The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 14 and Guideline 16.

[27] *Ibid*, Guidelines 11, 12 and 16.

[28] *Ibid*, Principle 14, Guidelines 11, 12 and 16.

[29] The legal profession in Bangladesh is regulated by three distinct organizations: the district Bar Association in each district, Supreme Court Bar Association in the Supreme Court and the Bangladesh Bar Council. The Bar Council is the key institution and it issues licenses to lawyers, and monitors their disciplinary and welfare activities.

silent about the responsibilities to poor justice seekers.[30]As a result, the Bar Council Rules or the Canons of Professional Conduct and Etiquette do not specifically obligate lawyers to provide *pro bono* services for poor justice seekers in Bangladesh.

Yet an obligation exists concerning lawyers' *pro bono* obligation in Bangladesh. This becomes evident from the Preamble of the Canons. The Preamble states that the rule of law is an essential feature of civilized society as well as a pre-condition for the realization of ideal justice. Such a society aims to provide all citizens equal protection of the law and thereby secures to them the enjoyment of their lives, property, and honour. The community of advocates imbued with the spirit of public service and dedicated to the task of upholding the rule of law is expected to contribute significantly towards the creation and maintenance of conditions so that the government can function fruitfully with a view to ensure the realization of political, economic, and social justice by all citizens.[31]Therefore, members of the legal profession are expected to contribute not only to solving legal problems, but also to ensure social justice and the rule of law in society. According to Sossin, social justice and the rule of law are two underlying principles that require lawyers to perform *pro bono* services.[32]States are under an obligation to ensure that all citizens become subject to similar legal rules and are able to exercise similar legal rights. However, even when equality is guaranteed, an affluent party has the privilege to have an unfair outcome merely because the opposite party is unable to retain a qualified lawyer due to financial in capacity. The role of *pro bono* service is crucial in this respect. By providing this service, lawyers can mitigate the justice gap and ensure that the rule of law prevails in the society.[33]

As far as social justice is concerned, *probono* is an effective means in redressing the imbalance of power where one party appears before the court without a lawyer. Self-representation in the courtroom without realizing the case is unable to give voice to legal rights of the parties concerned. This undermines the egalitarian values of a liberal democracy.[34]Moreover, as Sossin notes, lawyers help parties to understand the case against them and thus, play the role of empowerment.[35]Another aspect of the social justice rationale for *pro bono* suggests the legal profession's monopoly in the delivery of

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[30] *Bangladesh Bar Council Canons of Professional Conduct and Etiquette* (as amended up to 2013), Chapter II.

[31] <http://bangladeshbarcouncil.org/cmsadmin/upload_dir/bar_council_rules.pdf> accessed 13 March 2014.

[32] Sossin, see above n 9, 137-141.

[33] *Ibid*, 137.

[34] *Ibid*, 139-140.

[35] *Ibid*, 140.

legal services. The price of legal service is high and a considerable portion of the population cannot afford such service. Therefore, lawyers have recognized the responsibility of *pro bono* service in return of the privileges enjoyed by them.[36]

Along with the ethical motivation of lawyers, other factors can influence the delivery of *pro bono* service. According to Gran field, institutional variations including involvement of the intending lawyers in *pro bono* activities in law schools, workplace characteristics, such as, solo practitioners or large law firms, allowing lawyers to charge a particular portion of their volunteer legal work as billable service and offering awards are able to put a mark on the motivation and performance of lawyer's *pro bono* service.[37]The educational experience of law students builds the foundation for their future practice.[38]Particularly when law students are involved in providing free legal services to the poor during the formative stage of their career, they acquire adequate motivation to continue such service even in their professional life.[39]However, academic exercise does not provide adequate motivation to Bangladeshi students in using the law for the poor people.[40]In other words, law students lack adequate service-mindedness to provide *pro bono* service to the poor people of the community.[41]This influences their service delivery when they enter into professional life.

In Bangladesh, the lack of lawyers' commitment to provide *pro bono* service becomes evident from other factors also. As Farid notes, the Bangladesh Bar Council or the district bar associations has not made a significant effort to motivate lawyers to perform *pro bono* representations.[42] In addition, *pro bono* practice has not achieved an

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[36] *Ibid*.

[37] Robert Granfield, 'The Meaning of Pro Bono: Institutional Variationsin Professional Obligations among Lawyers' (2007)41 *Law and Society Review*113.

[38] M Jeeves and J Macfarlane, 'Rethinking Legal Education', in J Cooper and R Dhaveen (eds), *Public Interest Law* (Basil Blackwell ,1986) 394.

[39] Farzana Akter, 'Integration of Legal Aid Activity in Law School Curriculum: An Overview of Bangladesh and India' (2016)23*International Journal of Clinical Legal Education*172, 194.

[40] Cynthia Farid, 'New Paths to Justice: A Tale of Social Justice Lawyering in Bangladesh' (2014)31*Wisconsin International Law Journal* 421, 459; Ridwanul Hoque, '*Room for Improvement*' (D + C Development and Cooperation2012)<http://www.dandc.eu/en/article/law-schools-must-do-much-better-job-bangladesh> accessed 14 March 2016.

[41] Laila Binte Rahman, 'To improve legal education', *The Daily Star* (Dhaka, 17 February 2015) <http://www.thedailystar.net/law-and-our-rights/to-improve-legal-education-65253> accessed 18 February 2015.

[42] Farid, see above n 40, 460.

institutional shape within law firms in Bangladesh. As a result, specific lawyers designated to conduct such cases does not exist within law firms.[43]

It should be noted that lawyers enrolled in the Bar Council of Bangladesh or members of respective district bar associations are required to subscribe a small amount in its annual fee as a part of providing legal aid service to the poor. This is compulsory to prolong their membership in the concerned organization. However, the obligation of a lawyer to render *pro bono* services is not satisfied merely by cash donations, rather such obligation is fulfilled through personal commitment, engagement, and individual relationships with a view to ensuring social justice.[44]Providing *pro bono* services can make a difference between the mere practice of law and legal profession. When service is rendered for the public good, this works as the foundation for the practice of law.[45]

As noted earlier, international human rights instruments have also acknowledged the responsibility of lawyers to provide *pro bono* services. More particularly, the Principles and Guidelines have considered *pro bono* a cost effective and practical model for providing free legal services to the poor. This can widen the coverage of the potential beneficiaries and ensure effective outreach of the service. Thus, *pro bono* can complement the government operated legal aid system in a given country and can ensure access to justice for those living in poverty.

3. Conclusion

The lawyer's role is crucial in establishing the rule of law in the society.[46] However, it becomes apparent that the organized *pro bono* practice is not prevalent among the law firms and lawyers in Bangladesh. The lack of aninstitutionalized base towards *pro bono* services is not only inconsistent with the international human rights standards, it also causes a lack of wide outreach of legal services for those living in poverty in Bangladesh. This eventually disables the poor to access justice to claim their rights under the law and the constitution. The article, therefore, recommends that Bangladeshi lawyers should render *pro bono* services as a part of their professional responsibility, and law firms should assign designated lawyers to provide the same. Various institutional arrangements are essential for establishing an organized *pro bono* culture. As Jeeves and Macfarlane note, the educational experience of the intending lawyers is

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[43] Ishita Dutta, 'Strengthening pro bono legal services', *The Daily Star* (Dhaka, 24 December 2014)<http://www.thedailystar.net/op-ed/strengthening-pro-bono-legal-services-56731>accessed 26January 2015.

[44] Sossin, see above n 9, 140.

[45] J C Major, 'Lawyers' Obligation to Provide Legal Services' (1995),33 *Alberta Law Review* 719, 721.

[46] Sossin, see above n 9, 132.

able to influence his or her aims and expectations for future practice.[47]Legal education in Bangladesh, therefore, should integrate legal aid programme or *pro bono* activities as a compulsory component of its curriculum. The bar is influential and can direct the activities of the legal institutions; it is accountable for their failures also.[48]Therefore, step should be taken to establish legal aid committees in district bars of Bangladesh as well as to ensure their accountability through appropriate regulations. The Bar Council could make provision to the effect that after the enrolment as an advocate, a lawyer is required to take on a certain number of *pro bono* cases within a specified number of years. In addition, as the Principles and Guidelines suggest, introduction of some other incentives might be useful in attracting lawyers to *pro bono* services, like tax exemption and offering various fellowships.[49] Thus, an organized system of *pro bono* services could be established in Bangladesh for the purpose of ensuring access to justice for those living in poverty.

[47]See above n 38, 394.

[48] See above n 13, 4.

[49] See above n 26, Guideline 11.

Defying Torture: Role of the Judiciary in Bangladesh

Dr. Raushan Ara*

1. Introduction

The UN Human Rights Committee in its 'General Comment No. 20' considers the prohibition of torture under 'article 7' of the 'International Covenant on Civil and Political Rights, 1966'. This consideration places emphasis on the obligation of state parties to afford anti-torture protection within its legal framework. States may provide this protection through legislative, judicial, administrative or any other measures as may be necessary. Simultaneously, there has also been a growing emphasis upon the positive obligation of states to fulfill protected rights of their citizens. This obligation requires states to adopt various appropriate measures towards the full realization of those rights.[1] However, all these realizations and protections of rights will be done by state organs like the Legislature, Executive and Judiciary of concerned state. And Bangladesh as a state party is also having its international obligations to protect rights of individuals and to guarantee full realizations of those rights. Within these obligations Bangladesh derives special obligation to protect individuals' from various abuses of human persons including torture[2]. This special obligation derives from the 'United Nations Convention

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This article is a modified version of 'chapter-5' of the author's Ph.D. thesis titled 'Normative and Institutional Responses to Torture in Bangladesh'.

1 Md Mahbubur Rahman, and Sk Samidul Islam, 'Obligation of Bangladesh under article 4 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984: A Performance Audit' (2006) 10 (1&2) *Bangladesh Journal of Law* 119, 134.

2 The definition of 'torture' as provided by article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,1984 is taken as standard. It is stated that "the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application".

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984' popularly known and hereafter referred as the 'CAT' or the 'Convention against Torture'. 'CAT' is the only binding convention at the international level that deals exclusively with the 'eradication of torture'. This convention obliges state parties to take specific and general measures to prevent torture and other cruel, inhuman or degrading treatment or punishment. These standards for anti-torture protection developed by the international community apply to all legal systems and set out bare minimum guarantees that every system should provide.[3] Therefore, Bangladesh in order to provide those bare minimum guarantees as a fulfillment of her international obligation activates the state organs. These state organs in Bangladesh are the 'Legislature, Judiciary and Executive'. Thus, this article focuses role of the Judiciary as one of the state organs regarding the prohibition of torture, how it activates implementation and promotes the effective prevention of torture. It is to be noted here that although Non Governmental Organizations (NGOs) are playing vital roles in laying the ground for effective implementation from their national and organizational obligations, this article leaves them apart from the main role[4] only because they have no international obligations to fulfill just like the state actors and here focus is all about one of the state organs i.e. the Judiciary's role in defying torture.

2. Judicial Activism Defying Torture

For effective administration of justice courts have a distinct and decisive role to play. In countries of written constitutions, like Bangladesh 'constitutional supremacy' presupposes existence of a 'neutral organ' and in Bangladesh it is none other than the 'Judiciary' that would be able to prevent unlawful onslaughts done by the other organs of the state. Judiciary also maintains checks and balances on the legislative and execution powers of the Legislature and the Executive.[5] It has been empowered to undo all the unconstitutional activities done by other organs of the state.[6] Apart from these, Judiciary is obliged to protect any infringement of rights and liberties of people and from any abuses of powers by the state regarding this.[7] Judiciary thus in a state which

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[3] Kolawole Olusola Odeku, *In Search of a Regime of Responsibility and Accountability for Perpetrators of Torture with Reference to Persons with Special Responsibility for Protecting Human Rights* (PhD Thesis, University of Fort Hare, 2008).

[4] The helping role is still present in this article.

[5] Arafat Hosen Khan, *Stop Extra Judicial Killings: Respect and establish an effective judiciary* (2010) <http://www.blast.org.bd/news/news-reports/101-stopextrajudicialkillings> accessed 14 September 2013.

[6] Sheikh Hafizur Rahman Karzon and Abdullah-Al Faruque, 'Martial Law, Judiciary and Judges: Towards an Assessment of Judicial Interpretations' (1999) 3(2) *Bangladesh Journal of law* 181, 181.

[7] Khan, above n 5.

declares itself a legal state plays very important roles in protecting, controlling and balancing powers of different organs of the state. However, in Bangladesh, in case of prohibition of torture, various state organs in certain steps failed to reach its optimized goal. Arbitrary arrest, detention and custodial violence have remained an unrelenting feature of our criminal justice system. These abuses are not stopped yet but fluctuated in natures only. Against this background, the higher judiciary in Bangladesh has taken a proactive stand in the prevention of arbitrary arrest, detention and the resulting torture. It delivered a number of guidelines in line with the international standards in some Public Interest Litigation (PIL) cases for initiating legal reforms by the government.[8]

Therefore it is pertinent to stress from the outset that this article focuses the role of the judiciary in activating implementation and promoting the effective prevention of torture. It is done by the Judiciary by invoking international standards in many judgments through directly or indirectly in the form of interpretation. In certain times Judiciary is developing consistent jurisprudence regarding torture by addressing legal reform in the power of arrest, detention and custodial violence. It also moves towards innovative approaches of redress in case of violations of fundamental rights and illegal detentions. All these issues are at this instant discussed underneath.

2.1 Invoking International Standards in Judgments

Today, many human rights conventions both regional and international, address the issue of torture and ill-treatment of persons. This signifies the dedication of international community in outlawing tortuous activities. The United Nations 'Convention against Torture', first binding international instrument, particularly asserts the prohibition of torture in absolute form in any case whatsoever, even in, emergencies or armed conflicts. It obliges states to take appropriate measures to prevent torture and facilitates redress to the survivors within the framework of their legal systems. Every state party to the convention under 'treaty laws' and non-state party under the 'general international laws' is responsible for the administration of criminal justice system to ensure that these international standards are adhered to.[9] However, among the national institutions, the Judiciary indeed, always comes and is, in the forefront for the protection of human rights guaranteed in the Constitutions and other existing laws of the country. Functions of the Judiciary thus among others, are to oversee whether the powers of the 'implementing organs of the state' are exercised according to laws, and whether the rights of individuals are protected from abuses of human persons done by the unauthorized state actions.[10] It is also necessary to make the protector of law and the custodians of lock-ups and prison

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8 National Human Rights Commission, Bangladesh, *Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh* (2013) 16.

9 Odeku, above n 3.

10 NHRC, above n 8.

houses to aware of the national and international legal rights of the people[11] within which torture is obviously be set in priority. However, the judiciary in Bangladesh did and is trying to do to oversee the powers of the implementing organs and to protect the abuses of human persons especially in tortuous activities taking the international standards into consideration in its judgments. These international standards may be applied directly in certain situations in domestic laws of our country and may also be applied by Judiciary indirectly taken into account the spirit and intention of the existing laws and its makers as a whole.

2.1.1 Direct Application of International Law

In Bangladesh application of international standards or norms to national laws is very slow and complex. In the process of implementation not only states but also domestic courts can play an imperative role. Courts can cite precedents of other jurisdictions by conforming to relevant international standards. In the adjudication of international crimes, domestic courts will lead the trial and when they are 'unable' or 'disinclined' to prosecute the same, any other international courts like the International Criminal Court can step into it and prosecute the crime.[12] Historically international law has long been swaying and contouring the basis for decisions of domestic courts. National courts now are regularly confronting with various issues of international law where they apply their unique version of law and try to resolve the issue of international concern objectively, even if, national factors always influence the international one.[13] However, in Bangladesh, international treaties do not automatically become part of national laws. Sometimes those require approval of the legislative body of the country and have to be included in various legislations of the country. Nevertheless, it is possible for Bangladeshi courts to apply relevant aspects of customary international laws.[14] In this complicated process Courts must persistently try to invoke international human rights standards either directly, where possible, using standards in interpreting domestic laws of the country.[15]

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[11] A H Monjurul Kabir, *Police remand and the need for judicial activism* (2007)< http://www.banglarights.net/HTML/civilrights-07.htm> accessed 14 September 2013.

[12] International Bridges to Justice, *Representing Victims of Torture* (2011) < http://defensewiki.ibj.org/index.php/Representing_Victims_of_Torture> accessed 16 May 2013.

[13] Sheikh Hafizur Rahman Karzon and Abdullah-Al Faruque, 'Status of International Law under the Constitution of Bangladesh: An Appraisal' (1999) 3(1) *Bangladesh Journal of Law* 23, 29.

[14] REDRESS, *Torture in Bangladesh 1971-2004 Making International Commitments a Reality and Providing Justice and Reparations to Victims* (2004) 16.

[15] International Bridges to Justice, above n 12.

In case of treaty making and implementation under the present legitimate system, the executive exercises unlimited power. Since a treaty often creates rights and duties for citizens, the question of legitimate implementation of a treaty requires its legislative implementation.[16] Further, international treaties have persuasive value where no domestic law exists or where it is unclear but obviously those have to be subordinate to and consistent with national laws. The Appellate Division of the Supreme Court in the judgment of *Hussain Mohammad Ershad v Bangladesh and others*[17]also affirm this connotation in the words that :

> … The local laws, both constitutional and statutory, are not always in consonance with the norms contained in the international human rights instruments. The national courts should not straightway ignore the international obligations, which a country undertakes. If the domestic laws are not clear enough or there is nothing therein, the national courts should draw upon the principles incorporated in the international instruments. But in the cases where the domestic laws are clear and inconsistent with the international obligations of the state concerned, the national courts will be obliged to respect the national laws, but shall draw the attention of the law-makers to such inconsistencies.

However, the High Court Division and the Appellate Divisions of the Supreme Court referred in several judgments[18]certain international human rights standards where they looked into those treaties and conventions as an 'aid in interpreting' the implied rights of the Constitutions. [19] But this is not a consistent judicial practice.[20] International conventions are only ignored when it is contrary to the national laws.[21]

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[16] Karzon and Faruque, above n 13, 43.

[17] (2001) 21 BLD (AD) 69.

[18] Per Bimalendu Bikash Roy Choudhury J, *Hussain Mohammad Ershad v Bangladesh* (2001) 21 BLD (AD) 69. See also *Bangladesh v Professor Golam Azam* (1994) 46 DLR (AD) 192 and *Tayazuddin and another v The State* (2001) 21 BLD (HCD) 503.

[19] *H M Ershad v Bangladesh* (2001) BLD (AD) 69, 70; *Bangladesh National Women Lawyers Association v Ministry of Home Affaairs* (2009) 61 DLR 371; *State v Metropolitan Police Commissioner* (2008) 60 DLR 660; *Apparel Export Promotion Council v Chopra* (1999) AIR (SC) 625, 634 ("in cases involving violation of human rights , the courts must forever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field"); *State v Metropolitan Police Commissioner* (2008) 60 DLR 660 (referring to *People's Union for Civil Liberties v India* (1997) SCC (Cri) 434 which quoted with approval the statement, "the provisions of an international convention to which Australia is a party especially one which declares universal fundamental rights , may be used by the courts as a legitimate guide in developing the common law" made in *Minister for Immigration and Ethnic Affairs v Teah* (1995) 69 A.L.J. 423); see also *Anuj Garg v India* (2008) AIR (SC) 663.

In case of customary international law whether the same perceptions can be applied or not by our courts is at this instant, a matter of concern. In a country where Constitution is written like Bangladesh since courts are established 'under' the Constitution and being 'creatures' of that supreme law, are required to enforce constitutional and other laws' provisions only in compliance therewith. The work of interpretation of the Constitution generally in this case comes in case of uncertainty or ambiguous legal norms. Therefore judicial decisions can be resorted to in clarifying the position of customary international laws in Bangladesh. The higher court of Bangladesh in the case of *Bangladesh v Unimarine S A Panama*[22] confronted with the issue of application of international law and declared that 'customary international law is binding on the state in order to give effect to rules and norms of customary international law'. The Appellate Division of the Supreme Court in *Bangladesh v Somboon Asavhan*[23] observed that 'court's function is to enforce the municipal law within the plain meaning of the statute'[24] when there is municipal law on an international subject. And if any conflicting situation arises as to the application and primacy of statute and customary international law, it is the statute that will be given effect to. Customary international law cannot surpass any statute in Bangladesh, on its own, nor can it fetch an alteration or becomes additional eminence to the municipal law. The trend in here in court practices is to follow the domestic statutes only on a given subject. This inclination casts serious duties on the legislators not to make laws as would intrude accepted international standards. In deciding questions of international law not covered by any statute judicial precedents, executive assertions, principles of state policy or treaties are applied as necessity by courts. Also article 25 of the Constitution may serve as a rule of interpretation for courts in the applicability of principles of international laws into laws of Bangladesh. Conversely, the Constitution and other laws even if, do not make customary international law a part of the law of the land, courts in Bangladesh are firmly declaring it to be so.[25] Providentially, Bangladesh in torture cases, now has specific domestic legislation known as 'Nirzatan Abong Hefazate Mrittu Nibaran Ain, 2013' (Torture and Custodial Death (Prevention) Act, 2013) which trails almost all the international standards regarding tortuous activities provided by the UNCAT. And now, courts in Bangladesh in this particular issue can and is applying both the domestic and international standards regarding torture specifically, directly, without any vacillation and intricacy.

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[20] Bangladesh Rehabilitation Centre for Trauma Victims (BRCT) and Bangladesh Institute of Human Rights (BIHR), *Broken Promises: The State of Reparation for Torture Victims in Bangladesh* (2006).

[21] Mahmudul Islam, *Constitutional Law of Bangladesh* (Mullick Brothers, 3rd ed, 2012) 127.

[22] (1977) 29 DLR (HCD) 252.

[23] (1980) 32 DLR (HCD) 198.

[24] *Bangladesh v Somboon Asavhan* (1980) 32 DLR 198, 201.

[25] Karzon and Faruque, above n 13, 30-33.

2.1.2 Indirect Application of International Law

Since direct application of international conventions and treaties into the municipal laws of Bangladesh may not always be possible, courts can resort to the indirect application of laws whenever it is necessary, by interpreting laws and taking the intention of its makers as a whole.[26] In case of supreme law of the country that is the Constitution, court can interpret it in such a way that ascertains the intention of the makers. However, all other existing laws and principles may serve as a guide in the determination of that intention. This intention can be gathered primarily from the language, from the words used[27]or upon consideration of the whole of the enactment.[28] Sometimes it is necessary to construe a 'unified whole' in order to explain a particular 'clause' of the enactment. It cannot be interpreted in isolation. It is a legal presumption that each and every clause inserted has been 'carefully chosen', 'intentionally placed' and inserted for some 'useful purpose'. It has been mallet into such a way that every word has to be given effect to and when duly realized has some 'practical operation'. No word should be rendered 'meaningless or inoperative'.[29] Unless it is otherwise provided when the same words are used in several places, it has to be interpreted as meaning the same thing. And in case of different words it has to be needed to take it as assigning different meanings unless anything contrary appears. Also to determine the intention of the makers it is erroneous to start with a '*priori* ideas' and then try to form it into the mesh words of the Constitution. And when the language is simple and plain, admits of only one meaning, the intention is very clear and declared by the statute itself even if the effect is harsh. The court in such a situation is not at liberty to explore a meaning beyond the instrument. But when it appears to be unduly harsh or absurd, court can enquire about the real intention of the framers on the conferment of such powers on legislature. This interpretation applies when the concept of reasonable law is implicit in the constitution as in the case of the American and Bangladesh Constitutions. Generally the court defers about the legislative judgment of reasonableness of a law but when a statute is quite unreasonable and needlessly impinging on the accepted values of laws and international standards, Court can declare that law absolutely void as not being permitted by the Constitution.[30] And where the Constitution grants a power, the interpretation should include the widest possible explanation of that power and all other ancillary powers in order to effectuate the main one should also be constructed with and presumed to have been given. In construing a provision conferring prohibition of torture, which is not within the 'special law' regarding torture as provided above, any construction which

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[26] *Anwar Hossain Chowdhury v Bangladesh* (1989) BLD (Spl) 1.

[27] *Mujibur Rahman v Bangladesh* (1992) 44 DLR (AD) 111; *Mahboobuddin Ahmed v Bangladesh* (1998) 50 DLR 417, 423; *Aftabuddin v Bangladesh* (1996) 48 DLR 1.

[28] See above n 26.

[29] See also *Begum Shamsunnahar v Speaker* (1965) 17 DLR (SC) 21.

[30] Islam, above n 21, 43.

would unduly restrict that right ought not to be adopted. Construction of these rights have to be such that renders the right fully effective and operative.[31] In respect of fundamental rights and freedoms of individuals, courts should provide a generous interpretation avoiding what has been called the 'austerity of tabulated legalism' suitable to give the individuals the full measure of the fundamental liberties. It is necessary to bear in mind that by construction a provision is not extended to meet a case for which it has not been made clearly and undoubtedly.[32] It is the duty of the court to get at the real intention of the legislature by carefully analyzing the whole scope of the statute or section or phrase under consideration and in this respect regard must be had to the context, subject-matter and object of the statutory provision in question in determining whether the same is mandatory or directory.[33] Thus in case of direct application or indirect application of international standards prohibiting torture, as a signatory State, our Constitution is in nowhere a bar, moreover, it has got the express provision regarding the prohibition and the existing anti-torture laws as auxiliary to help courts in interpreting that standards clearly and absolutely. All the existing provisions of law that may lead to torture, as are falling under this category; the courts can also follow all the above mentioned principles in this regard.

2.2 Developing Consistent Jurisprudence for Torture

International crimes wherever they occur, being universal in nature, have to be condemned and every state has inherent right to prosecute perpetrators of such crimes. In case of systematic violations of human rights including torture, an effectively functioning domestic system or investigative body like the judiciary may serve the best safeguards against this and provides redress that normally appeared to have a preventive effect where it is most unlikely that violations of human rights would be widespread. In Bangladesh, however, torture generally occurs when the victim is in custody. Therefore the right to challenge the legality of detention becomes an important tool in combating torture and ill-treatment. Detainees also have the right to be heard promptly by a judicial or other relating authority. All these rights are one of the primary rights of international laws and have been recognized as non-derogable by a number of international bodies and instruments. However, in the process of framing charges, it is often the judge who confirms charges, is the first official beyond the prison that the detainee sees, and to whom consequently may be the first opportunity for them to raise allegations of torture. Therefore the role of judicial and prosecuting authorities as regards combating torture and ill treatment is utmost importance, cannot be denied and overstated.[34] This institution i.e. the Judiciary, among others, in Bangladesh is trying to activate the effective prevention of torture and develops anti-torture regime through a large number

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[31] *Rashid Ahmed v State* (1969) 21 DLR (SC) 297.

[32] Islam, above n 21, 49.

[33] *Ibid*, 56.

[34] REDRESS, *Reparation for Torture* (2003).

of judgments regarding this and fulfills its international obligations as one of the state organs of Bangladesh. This part thus focuses first how the judiciary is forming legal reform in the issues of arbitrary use of arrest and detention, founding innovative approaches of redresses and how it is addressing the standards of personal liberty and its reasonable restrictions in the light of international standards.

2.2.1 Legal Reform to Address Arbitrary Use of Arrest and Detention

Arbitrary use of power of arrest and the ensuing custodial violence is rife in Bangladesh. This exceeding and abusive power of arrest and detention is not only the violation of national laws but also the international standards regarding this. In this situation the judicial organ of Bangladesh stands forefront among others to prevent those abuses and recommends legal reforms of certain laws concerning this. This part of the article thus is divided into four sub-parts providing first one, the police power of arrest and custodial violence; second one, unlawful detention; third one, system of remand and extorting confession or information and the last to develop the evidentiary principles of torture. All of these are stated in the following:

2.2.1.1 Power of Arrest and Custodial Violence

Torture in the custody of police is a bare violation of human rights and an intended assault on human dignity. It is degrading and sometimes destroys the individual's personality to a certain extent. During the police custody, under the shield of uniform and confined in the periphery of police stations and lock-ups, victims are in complete unaided situation that requires special protection, safety and aid from the outsiders.[35] Therefore, an effectively functioning authority that will control the insiders from arbitrary and excessive use of powers, provide guidelines specifically to follow throughout investigation, interrogation or otherwise, is needed for those detainees presently. And it is none other than the judiciary with its special authority as the guardians of the Constitution dissects all the activities regarding this of both the Legislature and the Executive. The Judiciary is trying to restrain excessive police powers with its various pronouncements and form legal reforms to address arbitrary use of arrest and detention.

The first major case to question the abuse of police power of arrest under section 54 of the Code of Criminal Procedure, 1898 (Cr. P. C.) is the *Bangladesh Legal Aid and Services Trust (BLAST) v Bangladesh.*[36] The judgment is undoubtedly an important judicial pronouncement that is already upheld by the Appellate Division of the Supreme Court of Bangladesh for limiting arbitrary and excessive power of arrest and detention.

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[35] Assignment Point, *Assignment on Human Dignity and Torture in Bangladesh* (2013) <http://www.assignmentpoint.com/arts/law/assignment-on-human-dignity-and-torture-in-bangladesh.html> accessed 11 June 2013.

[36] (2003) 55 DLR (HCD) 363.

The judgment offered guidelines for the law enforcing agencies to follow[37] and directed the Government to amend legislations that facilitates torture.[38] Amnesty International released a report on this judgment noting with similar wording that this judgment restricts arbitrary use of 'administrative detention law' including the Special Powers Act,1974 and recommends changes in 'prison terms for wrongful confinement and malicious prosecution'.[39]

However, directions given in the *BLAST v Bangladesh* case cover three important issues of criminal proceedings i.e. directions on arrest, detention and remand.[40] In case of the first issue i.e. directions on arrest, the word 'accused' is clarified by the Appellate Division of the Supreme Court by stating that the word 'accused' used under sections 167, 169,170 and 173 of the Code of Criminal Procedure,1898, stands for 'the suspected offender who has not yet come under the cognizance of court'. It is the duty of the police officer regarding arrest, to ascertain the connivance of the accused in respect of a cognizable offence, if arrest is made during investigation.[41] However, the magistrate in this situation has to scrutinize the reasonableness of complaint, credible information or the suspicion for arrest according to the said judgment.[42]

The Supreme Court also directed in the said judgment as to the issue of arrest without warrant and stated that arrest under section 54 of the Code of Criminal Procedure, 1898 cannot be made only for the purpose of detaining the accused under special detention laws like the Special Powers Act, 1974. The judgment also focused on the disclosure of the 'identity' and showing of the 'identity card' of the concerned officer to the accused and to the person present at the time of arrest. It is the duty of the police officer to have all the reasons and other particulars of arrest entered in a separate register (also supported by the Appellate Division of the Supreme Court) 'until a special diary is prescribed for that purpose'.[43] Also the Court recommended addition of a new section providing for a special diary to record the reasons and other particulars of the accused as required under recommended new sub-section (2) of section 54 of the Code of Criminal

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[37] Shahdeen Malik, 'Arrest and Remand: Judicial Interpretation and Police Remand' (2007) (Special Issue: Criminal Justice System) *Bangladesh Journal of Law* 258, 261.

[38] NHRC, above n 8.

[39] Human Rights Initiative, *Bangladesh Country Report: Anti-terrorism Laws and Policing* (2007) <http://www.humanrightsinitiative.org/publications/chogm/chogm_2007/docs/country_reports/071004_chogm07_bangladesh_anti_terrorism_policing_country_report2007.pdf> accessed 16 January 2013.

[40] NHRC, above n 8.

[41] *Government of Bangladesh v BLAST* (2016) 8 ALR (Special Issue)(AD) 5, 141, Para 134.

[42] *Ibid*, Para 136.

[43] *Ibid*, Para 140.

Procedure by the officer in charge of the police station after section 44 of the Police Act, 1861since there is no provision for maintaining that diary in the concerned Act.[44]

Also the detained person has the right to know the reasons of his or her arrest and the concerned police officer shall furnish those reasons to him within three hours of bringing him to the police station. The court's directions also provide for consulting a lawyer according to the choice of the detainee or meet his family or relations.[45] And where arrest is made not from the detainee's 'residence or place of business', a relative of him shall be informed of arrest through 'messenger devices or processes, within one hour of bringing the accused to the police station'.[46]

At the instance of finding any mark of injury on the body of the arrested person, it is the responsibility of the police officer to record the reasons for such and takes the person to the nearest hospital or Government doctor for the better treatment and obtains a 'certificate' concerning the wound from the assigned doctor.[47] Guidelines provided by the Appellate Division of the Supreme Court also stated that where there are reasons for the Magistrate to believe that the 'authority to commit a person in confinement' is acted in contravention of law, it is the duty of that particular Magistrate to 'proceed against such officer under section 220 of the Penal Code' 1860.[48]

In another case '*Saifuzzaman v State*',[49] the High Court Division noticed about the ruthless violation of the fundamental rights of many citizens by police. The court issued certain guiding principles on arrest just like the *BLAST* case and discerned about the fact that in certain situations magistrates are not acting in accordance with the law. Among others, the High Court Division directed that while making the arrest of any person the police officer shall prepare a 'memorandum of arrest' and obtain the 'signature of the arrestee with particular date and time of arrest'. However, copies of all the relevant documents as stated above should be sent at the time of production of the arrestee to the Magistrate for making order under section 167 of the Code of Criminal Procedure.[50] It is also supported by the guidelines as provided in *BLAST* case by the Appellate Division of the Supreme Court to the magistrate, judges and tribunals having power to take cognizance of an offence under section 167(2) and 169.[51]

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44 BLAST, above n 36.

45 NHRC, above n 8.

46 BLAST, above n 36.

47 NHRC, above n 8.

48 BLAST, above n 41, Para 223.

49 (2004) 56 DLR (HCD) 324.

50 NHRC, above n 8.

51 BLAST, above n 48.

However, numerous reports from the media confirm about constant abuse of power and authority by various law enforcing agencies resulting in extra-judicial killings of the citizens. These abuses comprise gross violations of fundamental rights as guaranteed by the Constitution of the People's Republic of Bangladesh which was also noticed by the High Court Division. And in 2009 in the case of *ASK, BLAST and Karmojibi Nari v Bangladesh*[52] the court issued a *Rule Nisi* on the respondents to show cause as to why the extra-judicial killings, in the name of cross-fire or encounter by the law enforcing agencies, should not be declared to be illegal and without lawful authority. The *Rule Nisi* also directed the respondents to show cause as to why they should not be directed to take departmental and criminal action against responsible persons for such killings.[53]

As regards abuse of power and custodial torture, killings by Special Forces, the High Court Division of the Supreme Court of Bangladesh issued various Rules for protecting the rights of citizens.[54] The High Court Division ordered the law enforcing agencies to follow the existing procedural laws like Cr. P.C. provisions properly and remain within the limits of the law while arresting any citizen of the country.[55] The Court also issued a show-cause ruling for the government to explain the reasons why it should not be directed to ensure the safety of people it had arrested or detained.[56] There are other instances also where writ petitions were filed by NGOs and the High Court Division issued Rules to show cause as to why detained authority should not be directed to ensure the detained or arrestees' safety and security while they remain in custody.[57]

2.2.1.2 Unlawful Detention

In Bangladesh, the preventive detention laws provide for detention of persons and the power is given to them in the Code of Criminal Procedure, 1898 law in the form of arrests on suspicion by police. These powers are exercised in terms of established laws of the country and, hence, are 'in accordance with law'. However, the Judiciary has, over the years, especially at the highest level struggled to limit the exercise of 'special detention' power by the executive on the plea of deterring 'prejudicial acts, i.e. acts for which one can be detained by the order of the Executive'.[58] And in recent years the

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[52] Writ Petition No. 4152 of 2009.

[53] NHRC, above n 8.

[54] Ain o Salish Kendra (ASK), *Human Rights in Bangladesh 2006* (2007).

[55] NHRC, above n 8.

[56] Human Rights Watch, *Judge, Jury, and Executioner: Torture and Extrajudicial Killings by Bangladesh's Elite Security Force* (2006) <http://www.unhcr.org/refworld/docid/45a4db532.html> accessed 16 January 2013.

[57] NHRC, above n 8.

[58] Shahdeen Malik, 'Arrest and Remand: Judicial Interpretation and Police Remand, Special Issue: Criminal Justice System (2007) *Bangladesh Journal of Law* 258-292, 264.

Higher Court has delivered some judgments by taking a 'liberal stance' on writs of *habeus corpus* through reinterpretation of the 'old' notion of 'person aggrieved'.[59] Also it declared 'preventive detention' under various special laws as illegal and recently awarded compensation[60] for illegal detention.[61]

However, among the three important issues of criminal proceedings that is covered in the *BLAST v Bangladesh* case, 'detention' is one of them.[62] This judgment stated about discretionary powers of the police to keep the accused person in custody according to their desires in the 'negative'. There is no way or other that the accused person can be detained 'for more than 24 hours without the special leave of the Magistrate concerned' and the police has to 'write for and obtain special leave for such detention'. The special provision in the judgment is that any longer detention other than 24 hours is declared 'absolutely unlawful'. However, police should sent the accused before the magistrate and seek permission for such detention.[63] At the time of detention order, it is the duty of the magistrate to record the reasons for such order. The Magistrate should also satisfy himself about the well founded accusation of crime and the necessity of the presence of the accused for investigation.[64] The Appellate Division in this judgment also held that the case diary should 'contain full unabridged statement' of the examination of accused and 'copies of entries of the diary' should be forwarded with all other documents in order to 'to prevent any abuse of power by the police officer'.[65] And if all these requirements are not satisfied and complied with, it is not obligatory on the magistrate 'to forward the accused either in the judicial custody or in the police custody'.[66]

However, the Supreme Court of Bangladesh previously repeatedly held about the obligation of it to examine both the legality and the manner in which the detention orders were passed. It was held in *Sajeda Parvin v Government of Bangladesh*[67] that a rule was wrongly discharged in *habeas corpus* matter and it is ineffective for the reason

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59 *Mohiuddin Farooque v Bangladesh* (1997) 49 DLR (AD)1.

60 *Bilkis Akhter Hossain v Bangladesh* (1997) 17 BLD (HCD) 395. The government, however, has appealed against this judgment to the Appellate Division and the matter is pending before that Division.

61 Shahdeen Malik, 'Human Rights and the Role of the Judiciary', in Bangladesh Institute of Law and Informational Affairs (BILIA), *Human Rights in Bangladesh: A Study for Standards and Practices* (BILIA, 2001) 169.

62 NHRC, above n 8.

63 BLAST, above n 41, Para 133.

64 *Ibid*, Para 135.

65 *Ibid*, Para 140.

66 *Ibid*, Para 136.

67 (1988) 40 DLR(AD) 178.

that the detention order has expired. It was also observed that in a *habeas corpus* matter it is not the 'order' of detention but the 'fact' of detention that should be taken as an issue to be considered. And in exceptional circumstances when Court's order of release were frustrated by a fresh order of detention, the High Court Division in *Alam Ara Huq v Government of Bangladesh*[68] resorted to '*habeas corpus ad subjiciendum et recipiendum* (you may have the body for submitting and receiving) directed the detenu to be brought before the court and after hearing, it directed the immediate release of the detenu from the court premises.[69] Sometimes various ways were devised to avoid compliance of the order of release and compelled the Supreme Court to initiate proceedings for contempt of court.[70] In *Abdul Latif Mirza v Bangladesh*[71] the court rejected the plea of the government by declaring the intervening detention illegal.[72] It was considered that a

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[68] (1990) 42 DLR (HCD) 98.

[69] Justice Muhammad Habibur Rahman, 'Our Experience with Constitutionalism' (1998) 2(2) *Bangladesh Journal of Law* 115-132, 128.

[70] *Tahera Nargis v Shamsur Rahman* (1989) 41 DLR (HCD) 508.

[71] (1979) 31 DLR (AD) 1.

[72] See also *M A Hashem v Bangladesh* (1996) 1 BLC 5, *Mohammad Ali v Bangladesh* (1995) 47 DLR 350 (a writ of *habeas corpus* will not be maintainable where the detention order has been passed but the person concerned has not been detained). See also *Anwar v Bangladesh* (1976) 28 DLR 428 (the court found the detention order unlawful as the detention order did not indicate the nature of the prejudicial activity), *Bangladesh v Dr Dhiman Chowdhury* (1995) 47 DLR(AD) 52, *Mansur Ali v Secy. Ministry of Home* (1990) 42 DLR 272 , *Rama Rani v Bangladesh* (1988) 40 DLR 364, *Tahera Islam v Secretary, Home* (1988) 40 DLR 193, *Kabir Ahmed v Minisrty of Home* (1988) 40 DLR 353, *Amaresh handra v Bangladesh* (1979) 31 DLR (AD) 240, *Ranabir Das v Ministry of Home* (1976) 28 DLR 48, *Ghulam Azam v Bangladesh* (1994) 46 DLR 49, *Abdul Latif Mirza v Bangladesh* (1979) 31 DLR (AD) 1, 14; *Farida Rahman v Bangladesh* (1981) 33 DLR 130, *Shyam Sunder Rajgharia v M. A. Salam* (1988) BLD 127; *Khair Ahmed v Ministry of Home* (1988) 40 DLR 353, *Sayedur Rahman v Secretary, Home Affairs* (1986) BLD 272. See the observation of the court in *Dr. Habibullah v Secretary, Ministry of Home Affairs* (1989) 41 DLR 160, *Chunnu Chowdhury v D M* (1989) 41 DLR 156, *Ahmed Nazir v Bangladesh* (1975) 27 DLR 199, *Mansur Ali v Secy. Ministry of Home* (1990) 42 DLR 273, *Habiba Mahmud v Bangladesh* (1993) 45 DLR (AD) 89, *Maksuda Begum v Secy. Ministry of Home* (2000) 52 DLR 174, *Ali v Bangladesh* (1990) 42 DLR 346, *Azizul Haq v Bangladesh* (1990) 42 DLR 189, *Farzana Haq v Bangladesh* (1991) BLD 533, *Abu Sayed v Bangladesh* (2007) 12 BLC 773, *Mohammad Sayed v Bangladesh* (2008) 16 BLT 27, *Faisal Mahtab v Bangladesh* (1992) 44 DLR 168, *Aruna Sen v Bangladesh* (1975) 27 DLR 122, *Khair Ahmed v Ministry of Home* (1988) 40 DLR 353, *Habiba Mahmud v Bangladesh* (1993) 45 DLR (AD) 89, *Krisna Gopal v Bangladesh* (1979) 31 DLR (AD) 145, *Humayun Kabir v State* (1976) 28 DLR 259, *Hasina Karim v Bangladesh* (1992) 44 DLR 366,

subsequent order of detention 'howsoever independent'[73] cannot validate the previous illegal order of detention since in fact; it is nothing but purported to continue that illegal order and cannot be sustained.[74] Unless and until the detenu is released actually not merely on paper, the rule of law will be undermined.[75] It is also observed in this case that detention laws provide extensive discretionary power to the detaining authority to act in its own opinion. But conversely, the Constitution empowers the High Court Division to satisfy itself that the detaining authority has acted in accordance with law and under a lawful authority.[76] In exercise of the power of judicial review, however, the court will apply the test of reasonableness and inquire whether it was actually necessary to detain a person.[77] If there is no such satisfaction, it is obligatory on the court to issue writ of *habeas corpus* whereas the issue of any other writ is discretionary.[78] According to Hamoodur Rahman J, it is agreed that within 'lawful authority' all questions of *vires* of the statute itself and of the person or persons acting under the statute will be comprised of.[79] Article 102 of our Constitution, provides for judicial review of legislation so that the question of *vires* need not always opt for an inquiry as to 'lawful authority'. Law here is used in generic sense including judicial principles that are laid down from time to time by the Superior Courts. It suggests a strict performance of the functions and duties as laid down by laws. It is however; in this sense a *mala fide* action or an action which is colorable is not regarded an action in accordance with law and would, therefore, have to be struck down as being taken in an unlawful manner.[80]

Again in *Farzana Huq v Bangladesh*[81] it was held that when the detaining authority disregarded the court's order regarding the rights of the detained person, it goes against articles 32 and 112 of the Constitution which guards the liberty of citizens and requires

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Jahanara Begum v State (1994) 46 DLR 107, *Mahboob Anam v East Pakistan* (1959) PLD Dac 774.

73 Islam, above n 21, 761.

74 *Abdul Latif Mirza v Bangladesh* (1979) 31 DLR (AD) 1 Para 23 and 24; *Monwara Begum v Secy Ministry of Home* (1989) 41 DLR 35.

75 Islam, above n 73.

76 Md Jahid Hossain Bhuiyan, 'Preventive Detention and Violation of Human Rights: Bangladesh, India and Pakistan Perspective' (2004) 8 (1&2) *Bangladesh Journal of Law* 103-132, 121.

77 See above n 74 and also see *Abdul Baqui Balooch v Pakistan* (1968) 20 DLR (SC) 249.

78 Md Abdur Rob Howlader, 'Writ Jurisdiction of the Supreme Court of Bangladesh' (2006) 10 (1&2) *Bangladesh Journal of law* 21-52, 43.

79 *West Pakistan v Begum Shorish Kashmiri* (1969) 21 DLR (SC) 1, Paras 20- 21.

80 *Ibid*, Para 21.

81 (1990)Writ petition no. 271 of 1990.

the Executive to act 'in aid of the court's order'.[82] In the case of *Habibullah Khan v S A Ahmed* (1983) 35 DLR (AD) 72, the Appellate Division held that while giving the order of detention both the government's and court's satisfaction about the necessity of detention in public interests is required. Concerning preventive detention, it was held that it cannot be extended unless the Advisory Board, before the expiry of six months, opines positively about the necessity for detention.[83] If the opinion given by the Advisory Board is negative, the detenu has to be released[84] on the expiry of six months.[85] Also the Appellate Division in *Krisna Gopal v Govt. of Bangladesh*,[86] held that an order that deprives a man of personal liberty cannot be dealt with in a 'careless manner', and if it needs to do so, the court will be justified in interfering with such order.[87] Also in *Ferdous Alam Khan v State*[88] the court held that if the Executive passes any order with 'insufficient materials or without application of mind to the materials placed', the higher courts in Bangladesh will always look into the 'subjective satisfaction' of the authority 'objectively'.[89] In *ASK (Ain o Salish Kendra) v Bangladesh*,[90] the Court issued a *rule nisi* calling upon the respondents to show cause as to why the continued detention should not be 'declared to be without lawful authority' and why an 'independent commission should not be appointed to conduct an inquiry' into the matter.[91] The court issued this rule nisi given that it is a violation of fundamental rights as guaranteed under articles 31, 32, 35 (1) and 36 of the Constitution and since the concerned prisoners served out the terms of their respective convictions. Also in *State v Deputy Commissioner, Satkhira*[92] the High Court Division issued a *suo motu* rule and freed the victim who had been tried in violation of the Children Act, 1974 and sent

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82 See above n 74.

83 *Abdul Aziz v West Pakistan* (1958) PLD (SC) 499, 513.

84 See above n 82.

85 Asif Nazrul, *The Security and Emergency Related Laws in Bangladesh: Tools for Human Rights Violations* (2009) <http://www.southasianrights.org/wp-content/uploads/2009/10/securitylaw_BD.pdf> accessed 12 June 2013.

86 (1979) 31 DLR (AD) 145.

87 Md Ashraful Arafat Sufian, 'Preventive Detention in Bangladesh: A General Discussion' (2008)1(2) *Bangladesh Research Publications Journal* 166 -176, 170-172.

88 (1992) 44 DLR (HCD) 603.

89 Md Jahid Hossain Bhuiyan, 'Preventive Detention and Violation of Human Rights: Bangladesh, India and Pakistan Perspective' (2004) 8 (1&2) *Bangladesh Journal of Law* 103-132, 121.

90 (2004) 56 DLR (HCD) 620.

91 NHRC, above n 8.

92 (1993) 45 DLR (HCD) 643.

various directions to the concerned Ministry about the victims of prison mismanagement.[93]

2.2.1.3 System of Remand and Extorting Confession or Information

In Bangladesh, the higher judiciary in many instances ruled against the system of remand. The Supreme Court of Bangladesh opined about the system of remand for interrogation and extortion of information by application of force and stated that it is entirely against the spirit and explicit provisions of the Constitution. [94] Any law or action that is not in conformity with the guaranteed four special rights to a person arrested under article 33(1) and (2) of the Constitution will be void and makes the particular arrest unlawful.[95] Among the directions provided in the *BLAST v. Bangladesh* case, there are also guidelines for interrogations and remand. It says when the investigating officer requires to interrogate the accused, he has to file an application stating the grounds in detail for interrogation and has to produce case diary for consideration of the Magistrate. [96] Since a remand order is a 'judicial order, the magistrate has to exercise this power in accordance with the well settled norms of making a judicial order'. Accordingly he has to satisfy about all the reports and allegations constituting the offence. And 'non-disclosure of the grounds of satisfaction by a police officer should not be accepted'.[97] Also where investigation is not completed within 15 days of the detention and 'the case is exclusively triable by a court of Sessions or tribunal, the Magistrate may send such accused person on remand under section 344 of the Code for a term not exceeding 15 days at a time'.[98]

There are also directions in the said judgment regarding the place of detention. The Superior Court in order to eliminate the possibility of torture directed among others that, interrogation whenever is necessary, may be made while the accused is in 'jail custody'. Therefore by implication it can be said that any remand of the accused to the 'thana hazat' is totally prohibited by this judgment.[99] Interrogation of the accused whenever it is necessary may be done in a room in the jail by the investigating officer on the satisfaction of the concerned Magistrate for further detention.[100] Interrogation in 'jail custody' is permitted only till the special room with glass wall and grill, within the view but not within hearing of a close relation or lawyer of the accused is not constructed as

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93 Rahman, above n 69, 129.

94 BLAST, above n 63, 371.

95 *Ibid*, 276.

96 BLAST, above n 63.

97 *Ibid*, Para 134.

98 *Ibid*, Para 223.

99 Malik, above n 58, 277.

100 BLAST, above n 36.

recommended in that case.[101] In the case of Ain-*o*-*Salish Kendra v Bangladesh*[102] it was held that where there is nothing before the court to show for further remand, the parties are directed not to go for it. About ongoing remand, it also stated specifically that the accused should not be subjected to physical torture of any kind during remand.[103]

About the custodial violence, guideline (h) of the Appellate Division of the Supreme Court provided that it is the responsibility of the law enforcing officer who takes the accused in his custody on remand to produce the accused person before court as soon as the remand period expires. And where death of the accused is caused in custody, the guidelines provided for 'examination of the victim by a medical board'. And where burial of the victim is done, 'direct examination of the dead body for fresh medical examination by a medical board' is directed for. It is also provided that where 'death is homicidal in nature,' the Magistrate shall take cognizance of the offence which is punishable under section 15 of the Nirzatan Abong Hefajate Mrittu (Nibaran) Ain, 2013. However, the concerned officer in whose custody the death took place, the officer in charge or commanding officer of the respective police station all will be liable for such death according to the judgment. And in case of death in custody or the accused person is subjected to injury or 'Nirzatan' according to section 2 of the Nirzatan Abong Hefajate Mrittu (Nibaran) Ain, 2013, guideline (i) of the Appellate Division of the Supreme Court provided that the Magistrate shall refer the victim to the nearby doctor and if death caused due to such torture, he shall send the victim's body to the medical board. The doctor or the board shall ascertain the injury or the cause of death as the case may be. It is also stated in the guideline that the magistrate 'shall take cognizance of the offence *suo moto* under section 190(1)(c) of the Code of Criminal Procedure, 1898', where medical report reveals about the torture of the detainee or death of the detainee due to that torture, should not wait for 'filing of the case under sections 4 and 5' of the Nirzatan Abong Hefajate Mrittu (Nibaran) Ain, 2013, and shall proceed accordingly.[104]

On the other hand, the general criminal law of the country i.e. the Penal Code, 1860 does not provide for any specific 'crime of extortion for confession in police custody'. Therefore the *BLAST* judgment recommended addition of new provisions to include 'hurt in police or jail custody for extorting confession' as a crime and be punished with imprisonment of up to ten years with a minimum sentence of seven years of imprisonment 'if hurt is caused while in police custody or in jail' as well as payment of compensation to the victim and to the nearest relatives of the victim when death of the victim caused in police custody.[105] However, this provision is not a need now since the

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[101] NHRC, above n 8.

[102] (2004) 56 DLR (HCD) 620.

[103] NHRC, above n 8.

[104] BLAST, above n 98.

[105] BLAST, above n 63, 373.

passing of the special law named 'Nirzatan Abong Hefajate Mrittu (Nibaran) Ain, 2013' has provided for taking legal actions under this law for those specified instances.

However, in *Saifuzzaman v State*,[106] the High Court Division among others took notice of the severe violation of the fundamental rights of citizens by police and failure of the Magistrate to act according to law. In this case the Division Bench issued eleven guidelines just like the *BLAST* case to the police and magistrates as to 'arrest, detention and remand' of suspects. Among the guidelines it is also stated that non-disclosure of the grounds of satisfaction by the magistrate rendered him liable for contempt of Court, where the application is made by aggrieved person in the Court.[107] The court also recommended that the existing provisions regarding the duty of the Magistrate shall be made 'mandatory' in order to take appropriate and effective actions about custodial deaths.[108] Also in the case of *State v Abul Hashem*[109] the Court held that while the accused was in custody, it is obligatory on the Magistrate, who recorded their confession, to put questions as to the treatment, confessions and remand in police custody and remove the inducement as well as influence of the police entirely from the mind of the accused before recording his confession. It is also repugnant to 'notions of justice and fair play' and is also 'dangerous to allow' a man convicted on the potency of a confession that is not voluntary.[110] Courts have to apply a 'double test' of 'voluntariness of the confession' and whether it is 'true and trustworthy'.[111] In the case of *Hafizuddin v the State*[112] the Magistrate was held liable for not warning the accused and not giving time for reflection.[113] In *State v Mizanul Islam @ Dablu and others*[114] the court held that 'gross illegality' was committed by the magistrate while recording confessional statements as the prisoner was kept in police custody at the time of reflection which 'stands vitiated by illegality'.[115] Therefore police custody before and after the confession, is not acceptable.[116] And when a confession is 'non-voluntary' the Court has to keep the confession totally out of consideration, look for other sufficient

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[106] (2004) 56 DLR (HCD) 324.

[107] NHRC, above n 8.

[108] BLAST, above n 36.

[109] (1998) 50 DLR (HCD) 17.

[110] 9DLR (DB) 511; (1958) PLD Dhaka 75; (1956) AIR (SC) 217.

[111] M Ansaruddin Sikder, *Law of Evidence* (M Tanveer Foysal, 1st ed, 1991) 414.

[112] (1990) 42 DLR (HCD) 397.

[113] NHRC, above n 8.

[114] (1988) 8 BLD (HCD) (DB) 317.

[115] *State v Mizanul Islam @ Dablu* (1988) 8 BLD (HCD) (DB) 317, 328.

[116] Obaidul Huq Chowdhury, *Evidence Act* (Dhaka Law Reports, 3rd ed, 1999) 67.

evidences for conviction and in case of failure, the accused must be acquitted.[117] Also, 'one cannot base a conviction solely on a confession, especially in a criminal offence' the learned Judge has commented in the matter of *Abu Syed v the State*.[118]

2.2.1.4 Evidentiary Principles of Torture

In Bangladesh, the Evidence Act, 1872 recognizes the danger of false implication against the accused. Sometimes 'particular statement' made to the police officer is given the legal status of a 'confession'.[119] International 'principles and treaty texts' also to a certain extent have echoed about difficulties in corroborating various allegations of torture. The Special Rapporteur on torture has recommended the shifting of burden of proof to prosecution during trial beyond reasonable doubt regarding the voluntariness of the confession.[120] This may also be applicable for Bangladesh since it is indeed difficult to hold the accused person responsible for torture due to lack of witnesses. The higher judiciary in Bangladesh however, for the last few years through various judgments stand in favor of shifting burden of proof on to the accused person when any person died in the custody of the detaining authority.[121] The High Court Division therefore in order to provide a legal backing to the above principle recommended an amendment of sections 106 or 114 the Evidence Act, 1872 in *BLAST v Bangladesh* case. According to the recommendation the new section will opt for the detaining authority's explanation on the death of the accused and proof the related facts to corroborate that explanation.[122] However, this judgment is upheld by the Appellate Division[123] with an observation that 'since the law is settled on the said issue, there is no reason for any amendment of the Evidence Act, 1872'. The Appellate Division observed on the doctrine of '*stare decisis*' and explained it in '*Corpus Juris Secundum*'. It provides that when a particular principle is settled by various decisions of courts, it is generally binding on other courts and should follow the same decision in similar cases. However, about the particular burden of proof on the death of accused in custody, Bangladesh now has supporting law named the 'Nirzaton Abong Hefajate Mrittu (Nibaran) Ain, 2013'. Under this law the burden of proof is specifically shifted to the detaining authority whenever any person died in the

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[117] Sikder, above n 111, 416. See (1930) AIR Lah 88.

[118] Saira Rahman Khan, 'The Use and Abuse of the Laws of Confession in Bangladesh' Special Issue: Criminal Justice System (2007) *Bangladesh Journal of Law* 79-106, 99.

[119] *Ibid*, 85.

[120] REDRESS, *Reparation for Torture* (2003).

[121] See, *State v Md Shafiqul Islam alias Rafique* (1991) 43 DLR (AD) 92; *State v Khandhker Zillul Bari* (2005) 57 DLR (AD) 29; *Shahjahan Mizi v State* (2005) 57DLR (HCD) 224; *Shamsuddin v State* (1993) 45 DLR (HCD) 587.

[122] BLAST, above n 36.

[123] BLAST, above n 41, Para 220.

custody of that authority.[124] Therefore, there is no need for the amendment of the Evidence Act, 1872 when either the doctrine is followed by the courts or the Act's provision is strictly adhered to.

2.2.2 Innovative Approach of Redress and Reparation for Fundamental Rights Violations

Principles of international law generate a duty on the state to make adequate reparation in case of violating international obligations which result in damages. These obligations since are regulated by international law cannot be modified by State's domestic legislation. States as a form of redress are awarded 'non-pecuniary measures' though compensation which is the most common form of redress for human rights violations. Reparation now, must take the form, if possible, of 'full restitution' including 'material and non-material damages' counting the emotional harms also. The 'nature and amount of compensation' therefore are directly related to the 'specific violation of human right' found by the concerned authority. [125] And in Bangladesh the Supreme Court also considers the international standards and tries to implement them in case of violation of fundamental rights and illegal detention.

The High Court Division of the Supreme Court of Bangladesh has avowed which is also approved by the Appellate Division[126] that this court is competent to award compensation whenever fundamental rights of citizens as guaranteed by the Constitution are violated.[127] In *Bilkis Akhter Hossain v Bangladesh*[128] it is held that even if, the Constitution under article 102 does not specifically provide for awarding costs and compensation, it is a 'long-drawn custom or discretion' of the High Court Division that in writ cases it passes judgment either with or without costs and award monetary compensation to the victim. However, array of compensation regarding this depends on the facts and circumstances of each particular case[129] and the severity of violation.[130]

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[124] *Nirzatan Abong Hefajate Mrittu (Nibaran) Ain 2013*, s 19.

[125] Odeku, above n 3.

[126] *Habibullah Khan v S A Ahmed* (1983) 35 DLR (AD) 72 (Bang SC AD) considered.

[127] *Maharaj v Attorney General of Trinidad and Tobago* (1978) 2 All ER 670 (T&T PC), *Ruhul Sah v State of Bihar & Anor* (1983)AIR SC 1086 (Ind SC), *Bhim Singh MLA v State of Jammu and Kashmir* (1986) AIR SC 494 (Ind SC), *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) AIR SC 2426; (1996) 2 CHRLD 109 (Ind SC), *Government of East Pakistan v Rowshan Bijaya Shaukat Ali Khan* 18 DLR (SC) 214 (Bang SC), *Amaratunge v Police Constables* (1993) SAARC Law Journal 88 (SL SC) applied).

[128] (1997) 17 BLD (HCD) 395, (1997) 2 CHRLD 312.

[129] In *Bilkis Akhter Hossain v Bangladesh* (1997) 17 BLD (HCD) 395, the court compare in this respect the Indian jurisprudence, in particular Justice Anand in *Nilabati Behera v State of Orissa* (1993) 2 SCC 746 (Ind SC), Para 33 that "… when the court moulds the relief by

Therefore, it follows from that the Supreme Court, in the exercise of its constitutional jurisdiction, can award monetary compensation in appropriate *habeas corpus* cases for illegal detention in violation of a person's fundamental rights. In the recent case of *BLAST v Bangladesh*, the High Court Division referring to the jurisprudence of the Indian Supreme Court[131] confirmed that it is competent to award compensation to a victim of torture or to the relations of a person who died in police or jail custody. Courts powers are not confined to compensation only; there may be other types of reparations in the form of 'directions'. The High Court Division may direct the government to take measures in the form of 'rehabilitation, satisfaction and guarantees of non-repetition' of the crime for the victims of torture. It may also includes 'recommendations to prosecute' the concerned official liable for the violation of fundamental rights when such conduct constitutes a criminal offence.[132] About aggrieved persons, over and above, the High

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granting "compensation" in proceedings under Article 32 and 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizens. The payment of compensation in such cases is not to be understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law."

[130] See *Bangladesh v Ahmed Nazir* 27 DLR (AD) 41 and *Bilkis Akhter Hossain v Bangladesh* (1997) 17 BLD (HCD) 395.

[131] See for an overview of the jurisprudence of the Indian Supreme Court and High Court on reparation for torture, REDRESS, *Responses to Human Rights Violations, the Implementation of the Right to Reparation for Torture in India, Nepal and Sri Lanka* (2003).

[132] *BLAST v Bangladesh*: "Now, a question is raised whether this court is competent to award compensation to a victim of torture or to the relation of a person whose death is caused in police custody or jail custody. Indian Supreme Court held the view in the above case that compensatory relief under the public law jurisdiction may be given for the wrong done due to breach of public duty by the state of not protecting the fundamental right to the life of a citizen. So, we accept the argument of the learned Advocate for the petitioner that compensation may be given by this Court when it is found that confinement is not legal and death resulted due to failure of the state to protect the life. But at the same time we like to emphasize that it will depend upon the facts and circumstances of each case. If the question of custodial death becomes a disputed question of fact, in that case, under the writ jurisdiction it

Court Division has recognized recently that members of the public may have standing in cases of gross violations of human rights. And this recognition opened the way for 'Public Interest Litigation (PIL)' proceedings.[133] The case of *Dr. Mohiuddin Faruque v Bangladesh* and *Ekushey Television Ltd v Dr. Chowdhury Mahmood Hasan*[134] held about High Court Division's constitutional mandate and obligation to preserve and protect the rule of law. Gross violations of fundamental rights as provided by the Constitution should 'shock the judicial conscience' and provides *locus standi* to petitioners leaving aside all existing transitional procedures. The High Court Division if ignores these issues then it will let 'governmental agencies free to subvert the rule of law to the detriment of the public interest'. Also in *Chowdhury Mohmood Hossain v Bangladesh*,[135] the Court resolved that when fundamental rights of indeterminate number of people are affected, each member of the public who suffered the common injury has the right to move the court under article 102 of the Constitution. However, certain procedural formalities like inordinate delay in bringing the application, not to exhaust all available remedies for this type of application, burden to adduce evidence affirmed on oath,[136] discretion in awarding costs, [137] review judgments and orders when necessary for the interests of justice[138]etc. have to be pursued while the petition is going on. So the judgment held that this Court in exercise of its power of judicial review when finds that, fundamental rights of an individual has been infringed by abusive exercise of power by the police including the case of victim of torture, it is competent to award compensation for the wrong done to the person concerned[139] and to initiate criminal

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will not be possible to give compensation. But where it is found that the arrest was unlawful and that the person was subjected to torture while he was in police custody or in jail, in that case, there is scope for awarding compensation to the victim and in case of death of a person to his nearest relation."

133 See *Dr Mohiuddin Faruque v Bangladesh*, and *Ekushey Television Ltd v Dr Chowdhury Mahmood Hasan* (2002) 22 BLD (AD) 163.

134 (2002) 22 BLD (AD) 163.

135 (2002) 22 BLD (HCD) 459.

136 *Ghulam Azam v Bangladesh*, 46 DLR (AD) 192. See also general considerations in *Jabon Naher v Bangladesh* (1998) 18 BLD 141. See also the Rules of the High Court Judicature for East Pakistan, 1960, which have been adopted as the Rules of the High Court Division.

137 *Bilkis Akhter Hossain v Bangladesh* (1997) 17 BLD (HCD) 395.

138 *Serajuddin Ahmed v AKM Saiful Alam*, (2004) 56 DLR (AD): "There is no provision in the constitution precluding the High Court Division to review its judgment and order. The Court's inherent power to do justice to the parties before it is an accepted one and for that purpose the form in which the Court shall dispense justice is a matter for the Court to resort to."

139 Malik, above n 58, 279.

proceedings against the perpetrators.[140] However, the 'Nirzatan Abong Hefazate Mrittu (Nibaran) Ain, 2013' has made easier for the courts to award compensation and take legal action for torture cases under various sections. It provides special compensation for specific torture cases to the victims and sometimes to their relations.

2.2.3 Developing Jurisprudence through Interpretation

The Supreme Court of Bangladesh among others is developing consistent jurisprudence against torture through interpretation of certain terms that are used for facilitating torture by various agencies. In Bangladesh under various laws, detention is authorized for certain acts termed as 'prejudicial' and arrest can be made on the ground of 'suspicion' of criminal wrong-doing. Detention under these laws since is a deprivation of personal liberty; has to satisfy the requirement of doing it 'in accordance with law', or under 'due process of law.' And it is none other than the judiciary which should ensure about the strict adherence of all legal conditions or requirements regarding this.[141] The *BLAST v Bangladesh*[142] case is basically the first judgment in Bangladesh to interpret the terms of 'credible information' and 'reasonable suspicion'. This judgment has provided a number of 'guidelines' to be followed by 'Police and Magistrate's in case of arrests and granting remand, respectively. However, the core of the *BLAST* judgment is sections 54 and 167 of the Code of Criminal Procedure. Section 54 of the Code empowers any police officer to arrest a person on 'a reasonable suspicion' about committing a crime. In order to limit the abuse of police power, the judgment did provide that when a person is arrested on suspicion the concerned police officer shall record the 'reasons of arrest, the knowledge about the involvement of the person in a cognizable offence, particulars of the offence, circumstances under which arrest was made, the source of information and the reasons for believing the information'.[143] However, the judgment has made a distinction between the terms 'suspicion and knowledge'. The term 'suspicion' can no longer, after his judgment, be an 'indefinite and undefined guess or imagination or whim of police'. And the term 'knowledge' has to be a 'definite knowledge' of the existence of some facts that can be used as a basis of arrest without warrant. It is also elaborated that arrest when made on the basis of 'credible information', the 'nature, source and reason of believe' of that information must be disclosed by the police officer. 'Credible' means 'believable' and a police officer's belief which is different from ordinary lay man's belief has to be verified by perusal of documents kept in police custody. So whenever any arrest is made without warrant, the police officer must have some knowledge of 'definite facts'[144] and

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[140] UNHCR, *Country of Origin Information Report–Bangladesh* (2009) < http://www.unhcr.org/refworld/docid/4a8d005b2.html> accessed 16 January 2013.

[141] Malik, above n 58, 265.

[142] BLAST, above n 36.

[143] *Ibid*, 374.

[144] *Ibid*, 367, 368.

on the basis of that he can have 'reasonable suspicion'.[145] Also earlier in *Alhaj Md. Yusuf Ali v The State*,[146] the High Court Division interpreted the term 'reasonable suspicion' as a '*bona fide* belief' and rendered the concerned police officer liable for prosecution under section 220 of the Penal Code, 1860 when arrest was made by him unduly or unreasonably.[147] Also in *Saifuzzaman v State*[148], many of the interpreted issues of the *BLAST* judgment was taken up with an addition of few more directives for 'Police and the State'. The prime concern of this judgment, however, was the 'power of preventive detention under the Special Powers Act, 1974'.[149] The case also dwelt upon the meaning in scrutinizing the power of arrests and stated that 'information or suspicion' cannot, 'by itself', 'be sufficient to justify' the arrest by depriving a person's right to liberty. The expression 'credible information' includes any information which is 'entitled to credit in the particular instance'. The word 'reasonable' has reference to the 'mind of the person receiving the information'. The 'reasonable suspicion' and 'credible information' must relate to 'definite averments,' may vary case to case but should not be a 'mere vague surmise'.[150]

And on the subject of arrest in accordance with law, the judgment by Mr. Justice M.A. Aziz pointed out that it is the fundamental aim of the State to establish the rule of law which is one of the 'basic features' of the Constitution. It is the Constitution that has made substantive provisions for every functionary of the State to justify his action 'with reference to law'. Articles 27 and 31of the Constitution forbid specifically discrimination in law and prohibits 'arbitrary or unreasonable law or State action'.[151] The relevant laws in fact provide wide discretionary powers of the state to derogate from the right to personal liberty but the Courts in Bangladesh over the years, have appended a number of imperatives requiring the fulfillment of the said conditions and make it the real parameters of right to personal liberty. A detention law must be 'objectively reasonable' and the Court is obliged to inquire whether in the view of an ordinary prudent man the law is reasonable. It must be shown that the 'security of the State or of the organized society and not the governmental interest' that demands the deprivation of life or personal liberty. [152] Article 31 of the Constitution also ensures fairness concept of

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[145] Malik, above n 58, 275.

[146] (2002) 22 BLD (HCD) 231.

[147] NHRC, above n 8.

[148] (2004) 56 DLR (HCD) 324.

[149] Malik, above n 58, 273.

[150] See above n 106, 329.

[151] Malik, above n 58, 270.

[152] *Ibid*, 265-270.

natural justice in any proceeding affecting rights and liberties of individuals.[153] It provides the only exclusion i.e. 'compelling governmental interest' where *'post facto'* hearing or other safeguards against that arbitrary or unlawful application of law should be in existence.[154]

However, the Constitution also provides for the 'Fundamental Principles of State Policy' as the yardstick for testing the reasonableness of any law when it is challenged on the ground of violating fundamental rights. Where any statute has diverse meaning, an effort should be made to take the connotation which is in conformity with the principles of Part II of the Constitution. It has to be assumed that the other provisions of the Constitution 'have been made to facilitate and not to hinder' the aims and objectives of Fundamental Principles of State Policy.[155] In Part III of the Constitution, many of the fundamental rights are subject to reasonable restrictions[156] that may be imposed by law and not by Executive instruction.[157] In case of arbitrary exercise of the discretionary power, law should provide a test where it requires the authority to record reasons and supply a copy of that to the affected persons. This compulsion ultimately helps the authority to apply its mind judicially and provides grounds for judicial review of those actions.[158]

3. Compliance in Practice

Proper and efficient administration of justice is a '*sine qua non'* for achieving equality, justice, rule of law and securing guarantee to fundamental human rights and freedom. Along with law enforcing agencies, subordinate courts, tribunals and the Apex Court in Bangladesh ensure rule of law and administration of justice within the country.[159] Though majority of people in Bangladesh have respect for rule of law, persons having

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[153] *See Cleveland Board of Education v Loudermill (*1985) 470 US 532 (the right to due process is conferred, not by legislative grace, but by constitutional guarantee); see *Razia Sattar v Azizul Huq* (2007) 12 BLC 357 (a law which excludes the necessity of hearing will be void under art. 31 and an action taken under that law will be void and not voidable.)

[154] Islam, above n 21, 247.

[155] *Ibid*, 75.

[156] *Oali Ahad v Bangladesh* (1974) 26 DLR 376. For unreasonable restrictions see also *Abul A'la Moudoodi v West Pakistan* (1965) 17 DLR (SC) 209; *Chitta Ranjan v Secy Judicial Department* (1965) 17 DLR 451; *Municipal Corp v Jan Mohammad* (1986) AIR (SC) 1205, 1210; *Maharashtra v Kamal* (1985) AIR(SC) 119; *Kaushal v India* (1978) AIR (SC) 1457; *Harichand v Mizo Dist Council* (1967) AIR(SC) 829; *Joseph v Reserve Bank* (1962) AIR (SC) 1371; *Pooran Mal v Director of Enforcement* (1974) AIR (SC) 348.

[157] *Krisnan Kakkanath v Kerala* (1997) AIR (SC) 128. See also Islam, above n 21, 140.

[158] Islam, above n 21, 142.

[159] Asiatic Society of Bangladesh, *Administration of Justice in Bangladesh* (2003).

power and influence, if aggrieved, are not awaiting for justice through Courts.[160] Courts here now are confronted with obstacles not only in its constitution and laws but also those which are present and often resorted to by various agencies against the Judiciary.[161] These obstacles are hindering ways towards anti-torture regime and to foster the active prevention of torture. With this background, this part 'compliance in practice' focuses the institutional compliance of international obligations regarding torture by the judicial organ of the State in practice through scrutinizing various impediments. Among other hurdles focus is specifically on the flawed implementation of separation of powers in the higher and the lower judiciary and certain existing deficiencies in institutional and procedural framework.

3.1 Lower Judiciary, Separation of Powers and its Flawed Implementation

The President in Bangladesh is having the power of control (which includes the 'power of posting, promotion and grant of leave') and discipline of persons employed in the judicial service and of Magistrates exercising judicial functions according to the Constitution. Article 116 (which ironically precedes article 116A) requires the President to exercise this power in consultation with the Supreme Court. Originally article 116 provided the vesting of power completely in the Supreme Court of Bangladesh. This article as it stands now is termed as an 'insurmountable block' against separation of the Judiciary from the Executive control. [162] Retention of the power of 'promotion, transfer and discipline of judges of the Subordinate Judiciary and Magistrates exercising judicial functions' by the Executive organ of the State may go against them in expecting favor or concerning a fear of victimization. Therefore the constitutional provision empowering the Executive organ to control the Judges of the Subordinate Courts has in some way or other lowered the image of the subordinate judiciary in Bangladesh.[163] Therefore, the non-independence of the lower judiciary impinges on enjoyment of overall human rights in Bangladesh including the prohibition of torture. On torture cases, the Asian Human Rights Commission (AHRC) has documented that victims of torture and their family members face various hurdles starting from filing of cases. The concept of judicial redress for abuses of human person committed by various State Officials is thus nearly non-existence in Bangladesh. Victims here in various cases can expect only

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[160] Kazi Ebadul Hoque, 'Problems and Prospects of Administration of Justice' in Asiatic Society of Bangladesh, *Administration of Justice in Bangladesh* (Asiatic Society of Bangladesh, 2003) 251.

[161] Justice Naimuddin Ahmed, 'The Problems of Independence of the Judiciary in Bangladesh' in Bangladesh Institute of Law and Informational Affairs (BILIA) (ed), *Human Rights in Bangladesh: A Study of Standards and Practices* (BILIA, 2001) 173.

[162] See *Aftabuddin v Bangladesh* (1996) 48 DLR (HCD) 1 for interpretation and implication of article 116.

[163] Ahmed, above n 161, 185-187.

investigations leading to limited disciplinary actions against perpetrators.[164] Certain times in court procedures '*en masse'* replacement of prosecuting attorneys in each government regime results in lacking of prosecuting skills. Political bias in various court procedures dominates here.[165] Granting remand for interrogation, employing violence to extract a confession of one's guilt and allegations of corruption to save oneself from violence are also persistent in Bangladesh.[166]

3.2 Higher Judiciary and Related Ills

NGO Odhikar's Human Rights Report, 2008 commented on the exercise of control of Executive over the recruitment of judges, through the Public Service Commission and the Ministry of Law, Justice and Parliamentary Affairs.[167] The power of appointing the judges of the Supreme Court other than the Chief Justice practically vests in the Prime Minister which makes the political factor a major question in the appointments of judges of the Supreme Court. However, a constitutional convention of consulting with the Chief Justice in case of appointments of Judges of the Supreme Court has been established although instances of discrimination against Judges of the Supreme Court are not totally absent since judges of the higher judiciary are 'constitutionally, conventionally and characteristically incapable of canvassing for themselves'.[168] Also administrative freedoms of the Supreme Court of Bangladesh are encroached by various rules like previous approval of the President in the appointment of staffs, creation of posts of non-judicial personnel in the Supreme Court by the Government on the proposals submitted by the Supreme Court and rules relating to conditions of service of both the staffs are subject to any law made by the Parliament in this respect. Also the rule making power regulating the practice and procedure of each Division of the Supreme Court under article 107 of the Constitution are subject to law made by Parliament. In order to be effective those rules as are framed by the Supreme Court must obtain the approval of the President. Therefore it is apparent that the Supreme Court of Bangladesh for its own procedures and also for the procedures of the Subordinate Courts is subject to both 'legislative and executive control'. In case of financial matters and budget allocation, to

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[164] Basil Fernando, 'Bangladesh: Urgent need for UN experts to visit and assess Bangladesh judiciary' (2006) 5 (4) *Article 2 of the International Covenant on Civil and Political Rights* 110-111.

[164] REDRESS, above n 120.

[165] Fernando, above n 164,110-111.

[165] REDRESS, above n 120.

[166] Mainul Hosein, *Practice of Police Remand is Unconstitutional and Judges can't be Party to It* (2013) < http://www.thenewnationbd.com/newsdetails.aspx?newsid=62000> accessed 11 June 2013.

[167] UNHCR, above n 140.

[168] Ahmed, above n 161, 177-179.

meet the expenses of the Supreme Court, it is still under the administrative control of the Government. The budget allocation is done by the Ministry of Finance on the suggestions made by the Ministry of Law, Justice and Parliamentary Affairs. Moreover, the Chief Justice is empowered to sanction expenditure up to a 'certain limit' from the budget allocation and expenditure 'exceeding the said limit' must again be sanctioned by the Government. This colossal financial power retained by the executive organ seriously hampers the independence of judicial administration, directly and in some way or other indirectly which may not always be elaborated.[169]

However, it is not the courts or their independence alone that may ensure the protection of human rights including torture in Bangladesh unless access to Courts is not readily available for a vast majority of population.[170] Though writ jurisdiction of the High Court Division of the Supreme Court provides the forum for redress of violations of fundamental rights enshrined in the Constitution, it is sometimes seriously compromised by the fact that the Writ Bench is constrained by a huge backlog of pending and undecided cases. The time necessary for resolution of disputes by the judicial system which is usually a lengthier one becomes serious detriment even to those who can afford access to the highest court of the country.[171] Sometimes it also creates opportunities for manipulation of the system for expediting one's cases through collusion with judicial administration and a number of related ills.[172]

There are certain other procedural difficulties regarding the implementation of the orders of the Supreme Court.[173] Speakers at a meeting of exchanging views organized by the Bangladesh Legal Aid and Services Trust (BLAST) with the Law Reporters Forum (LRF) in the city, said that regardless of the High Court Divisions orders on various issues, like preventing extra-judicial killings, sexual harassment, establishing a Court in the Hill Districts etc., compliance with these orders of the High Court Division is in failure.[174] Non-institution of various complaints and not scrutinizing those difficulties by

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[169] *Ibid*, 182.

[170] Malik, above n 61, 164.

[171] *Ibid*, 160-161.

[172] *Ibid*, 163.

[173] Md Ashrafuzzaman, 'Laws without order & courts of no relief in Bangladesh' (2006) 5(4) *Article 2 of the International Covenant on Civil and Political Rights* 20, 25.

[174] Bangladesh Legal Aid and Services Trust (BLAST), *HC Order Ignored* (2005) <http://www.blast.org.bd/issues/criminaljustice/265> accessed 14 September 2013. See also Bangladesh Legal Aid and Services Trust (BLAST), *Implement HC orders to Stop Arrest on Suspicion, Torture in Remand* (2010) < http://www.blast.org.bd/news/news-reports/102-thedailystar> accessed 19 May 2013; Arafat Hossain Khan, *Stop Extra Judicial Killings: Respect and Establish an Effective Judiciary* (2010) <http://www.blast.org.bd/news/news-reports/101-stopextrajudicialkillings> accessed 19 May 2013; The Independent, *High Court*

the judiciary provide a typical 'Catch 22' situation where the power of police is not challenged by the complainants and the judiciary does not scrutinize it to put checks and balances on that power.[175] And since enough checks and balances are not in place, the power continues to be abused in various ranges, which in sequence discourages challenges.[176]

However, according to the US State Department Country Report on Human Rights Practices 2008 (USSD 2008 report), released 25 February 2009, among others 'corruption, judicial inefficiency, lack of resources in Courts in terms of administrative and other relevant personnel and facilities, courts have not been modernized in terms of information technology,[177] and a large case backlog remain serious problems in Bangladesh'.[178] The shortage of number of courts, delays in disposal of cases along with various inner difficulties in State legal aid facilities[179] have virtually made the judicial

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Directive on Remand not Followed (2013) < http://theindependentbd.com/index.php?option=com_content&view=article&id=162367:hc-directive-on-remand-not-followed&catid=132:backpage&Itemid=122> accessed 11 June 2013.

[175] *A H M Abdullah v Government of Bangladesh* (2005) 25BLD (HCD) 384, 391.

[176] Malik, above n 58, 260.

[177] Malik, above n 61, 171.

[178] UNHCR, above n 140.

[179] 'It needs to be mentioned that the government started a fund for legal aid from 1994. However, no official figures about the extent of legal aid actually provided by this committee could be obtained except in one or two districts the legal aid activities have not gathered pace. In fact the judges often refer a legal aid case to relevant NGOs of the district instead of the official legal aid committee. And several factors may be responsible for the non-utilization of this legal aid fund. First and foremost, by making the district and sessions judge responsible for administering this fund, another burden has been placed on the judge who is generally overworked. A district judge is not only the highest trial and appellate judge of the district but also performs a host of administrative and other related functions. As such this responsibility of legal aid is another onerous duty for which he is not provided with any logistics or other necessary support. Secondly inclusion of the highest government officials of the district, such as the district commissioner and superintendent of police, do not we feel, make it a 'client friendly' body. The clients due to their comparatively disadvantages status may find it too intimidating to approach such a committee or body. Lastly the formalism inherent in any official action from which the district legal aid committee is not immune, makes it nearly impossible for this body to perform the task of providing services to the poor, the disadvantaged and women. The fact that the activities of this legal aid committee are not documented is indicative of the status of this committee in the concerned ministry itself.' See for details Malik, above n 61, 165.

system inaccessible for the vast majority of the poor and the disadvantaged which ultimately affects the procedural accessibility in torture cases also.

4. Conclusion

In defying torture an independent judiciary is now the crying need of the nation. Judiciary along with various honest, dignified and brilliant judges can serve the delivery of justice regarding torture as a last hope. The supreme judiciary of our country is the independent organ of the state on which full judicial power is conferred by the Constitution. It is now becoming an agent of change, trying to enforce corresponding duties of State regarding various rights of torture survivors and taking a leading role in providing justice and reparation to victims of torture both in law and in practice in Bangladesh. In various cases Judiciary invokes international standards regarding torture directly or through interpretation of various domestic laws. It also helps in developing jurisprudence in the form of legal reform on the issues of arrest, detention and custodial violence. In violating fundamental rights and illegal detentions, the supreme judiciary in Bangladesh comes up with the appropriate form of redress including compensation both in terms of money and in kinds.

The dedication of international community in outlawing tortuous activities in absolute form through the 'Convention against Torture' has significant impact over our criminal justice system. Judiciary now is trying to apply those international standards directly through new domestic legislation and in certain situations where provisions are not provided by the Statute, through interpreting spirit and intention of law makers as a whole. There are various judgments of the Supreme Court of Bangladesh limiting arbitrary and excessive power of arrest and detention, provides guidelines for law enforcing agencies to follow, directions for government to amend legislations that facilitates torture and recommends changing prison terms for wrongful confinement and malicious prosecution. The High Court Division also issued Rules to ensure detained or arrestees' safety and security while remaining in custody and making it obligatory to examine both 'legality and manner' of passing concerned detention order. Also, government's and court's satisfaction of the necessity of detention in 'public interests' is required. Even for non-compliance of order of the court, contempt petition was issued against the offender. Now Magistrates have to follow well settled norms of the country of making a 'judicial order' while granting any remand order. In case of confessions 'double test' of 'voluntariness' and 'true and trustworthy' have to be applied. Substantive provisions for every functionary of the State to justify his action 'with reference to law' and prohibition of 'arbitrary or unreasonable law or State action' are provided by the Constitution of the Peoples' Republic of Bangladesh. The right to challenge legality of detention, role of judicial and prosecuting authorities regarding abusive power of arrest and detention, providing procedural safeguards regarding arrest, total prohibition of remand in the 'thana hazat', preparing 'memorandum of arrest' and obtaining 'signature of the arrestee with particular date and time of arrest', ensuring safety and security of the arrestees' while they remain in custody, non-acceptance of police custody before and after confession, directions to the concerned Ministry about

victims of prison mismanagement, examination of victims body by medical board where death is caused in custody, taking cognizance of the offence by Magistrate *suo moto* under the special law where 'death is homicidal in nature' are significant achievements on arrest, detention and remand issues. However even with these achievements, political factors in various appointments of judges both in higher and lower judiciary, administrative and procedural freedoms of Supreme Court in many issues are subject to 'legislative and executive control', procedural difficulties starting from initiation of court proceedings up to implementation of orders of court; all of these, in turn, sometimes defer challenges, eventually have effects on accessibility of torture cases are hindering ways for active prevention of torture and presently should be major issues to consider.

Sexual Violence in Bangladesh: Addressing Gaps in the Legal Framework

TaslimaYasmin*

Introduction

The situation of violence against women in Bangladesh in recent times has witnessed an alarming increase in sexual offences including rape and sexual harassment. The statistics shows an alarming number of child rape victims where majority of the cases reported in the daily newspapers involved minor and child victims. On the other hand, in rape cases instances of conviction are extremely low compared to a high rate of acquittal. In addition, the existing legal framework relating to sexual offences does not adequately address the plight of the victims. In this context, this paper attempts to analyze the current laws on sexual violence in Bangladesh with a key focus on 'rape' and identify the gaps in the existing laws that potentially make the legal battle of victims of sexual violence even more difficult to win.

Sexual violence in context:

The statistics on incidents of rape are mostly generated from the media based reports prepared by non-governmental organizations. There is however updated Police Crimes Statistics available which provides the total number of cases reported under the category of "women and child repression" from 2005 to 2015 (Table 1). However, as these statistics are not disaggregated according to individual offences it is difficult to track trends in rape cases per se.[1]This data shows a substantive increase in the number of cases reported on women and child repression from 2005 till 2015.

Table 1 -Police Crime Statistics

Police Crime Statistics Number of Reported Cases (2005-2015)[2]											
	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Women and Child repression	11981	11730	15217	15246	13997	17752	21389	20947	19601	21291	21220
Total Number of Cases	123033	130578	157200	157979	157108	162898	169667	183407	179199	183729	179880

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1 Asmita Basu, 'Use of Medical Evidence in Rape cases in Bangladesh' (Bangladesh Legal Aid and Services Trust, SAFE Project Research Report, 2012) <https://www.academia.edu/9384955/Use_of_medical_evidence_in_rape_cases_in_Bangladesh>accessed 29 April 2018.

2 Bangladesh Police, <http://www.police.gov.bd/Crime-Statistics-comparative.php>accessed 29 March 2018.

According to a 2015 new source, an annual report of the government ministries and divisions discussed at a cabinet meeting, showed that the number of rape victims have increased by 5.4 percent with 3592 cases in the year 2013-2014 and 3786 in the year 2014-2015. The report disclosed that a total of 14712 women became victims of repression in 2013-2014 which was increased by 9.4 percent with 16102 such cases in 2014-2015.[3]

According to Bangladesh Mohila Parishad statistics, the number of women raped rose alarmingly in 2016 – with 1,050 women and girls raped in total, including 166 gang rape victims and 44 killed after being raped. The number of gang rapes was 199 in 2015.[4]

As per the documentation of Ain o Salish Kendra, from January 2017 till August 2017, the total number of rape incidents has been 520 and a total of 317 cases have been filed.

Table 2- Statistics (Rape) by ASK[5]

Age / Form of rape	Under 6	7-12	13-18	19-24	25-30	30+	Not mentioned	Total	Cases filed
Attempt to rape	9	14	11	2	1		19	56	30
Rape	34	90	83	8	3	3	112	333	201
Gangrape		10	37	10	4	4	58	123	83
not mentioned	2	1			2		3	8	3
Total	45	115	131	20	10	7	192	520	317

Although these statistics cannot provide a comprehensive picture of the number of sexual violence incidents in the country, they can very well provide a useful starting point to understand the situations of violence against women in Bangladesh. The documentation of sexual violence is further limited by the fact that due to the apprehension of social degradation, in many cases of rape and other forms of sexual violence, the victim or her family does not disclose the crime or attempts to compromise the matter with the perpetrator. The high number of reported rape incidents committed against children is a possible indication that where the victim is minor the parents or family members generally reach out to the local community and to the formal legal systems. This may be due to the reason that the reputation of a child victim of rape is

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3 *The Daily Star*(Star online report), 26 October 2015 <http://www.thedailystar.net/country/rape-repression-women-increases-bangladesh-report-says-162682>accessed 29 March 2018.

4 *The Dhaka Tribune*, 8 January 2017 <https://www.dhakatribune.com/bangladesh/crime/2017/01/08/violence-4896-women-girls-2016 >accessed29 March 2018.

5 Ain o Salish Kendra, *Violence Against Women – Rape : January-August 2017*(14 September 2017) <http://www.askbd.org/ask/2017/09/14/violence-women-rape-january-august-2017/>accessed 29 March 2018.

socially perceived to be less affectedin comparison to older victims and also the child victims are more often in higher risk of medical emergencies.

Laws on Sexual Offences

The obligation to protect victims of sexual violence stems from the constitutional guarantees for equality before law[6], as well as from the international recognition against discrimination and all forms gender based violence[7]. The current legal framework that defines and punishes sexual violence comprises mainly of two legislations. One is the *Penal Code 1890* enacted during the British colonial regime and kept almost as it is since then and the other one is the *Women and Children Repression Prevention Act 2000 (WCRPA)* (*Nari-o-ShishuNirjatan Daman Ain*2000), a special statute enacted as a response to the increasing violence against women and children. Other than these two substantive laws, the *Evidence Act 1872* and the *Code* of Criminal Procedure*1898* comprise the procedural regime for trial of sexual offences.

i. 'Rape'

Rape is considered the gravest forms of sexual violence under the Bangladeshi legal framework. The Penal Code defined rape in section 375 as committing of 'sexual intercourse' by a man with a woman against her will or without her consent. Explaining what is to be considered as sexual intercourse, the section provides that penetration is sufficient to constitute the offence of rape. In three additional exceptions, the section describes conditions where sexual intercourse so committed will be considered as rape irrespective of 'consent'. These exceptions are, when consent of the woman has been obtained by putting her in fear of death, or of hurt; when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married and when she is under fourteen years of age. Importantly this definition authorizes marital rape of a girl of 13 or above under the Exception clause which provides that, 'sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.'

When WCRPA came into force, this definition of 'rape' in the Penal Code was adopted with few additions. Section 2(e) of the WCRPA provides that subject to section 9, the

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[6] Article 27 of the Constitution of Bangladesh provides 'all citizens are equal before law and are entitled to equal protection of law'. Article 28 declares 'the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth'. Article 31 provides 'to enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen'.

[7] CEDAW Committee, General Comment 19: "The Convention (CEDAW) in Article 1 defines discrimination against women. The definition of discrimination includes gender-based violence that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty".

word 'rape' shall have the same meaning as in section 375 of the Penal Code. However, the minimum age of consent below which any sexual intercourse would be considered as rape; in other words, the minimum age for statutory rape had been increased by the 2003 Amendment to the WCRPA to 16 years which was previously 14 (same as the Penal Code).

The Explanation to Section 9 of the WCRPA, thus adds to the definition of rape:

> "If a male person without marital relationship has sexual intercourse with a woman above 16 years of age without her consent or with consent obtained by putting her in fear or by deceitful means or with a woman below 16 years with or without her consent he shall be presumed to have raped such a woman."

Under the Penal Code the punishment for rape is imprisonment for life for a term which may extend to ten years and fine. However, in case of marital rape of a girl not below 12 years of age the punishment is reduced to only a maximum of two years imprisonment and fine. Penalties provided for rape under the WCRPA are as follows:

- Life imprisonment and fine for those committing rape on any woman or child. The WCRPA defines 'child' as any person under 16 years of age.[8]
- Death penalty or rigorous imprisonment for life and fine not exceeding one lac taka if death is caused as a consequence of rape or any act followed by the rape.[9]
- Death penalty or life imprisonment and fine for each member of a gang for causing death or injury to a woman or child who has been gang raped.[10]
- Imprisonment for life and fine for attempting to cause death or hurt after committing rape.[11]
- Imprisonment upto 10 years and not less than 5 years for attempting to commit rape.[12]
- Imprisonment upto 10 years and not less than 5 years for custodial rape, for each and every person, under whose custody the rape was committed and those who were directly responsible for safety of the woman in custody.[13]

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[8] *WCRPA*,s 2(*ta)*.

[9] *Ibid*, s 9(2).

[10] *Ibid*, s 9(3).

[11] *Ibid*,s 9(4)(a).

[12] *Ibid*, s 9(4)(b).

[13] *Ibid*,s 9(5).

Gaps in the laws penalizing'Rape'

Although the provisions addressing rape under the present laws appear to be comprehensive, there are still considerable gaps in the overall legal framework which impede the victims' right to get effective justice. This section elaborates on this issue.

a. Definition of rape is problematic

The definition of rape given by the Penal Code is one which was formulated back in the colonial time and it is unfortunate that till now our criminal justice system has defined rape as such without much changes. Compared to how the Indian Penal Code has moved on from this old colonial formulation of rape, and how the British law itself had gone far ahead with a separate statute for sexual offences,[14] it is long due for our legal regime to formulate a definition that can address more efficiently the plight of the rape victims.

Firstly, the definition in section 375 of the Penal Code describes that to constitute 'sexual intercourse' penetration is sufficient. However the meaning of 'penetration' is nowhere given in the existing laws. By general implications of the term and by its practical usage, penetration is conceived to be committed by insertion of the penis into the vagina, or in other words a *peno-vaginal* penetration. However, the term penetration when used singly in the definition of rape, it can very well mean penetration by the penis or by any other parts of a man's body or by any object into the vagina, anus or mouth of a woman for sexual purpose. But because the definition falls short of illustrating the meaning of 'penetration' the traditional meaning of 'sexual intercourse' is used to define rape, which leaves out several other ways of sexual penetration which are generally conceived as rape in many jurisdictions.

Most importantly the definition fails to elaborate on the meaning of the term 'consent'. 'As a result, courts have in most cases required evidence of force to demonstrate lack of consent' and eventually have interpreted rape in a manner framed by gender stereotypical notions.[15] Although the Penal Code in section 90 provides that when a consent is given under fear or misconception such consent is not to be considered valid for the purpose of the Code, it does not sufficiently address how consent is interpreted in a rape prosecution.

Again according to the third clause of section 375 a man is said to commit rape when consent of the woman to the sexual intercourse has been obtained by putting her in fear of death, or of hurt. One important element that is missing in this section is that the same provision can and should apply in a case where consent has been obtained by putting someone else in fear of death or hurt with whom the victim is related to or is interested in. Such an addition has been made in the 2013 Amendment in the Indian Penal Code.

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[14] *Sexual Offences Act* 2003, (United Kingdom).

[15] Basu, above n1.

Another gap in the definition of rape is that in section 375 of the Penal Code, the reference is only of a 'woman' with whom a nonconsensual intercourse would amount to rape. This clearly excludes a male child from the purview of the law. If a man rapes a minor boy of any age, he will be charged with an offence under section 377 *i.e.*'unnatural offences,'[16] and not for rape although the experience should be equally brutal and traumatizing for a male child.[17] On the other hand, the WCRPA does not differentiate between a boy and girl child in its definition of 'child' and in section 9 it does make a reference to a child in making provisions for punishment of rape. Nevertheless, because of how rape is defined in the Penal Code and how 'penetration' is traditionally interpreted, a male child or for that matter any victim of rape by same sex perpetrator will not possibly find any redress under the special statute, and such case can only fall under section 377. At the same time because the WCRPA only refers to woman and child and sections 375, 354 and 509 of the Penal Code only apply to 'woman' victim, prosecutions forsexual offences committed against adult transgender persons or hermaphrodites would be difficult to pursue'[18].

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[16] Section 377 of the *Penal Code1890* provides for 'unnatural offences'. As per the section, whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. The Explanation to section 377 provides that penetration is sufficient to constitute the carnal intercourse necessary to the offence. Although section 377 had been in judicial and public debates in India regarding its applicability with respect to rights of LGBT community, the same has never been questioned in a public discourse in Bangladesh, neither there has been any significant reported case decided under this section.

[17] It is relevant to mention here a recent case of rape of eight years old boy by his *madrassa* teacher which has been reported in the national media. As per the report police had filed a case against the perpetrator under section 377 of the Penal Code, although this is a clear case of rape against the child. *ProthomAlo*, 17 October 2017<http://www.prothom-alo.com/bangladesh/article/1345996/%E0%A6%9B%E0%A6%BE%E0%A6%A4%E0%A7%8D%E0%A6%B0%E0%A6%95%E0%A7%87-%E0%A6%AC%E0%A6%B2%E0%A6%BE%E0%A7%8E%E0%A6%95%E0%A6%BE%E0%A6%B0%E0%A7%87%E0%A6%B0-%E0%A6%85%E0%A6%AD%E0%A6%BF%E0%A6%AF%E0%A7%8B%E0%A6%97%E0%A7%87-%E0%A6%AE%E0%A6%BE%E0%A6%A6%E0%A7%8D%E0%A6%B0%E0%A6%BE%E0%A6%B8%E0%A6%BE%E0%A6%B6%E0%A6%BF%E0%A6%95%E0%A7%8D%E0%A6%B7%E0%A6%95-%E0%A6%95%E0%A6%BE%E0%A6%B0%E0%A6%BE%E0%A6%97%E0%A6%BE%E0%A6%B0%E0%A7%87>accessed 29 March 2018.

[18] Lyal S Sunga and Kawser Ahmed, 'A Critical Appraisal of Laws Relating to Sexual Offences in Bangladesh: A Study Commissioned by the National Human Rights Commission Bangladesh'(National Human Rights Commission Bangladesh, 2015) 19-20; available at <http://www.idlo.int/publications/critical-appraisal-laws-relating-sexual-offences-bangladesh> accessed 5 April 2018.

a. Rape of a child bride is excluded from the definition

Intercourse with a girl child who is not below 13 years of age has not been criminalized as rape when the child is married to the perpetrator. Although the WCRPA provides 16 years as the age for statutory rape (below 16 years sexual intercourse will be considered as rape with or without her consent), this has been 'severely weakened by the Penal Code's position.'[19] Not only that the WCRPA ignored to address the marital rape of child brides, it reinforces the Penal Code's definition by clearly specifying in section 9 that the 16 year's age limit below which any sexual intercourse would be considered as rape will not apply to cases where the perpetrator is in a marital relation with the girl.

This position is particularly challenging as it is tacitly allowing child marriage leaving no legal redress for a potential child victim of rape. This is not only contradictory to Bangladesh's international commitment to protect girl child from sexual exploitation, particularly its obligations to ensure best interest of the child under the UN Child Rights Convention, it also contradicts with the existing domestic law regime of the country. The recently enacted Child Marriage Restraint Act 2017 criminalizes marriage of a girl below 18 years of age. It even prescribes for criminal punishment and cancellation of license of Marriage Registrars for registering any child marriage. However on the other hand, a penal law giving immunity to a perpetrator of rape if he can prove that the victim is his 13 years or older wedded wife, is clearly an expression of the legal validation of a child marriage. This encourages the culture of forced marriage of a child rape victim with her perpetrator in order that the perpetrator can get away with the crime easily[20] which is again violation of the state's obligations under various international treaties[21] as well as of its own constitutional guarantees.

a. ***Rape by deceitful promise to marry is not sufficiently addressed in the definitions:***

Another important area where the existing provisions lack sufficient focus is rape by fraudulent enactment of marriage or by deceitful promise to marry. A reading of the recent supreme court judgments reveal that on several occasions the courts had to adjudge whether sexual intercourse with a woman who believed that she was married to the perpetrator because of some false staging of marriage, or that he intended to marry her based on a false promise, amounted to rape or not. Section 375 of the Penal Code addresses a similar situation contemplating that a sexual intercourse would be

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[19] *Ibid*, 19.

[20] Shabina Begum, 'Ending early and forced marriage: Bangladesh and UK Perspective' (The Office of the United Nations High Commissioner for Human Rights,2016) <http://www.ohchr.org/Documents/Issues/Women/WRGS/Earlyforcedmarriage/SG/ShabinaBegum.pdf>accessed 05 April 2018.

[21] *Universal Declaration of Human Rights 1948*, art 16(2); *International Covenant on Civil and Political Rights 1966*,art 23(3); *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 1962*, art 1; *Convention on the Elimination of All Forms of Discrimination against Women1979*, art 16(1)(b).

considered as rape even with the consent of the woman when 'the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.' Now theoretically, neither the case of 'false promise of marriage' nor 'fraudulent staging of marriage' would fall under this clause as the woman essentially was married at the time of sexual intercourse and had given consent by mistaking the perpetrator to be another man to whom she was married. On the other hand the Penal Code in Section 493 criminalizes 'deceitful cohabitation' but does not recognize it as rape or sexual assault. According to this section 'every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine'. Although a false staging of marriage can be criminalized under this section, the charge will be one of 'deceitful cohabitation' and not of 'rape'. Further, this section will not apply to criminalize a fraudulent inducement of consent to sexual intercourse by a false promise to marriage. Thus the Penal Code leaves out a perpetrator of rape by fraud from the available criminal sanctions.[22] Also 'section 375 relates to the case where a married woman is the victim of deceitful cohabitation, but section 493 relates to the case of a woman who is not married to anyone. However, the distinction between a married and unmarried woman for the purpose of prosecuting rape should be immaterial'[23].

However, although the definition of rape given in Penal Code does not specifically address this situation, a more attentive study of section 9 of the WCRPA shows that a fraudulent promise to marry to induce consent in sexual intercourse, can very well be criminalized as rape. The explanation to Section 9 clearly states that a man would be said to commit rape when he obtains the consent 'fraudulently'. As such legally a false staging of marriage or a false promise of marriage in order to induce consent to sexual intercourse will certainly fall within the explanation of rape given in section 9. However, because in such cases the court is usually overwhelmed by the 'absence of force' during the time of the sexual intercourse, the initial 'fraudulent' means or intention which induced such consent takes a backseat in judicial consideration. In most of such cases, as discussed earlier, the woman victim is left alone by the perpetrator to bear the social reprimands for engaging in premarital sex, along with the lone responsibility of an unborn 'illegitimate' child. To address this specific situation in the current laws, an

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[22] Unless the court actively engages itself to interpret section 90 of the Penal Code to imply that the consent of the victim has been vitiated by the 'misconception of fact'. Although the Indian Supreme court has on several occasions interpreted consent under section 90 to consider 'false promise to marry' to be falling within the definition of rape, our SC is yet to take on the similar route. However, very recently the court has borrowed from the Indian SC jurisprudence on the matter, recognizing the viability of such an interpretation. Nevertheless the HCD generally would consider such accusations as a mere breach of promise and not rape.

[23] National Human Rights Commission Bangladesh Study, above n 18, 17.

explanation may be included in section 9 specifying that the 'fraudulent means' will include a fraudulent promise to marry in order to induce consent to sexual intercourse'.

i. Laws on sexual assault and sexual harassment

In the Penal Code, other than rape, sexual assault and sexual harassment without any physical contact have been made a punishable offence.

Section 354 of the Penal Code provides that whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with a maximum of two years imprisonment and fine. Section 509 of the Penal Code criminalizes other sexual offences without any physical contact. The section provides that, whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both. However, a problematic feature of these provisions is that they are both grounded on the concept of outraging or insulting the 'modesty' of a woman and further such acts had to be 'intentional'. The concept of outraging modesty remains ambiguous in these sections and opens up opportunity to victim blaming on the basis of the stereotypical notions surrounding the 'modesty' of a woman.[24]'Thus, a woman who feels harassed or abused will find no redress under these provisions if the man did not "intend" to make her feel that way. This "intent" requirement creates particular problems in sexual harassment, where feminist research has illustrated that discriminatory behavior such as sexual harassment occurs as a result of that behavior becoming normalized and institutionalized. As a result, it is not always "intentional" in the strict legal sense.'[25]

Similar to section 354, the WCRPA makes a provision for sexual assault with higher degree of punishment.[26] The WCRPA provides in section 10 (titled as 'sexual oppression, etc.) that, 'if any person, in furtherance of his sexual desire, touches the sexual organ or other organs of a woman or a child with any of his organs of his body or with any substance, or he outrages the modesty of a woman, he will be said to have committed sexual assault.'[27] However, despite of a harsher punishment, the provision does not the cure the ambiguity of the existing provision on sexual assault, as the

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[24] For detail discussion on this issue see Nuara Choudhury, 'The Immodest Truth: An Evaluation of the Measures Taken to Combat Sexual Harassment in Bangladesh' (2012) 12 (1&2) *Bangladesh Journal of Law* 137.

[25] *Ibid*,153.

[26] Rigorous imprisonment which may extend up to ten years but shall not be less than three years and shall also be liable to additional fine.

[27] The English translation of the section is used in the 2015 Report of the National Human Rights Commission of Bangladesh, above n 18.

offence is still made contingent upon the vague concept of 'outraging modesty' of a woman.

Although sexual harassment without physical contact is not addressed in WCRPA; before the 2003 amendment,[28] the Act originally contained another sub-section to section 10 which dealt with such sexual harassment provisions similar to section 509 of the Penal Code.[29] Apparently this was omitted due to lack of clarification regarding the definition of certain terms used in section 10(2) and the consequent risk of 'abuse of law'.[30] However although this had been omitted in 2003, in 2010 pursuant to an interim order of the HCD in *BNWLA v Bangladesh* (Writ Petition No. 8769 of 2010) the concerned Ministry submitted` a report to the court describing the steps taken to include a proposed amendment to the WCRPA, by incorporating a new section '10 Ka'. This section proposed a definition 'Sexual Harassment' as a separate offence, as well as punishment of one to seven years' imprisonment and fine for committing the same.[31] However, till now no such amendment has been made to the WCRPA to include sexual harassment. Moreover the court was also critical about such provision of sexual harassment as not being comprehensive enough 'to tamp down the prevailing amorphous social-epidemic'[32].

Another relevant section is section 9A of the WCRPA which makes it an offence to cause a woman to commit suicide by 'outraging her modesty'.[33] 'This section does see the creation of a new offence, which is a positive development in that it recognizes the problem of women committing suicide as a result of persistent abuse and harassment.'[34] Although, this section perceives creation of a new offence; this has been again constrained by the existing concepts of violating or outraging "modesty".[35]

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[28] *Nari O ShishuNirjaton Daman (Songshodhon) Ain 2003* (*Women and Children Repression Prevention [Amendment] Act* 2003).

[29] *WCRPA*, s 10(2) stated: "If any male, trying to illegally satisfy his sexual urges, abuses the modesty of any woman or makes indecent gesture, his act shall be deemed to be sexual harassment and for such act he shall be punishable with rigorous imprisonment which may extend up to seven years but shall not be less than two years and shall also be liable to additional fine." [English translation by Shahnaz Huda, 'Sexual Harassment and Professional Women in Bangladesh' (2003)2 *Asia-Pacific Journal on Human Rights and the Law* 52-69].

[30] It was proposed that the 'indecent gesture' term should be omitted from the list of acts constituting sexual harassment, as it is used to exploit and harass rivals. *The Daily Star*, 16 June 2003, referred by Huda, ibid.

[31] Reference to such amendment proposal is found in the judgment of *BNWLA v Government of Bangladesh and Others* (2011) 31 BLD (HCD) 3240.

[32] *Ibid*, para 13.

[33] See above n 24,155.

[34] *Ibid*.

[35] Ibid; Other than the Penal Code and the WCRPA; the *Metropolitan Police Ordinances* for six units of the Metropolitan Police in six the Metropolis area also include a specific provision

Thus, the overall existing legal framework is relatively weak in addressing sexual harassment against women. Acknowledging this lack of an effective legal framework to address sexual harassment, particularly in the context of harassment of women in educational and workplaces, the HCD, in a landmark judgment in 2009[36], formulated a detail guideline to be followed at all work places and educational institutions. The Court categorically referred that these directives are to be followed till adequate and effective legislation is made in this field. Drawing on the validity of such directives as having the force of 'law', the Court further stated that "these directives are aimed at filling up the legislative vacuum in the nature of Law declared by the High Court Division under the mandate and within the meaning of Article 111 of the Constitution."[37]

Other key gaps in laws affecting victims of rape and sexual violence:

a. Admissibility of character evidence under the Evidence Act

Section 155 (4) of the Evidence Act provides, "when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character".'The introduction of character evidence is humiliating and degrading for the victim. While a victim's character has no bearing on determining consent, statements about the victim's character made by the defence are taken into serious consideration by the courts. Any suggestion that the victim is "of easy virtue" may result in an acquittal for the defendant even if the court has found that non-consensual intercourse occurred.'[38] In many jurisdictions admissibility of such character evidence or evidence as to past sexual history of the victim is restricted, so that the victims of sexual offences do not have to go through harsh cross examination during trial. In order that the courts in Bangladesh can move beyond the stereotypes surrounding a rape victim, it is absolutely

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similar to section 509 of the Penal Code. All the sexual harassment related sections in all of the six Ordinances are identical in language, other than the area of their operations. For instance, The *Dhaka Metropolitan Police Ordinance 1976* in section 76 lays down the penalty for teasing women:

"Whoever willfully and indecently exposes his person in any street or public place within sight of, and in such manner as may be seen by, any woman, whether from within any house or building or not, or willfully presses or obstructs any woman in a street or public place or insults or annoys any woman by using indecent language or making indecent sounds, gestures, or remarks in any street or public place, shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to two thousand takas, or with both."

[36] *Bangladesh National Women Lawyers Association (BNWLA) v Government of Bangladesh and Others* (2009) 29 BLD (HCD) 415.

[37] *Ibid*, para 49.

[38] 'Character Evidence in Rape Trials: A Comparative Study of Rape Shield Laws and the Admissibility of Character Evidence in Rape Case'(Research note by Norton Rose Fulbright [South Africa] for the Bangladesh Legal Aid and Services Trust, 2015) 2 <https://www.trust.org/contentAsset/raw-data/7c70a653-6c85-4734-981b-72a1de7db614/file>accessed 28 April 2018.

essential that this provision is omitted from the Evidence Act. The justice system should acknowledge that a rape has no logical link with good or bad character of the victim.

In addition to section 155 (4), section 146(3) of the Evidence Act which deals with cross examination of a witness is also often used against victim of rape and other sexual offence. Because of the presence of such a highly degrading provision in the law, it is often said that a woman rape victim goes through a double trauma- once when she is raped and second during the trial.[39] Harassment during the trial through this defence weapon of character evidence also is viewed to be one of the major reasons for low reporting of rape cases as well as of the extremely low rate of conviction in rape prosecutions.[40] Thus in order to ensure a conducive environment for the women who seek help from the criminal justice system, it is imperative that the past sexual history of the victim or any evidence linking to the 'character' of the victim is made inadmissible in court. At the same time provisions should be incorporated which would bar the defence from adducing any evidence or putting any question during cross examination as to the general immoral character or past sexual behavior of a rape victim to infer her consent to the sexual intercourse. Such rape shield provisions have been incorporated in a number of jurisdictions including India.[41] The Criminal Law Amendment Act 2013 in India has added section 53A in the Indian Evidence Act providing that in order to prove consent in a rape prosecution, the victim's character or previous sexual experience will not be relevant. Also, a proviso is added to section 146 of the Act which bars admissibility of character evidence in order to ascertain consent in a rape case.

a. Inadequate legal provisions addressing various forms of sexual acts against children

Apart from the specific gaps addressed above, the overall legal framework for sexual violence in Bangladesh also does not specifically focus on the issue of sexual offences against child victims and it does not differentiate between sexual violence against an adult and a child. Whereas, in terms of sexual violence occurring against a child the definition should include a wider range of sexual acts, considering that the infliction of trauma would most likely be more harmful in case of a child victim. At the same time recording statement and collecting medical evidence of a child as well as procedure during trial of a child victim should get special attention in the laws, but the Code of Criminal Procedure does not provide any special procedure for a child victim of sexual offences.

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[39] Taslima Monsoor, *Management of Gender Relations: Violence against Women and Criminal Justice System in Bangladesh*, (British Council Dhaka, 2008) 25.

[40] 'Appalling conviction rate of rape cases!'*The Daily Star*, 28 May 2017, <http://www.thedailystar.net/editorial/appalling-conviction-rate-rape-cases-1411705> accessed 28 April 2018.

[41] For details on the various jurisdictions' rape shield provisions, see above n 38, *Character Evidence in Rape Trials*, BLAST.

The Protection of Children from Sexual Offences Act, 2012 in India is a good example, which, apart from listing a wide range of specific acts to be considered as rape or sexual assault committed against a child, makes a specific provision which lists the acts to be considered as sexual harassment against a child. Under the Act, for instance, a person is said to commit sexual harassment upon a child if he exhibits any object or part of body with the intention to show it to the child or if he makes a child exhibit his body or any part of his body so that it is seen by him or any other person, etc.[42] Additionally the Act of 2012 also makes special provisions for recording statement of a child as well as procedure during trial.[43] Most importantly it creates a mandatory presumption as to the commission of offences relating to sexual assault under the Act where a person is prosecuted for committing, abetting or attempting to commit such offence, unless the contrary is proved. Thus in certain cases the burden of proof is actually shifted upon the accused to prove his innocence.

a. The Code of Criminal procedure lacks special focus to the needs of women and disabled victims (and witnesses) of sexual offences

The existing legal provisions also do not address the special circumstance of a disabled or mentally unsound person as well as of the special needs of a woman witness or a victim of sexual offences. For example, the Code nowhere provides any special provision for identification of the accused, or for recording statement before police or giving testimony in court when the witness in a rape prosecution is physically or mentally disabled. The sensitivity related to the recording of statements of a rape victim is also not specially considered which should ideally be done exclusively by women police officers.

There is also no mandatory provision for *in camera* trial to ensure privacy of the victims of all forms of sexual offences. Such provisions, if made mandatory, would ensure privacy of the victim and of the prosecution witnesses and may have a positive impact in earning the confidence of a woman facing sexual violence to take resort of the court. As such section 352 of the Code of Criminal Procedure which ensures an open court for trial of offences with public access during the trial procedure, may consider an exception to be added which would make an *in camera* trial for sexual offences mandatory.[44] Although under section 9(6) of the WCRPA, provision has been made where the court may conduct trial in camera, such provision is discretionary and subject to an application of a party or on the initiative of the Tribunal itself. Moreover such provision for *in camera* trial will not apply in cases of sexual offences other than rape.

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[42] *The Protection of Children from Sexual Offences Act 2012*, s 11 (India).

[43] *Ibid*, Chapters VI, VIII.

[44] *Code of Criminal Procedure 1973*,S 327 (India).It can be learning example where such mandatory trial *in camera* provisions has been made for trial of sexual offences under the Indian Penal Code.

Conclusion

The current legal framework addressing rape and other sexual offences is clogged with colonial language and concepts, contradictions and ambiguities that need to be efficiently addressed. However only amending the substantive or procedural laws cannot be the answer to the ever ending hardships of victims of rape and sexual violence in accessing justice. Attitudinal changes are also important together with a pro-victim approach of the courts. Most importantly, the enforcing authorities' proactive role, efficiency and accountability are essential to bring positive changes in ensuring effective legal redress to the victims of sexual violence.

Dealing with Loss and Damage Arising out of Climate Change: From Warsaw International Mechanism to Paris Agreement

Mohammad Golam Sarwar*

1. Introduction

While developed countries are contributing largely to the causation of climate change, developing countries are 'unfortunately' taking disproportionate burdens arising out of climate change. Though developing countries contribute least to the causation of climate change, they are more vulnerable to climate change because of their geographical and socio-economic circumstances.[1] It is evident that developed countries are morally obliged to be accountable for compensation because of their large scale emission of greenhouse gases.[2] In this backdrop, developing countries were continuously urging to make the developed countries liable to compensate for loss and damage due to climate change suffered mostly by developing countries. The alarming point is that loss and damage are approaching inevitably towards developing countries even if their capacities and resources to tackle climate shocks are much less and inadequate. However, the claim of developing countries for compensating loss and damage was ignored in every climate dialogue and the Paris Agreement was the latest denial.

Developed countries negated any provision of liability or compensation for loss and damage because of political realities back at their home. While there remains no hope for liability or compensation for loss and damage, the Paris Agreement, however, reinforced the mandate of Warsaw International Mechanism (Hereinafter referred as WIM) for loss and damage recognising the 'loss and damage' as a distinct issue. This paper explores how the institutional framework of WIM is likely to operate after the Paris Agreement. In doing so, the paper starts with a background on how the framework of loss and damage has been developed in the discourse of climate change till date and how it has been envisaged in the Paris Agreement and why it is important as a separate issue. It also analyses the works of Executive Committee of the Warsaw Mechanism in action areas. While discussing the action areas enlisted both in Paris Agreement and the work plan of Executive Committee, this paper focuses particularly on the potentials of insurance as an essential tool to deal with loss and damage.

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1 Alexa Zellentin, 'Compensation for historical emissions and excusable ignorance' (2014) *Journal of Applied philosophy* 258.

2 Daniel A Farber, 'The Case for Climate Compensation: Justice for Climate Change Victims in a Complex World' (2008) *Utah Law Review* 379.

2. Framing Loss and Damage

It has been attempted to define loss and damage as 'the actual and/or potential manifestation of impacts associated with climate change in developing countries that negatively affect human and natural systems'.[3] In other words, loss and damage indicates those 'negative effects of climate variability and climate change that people have not been able to cope with or adapt to'[4] that also include the incapacity to deal with climate pressures arising out of the costs of coping and adaptive strategies.[5] While 'damage' refers to those climate change impacts which are feasible to reconstruct by a person or entity, 'loss' indicates those impacts that are not practicable to renovate.[6] Three kinds of loss and damage are identified: 'avoided, unavoided and unavoidable'.[7] While avoided damage refers 'damage prevented through mitigation and/ or adaption measures', unavoided damage means 'the avoidance of further damage was possible through adequate mitigation and/or adaptation' but implementation of the adaptation and mitigation measures were hampered because of financial or technical limitations.[8] Unavoidable damage indicates damage 'that could not be avoided through mitigation and/or adaptation measures (for example, coral bleaching, sea level rise)'.[9] Dealing with loss and damage as adverse consequences of climate change after the costs and benefits of mitigation and adaptation is found to be problematic because there is no certain degree to measure the attainment of adaptation and mitigation schemes and the approaches of risk reduction and risk transfer relating to loss and damage also suffer from limitations.[10] It has been estimated that the aggregate costs of loss and damage will be total $275 trillion (using the 2000 value of the US dollar as a baseline) between 2000 and 2200, even if mitigation is successful.[11] In addition, adaptation costs will be greater

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3 'A Literature Review on the Topics in the Context of Thematic Area 2 of the Work Programme on Loss and Damage: A Range of Approaches to Address Loss and Damage Associated with the Adverse Effects of Climate Change' FCCC/SBI/2012/INF.14 (UNFCCC Subsidiary Body for Implementation, (2012) 3, <http://unfccc.int/resource/docs/2012/sbi/eng/inf14.pdf > accessed 22 March 2018.

4 Sam Adelman, 'Climate justice, loss and damage and compensation for small island developing states' (2016) 7 (1) *Journal of Human Rights and the Environment* 32.

5 K Warner, K van der Geest, S Kreft, S Huq, S Harmeling, K Kusters and A de Sherbinin, 'Evidence from the Front lines of Climate Change: Loss and Damage to Communities despite Coping and Adaptation' UNU-EHS, (2012) 20.

6 Laura Schäfer & Sönke Kreft, 'Loss and Damage: Roadmap to Relevance for the Warsaw International Mechanism' (Briefing paper, German Watch) <https://germanwatch.org/en/8366> accessed 22 March 2018.

7 Above n 4, 33.

8 'Loss and Damage from Climate Change: the Cost for Poor People in Developing Countries' (Discussion Paper, Action Aid, 2010) 8 <http://www.actionaid.org/sites/files/actionaid/loss_and_damage_discussion_paper_by_actionaid-_nov_2010.pdf > accessed 22 March, 2018.

9 *Ibid* 8.

10 Above n 4, 33.

11 *Ibid* 33.

than current adaptation funding which seems to increase the growing adaptation deficit.[12]

3. Why Loss and Damage deserves significance as a distinct issue

Loss and damage comes into the premise of climate regime when the limits of adaptation and mitigations efforts against the catastrophic events of climate change became apparent. The issue of loss and damage is particularly important for less developed countries for at least two reasons: (i) less developed counties would be most vulnerable despite the fact that their input are much less compared to the developed countries in terms of causation of climate change and (ii) these (less developed) countries will face multiple vulnerability because they have relatively low adaptive capacities and less resources to overcome loss and damage arising from dangerously sudden and slow-onset climate change consequences.[13] In addition, while the influences of climate change are becoming more and more severe, maintaining stability of many governments particularly in the most vulnerable countries became a crucial challenge in terms of tackling loss and damage.[14] Further, the frequently occurred climate related disasters are creating severe pressure to cope with the unpredictable changes and to repair the costs and shocks of economic, human, social and cultural losses.[15] These losses carry the manifestation of injustice to the developing countries especially on its poor.

In order to discuss about proper approaches to deal with loss and damage and support the most vulnerable countries, it becomes necessary to boost the issue of loss and damage as a distinct issue through leadership and facilitation of support. Though the significance of loss and damage was found to be undeniable, the controversy about it started because developed countries feared that the claim of loss and damage could make them accountable for compensating damages arising due to climate change.[16] The uncomfortable position of developed countries regarding the admission of any legal responsibility for loss and damage shaped the loss and damage negotiations into facilitative rather than punitive approaches.

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12 *Ibid* 33.

13 *Ibid* 34.

14 Above n 6, 5.

15 'Loss and Damage Negotiation at the UNFCCC: An era of liability and Compensation, Briefing Paper, Centre for Participatory Research and Development and Network on Climate Change, Bangladesh-NCC, B' <http://www.cprdbd.org/papers/Loss%20and%20Damage%20Negotiation%20at%20the%20UNFCCC%20An%20Era%20of%20Liability%20and%20Compensation.pdf> accessed 22 March 2018.

16 'Loss and Damage In the Paris Agreement, Climate focus Client Brief on the Paris Agreement IV' <http://www.climatefocus.com/sites/default/files/20160214%20Loss%20and%20Damage%20Paris_FIN_0.pdf> accessed March 22, 2018.

4. Road to Warsaw

The continuing urge from developing countries particularly Alliance of Small Island States (AOSIS), compelled the negotiators to rethink about possible measures in order to tackle climate change impacts that cannot be evaded through mitigation and adaptation measures.[17] In response to the demands of AOSIS, the Bali Action Plan in 2007 at 13th Conference of the Parties (COP 13) urged to take action on 'disaster risk reduction strategies and other means to address loss and damage particularly in vulnerable countries'.[18] By virtue of this Bali Action Plan, the notion 'loss and damage' was inserted in the UNFCCC negotiation agenda. At the Cancun session in 2010, COP 16 'agreed to establish a work program on loss and damage under the guidance of the Subsidiary Body for Implementation (SBI)' that contained work areas which included 'assessing the risk of loss and damage and current knowledge on the same and the role of the Convention in enhancing the implementation of approaches to address loss and damage'.[19] While these areas of focuses were endorsed at COP 17 in Durban, the Parties agreed to extend the work programme with particular emphasis on risk assessment approaches. In 2012 at COP 18 in Doha, AOSIS reintroduced its proposal that contained three main components: (i) a system to help vulnerable countries in order to identify the risks they face and to develop disaster management and risk reduction strategies, (ii) an insurance scheme that replicates the exclusivity of climate change and the prohibitive costs of insurance and (iii) 'an international solidarity fund to compensate communities for damage from slow onset events' that include the relocation of some communities.[20] Developed countries showed concern about the proposal particularly regarding the liability for past or future loss and damage and accordingly they resisted the insertion of responsibility, liability and compensation. At COP 19 in Warsaw, Parties decided to establish 'Warsaw International Mechanism on Loss and Damage' that was considered one of the milestones of the conference after series of negotiations.[21]

4.1 Functions and Goals of Warsaw Mechanism

The Warsaw International Mechanism on Loss and Damage was the starting of a process for further actions to deal with loss and damage.[22] The functions of WIM broadly includes: '(i) enhancing knowledge and understanding of comprehensive risk management approaches, (ii) strengthening dialogue, coordination, coherence and

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[17] Meinhard Doelle, 'The Birth of the Warsaw Loss & Damage Mechanism: Planting a Seed to Grow Ambition?' (2014) 8 (1) *Carbon & Climate Law Review* 35, 35.

[18] Above n 16, 2. Also in Above n 4, 45.

[19] Above n 17, 36.

[20] Above n 4, 46.

[21] *Ibid* 46. Also in Juan P. Hoffmaister, Malia Talakai, Patience Damptey & Adao Soares Barbosa, 'Warsaw International Mechanism for loss and damage: Moving from polarizing discussions towards addressing the emerging challenges faced by developing countries' <http://www.loss-and-damage.net/4950> accessed 22 March 2018.

[22] Birsha Ohdedar, 'Loss and Damage from the Impacts of Climate Change: A Framework for Implementation' (2016) 85 (1) *Nordic Journal of International Law* 1, 2.

synergies among relevant stakeholders (iii) enhancing action and support including finance, technology and capacity building'.[23]

Though Warsaw Mechanism was criticized for not having liability provision, it provides guidance to gather further knowledge and action on various issues including long term adverse effects of climate change, slow onset impacts, loss of livelihood, loss of ecosystems. With a view to provide guideline for the implementation of the purposes of Warsaw Mechanism, the Conference of the Parties (COP) established an Executive Committee (ExCom), accountable to the COP. The Conference of the Parties also dictated the Executive Committee to prepare an initial two year work plan for the functioning of WIM.

The Warsaw Mechanism while having three vital elements: risk management, insurance and compensation/ rehabilitation, aims to reduce vulnerability, improve adaptive capacity, and provide predictable funding for direct and indirect losses.[24] However, questions remain regarding the operation and administration of the mechanism, identification of beneficiaries, and types of compensable damage that need to be settled.

4.2 Action areas of Executive Committee

According to the decision 2/CP.19, paragraph 9 the Executive Committee of WIM has outlined its initial two-year work plan that mainly urges to 'enhance knowledge and data regarding comprehensive risk management approaches, risks of slow onset events and non-economic losses'.[25] The work plan also contains provisions 'to develop capacity in building resilience and to improve expertise on the impacts of climate change related to migration, displacement and human mobility'. [26] In order to materialize these action areas, activities broadly include: expanding knowledge, methodologies and good practices, identifying tools and technologies and engaging dialogue with multilateral financial institutions, UN agencies, bilateral channels and other relevant organizations and expert groups.[27] It is to be noted that the indicative timeline to initiate and undertake this work plan ranges between the years of 2015 and 2016 and the work plan also contained the provision of follow up actions to be analyzed during the meetings of Executive Committee.

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[23] *Ibid* 5. Also in 'Report of the Conference of the parties on its nineteenth session, held in Warsaw from 11-23 November 2013'(United Nations FCCC/CP/2013/10/Add.1, 2013) <http://unfccc.int/resource/docs/2013/cop19/eng/10a01.pdf#page=6> accessed 23 March 2018.

[24] Above n 4, 47.

[25] 'Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts' (United Nations FCCC/SB/2014/4, 7-9) <http://unfccc.int/resource/docs/2014/sb/eng/04.pdf> accessed 30 March 2018. Also in Saleemul Huq, 'From Paris to Marrakech: The next stage of global climate change policymaking' <http://www.thedailystar.net/op-ed/the-next-stage-global-climate-change-policymaking-783148> accessed 30 March 2018.

[26] *Ibid* 10.

[27] *Ibid* 7.

The Executive Committee while undertaking the work plan is providing emphasis to create linkages with relevant bodies within and outside the UNFCCC which deal with the discourse of loss and damage.[28] An information hub is created to create awareness and spread information regarding the activities of the Executive Committee. It is to be noted that the work of the ExCom was suffering from shortage of financial and human resources that was addressed in Paris negotiations.

5. Loss and damage in Paris Agreement

Since the aforesaid wok plan of the Executive Committee under WIM is supposed to be ended at COP22 in December 2016, one of the pressing issues from the developing countries at the COP 21 was to make the WIM into a permanent mechanism.[29] But this was not easy to attain since the issue of loss and damage particularly the liability and compensation from developed counties to developing countries for loss and damage was highly contentious at the Paris negotiations.[30] While developing countries were urging to incorporate liability provision for compensating loss and damage in the Paris Agreement, developed countries, though agreed to insert the notion of 'loss and damage', wanted to avoid the issue of liability and compensation considering political realties back at home.[31] Finally, developing countries made a concession on the issue of liability and compensation for the sake of, at least, making loss and damage as a separate issue and keeping the negotiations on loss and damage alive in the climate regime. Consequently, there remains no hope to claim compensation for loss and damage under the Paris Agreement. This exclusion of liability for compensation comes as a shock particularly to the small island developing states (SIDS) where dangerous consequences of climate change are inevitable destroying even their habitable locality.[32] These states while carrying their never-ending vulnerabilities along with the lack of basic resources including food and water were continuously claiming for compensation but unfortunately their claims were ignored in every international forum and the Paris Agreement was the latest denial. While the survival and basic economic needs are in dire situation in the localities of SIDS let alone their capacities to tackle climate shocks, mere

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[28] Above n 16, 2.

[29] Saleemul Huq, Roger-Mark De Souza, 'Not Fully Lost and Damaged: How Loss and Damage Fared in the Paris Agreement' <https://www.wilsoncenter.org/article/not-fully-lost-and-damaged-how-loss-and-damage-fared-the-paris-agreement> accessed 31 March 2018. Also in Elisa Calliari, Aurora D'Aprile and Marinella Davide, 'Unpacking the Paris Agreement' <http://www.feem.it/getpage.aspx?id=8250> accessed 31 March 2018. Also in Kathleen Mogelgaard and Heather McGray, 'When Adaptation Is Not Enough: Paris Agreement Recognizes Loss and Damage' <http://www.wri.org/blog/2015/12/when-adaptation-not-enough-paris-agreement-recognizes-%E2%80%9Closs-and-damage%E2%80%9D> accessed 31 March 2018.

[30] *Ibid.*

[31] *Ibid.*

[32] Maxine Burkett, 'A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy' (2013) 35 *University of Hawai'i Law Review* 633.

cooperation and coordination without any provision for financing to deal with loss and damage under Paris Agreement leaves many questions unsettled.[33]

There also remains vagueness regarding the legal force of liability provision since it has been placed in the accompanying decision not in the actual legally binding Paris Agreement.[34] Some proponents claimed that a COP decision is not legally enforceable unless there is a special measure in the treaty that can provide legal force.[35] Further, under UNFCCC, no provision has been inserted that would provide legal authority prohibiting any claims for compensation.[36] Principles of international environmental law including no harm and polluter pays are still operative for claiming liability and compensation that cannot be barred by paragraph 52 of the Paris Agreement.[37]

However, despite all criticisms the praiseworthy point is that, the placement of loss and damage in the Paris Agreement, at least, admits its distinct status along with the pillars of adaptation and mitigation in future climate talks.[38] Paris Agreement signifies the necessity of minimizing loss and damage arising out of the dangerous impacts of climate change that include extreme weather events and slow onset events.[39] It also highlights the potency of sustainable development to lessen the risk of loss and damage.[40]

One of the significant aspects of Paris Agreement is that it makes the Warsaw International Mechanism for Loss and Damage as a permanent institution with a mandate to collaborate with existing bodies and expert groups and relevant organizations within and outside the Agreement.[41] While expanding the mandate of WIM[42], Paris Agreement also stressed on cooperation with a view to improving action and support in few areas that include among others 'comprehensive risk assessment and management, risk insurance facilities, climate risk pooling and other insurance solutions, non-economic losses, resilience of communities, livelihoods and ecosystems'.[43] It is expected that the aforesaid expanded mandate would make the WIM as a proactive and

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33 Meinhard Doelle, 'The Paris Agreement: Historic Breakthrough or High Stakes Experiment?' (2016) 6 *Climate Law* 1, 2.

34 Alex Pashley, 'Did the Paris deal rule out climate compensation?' (2015) <http://www.climatechangenews.com/2015/12/18/did-the-paris-deal-rule-out-climate-compensation/> accessed 09 April 2018.

35 Maxine Burkett, 'Reading Between the Red Lines: Loss and Damage and the Paris Outcome' (2016) 6 *Climate Law* 118, 127.

36 *Ibid* 127.

37 *Ibid* 127.

38 Maryam Al-Dabbagh, 'Towards a Middle Path: Loss & Damage in the 2015 Paris Agreement' (2016) *NYU Environmental Law Journal* <http://www.nyuelj.org/2016/04/towards-a-middle-path-loss-damage-in-the-2015-paris-agreement/> accessed 19 April 2018.

39 Paris Agreement, Article 8(1).

40 Paris Agreement, Article 8(1).

41 Paris Agreement, Paragraph 48 and Article 8(5).

42 Above n 33, 13.

43 Paris Agreement, Article 8(4).

operative institution.[44] The mention worthy point is that like WIM, Paris Agreement also failed to include funding measures necessary for the cooperative and facilitative actions stated above.[45] The action areas listed under the provision of loss and damage without having any financial commitment and falling beyond adaptation infrastructure will face significant challnges to function effectively.[46] Another notable feature of Paris Agreement is that the decision accompanying the agreement 'requests the Executive Committee of WIM to establish a clearing house for risk transfer that serves as a repository for information on insurance and risk transfer', with a view to facilitating the implementation of comprehensive risk management strategies.[47] It also calls to establish a task force for addressing human displacement associated with climate change.[48]

6. Strengthening Warsaw Mechanism after Paris Agreement

From the above mentioned Article and decision it is found that Paris Agreement anchored the WIM as a significant cooperation platform for the coming years.[49] With a view to developing the discourse of loss and damage, the functions of WIM need to be redesigned in the light of Paris agreement in addition to its ongoing activities. The proposed task force for addressing human displacement, which is to be launched by WIM, has to consider the fact that migration and human mobility is already part of the Cancun Adaptation Framework, though there have been no substantive initiative by the Adaptation Committee (AC), Least Developing Countries Expert Group (LEG).[50] Here, the task force should address this gap and develop recommendations for the NAPs process intending to avoid displacement and develop strategies in order to deal with forced migration.[51] Since the issue of displacement is related with many countries, a structured approach, that include the setting of Terms of References incorporating the mandate of COP and other details to understand displacement, needs to be undertaken while establishing taskforce.[52] In addition, the proposed taskforce can provide impetus to current activities related to migration, displacement and human mobility undertaken by WIM.[53] Further, the task force could expand its role of coordination regarding collection and disbursement of funds that are necessary to manage migration and relocate displaced people.[54]

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44 Above n 33, 13.

45 Above n 35, 124..

46 *Ibid* 124.

47 Paris Agreement, Paragraph 49.

48 Paris Agreement, Paragraph 50.

49 'Addressing the Climate Change Risk Gap: Insights for the 2nd Meeting of the Executive Committee' (Briefing Note, Politics and Society) <https://germanwatch.org/en/download/14306.pdf> accessed 31 March 2018.

50 *Ibid* 3.

51 *Ibid* 3.

52 *Ibid* 3.

53 Above n 35, 125.

54 *Ibid* 126.

Regarding the Risk Transfer Clearing house, the Executive Committee of WIM should follow 'form follows instruction' approach that involves an activity to track needs relating to functions and information which should be assembled in the clearing house internationally and from relevant stakeholders.[55] In this regard, a call for submission towards relevant stakeholders could be a proper initiative.[56]

6.1 Insurance as an effective tool to deal with loss and damage

The action areas enlisted in the Paris agreement, as mentioned above, mostly, coincide with the work areas of WIM. Out of those, the potentials of insurance as an instrument to deal with loss and damage deserves attention because it has been mentioned both in the actions areas and the decision relating to clearing house for risk transfer. Insurance is important because it reduces the catastrophic impact of some extreme weather events by spreading losses among people across the time.[57] The timeliness and reliability of insurance over post-disaster financing that includes aid, loans and family assistance is considered as its major advantage.[58] Insured clients have a right to post-disaster compensation which cannot be claimed in case of ad hoc disaster assistance.[59] Traditional insurance by giving compensation for losses and offering 'financial incentives for safety, risk avoidance and mitigation' can contribute to adjust with the causalities of climate change.[60] But in case of conventional insurance premiums are likely to be unaffordable for vulnerable individuals and SIDS and its coverage does not always include the costs of relocation and resettlement.[61] This type of formal insurance remains inaccessible to the poor who are forced to 'self-insure' exhausting their resources that make them more vulnerable.[62] Insurance schemes that are based on loss lack feasibility to operate particularly in case of slow onset events because these events are continuously changeable and also expand risk over many areas.[63] With a view to dealing with such slow onset events, development of resilience measures can bring effective outcome.[64]

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55 Above n 49, 3.

56 *Ibid* 3.

57 Koko Warner, 'Laura Schaefer and Michael Zissener, 'COP 21: Understanding insurance in the Paris Package MCII' <http://www.climate-insurance.org/fileadmin/mcii/pdf/COP-21/MCII_Paris_analysis_insurance.pdf> accessed 31 March 2018.

58 *Ibid*.

59 *Ibid*.

60 Joseph Macdougald and Peter Kochenburger, 'Insurance and Climate change' (2013) 47 (14) *The John Marshall Law Review* 101, 131.

61 Above n 4, 49.

62 *Ibid* 49.

63 Kehinde Balogun, 'Managing loss and damage from slow onset events: Applicability of risk transfer tools including insurance' 6, <http://www.lossanddamage.net/download/7271.pdf> accessed 06 April 2018.

64 *Ibid* 6.

The limitations of traditional forms of insurance including their failure to rescue from the consequences of direct damage have led to rethink about the potentials of insurance to address the adverse impacts of climate change.[65] The implantation of insurance scheme in a comprehensive climate risk management system, that includes risk assessment, risk reduction and planning for insurance payouts, can contribute to reduce immediate losses and maladaptation.[66] By giving financial support to the low income households, the tool of insurance (for example weather index based insurance) can be utilized to manage climate risks. In addition, insurance (weather related) can cover a variety of values at risk such as traditional (indemnity based) market based products include crop insurance and property insurance and newer hybrid insurance approaches include the use of parametric insurance covering livelihoods sensitive to weather, food security and ecosystems.[67] However, to deal with large scale weather related events such as recurrent disastrous flooding, resilience building and prevention of loss and damage in such instances are considered viable options to address these risks effectively. Though insurance is not regarded as an optimal device to deal with large scale weather events, the operation of local level insurance reveals that insurance can also contribute to build resilience among local people through social safety nets.[68] The social safety net programs by virtue of insurance can help to manage the risk by reducing the sufferings of low income people and improving their adaptability to cope with the climate shocks.[69] In this regard, with a view to improving climate resilient development pathways, G7 states, during the action day of the Lima Paris Action Agenda, pledged USD 420 million to support the implementation of Insu Resilience in order to increase the availability of risk transfer and insurance solutions for poor and vulnerable people.[70] The Lima Paris Action Agenda focuses mainly regional risk management and insurance pools to offer the services of insurance among 400 million people in the next five years.[71] This agenda highlighted the contribution of private financial sector such as the initiative of an insurance industry named 'the International Cooperative and Mutual Insurance Federation (ICMIF)', on microfinance called '555' that aimed to reach 5 million households in five countries over the period of five years.[72] The agenda also urged for the increased support from several existing platforms including the African Risk Capacity, the Caribbean Catastrophe Risk Insurance Facility, the Pacific Catastrophe

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65 Above n 57.

66 *Ibid.*

67 *Ibid.*

68 'Insurance solutions in the context of climate change-related loss and damage: Needs, gaps, and roles of the Convention in addressing loss and damage'(Munich Climate Insurance Initiative (MCII) Submitted to the SBI Work Program on Loss and Damage, 2012) 16 <http://unfccc.int/resource/docs/2012/smsn/ngo/276.pdf > accessed 09 April , 2018.

69 *Ibid* 16.

70 Above n 57.

71 'Back to Lima-Paris Action Agenda and Action Day' <http://www.cop21.gouv.fr/en/bilan-du-plan-daction-lima-paris-et-de-la-journee-de-laction/> accessed 06 April 2018.

72 *Ibid.*

Risk Assessment and Financing Initiative, and the German government's climate insurance fund.[73] The aforesaid regional and national initiatives can facilitate to diversify the risk and contribute to strengthen risk management efforts while dealing with extreme events.[74]

In this backdrop, the ExCom of the WIM submitted reports to the 2016 fourth forum on "financial instruments that address the risks of loss and damage associated with the adverse effects of climate change" urging inputs on how to analyze and construct risks related to climate change and how to design appropriate financing to address those risks including approaches on insurance and other risk financing instruments.[75] Here this paper submits that current work plan of the ExCom along with proposed Risk Transfer Clearing House and the G7 Initiative on Climate Risk Insurance all together can move forward to implement innovative insurance solutions for poor and vulnerable people. However, the innovative insurance solutions involve two challenges that need to be addressed properly and these are: (i) insurance solutions must benefit the poor, vulnerable and to those who currently have negligible access to insurance coverage (ii) they must revisit with new approaches and technologies to make insurance schemes affordable and sustainable.[76] The development of credible plans to implement risk management strategies including insurance schemes and robust national plans that assess climate risks and incentivize risk reduction and transfer will be the key factors to make the insurance solutions viable in the upcoming years.[77] It is to be noted that in many developing nations, the capability and the necessary funds to establish institutional framework relating to risk reduction is inadequate.[78] The WIM should consider innovative disaster risk financing in order to support the countries which are incapable to capitalize the required investment. The Mechanism could also be broadened by following the strategies of life and health insurance that involve both long period of time and unavoidable loss and damage.

From the abovementioned analysis it can be said that, the role of WIM while dealing with loss and damage still remains confined to collecting data and expanding knowledge without providing any actual sustenance. In this regard, areas of cooperation and

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[73] *Ibid.*

[74] 'Above n 68, 20.

[75] 'Submission of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts to the invitation of the Standing Committee on Finance (SCF) for inputs related to its 2016 fourth forum on "financial instruments that address the risks of loss and damage associated with the adverse effects of climate change' <https://unfccc.int/files/cooperation_and_support/financial_mechanism/standing_committee/application/pdf/excom_response_on_2016_scf_forum.pdf> accessed 06 April 2018.

[76] 'Did the Paris Climate Summit Deliver on Climate Risk Insurance?' (COP21 Part 3 – Guest Blog) <http://blog.results.org.uk/2016/01/07/did-the-paris-climate-summit-deliver-on-climate-risk-insurance-cop21-part-3-guest-blog/> accessed 06 April 2018.

[77] *Ibid.*

[78] Above n 63, 11.

coordination as recognized under Article 8 of the Paris Agreement can provide impetus to broaden the scope of WIM that needs to be addressed in the forthcoming climate negotiations.

7. Conclusion

Paris Agreement, considered as a historic achievement in international diplomacy, offers a platform for international cooperation[79] that needs to be promoted in order to achieve its outcome relating to climate change. The Agreement also sets the stage to deal with the issue of loss and damage by giving institutional dimension to the WIM. The current work plan of WIM which also echoed with Paris Agreement needs to be concretized by incorporating the outcomes of Paris agreement and decisions particularly by establishing a clearing house for risk transfer and utilizing the potentials of insurance schemes. Since the liability or compensation relating to loss and damage has been excluded and there is no specific commitment for parties regarding financial support under Paris Agreement or COP decisions, the WIM has to work on a facilitative and cooperative basis. In addition, under the Paris Agreement there is no direction to offer finance for loss and damage from the Green Climate Fund.[80] The aforesaid lapses imply that financing for loss and damage remains dependent on the 'support'[81] of state parties and other initiatives within and outside the UNFCCC like G7 initiative as discussed earlier. The COP23 meeting held in Bonn, Germany at November 2017 revealed that the executive committee of the WIM failed to include, in the technical paper on financial instruments for loss and damage being part of its five-year work plan, the proposal for additional and innovative financial resources which are necessary to actualize the issue of loss and damage.[82] As the deadline for finalization of the technical paper is approaching in June 2019 and there is no assurance for raising finance for loss and damage, it can be deduced that the issue of loss and damage is not being addressed with utmost commitment. Going beyond the report of WIM, developing countries at COP23 urged for a permanent agenda item to voice addressing their challenges and triggering for effective solutions.[83] Finally it is to be noted that in line with the argument of this paper, the COP23 meeting also highlighted the importance of Insurance-based and risk-pooling initiatives, such as the Insu Resilience Global Partnership and Africa Risk Capacity.

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[79] Bryan H Druzin, 'A Plan to Strengthen the Paris Agreement' (2015-2016*)* *Fordham Law Review Res Gestae* 18.

[80] Above n 16, 4.

[81] The text of Article 8(3) uses the more general language of 'support' rather than explicitly refer to 'finance' and the language is also non-binding (should).

[82] Sheri Lim, 'Climate change loss and damage: The verdict from COP23 in Bonn' <https://insights.careinternational.org.uk/development-blog/climate-change-loss-and-damage-the-verdict-from-cop23-in-bonn> accessed 4 July 2018.

[83] Olivia Serdeczny, 'Loss and Damage at COP23 – goals, roadblocks and detours' <http://climateanalytics.org/blog/2017/loss-and-damage-at-cop23-disappointments-and-consolation-prizes.html> accessed 4 July 2018.

Protecting the Best Interests of the Child: The Child Marriage Restraint Act, 2017 of Bangladesh in Consideration

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1. Introduction

Child marriage is a marriage where either party to the marriage is a child being a person below the age of eighteen years or below the marriageable age set by national legislations.[1]Though child marriage can affect both males and females but it always happens that the girl child becomes the victim of child marriage. It is claimed that for girls, child marriage violates a number of interconnected rights, including the right to equality on grounds of sex and age, the right to marry and found a family, the right to life, the right to the highest attainable standard of health, the right to education and development and the right to be free from slavery which are guaranteed under a number of international instruments on human right.[2] Accordingly, most of the countries are taking numerous steps for stopping this abominable practice. Bangladesh is by no means an exception in this regard. In quest of Bangladesh's series of initiatives to prevent child marriage, the Child Marriage Restraint Act 2017 was passed in February 2017 repealing the earlier legislation of 1929. Though on some points this new law is an improvement from the earlier one, this law contains some new provisions which are a matter of concern for all. The most discussed one is that of special provision[3] which allows child marriage in a particular situation for the best interest of the child. It is an established position of law in every country that anything can be done for the best interest of the child in issues involving them. But it is extremely worrisome to allow child marriage in the name of protecting their best interest, which is designed by the new legislation of Bangladesh though the usual rate of child marriage is very high in the country.[4]

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1 As per the Convention on the Rights of Child 1989, child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

2 UNICEF, *Child Marriage and the Law: Legislative Reform Initiative Paper Series* (January 2008) <https://www.unicef.org/policyanalysis/files/Child_Marriage_and_the_Law (1).pdf>accessed 23 January 2018.

3 *Child Marriage Restraint Act 2017*, s 19.

4 A study of 2016 by UNICEF found that the rate of child marriage in Bangladesh is- under the age of 15 is 18% and under the age of 18 is 52%, cited by Rohini Alamgir and Afroza Jahan Chaity, 'Child Marriage Restraint Act 2017 to practice no restraint' *Dhaka Tribune* (online) 8 November 2017 <http://www.dhakatribune.com/bangladesh/law-rights/2017/02/28/child-marriage-restraint-act/> accessed 25 December 2017.

Accordingly, this present study is aimed at evaluating the extent to which this new Act is compatible for protecting the best interest of the child. For so doing, at first the concept of 'best interest of child' is explained by identifying its evolution, applications under national and international instruments including the context of Bangladesh. In the next chapter the child marriage restraint laws of Bangladesh including the newly enacted Child Marriage Restraint Act of 2017 are discussed with comparison to other jurisdictions. Thereafter, the fourth chapter analyzes the key question raised in this study i.e., as to which extent this new law can protect the best interest of the child. The fifth chapter is designed with some recommendations provided for making the child marriage restraint laws effective in Bangladesh which is followed by the authors' concluding words.

2. Origin and Development of the Concept of 'Best Interest of Child'

2.1 Emergence of the Concept of 'Best Interest of Child':

In the present era, the best interest of the child is the iconic standard used in deciding disputes relating to child. Although the standard is centuries old, there is no fixed meaning of this term. Simply put, the best interest of the child denotes giving priority of the child before any decision affecting his/her life is made.[5] The historical emergence of the best interest doctrine can be traced back to early English law and in the hands of judges. From the end of the thirteen century, the English sovereign started to exercise a type of guardianship over those of its subjects who were unable to look after themselves such as idiots and lunatics, to protect them. Eventually this power came in the hands of Chancery court in 1540.[6] This exercise of protection over adults who lacked the mental capacity to protect themselves seems to have been the origin of the *parenspatriae*[7] doctrine which ultimately led to the ability of the state to regulate the treatment of children.[8] Nevertheless, in feudal England, the law considered children to be the property of their fathers who had the supreme right of guardianship over their infant heirs as they did over their property.[9] For these reasons, courts generally did not interfere with a father's decisions over his infants. But due to the emergence of the doctrine of *parenspatriae* of the state, courts gradually gained increasing jurisdiction over issues involving children. The Court of Chancery was given the power to appoint guardians where the father died without appointing a guardian, or if a guardian became incapacitated during the child's life. Even the court was empowered to resolve disputes

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5 Yvonne Dausab, 'The Best Interest of the Child' in Oliver C Ruppel (ed), *Children's Rights in Namibia* (Macmillan Education Namibia, 2009) 145.

6 Seema Shah, 'Does Research with Children Violate the Best Interests Standard? An Empirical and Conceptual Analysis' (2013) 8(2) *Northwestern Journal of Law and Social Policy* 122, 136.

7 A Latin term for 'parent of his or her country'.

8 Shah, See above n 6.

9 Sarah Abramowicz, 'English Child Custody Laws, 1660-1839, The Origins of Judicial Intervention in Parental Custody' (1999) 99 *Columbia Law Review* 1344, 1366.

between guardians and children.[10] In all these cases, the decision of the court was judged based on whether the decision was for the benefit of the infant.[11]

In *Blisset's* case, decided in 1774, Lord Mansfield granted custody to the mother over a bankrupt father and explained that 'if the parties are disagreed, the court will do what shall appear best for the child'.[12] This case was the first clear indication where the best interest of the child was given precedence over all other things. In all the subsequent cases, the court maintained the same position. In *De Manneville* case, decided in 1804, a French father and a British mother were entangled in a custody battle and the court decided the case by saying that 'it would do what is in the interest of the infant, without regard to the prayer'. [13] Subsequently through a series of legislation, the British parliament shifted the emphasis from paternal rights to the best interest of the child and conferred equal legal status to the father and the mother in determining guardianship and custody.[14]

Thus, the English common law set the stage for the common law countries to recognize the concept of best interests of the child as the prime consideration in custody cases. Although this best interest of child standard emerged in reference to custody matters, gradually the use of this standard in all matters affecting child became a new trend from the 20th century onward.[15]

2.2 Concept of 'Best Interest of Child' in International & Regional Instruments:

In international context, the 'best interests of the child' standard has been called an 'umbrella provision' and is invoked often as a guiding principle in many international instruments relating to child.[16] A number of international and regional instruments[17] contain this 'best interest of the child' standard in a varied manner covering a wide variety of subject matters.

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10 *Ibid*, 1370.

11 *Ibid*, 1378.

12 Daniel B Griffith, 'The Best Interests Standard: A Comparison of the State's Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients' (1991) 7(3) *Issues in Law and Medicine* 283, 290 (citing *Blisset's Case*, 1 Lofft 748 (Mansfield, C.J.)).

13 Abramowicz, See above n 9, 1385 (quoting R v De Manneville, 5 East 221 (1804)).

14 Law Commission of India, 'Reforms in Guardianship and Custody Laws in India' (Law Com Re No 257, 2015) para 1.4.2.

15 Marriane Blair and Merle Hope Weiner, 'Resolving Parental Custody Disputes – A Comparative Exploration' (2005) 39 (2) *Family Law Quarterly* 247, 247.

16 Jonathan Todres, 'Emerging Limitations on the Rights of the Child: The U.N Convention on the Rights of the Child and Its Early Case Law' (1998) 30 *Columbia Human Rights Law Review* 159, 160.

17 These international and regional instruments include both binding and non-binding documents.

If we go for chronological reference as per the date of adoption, the first international document containing this concept is the United Nations Declaration on the Rights of Child[18] which enunciates that the best interests of child shall be the paramount consideration in enacting any law to protect and facilitate the children. The second international instrument containing the best interest concept is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[19] As per this convention, while eliminating discrimination and ensuring equal rights of parents regarding their child by states, the interests of the child shall be of paramount consideration.[20] The third international document having reference of this concept is the Convention on the Civil Aspects of International Child Abduction,[21] the preamble of which acknowledged that the best interests of the child are of paramount importance in matters relating to their custody. Convention on the Rights of Child (CRC)[22] is the fourth international document containing best interest concept which is also the key international instrument relating to child rights. This concept of the best interests of child is found throughout the convention, providing states parties with numerous obligations to consider the best interests of individual children in relevant decision-making processes, especially in case of family matters and in relation to juvenile justice.[23] The basic principle is set forth in article 3 of this convention which states that:

> 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

In its General Comment No. 7,[24] the Committee of the Rights of Childs urged that the principle of the best interests applies to all actions concerning children and requires *active measures* (emphasis added by the authors) to protect their rights and promote their survival, growth, and well-being, as well as measures to support and assist parents and others who have the day-to-day responsibility for realizing children's rights. The fifth international document having best interest concept is the Convention on the Protection

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[18] Declaration of the Rights of the Child 1959, UN G.A. Res. 1386 (XIV), principle no. 2.

[19] Convention on the Elimination of All Forms of Discrimination against Women was adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 and entered into force on 3 September 1981.

[20] CEDAW, art 16(1) (d).

[21] Convention on the Civil Aspects of International Child Abduction was adopted at Hague Conference on Private International Law in 1980 to protect children from the harmful effects of cross-border abductions and wrongful retentions by providing a procedure designed to bring about the prompt return of such children to the State of their habitual residence.

[22] Convention on the Rights of Child was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990.

[23] CRC, art 9, 18, 20, 21, 37(c), 40(2) (b)(iii).

[24] Committee of the Rights of the Child, General Comment No. 7 (2005), CRC/C/GC/7/Rev.1, para 13.

of Children and Cooperation in Respect of Inter-Country Adoption.[25] In case of inter-state adoption of child, certain mechanisms are prescribed by this convention giving the best interests of child as a paramount consideration.[26] The sixth international document is the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.[27] In prescribing rules for achieving the goal under this convention, the best interest of child was given the highest priority.[28] The seventh international document having reference of the best interest concept is the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.[29]The eighth international document is the UNHCR Guidelines on Determining the Best Interests of the Child.[30] These guidelines after giving a comprehensive literature on the best interest concept provide a formal mechanism to determine and assess the best interest of child when they become unaccompanied and separated refugee. The latest international document in this respect is the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (the Paris Principles).[31]As per these principles, all measures relating to the release of children from armed forces or armed groups, their reintegration and prevention of recruitment and re-recruitment in armed groups shall be determined by the best interests of such children.[32]

As regards the regional instruments containing the concept of best interest of child, there are three documents; two of them are of European origin and one is of African origin. The first European document in this respect is the European Convention on the Exercise of Children's Rights[33] whose object is to promote the rights of the children, in particular in family proceedings before judicial authorities. In doing so, the convention provides a number of procedural measures to be adopted by the member states. And in all these

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25 A binding instrument, adopted at Hague Conference on Private International Law in 1993 designed to provide greater security, predictability and transparency for all parties to the inter-state adoption, including prospective adoptive parents.

26 See preamble (4thpara), art- 14, 16, 24.

27 This convention was adopted at Hague Conference on Private International Law in 1996 in order to avoid conflicts between legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of children when their parents are separated and living in different countries.

28 European Convention on the Exercise of Children's Rights, preamble (4thpara), art- 8, 9, 10, 22, 23, 28, 33.

29 This Optional Protocol was adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 and entered into force on 12 February 2002.

30 UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child* (May 2008) <http://www.refworld.org/docid/48480c342.html> accessed 11 February 2018.

31 These principles are formulated by UNICEF and endorsed by states at a ministerial meeting of UNICEF held in Paris in February 2007.

32 Paris Principles, para 3.4.0.

33 The Convention was adopted on 25th January 1996 and it entered into force on 1st July 2000.

cases, the convention puts emphasis on ensuring the best interests of the child.[34] The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse[35] is the second European document in this respect whereby certain forms of sexual abuse against children within the home or family are made criminal offence. Under this convention, best interest of child shall be considered in case of separating child from the parents or guardians involved in sexual exploitation or sexual abuse of the child.[36]

Among the regional documents for the advancement of child rights, the African Charter on the Rights and Welfare of the Child[37] is the most comprehensive one. Though based on CRC, this charter highlights issues of special importance in the African context. As like CRC, the foundation of this treaty is also to ensure the best interest of child (African child). Article 4(1) of this treaty provides this basic principle in the following words:

> 'In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.'

Although article 4(1) of the African Charter seems to be the counterpart of article 3 of CRC, there is a basic difference between the two. The African Charter phrases the concept in even stronger terms than CRC. CRC termed the best interest of child as *a primary consideration*, while the African Charter termed the best interest of child as *the primary consideration* (emphasis added by the authors).Apart from this basic principle, in a number of issues the best interest of child concept is given special importance in this Charter.[38]

2.3 Concept of 'Best Interest of Child' under National Jurisdictions:

In this chapter, the standing of the concept of 'best interest of child' in the legal system of a number of countries as United States, South Africa, Pakistan and India will be explored.[39]

United States- The emergence of the best interests of child approach in the United States occurred during the period from 1790to 1890due to a dramatic shift from the father's common law rights of custody and control of their children towards a more modern emphasis on the needs to nurture, care for, and love of the child.[40]In the 1970s, the US family courts started to use the concept of best interests of child as a determining

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34 *Ibid*, preamble (4th, 5th& 6thpara), art- 2, 6, 10.

35 The Convention was adopted on 25th October 2007 and it entered into force on 1st July 2010.

36 Council of Europe Convention, art 14.

37 The treaty was adopted on 1st July 1990 and entered into force on 29th November 1999.

38 African Charter, art 9, 19, 20(1) (a), 24.

39 The countries are chosen by the authors in order to present a comparative scenario among countries of different legal origins.

40 Gay A Debele, 'A Children's Right Approach to Relocation: A Meaningful Best Interests Standard' (1998) 15 *Journal of the American Academy of Matrimonial Lawyers* 75, 81.

factor in family suits affecting child especially in custody cases.[41]This concept got first statutory recognition though indirectly in the United States through the Adoption Assistance and Child Welfare Act 1980.[42]Thereafter, this concept got a firm place in the US legal system after the amendment in the Child Abuse Prevention and Treatment Act in 1996 therefore providing for the role of guardian ad litem[43] in child abuse and neglect proceedings so as to 'obtain firsthand a clear understanding of the situation and needs of the child; and to make recommendations to the court concerning the best interests of the child.'[44] At present, in the United States, every state embraces the 'best interests' standard in matters concerning child especially in custody laws.[45]

South Africa- In South Africa's family law, the central principle relating to child is that any decision concerning them should be in their best interests.[46] The courts are always guided by this best interest standard. This concept is given the highest priority by placing it in the South African Constitution of 1996 to the point that child's best interests will be of paramount importance in every matter concerning them.[47] In line with the constitutional mandate, the Children's Act of 2005[48] provides for the application of this concept in a comprehensive manner. As per this law, the application of this concept is not limited only in case of family law; rather it is applicable in any matter affecting child. Section 9 of this Act provides the basic standard in the following words:

> 'In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.'

Though best interest of child is not defined in this Act, a numbers of factors are listed to be considered while determining the best interest of child.[49] Together with these basic sections, best interest concept is incorporated in this Act in different specific issues relating to child such as parental responsibilities and rights, proceedings in children's court, safe home for children, alternative care, foster care, adoption etc.[50]

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41 Bridgette A Carr, 'Incorporating a 'Best Interests of the Child' Approach into Immigration Law and Procedure' (2009) 12 *Yale Human Rights and Development Journal* 120, 125.

42 *Adoption Assistance and Child Welfare Act 1980*, s 473(c)(2), 475(5)(B) (United States).

43 A guardian appointed by the court to represent the interests of Infants in legal actions.

44 *Child Abuse Prevention and Treatment Act (Amendments of 1996)*, s 107(b)(2)(A)(ix)(1) (United States).

45 Carr, See above n 41.

46 LufunoNevondwe, Kola Odeku and KonananiRaligili, 'Reflection on the Principle of BestInterests of the Child: An Analysisof Parental Responsibilities inCustodial Disputes in the SouthAfrican law' (2016) 13(1) *Bangladesh e-Journal of Sociology*101 <https://www.researchgate.net/publication/316856417> accessed 11 February 2018.

47 *Constitution of the Republic of South Africa*, s 28(2) (South Africa).

48 Act No. 38 of 2005 (South Africa).

49 *Children's Act 2005*, s 7 (South Africa).

50 *Ibid*, s 2(iv), 6(3), 23(2)(a)(3)(a), 24(2)(a), 28(4)(a), 29(3), 33(4), 60(2)(3)(a), 61(2), 64(1)9a), 66(b), 137(1)(d), 152(4), 153(1), 156(1), 173(1), 174(2)(a), 185(1)(b), 186(2)(d), 235(4)(b), 239(1)(b)(ii), 240(2)(a), 262(5)(a).

Pakistan- In Pakistan, the concept of 'best interest of child' is a recognized principle but its application is limited only within the custody cases. The main statute regulating child custody disputes in Pakistan is the Guardians and Wards Act 1890.[51] It is with reference to the provisions of this Act that matters of custody of children are primarily decided in Pakistan. The Act does not ignore the religious law of personal status to which the minor is subject in a custody dispute, provided it does not impede the best interests of the child.[52] The welfare is the paramount consideration in all custody disputes under the Act. Though it does not precisely define the concept, it provides a checklist of factors that constitute the welfare and best interests of the child.[53] While adjudicating cases, this open-ended nature of the best interest concept led to the exercise of a wide discretion by the Pakistan courts.[54]

India- As a British colony, the legal system of India was also greatly influenced by English law. Accordingly, over the years the 'best interest of child' became a non-negotiable guiding principle for the Indian courts in custody cases following the decisions by English judges. As like Pakistan, the Guardians and Wards Act 1890[55] also constitutes the central statute regulating child custody disputes in India. This law provides for a balance between the personal laws and the best interest of the child concept in deciding custody cases. However, through judicial activism sometimes concern for best interest of child was given precedence over the statutory provisions.[56] India went further in recognizing this best interest concept apart from custody matters. In 2006, the Indian parliament passed the Commissions for Protection of Child Rights Act 2005 [57] for the constitution of a National Commission and State Commissions for protecting child rights and for the establishment of children's courts which will ensure speedy trial of offences against children or of violation of child rights. As per this Act, the constituted national commission is obliged to make recommendations for effective implementations of policies, programs and activities in the best interest of the child.[58]

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[51] Act No. VIII of 1890, which was introduced by the British to the Indian sub-continent and Pakistan, has continued with its application after the independence.

[52] Shabnam Ishaque and Muhammad Mustafa Khan,'The Best Interests of the Child: A Prevailing Consideration within Islamic Principles and a Governing Principle in Child Custody Cases in Pakistan' (2015) 29(1) *International Journal of Law, Policy and The Family* 78, 85.

[53] *Ibid.*

[54] Savitri Goonesekere, 'The Best Interests of the Child: A South-Asian Perspective' (1994) 8(1) *International Journal of Law, Policy and the Family* 117, 128.

[55] Act No. VIII of 1890, which was introduced by the British to the Indian sub-continent and India, has continued with its application after the independence.

[56] Law Commission of India, 'Reforms in Guardianship and Custody Laws in Indi' (Law Com Re No 257, 2015) para 2.3.1.

[57] Act No. IV of 2006 (India).

[58] *Commissions for Protection of Child Rights Act 2005*, s 13(1)(f) (India).

Even before this Act, the concept was cited in the National Charter for Children 2003.[59] The latest statutory instrument containing this concept is the Juvenile Justice (Care and Protection of Children) Act 2015.[60] This legislation is the first of its kind which provides a definition of the 'best interest of child' in the following words:

> 'the basis for any decision taken regarding the child, to ensure fulfillment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development'.[61]

Under this law, one of the guiding principles for the Central government, State government or any other agency working for implementation of this Act is to ensure that in all decisions regarding a child, the best interest of the child shall be *the primary consideration* (emphasis added by the authors).[62]Apart from this fundamental provision, the concept was also referred to in some specific issues under this Act.[63]

2.4 Concept of 'Best Interest of Child' in Bangladesh:

In Bangladesh, the concept of 'best interest of child' also emerged in child custody cases as like its predecessor Pakistan and India. Here, the primary legislations regarding child custody are the Family Courts Ordinance 1985[64] and the Guardians and Wards Act, 1890.[65] While abiding by the statutory requirements in custody matters, the courts always try to take decisions considering the best interests of the child. Various case laws have been developed in this connection by the decisions and precedents of the higher courts. And the gist of such precedents is that the family court's power to determine the entitlement of a party to the custody of a child is not limited to mere observance of the respective personal laws of the parties, rather the paramount consideration is to be the welfare and best interest of the minor child.[66]In the case of *Anika Ali v RezwanulAhsa*[67]**,** authorities of two earlier cases, *Abu BakerSiddique v SMA Bakar*[68] and*Abdul Jalil and others v Sharon Laily Begum Jalil*[69] were referred. In *Abu Baker* case,their Lordships

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[59] The charter was prepared by the Women and Child Development department of Ministry of Human Resource Development, Government of India and published by extraordinary gazette no. F. 6-15/98-CW dated 9 February 2004.

[60] Act No. II of 2016.

[61] *Juvenile Justice (Care and Protection of Children) Act* 2015, s 2(9) (India).

[62] *Ibid*, s 3(IV).

[63] *Ibid*, s 37(c), 74(1).

[64] Ordinance No.XVIII of 1985.

[65] Act No. VIII of 1890.

[66] Zahid Ahmed, 'Law on Child Custody' *The Independent* (Online) 21 April 2017 <http://www.theindependentbd.com/printversion/details/91022>accessed 12 February 2018.

[67] *Anika Ali, daughter of late KaziHaider Ali v RezwanulAhsan, son of MonjurulAhsan*[2011] Civil Petition for Leave to Appeal No 527 of 2011 (unreported)

[68] *Abu BakerSiddique v SMA Bakar* (1986) 38 DLR (AD)106.

[69] *Abdul Jalil v Sharon Laily Begum Jalil* (1998) 50 DLR (AD) 55.

held that 'If circumstances existed which justified the deprivation of a party of the custody of his child to whose custody he was entitled under Muslim Law, courts did not hesitate to do so.' In *Abdul Jalil* case, their Lordships agreed that 'nothing is more paramount, not even the rights of the parties under the rules of personal law or statutory provisions, than the welfare of the children which must be the determining factor in deciding the question of custody of children whether in a proceeding in the nature of *habeascorpus* or in a proceeding for guardianship under the Guardians and Wards Act 1890.'

Apart from the custody cases, there are instances where the higher courts referred to this concept of best interest of child in a number of cases concerning children especially in criminal cases. In a good number of cases, the Supreme Court of Bangladesh has dynamically interpreted the constitutional provisions and other laws concerning children with the active aid of the provisions and principles of the CRC and directed the concerned state agencies and the courts at District level to consider the best interest of the children when dealing with the child matters.[70] In *State v Md. Roushan Mondol @ Hashem*,[71] the Court held that the under-trial children should be kept in the custody of their parents for the sake of their best interest. In *State v The Metropolitan Police Commissioner, Khulna and Others*[72], the High Court Division has observed that 'although the domestic laws have not embodied the beneficial provisions of the UNCRC, they are not inconsistent with our domestic laws except Article 21 on adoption. They may, therefore, be taken into account for ensuring best interest of the child'.[73]In the case of *State v. Secretary, Ministry of Law, Justice and Parliamentary Affairs and Others*[74] the higher court expressly recognized the best interest principle of CRC. The High Court Division ordered that '*in all matters where a child is an accused, victim and witness, the best interest of the child shall be a primary consideration*' (emphasis added by the authors). The Court further stated that, 'due to the mandate of Article 3of the UNCRC, best interest of the children shall be primary consideration even if the children are accused of serious offences.' The Court opined:

> 'We note that when it comes to children committing more serious crimes, they are tried effectively as adults and the best interest of child takes back-stage as a mere slogan. This is in spite of the clear mandate in Article 3 of the [UN] CRC for state parties to ensure that in all actions concerning children taken by institutions, including Courts of law, the best interest of the child shall be a primary consideration. The age old attitude of demonizing children who commit serious

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[70] Abul Hasanat and Md Iqbal Mahmud Fahim, 'Judicial Use of UNCRC in Protection of Child Rights in Bangladesh' (2014) 8(1) *World Vision Research Journal* 17, 25.

[71] *State v Md Roushan Mondol @ Hashem* (2007) 59 DLR (HCD) 72.

[72] *State v The Metropolitan Police Commissioner, Khulna* (2008) 60 DLR (HCD), 660.

[73] *Ibid*, para 29.

[74] *The State v Secretary, Ministry of Law, Justice and Parliamentary Affairs* (2009) 29 BLD (HCD) 656.

> crimes is to be deplored. Courts should at all times consider the reasons behind the deviant behavior of the child and after taking into account all the attending facts and circumstances, decide what treatment would be in the best interest of the child.'[75]

Besides these judicial decisions, recently the best interest of child concept has got statutory recognition in Bangladesh. The Children Act 2013[76] which has been enacted for implementing the CRC[77] referred this concept throughout the Act on different issues relating to child. Observance of best interest (সর্বোত্তমস্বার্থ in Bangla) of child has been mandated in a number of matters concerning children such as participation of a child in court proceedings, determining factors for passing any order concerning children, diversion, family conference, trial procedure of child in contact with law, determination of minimum care in child development institute, determination of alternative care etc.[78] The latest legislation having reference of the best interest concept is the Child Marriage Restraint Act 2017.[79] This legislation has referred to the concept of best interest in order to justify child marriage[80] which itself is a debatable issue and the prime concern of this study.

3. Overview of the Child Marriage Restraint Laws of Bangladesh:

3.1 International Obligation of Bangladesh to Restrain Child Marriage:

Though child marriage may affect boys as well as girls, the trend is that child marriage has a disproportionately negative impact on the girl child.[81]It is seen as a violation of human rights of the girl child. Child marriage is said to be a violation of a number of interconnected human rights assured in the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.[82]Accordingly, there are a number of international instruments which provide for the abolition of this perilous practice. The foremost international instrument in this respect is the CEDAW to which Bangladesh is a party.

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75 *Ibid*, para 40.

76 Act No. XXIV of 2013.

77 *Children Act 2013*, preamble.

78 *Children Act 2013*, s 22(2), 25(1) (2), 30 (j), 48(1), 49(2), 54(3)(4), 63(4), 84(1), 86.

79 Act No. 6 of 2017.

80 *Child Marriage Restraint Act 2017*, s 19.

81 UNICEF, 'Child Marriage and the Law: Legislative Reform Initiative Paper Series' (2008), See above n 3.

82 *Ibid.*

CEDAW provides for the prohibition of child marriage.[83]The next instrument is the CRC which is also applicable to Bangladesh. Though child marriage *per se* is not prohibited under this convention, it contains a provision calling for the abolishment of traditional practices prejudicial to the health of children.[84] The third instrument is the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages[85] and Bangladesh ratified this convention in 1998. Though this convention doesn't prohibit child marriage but provides for minimum age of marriage. Apart from these specific instruments, there are certain international human rights instruments which can be referred to in this aspect such as UDHR, ICCPR and ICESCR since child marriage is considered to be violative of many human rights. From a combined reading of these international instruments, it can be concluded that Bangladesh is obliged to take steps under international law to prohibit child marriage.

3.2Enactment of the Child Marriage Restraint Act 1929:

Prior to the enactment of Child Marriage Restraint Act 2017, within the national legal framework of Bangladesh, the Child Marriage Restraint Act 1929 was the foremost legislation regarding the prevention of child marriage.

This Act was passed during the British regime in India. The practice of child marriage was prevalent in Indian sub-continent from ancient times. In such a background, the child marriage restraint law came into being due to the then surge of social reforms in the hands of some social reformers, Rammohan Roy, Ishwar Chandra Vidyasagar, Keshab Chandra Sen, BehramjiMalabari and some associations like the Brahmo Samaj and the Arya Samaj.[86] Another event which accelerated legislations on the subject was the lawful case of Phulmani Dasi, a child aged 11 years who died due to marital rape by her husband where the court acquitted the husband as intercourse with wife of above ten years was not rape as per law.[87] The death of Phulmani Dasi was an important factor in forcing the lady doctors to send a memorandum to the Government requesting suitable legislation to prevent child marriages which was supported by 1,500 Indian women who sent a representation to Queen Victoria in sistingon similar reforms. A committee of influential persons was formed to look into this issue. On the recommendations of this committee the Age of Consent Bill was passed in 1891 by the government whereby

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[83] CEDAW, article 16(2) stating that 'the betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory'

[84] See above n 81.

[85] This convention was opened for signature and ratification by the General Assembly resolution no. 1763 A (XVII) of 7 November 1962 and entered into force on 9 December 1964.

[86] R Kalaivani, 'Child Marriage Restraint Act (1929) - A Historical Review' (2015) 4(1) *International Journal of Humanities and Social Science Invention* 14, 15-16.

[87] *Ibid.*

cohabitation with a wife under the age of 12 years was prohibited.[88] This question was again examined by the Joshi Committee (1925) and on its recommendations the Child Marriage Restraint Act commonly known as Sarda Act was passed in 1929.[89] This Act of 1929 was in force in Bangladesh until the enactment of new Act in 2017.

According to the Act of 1929, the minimum legal age for marriage was at first 14 for girls and 18 for boys which were later increased to 18 years for girls and 21 years for boys in 1984. Under this Act early marriage was made punishable by law for the first time. This Act provided both punitive and preventive measures relating to child marriage. Punitive measures included the punishment of adult counterpart for solemnizing a child marriage and punishment for parent and guardians concerned in a child marriage.[90]The punishment was similar in all the above cases which was simple imprisonment of one month or fine of one thousand taka or both.[91] This Act gave the women immunity from punishment.[92] Under the preventive measures, the court could issue an injunction prohibiting the child marriage if satisfied from information received through complaint or otherwise that a child marriage has been arranged or is about to be solemnized. Punishment for violating injunction was also provided.[93] Any magistrate of first class could take cognizance of any offence under this Act. In spite of having laws against child marriage, occurrences of early marriage are still happening in the rural areas of the country due to non-execution of the laws properly. While the Act of 1929 did not declare child marriage invalid, it helped pave the way for change.

3.3Passing of the Child Marriage Restraint Act 2017:

As part of her international obligation under the Millennium Development Goals (MDG) and its aftermath, the Sustainable Development Goals (SDG), Bangladesh is committed to promote gender equality and to empower women. Moreover, Bangladesh was obliged to do so as per the commitment of the government at the girl summit 2014 to end child marriage by 2041 and reduce the number of girls' marrying between the ages of 15 to 18 by one third.[94] Since then the government started revising the Child Marriage Restraint Act of 1929 and finalizing the National Plan of Action for Ending Child Marriage with development partners.[95] Finally, the new legislation (Child Marriage Restraint Act 2017)[96] was passed repealing the earlier one of 1929 in 2017.

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88 *Ibid.*

89 *Ibid.*

90 *Child Marriage Restraint Act 1929*, s 4, 5, 6.

91 *Ibid.*

92 *Ibid*, s 6(1).

93 *Ibid*, s 12 (1) and 12(5).

94 UNICEF, *Girl Summit, A Future Free From FGM, Child and Forced Marriage: One Year On* (20 July 2015) <https://www.unicef.org/protection/files/6.1057_DFID_AR_Girl_Summit_Final_web_20072015.pdf> accessed 23 January 2018.

95 *Ibid.*

96 Act No. VI of 2017.

Under this Act, marriageable age for girls is 18 and 21 for boys and child marriage is marriage in which either of the contacting parties is a child.[97] This Act contains both preventive and punitive measures for the purpose of preventing child marriages like the earlier one but in a more comprehensive manner. The preventive measures are the formation of child marriage restraint committees in National, District, Upazilla and Union level,[98] taking action by certain government officials and local representatives for the prevention of child marriage[99] and issuing injunction by prohibiting marriage in contravention of this Act by the court.[100] The Act contains punitive provisions under different headings such as punishment for breaching the injunction, for false complaints, for child marriage, for guardians and other person related to child marriage and lastly for conducting, performing or directing child marriage.[101] In most of the cases the punishment is imprisonment which may extend to two years but shall not be less than six months or fine which may extend to fifty thousand taka or both. And in case of solemnizing child marriage, the fine may extend up to taka one lakh. The fine realized under this Act shall be given to the victim (child in a child marriage) and may also be deposited in the government fund.[102] The mobile court can punish offences under this Act.[103] The limitation period for lodging complaint is two years.[104] The last new provision in this Act is the most controversial provision which allows child marriage in special circumstances for the best interest of the child. Section 19 of the Actstates:

> 'notwithstanding anything contained in other provisions of this Act, nothing will be considered as an offence if a marriage of underage persons is solemnized by the order of the court and with the consent of the guardians and by following the prescribed rules and for the best interest of the underage party.'[105]

3.4 Comparison between the two Legislations (the Child Marriage Restraint Act 1929 and the Child Marriage Restraint Act 2017):

By repealing the Act of 1929, the Child Marriage Restraint Act 2017 is enacted to make the laws relating to the prevention of child marriage up to the mark of the international community. As to marriageable age and the definition of marriage, this new Act retained the provisions of earlier one. The punishments of persons related to child marriage in different ways have been increased radically from imprisonment of one month and fine of one thousand taka to imprisonment of two years and fine of taka one lakh. The punitive measures for a marriage Registrar solemnizing a child marriage is also

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97 *Child Marriage Restraint Act 2017*, s 2(1), 2(4).

98 *Ibid*, s 3.

99 *Ibid*, s 4.

100 *Ibid*, s 5.

101 *Ibid*, s 5(3), 6, 7, 8 and 9.

102 *Ibid*, s 13.

103 *Ibid*, s 17.

104 *Ibid*, s 18.

105 *Ibid*, s 19.

incorporated in the new Act which was absent in the Act of 1929. The limitation period also has been increased to two years from the previous one year. The punishment provision for false complaint is introduced in the new Act which was absent in the former one. Under the Act of 2017, there is provision for child marriage restraint committees in the National, District, Upazilla and Union level constituted of respectable persons who may stop the child marriage or take legal steps prescribed by rules through the written or oral complaints made by any person. Under the previous Act, the court could issue injunction, if satisfied from information laid before it through a complaint or otherwise that a child marriage has been arranged or about to be solemnized while under the Act of 2017, the court may issue injunction *suomotu*[106] which is the positive side of this Act. The provision for local investigation by the court and the 30 working days time limit for such investigation, the use of mobile court under the Mobile Court Act of 2009, the provision for realization of compensation and giving it to the victim party are some new provisions in the Act of 2017.While incorporating the aforementioned positive provisions, one controversial provision (validity of child marriage in special circumstance) is also incorporated in the Child Marriage Restraint Act of 2017 which was absent in the previous Act of 1929.

3.5 Comparison with Child Marriage Restraint Laws of Other Jurisdictions (India and Pakistan):

India is one of the countries with the highest rate of child marriages. In combating the practice of child marriage, India has taken a lot of schemes. One such scheme is the enactment of the Prohibition of Child Marriage Act of 2006[107] repealing the Child Marriage Restraint Act of 1929. Under the Prohibition of Child Marriage Act 2006, a child marriage is to be voidable at the option of the contracting party who was a child at the time of the marriage.[108] The petition for annulling a child marriage has to be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage. If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend along with the Child Marriage Prohibition Officer.[109]While granting a decree of nullity the court shall make an order directing both the parties to return to the other party the money, valuables, ornaments and other gifts received on the occasion of the marriage or an amount equal to the value of such valuables, ornaments, other gifts and money.[110]When the court grants a decree annulling a child marriage, the court may also make an interim or final order to pay maintenance to the female contracting party to the marriage until her remarriage by her husband and in case the husband is a minor, his parents would be liable to pay the

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[106] A Latin term meaning on its own motion.

[107] Act No. 6 of 2007(India).

[108] *Prohibition of Child Marriage Act 2006*, s 3 (India).

[109] *Ibid.*

[110] *Ibid.*

maintenance.[111]Under this Act, marriage of a minor child is to be void under certain circumstances such as where a minor is taken or enticed out of the keeping of the lawful guardian or by force compelled, or by any deceitful means induced to go from any place or is sold for the purpose of marriage.[112]The Act also contains provision for the custody and maintenance of children born out of child marriages at the expense of the adult contracting party.[113]Every child begotten or conceived of such marriage before the decree is made, whether born before or after the commencement of this Act, shall be deemed to be a legitimate child for all purposes.[114] On the other hand in Bangladesh, under the Child Marriage Restraint Act 2017 in lieu of keeping similar arrangements, child marriage is kept as a solution. In respect of punishments both the Act in Bangladesh and India contains almost similar provision. From the statutory arrangements, it is obvious that the Indian position regarding child marriage is very stringent. Even the court takes a strong stand in implementing the statutory law. In the case of *M Mohamed Abbas v The Chief Secretary, Government of Tamilnadu, Fort St George, Chennai*[115], the court upheld the Prohibition of Child Marriage Act 2006 over the personal laws of parties permitting child marriage. The court stated that:

> 'We hold that the provisions of Prohibition of Child Marriage Act, 2006 are in no way against the religious rights guaranteed under Articles 25 and 29 of the Constitution of India. In fact, the same is in favor of all the girl children in getting proper education and empowerment and equal status as that of men in the Society, as guaranteed under Articles 14, 15, 16 and 21 of the Constitution.'

Being a country where 21% girls are married before the age of 18 years, the measures taken by Pakistan is not up to the mark.[116] The prevailing law for preventing child marriage in Pakistan is the Child Marriage Restraint Act 1929. Except from some minor changes, no material change is brought about in the Act. The marriageable age is 16 for girls and 18 for boys. In April 2014, the Sindh Assembly unanimously adopted the Sindh Child Marriage Restraint Act, increasing the minimum age of marriage to 18 and making marriage below 18 a punishable offence.[117] The Punjab Provincial Assembly was the second province in Pakistan which took a similar action by increasing the penalties for marriage under the age of 16.[118] Following the footsteps of these two

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[111] *Ibid*, s 4.

[112] *Ibid*, s 12.

[113] *Ibid*, s 5.

[114] *Ibid*, s 6.

[115] *Mohamed Abbas v The Chief Secretary, Government of Tamilnadu, Fort St George, Chennai*[2015] Writ Petition (MD) No. 3133 of 2015 (unreported).

[116] Girls Not Brides, *Child marriage around the world*< https://www.girlsnotbrides.org/child-marriage/pakistan/>accessed 28 December 2017.

[117] *Ibid.*

[118] Tariq Ahmed, 'Global Legal Monitor, Pakistan: child marriage bill withdrawn' *Library of Congress* (online) 25 January 2016 <http://www.loc.gov/law/foreign-news/article/pakistan-child-marriage-bill-withdrawn/>accessed 12 January 2018.

provinces, a similar bill (the Child Marriage Restraint [(Amendment) Bill 2014] was presented in the national assembly of Pakistan but it was struck down.[119] Again, in 2017 another bill (the Child Marriage Restraint (Amendment) Bill, 2017) increasing the marriageable age of girls to 18 was rejected by the Senate Standing Committee.[120] Though the Pakistani law may lag behind in many respects, there is no special provision permitting child marriage like Bangladesh.

4. How far this Act Can Protect the Best Interests of the Child:

Bangladesh has one of the highest child marriage rates in the world – the highest in Asia. Over half (52%) of Bangladeshi girls get married before 18 and almost one-fifth (18%) are married off before 15.[121] In this background, the Child Marriage Restraint Act 2017 was passed allowing child marriage under exceptional circumstances for the best interest of the parties. According to a report by CARE, India, Nepal, Pakistan, and Bhutan do not allow any such exception and Bangladesh is the only South Asian country that allows child marriage in an exceptional case.[122]

Now the undisputed question is how far this Act can protect the best interest of the child? In this respect the following points need consideration:

1. The Child Marriage Restraint Act 2017 was enacted to protect the interest of the children, but it can be said that the Act encourages the child marriage rather than stopping it. Under the Act[123], in exceptional circumstances marriage of underage persons by the order of the court and with the consent of the guardians is permitted for the best interest of the parties to the marriage. Under this Act, underage in case of marriage means female one who has not attained the age of 18 and male one who has not attained the age of 21. But some crucial points remain unaddressed here- what will be considered as the best interest of the parties? How to determine the best interest? What can be special circumstances? The Act is totally silent about these questions. All these matters are left to the discretion of the court. Again, the minimum age is also not clarified. Can a girl of eight or even less than eight years be given to marriage in special context? That can happen under the ambit of the present Act. So, taking advantage of these obscurities of the Act, child marriage may increase.

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[119] See above n 116.

[120] *Ibid.*

[121] 'Parliament passes law allowing Child Marriages in special cases', *Dhaka Tribune* (online) 8 March 2017<http://www.dhakatribune.com/bangladesh/law-rights/2017/02/27/child-marriage-bill-passed> accessed 18 September 2017.

[122] Afrosejahan Chaity, 'Rights activists question whether child marriage Act serves children's best interest' *Dhaka Tribune* (online) 20 August 2017 <http://www.dhakatribune.com/bangladesh/law-rights/2017/08/20/rights-activists-question-whether-child-marriage-act-serves-childrens-best-interest> accessed 10 September 2017.

[123] *Child Marriage Restraint Act* 2017, s 19.

2. The most frightening aspect of this special provision lies in the context for which this provision was kept in the Act. In the words of Rebecca Momin, a Bangladeshi lawmaker and the chair of the parliamentary Children and Women Affairs Committee, 'those who are opposing the idea are not aware of the grass-roots society of Bangladesh. A child born from unwanted pregnancy requires an identity in this society'.[124] The same argument was put forward by another lawmaker, Meher Afroze Chumki, State Minister for the Ministry of Women and Children Affairs. She reiterated that 'Every society has problems. We have to think about the problems in our society. We also need to think about our children's security. But that does not mean you can marry off your underage child'.[125] Even the prime minister of the country, Sheikh Hasina defended the law by saying that 'the critics know nothing about Bangladesh's social system'.[126] Explaining the 'special circumstances', the prime minister said, 'We've fixed the minimum age for girls to marry at 18. But what if any of them becomes pregnant at 12-13 or 14-15 and abortion can't be done? What will happen to the baby? Will society accept it?... the girl could go for marriage with her parents' consent in such circumstances in order to give the baby 'legal status' in society.'[127] So, the best interest of the girl is designed to protect even by putting the rape victim in marriage with her assaulter. And this fear is not merely anticipatory as the first child marriage of this kind is reported to have been solemnized at Chittagong within one month of enacting the law where the victim girl was given in marriage with the consent of the two families thereby acquitting the groom from charge of rape.[128] This is clear violation of human rights of the victim girl. Different rights groups vehemently criticized the arguments put forward by the lawmakers for keeping this special provision. In the words of Khushi Kabir, Women's rights NGO Nijera Kori Coordinator, 'Marrying a girl off to her rapist or to a hooligan who sexually harasses her will definitely lower her dowry, but it will do nothing to guarantee a better life for her. If anything, her

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[124] MedhaviArora and Ben Westcott, 'Human rights groups condemn new Bangladeshi child marriage law' *CNN* (online) 3 March 2017 <https://edition.cnn.com/2017/03/02/asia/bangladesh-child-marriage-law/index.html> accessed 12 January 2018.

[125] AfrozeJahanChaity, 'Chumki: Special provision of child marriage act necessary' *Dhaka Tribune* (online) 8 March 2017 <http://www.dhakatribune.com/bangladesh/law-rights/2017/03/08/state-minister-chumki-defends-child-marriage-provision/> accessed 11 December 2017.

[126] 'Bangladesh Parliament passes law allowing child marriage in 'special circumstances'' *bdnews24.com* (online) 28 February 2017 <https://bdnews24.com/bangladesh/2017/02/27/bangladesh-parliament-passes-law-allowing-child-marriage-in-special-circumstances> accessed 23 December 2017.

[127] *Ibid.*

[128] 'First child marriage under special provision of new law held in Bangladesh' bdnews24.com (Chittagong Bureau) (online) 27 March 2017 <https://bdnews24.com/bangladesh/2017/03/24/first-child-marriage-under-special-provision-of-new-law-held-in-bangladesh> accessed 21 December 2017.

husband will use and abuse her further and throw her out. This will increase the stigma and destroy her life.'[129]While commenting on the special provision, UNICEF argues 'there are fears that such a provision will legitimize statutory rape and encourage child marriage'.[130] Afrina Chowdhury, gender specialist puts it nicely 'the belief that getting your child married to her rapist will save her is completely groundless. People are only looking at addressing the short term repercussion of shame and a tarnished reputation for the girl and her family. However, in the long run, by compelling her to marry her abuser and enabling this through law, she is being forced into a life time of abuse and suppression.'[131]

3. Keeping this special provision is also violative of the constitutional provisions of the country. Keeping in view the context of this special provision, it can be assumed that rape victims or impregnated minors will be given in marriage with the abuser to protect the honor of the unborn child. This is clear violation of the fundamental rights i.e., 'right to life and personal liberty'[132] under the constitution. Early marriage of girls also deprives them from equal access to education with men, hinders their way of becoming independent and self-reliant. Many studies show, young married girls are more likely to drop out of school and so will not have the opportunity to work and earn, says Aasha Mehreen Amin, Deputy Editor of The Daily Star.[133]A UNICEF report unveils 'Early marriage causes girls to drop out of education and limits their opportunities for social interaction. Only 45 percent of adolescent girls are enrolled in secondary school and even fewer attend regularly. New brides are expected to work in their husbands' households and are subject to the same hazards as child domestic workers'.[134]This points out that validating child marriage in special circumstances may deprive the girl child from right to education, health and other basic necessities of life which are secured under the 'fundamental principles of state policy'[135] of our constitution. Taj Hashmi, professor of Austin Peay State University argues in his seminal piece in *The Daily Star*that 'this Act, in short, grossly violates the Constitution, which guarantees equal rights and

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[129] Rohini Alamgir and Afroza Jahan Chaity, 'Child Marriage Restraint Act 2017 to practise no restraint'*Dhaka Tribune* (online) 8 November 2017<http://www.dhakatribune.com/bangladesh/law-rights/2017/02/28/child-marriage-restraint-act/> accessed 25 December 2017.

[130] Abida Rahman Chowdhury and Robina Rashid Bhuiyan, 'Bangladesh's fight against child marriage is stymied by Child Marriage Restraint Act 2017' *Firstpost* (online) 15 March 2017 <http://www.firstpost.com/world/bangladeshs-fight-against-child-marriage-is-stymied-by-child-marriage-restraint-act-2017-3331070.html> accessed 27 December 2017.

[131] *Ibid.*

[132] *Constitution of the People's Republic of Bangladesh 1972*, article 32.

[133] See above no130.

[134] *Ibid.*

[135] *Constitution of the People's Republic of Bangladesh 1972*, articles 15, 17, 19.

opportunities for all Bangladeshis irrespective of their ethnicity, socio-economic position, gender, and belief systems'.[136]

4. While keeping this special provision, the government has not considered the repercussions this arrangement will have on the physical, mental and psychological well-being of underage girls who may now be forced to marry their sexual assaulter. These young brides will run the risk of marital rape, the risk of birth complications, (which could result in them dying) and also may give birth to underweight babies who will grow up stunted and underdeveloped. They will also be more vulnerable to cruel husbands and in-laws. In the words of Aasha Mehreen Amin, 'these girls will either die of the violence inflicted on them or will be physically and mentally ill for most of their lives making them less productive, unhappy women in, no doubt, unhappy households'.[137]

5. While validating child marriage under the special cases, the requirements under this Act are parents (guardian's) consent and permission of the court. Though the marriage is to be validated for the best interest of the underage (child), nothing is said about the views of that child. Whether she wants to enter into such wedlock where she is being married to her abuser or not? In case of 'best interest of child' jurisprudence, it is now an established stand that while ensuring best interest in any type of action, the views of the child must be given due weight considering the age, maturity and level of understanding of the issue. The CRC whose foundation[138] is grounded on ensuring the best interest of child also emphasizes on state party's compliance that where the child is capable of forming his or her own views, he/she has to be given the right to express those views freely in all matters affecting them and due weight of such views has to be given considering the age and maturity of the child.[139] In a more obvious way, the African Charter places this matter with the basic article dealing with the best interest principle.[140] It may happen that the court dealing with such a child marriage in special context under this Act may ask the concerned girl what she wants to do, but it was not wise to leave the matter in uncertainty considering the magnitude of the matter.

6. Another perilous effect is that this special provision will create a negative impact on the overall implementation of the penal laws[141] dealing with rape, sexual assault and oppression against women and child. In our country, sexual violence against women and children is on the rampant. In a study by Yeasir Yunus, it was found that from

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[136] See above n130.

[137] *Ibid.*

[138] CRC 1989, art 3.

[139] *Ibid*, art 12.

[140] African Charter on the Rights and Welfare of the Child 1990, art 4 (South Africa).

[141] Examples of such laws are the Nari O Shishu Nirjatan Daman Ain 2000; Penal Code 1860, s 354, 375; Acid Crime Prevention Act 2000; Prevention and Suppression of Human Trafficking Act 2012.

2001 to March, 2016, total 11632 were victim of rape where 5994 were woman and 5515 were child.[142] In such a background, this Act of 2017 has came into being where marriage with the rapist or abuser will be allowed to protect the honor of the victim girl and her unborn child under the special provision. This will create an impression that entering into wedlock with the victim girl will legalize the very act of rape or assault. This will add fuel to the already aggravated situation of the country regarding sexual violence against women and child.

7. This Act[143] also contains provision of punishment (imprisonment not exceeding six months or fine not exceeding thirty thousand taka or both)for making false complaint to the court regarding solemnization of a child marriage. It is feared that this provision will act negatively in case of preventing child marriage, because people will not be encouraged to make complaints. Moreover, there is no dividing line between making complaint in good faith and in bad faith. This will reduce the reporting of child marriage tremendously.

8. Last but not the least, legalizing child marriage in whatever the situation can not be a good sign. It will hinder women empowerment and overall development of women and girl children. It can never be for the best interest of a child. While deciding a writ petition challenging the child marriage restraint law of India, Justice S Tamilvanan and V S Ravi of Madras High Court stated in the case of *M Mohamed Abbas v The Chief Secretary, Government of Tamilnadu, Fort St George, Chennai*[144] that

> 'we are of the view that any claim to perform marriage of a girl less than 18 years would not be for the welfare of the girl child but, such marriage would be *against the interest of the girl* (emphasis added by the authors), whereby education and empowerment of the girl is being denied unreasonably.'

5. Recommendations to Make the Child Marriage Restraint Laws Effective in Bangladesh:

Despite national and international laws, child marriage is common worldwide and affects almost all countries. This is also true in the case of Bangladesh. In such a background, Bangladesh has updated her 88 years old legislation. This is surely a laudable step. But this new legislation is criticized on many counts. By taking the following short-term and long-term measures, the criticism can be mitigated to a great extent.

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[142] Yeasir Yunus, *Rape in Bangladesh 2001-2016: Who are raped by whom*< https://www.academia.edu/32807259/Rape_in_Bangladesh_2001-2016_WHO_ARE_RAPED_BY_WHOM?auto=download> accessed 22 February 2018.

[143] *Child Marriage Restraint Act 2017*, s 6.

[144] *M Mohamed Abbas v The Chief Secretary, Government of Tamilnadu, Fort St George, Chennai*[2015] Writ Petition (MD) No. 3133 of 2015 (unreported).

1. With regard to the marriage of underage girls for their best interest in special circumstances, some points have to be clarified by the Act, such as, what will be considered as the best interest of the parties? How to determine the best interest? What can be special circumstance? Regarding the concept of best interest and the determination of the best interest, the Government should make rules clarifying the above issues and in this regard training for judges can be arranged. While commenting on the issue, Kazi Rezaul Hoque, Chairman, National Human Rights Commission of Bangladesh urged the government to take a proactive position and provide training for judges so that they can effectively deal with the special circumstances.[145]

2. A minimum marriageable age of girls even under special circumstances should be fixed of which no exception can be allowed. Strict adherence to such provision must be ensured. Similarly, when allowing marriage under special circumstance verification of the full and meaningful consent of both parties has to be ensured. Importantly, when the girl child was abused (raped) by the party to the marriage, marriage should not be allowed except in very exceptional cases. In such case, the victim has to be given every kinds of support so that they can express their views without any anxiety.

3. Apart from penalizing child marriage, the government should think over the status of marriage if solemnized in any way apart from the special circumstances. In this case, Bangladesh can follow the footstep of India. Marriage should be made voidable at the option of the underage party to the marriage, regardless of whether the marriage had been consummated.[146] However, marriage below a certain age which can be 16, marriage under compulsion, fraud should be declared void.

4. Protection of the girl child must be prioritized. And in this regard the girl child whose marriage is declared void must be given the fullest protection of the law including the right to maintenance at the expense of the party responsible for the marriage.

5. Apart from punishing the marriage Registrar for registering child marriage, some steps should be taken to ensure that no child marriage is solemnized by marriage Registrars. Among the Muslims it is a common trend that marriage is solemnized and registered at the office of marriage registrar[147], locally known as kazi where the

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[145] Mahadi Al Hasnat, 'NHRC Chief: Section 19 of Child Marriage Restraint Act 2017 is frustrating' *Dhaka Tribune* (online) 25 April 2017, <http://www.dhakatribune.com/bangladesh/law-rights/2017/04/25/nhrc-chief-child-marriage-frustrating> accessed on 23 February 2018.

[146] Elizabeth Warner, 'Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls' (2004) 12 *American University Journal of Gender, Social Policy & the Law* 233, 269-70.

[147] Marriage Registrar, appointed under the Muslim Marriages and Divorces (Registration) Act 1974.

bridegroom's family and only the male family members of the bride's family remain present with documents proving the age of the bride. Accordingly, there is no opportunity to hear about the views of the girls. Under the newly framed Muslim Marriages and Divorces (Registration) Rules 2009[148], there is only provision for asking about the solemnization of marriage before registration either to the parties or to the witnesses or to the advocate of the bride if the bride is apardanishin lady.[149] On the other hand, as in Hindu marriage registration is optional; there is little scope of surveillance. So, rules should be framed ensuring that the marriage registrar interviews both the bride and groom in detail prior to the registration of the marriage. The attendance of both parties at the interview has to be ensured where some credible evidence that the marriage is neither forced nor coerced should be guaranteed. There should be provision for inquiry by the marriage registrar where he doubts about the veracity of the documents relating to age of the parties. And in case of Hindu marriage, registration guaranteeing the above provisions has to be ensured.

6. There should be provisions for forming monitoring cells in local level for strong monitoring. Reporting systems need be set up and reporting of cases should be encouraged. In this regard, existing provision of punishment for making false complaint to the court regarding solemnization of child marriage should be reconsidered by the government and in this regard there should be a dividing line between making complaint in good faith and in bad faith. In addition, law enforcement and officials working in administration must be trained up in the way of reporting and collecting data on child marriage. NGOs and social audit can be used to check the implementation of the law.[150]

7. Together with the above legal reforms, some social reforms should be given priority such as expanding girls' education, providing supportive economic opportunities, improving healthcare facilities and awareness raising campaigns. For elimination of child marriage from the society with a bid to slash the maternal mortality rate in the country, the government should establish secondary school registration program with parents commitment about not to marry their daughters until they reach the age of 18.[151]

6. Conclusion:

Tracing back to early English law 'best interest' doctrine was regarded as the paramount consideration in custody cases, which gradually became a new trend in deciding children's affairs. A series of international and regional instruments also contain the

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[148] Muslim Marriages and Divorces (Registration) Rules 2009 are framed by repealing the earlier Muslim Marriages and Divorces (Registration) Rules 1975.

[149] Muslim Marriages and Divorces (Registration) Rules 2009, r 22.

[150] UNICEF, 'Child Marriage and the Law: Legislative Reform Initiative Paper Series' (2008), See above n 2.

[151] Nahid Ferdousi, 'Children Silent Victims in Child Marriage in Bangladesh: Significance of Legal protection for their Wellbeing' (2013) 3(14) *Developing country Studies* 18.

obligation of considering best interest in case of decisions concerning children. Gradually the best interest doctrine developed in different countries' legal system through distinguished matters. Like India and Pakistan, best interest doctrine also emerged in custody cases in Bangladesh. Apart from custody cases, in a number of cases the High Court Division considered the best interest of child as paramount consideration in matters where a child was accused, victim and witness. Due to the mandate of CRC, best interest of children shall be primary consideration even if the children are accused of serious offences. Except from the judicial decisions, the best interest of child concept also got statutory recognition in Bangladesh under the Children Act 2013 where consideration of best interest of child has been mandated in a number of aspects concerning child's affairs. The latest law on this point is the Child Marriage Restraint Act 2017 which was passed by Bangladesh repealing the previous one to make it contemporaneous. This Act allows marriage of underage boys and girls in special circumstances for the best interest of the child with the permission of the court. But the controversy surrounds this Act is as to what extent this can protect the best interests of child by allowing child marriage. As a girl child is more prone to be affected by this new provision of law, it is feared that it may compel the marriage of an underage girl even with her rapist or sexual assaulter. This is the flagrant violation of her human rights and also the violation of constitutional rights of right to life and personal liberty. This will run the risk of marital rape, birth complications and a major blockade in the way of gender equality. Accordingly, the government of Bangladesh should rethink about this provisions which negatively paves the way of child marriage. In this regard, the above-mentioned recommendations can be considered by the relevant stakeholders to make the marriage restraint laws effective. Last but not the least, considering all the issues raised in this study; Bangladesh should take timely and functional steps so that no child marriage can take place at any cost.

Sifting through the Maze of 'Person Aggrieved' in Constitutional Public Interest Litigation: Has Abu Saeed Case Ushered a New Dawn?

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Introduction

Public interest litigation (PIL)[1] i.e. cases filed for the benefit of not of the person (either natural or legal) who approaches the court but for someone else in Bangladesh has been

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[1] While apparently no law in Bangladesh contains a definition of PIL, a workable definition of the term may be taken from the following observations of the Indian Supreme Court in *People's Union for Democratic Rights and Ors v Union of India (UOI) and Ors* (1982) MANU/SC/0038/1982:

> Public interest litigation…is essentially a co-operative or collaborative effort on the part of the petitioner, the State or public authority and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them. The State or public authority against whom public interest litigation is brought should be as much interested in ensuring basic human rights, constitutional as well as legal, to those who are in a socially and economically disadvantaged position, as the petitioner who brings the public interest litigation before the Court. The state or public authority which is arrayed as a respondent in public interest litigation should, in fact, welcome it, as it would give it an opportunity to light a wrong or to redress an injustice done to the poor and weaker sections of the community whose welfare is and must be the prime concern of the State or the public authority. (Para 4).

At its core, PIL may be defined as observed by the AD in Bangladesh Sangbadpatra Parishad (BSP) v The Government of People's Republic of Bangladesh and four others (1991) 43 DLR (AD) 126 'litigation at the instance of a public-spirited citizen exposing causes of others.' (Para 9).

The observation of the HCD *Maulana Syed Rezaul Haque Chadpuri and others v Bangladesh Jamaat-e-Islami & others* (2017) 25 BLT (HCD) 403, may also be taken to define the nature and delineate the boundaries of PIL:

> A plain reading of the leading cases of different jurisdictions suggests that the basic thrust of PIL has always been to protect fundamental freedom and basic rights of the backward and less fortunate section of the people[,] but at times PIL surpassed its narrow frontiers and developed in other dimensions of public causes. Thus Superior courts in appropriate cases found it proper to allow standing to individuals having sufficient interest to maintain action treating

a common feature in the legal system of Bangladesh. This is particularly prominent in cases of writ petitions filed to the High Court Division (HCD) of the Supreme Court (SC) of Bangladesh. With the emergence of a burgeoning number of NGOs, PIL, particularly PIL invoking the special constitutional jurisdiction[2] under Article 102 of the *Constitution*, has become quite a frequent matter in the recent years. *Ain O Shalish Kendra*, Bangladesh Legal Aid and Services Trust, Bangladesh National Women Lawyers' Association, Bangladesh *Jatiyo Mahila Ainjibi Samity*, Bangladesh *Mahila Parishad*, Human Rights and Peace for Bangladesh, *Naripokkho*, *Odhikar*, and many other NGOs, as well as public-minded individuals, have filed a mushrooming number of public interest litigations before the HCD for seeking redress of the grievances, not of themselves but of others in the community. This has been a potent force in the hands of many public-minded individuals and NGOs for seeking redress to wrongs which may trample the rights of many who may not approach the court for one reason or the other.

By one account, one may argue that the whole gamut of PIL cases, at some level, is an oxymoron, since even the Good Samaritans may be motivated by some sort of gain seeking however indirect or remote that pursuit may be. Having said that, the PIL cases are at least distinct from other cases in that the result of the suit would not or should not bring in any direct gain for the party seeking remedies from the court. One particular issue that has vexed the highest court of Bangladesh is who is a person aggrieved i.e. who is entitled to file a PIL case. While the court, in this case, would on balance, probably have to be liberal because on a *stricto sensu* literal interpretation of the 'person

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constitutional questions of grave importance or gross and manifest abuse of public office which shocks public conscience. (para 27) [*Maulana Chadpuri*].

For a scholarly view, regard may also be had to Christine M. Forster and Vedna Jivan, 'Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience' (2008) 3 *Asian Journal of Comparative Law*, 1, 3 observing:

PIL can be defined as litigation in which the public or the community at large has some pecuniary or legal right or interest. Whereas private rights litigation, which has historically dominated the legal landscape, is solely concerned with the declaration of an individual's rights and obligations, the grievance in a public interest action concerns the conduct and content of government action or policy in relation to constitutional, statutory or general law rights of a particular segment of society. PIL had its origins in the 1960s in the socio-political context of the civil rights movement of the United States and was specifically utilised by civil organisations to assist the disadvantaged.

Some legal commentators prefer to use the term social action litigation; see for instance, Upendra Baxi, 'Public Interest Litigation in Developing Countries' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press, 2008) 964.

[2] The official terminology for the writ jurisdiction, 'special original jurisdiction' is not used in this article to separate the category of PIL cases discussed here from various other types of writs.

aggrieved' notion may mean that the door of the PIL is shut. Because by definition, here the party approaching the court is not seeking legal remedies to vindicate her/his rights.

In this article, we would look into the genesis of the person aggrieved in PIL cases in Bangladesh, dissect two important cases where the Appellate Division (AD) has given decisions on the meaning of person aggrieved which are difficult to reconcile, and we would conclude the article by analysing a relatively recent case in which, by noting some abuse of a liberal approach in admitting the PIL cases, the AD has issued some directives which if applied rigorously and consistently should raise the bar for being a person aggrieved for filing PIL cases and may usher a new era in constitutional PIL jurisprudence in Bangladesh. It should be pointed out here that the entire discourse in this article is focused on the meaning of the person aggrieved in constitutional PIL cases. However, this, of course, does not mean that PIL cases are only filed in constitutional cases. There are other avenues of filing PIL cases in Bangladesh,[3] but those avenues and the notion of person aggrieved in those are beyond the scope of this article.

While the constitutional remedy invoked through various forms of writ petitions is beyond the purview of this article, it may be worth mentioning that Article 102 applies the notion of a person aggrieved only in cases of seeking redress to the violation of fundamental rights or writ of certiorari, writ of mandamus, or writ of prohibition. It does not apply this requirement in cases of writ of habeas corpus or writ of quo warranto. Thus, the analysis of this article has no bearing on the writ of habeas corpus or writ of quo warranto. It is also important to point here that we do not seek to argue that a restrictive definition of the term person aggrieved should be applied. Indeed, pointing to various provisions of the *Constitution*, the author of a leading constitutional treatise, Late Mahmudul Islam, has argued that framers of the *Constitution* would likely have envisioned a society where adherence to a strict view of the person aggrieved would not stand in the way of avenging public wrongs.[4] In all probability, a person may be aggrieved without personally being affected by the matter at issue and if this were not so, the edifice of PIL would have crumbled. We do not dispute these points, we rather only endeavour to show two points: one is that on some occasions the jurisprudence has been somewhat conflicting and secondly, the decision in *Abu Saeed Khan*,[5] may make a

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[3] For an overview of the various avenues of PIL cases, see Justice A M Mahmudur Rahman, 'Existing Avenues for Public Interest Litigation in Bangladesh' in Sara Hossain, Shahdeen Malik, and Bushra Musa (eds), *Public Interest Litigation in South Asia* (The University Press Limited, 1997) 79. However, a caveat is that the avenues are only illustrative and some of them have become defunct with the passage of time.

[4] Mahmudul Islam, *Constitutional Law of Bangladesh* (Mullick Brothers, 3rd ed, 2012) 845-848. See also *Mohammad Tayeeb and another v Government of the People's Republic of Bangladesh and others* (2015) 23 BLT (AD)10; M. Amir-ul Islam, 'A Review of Public Interest Litigation Experiences in South Asia' in Ibid, 55, 66-68.

[5] *National Board of Revenue v Abu Saeed Khan and Others* (2013) 18 BLC (AD) 116 [Abu Saeed Khan].

significant contribution in the future development on this question. We also do not, in any way, imply that our discussion on the PIL cases, dwelling on the issue of person aggrieved, is an exhaustive one.[6]

The Genesis of Constitutional PIL in Bangladesh and the Interpretation of Person Aggrieved

The genesis of PIL in Bangladesh has been discussed elsewhere and would not be rehashed here.[7] However, a brief overview of the genesis is offered here to set the context for subsequent development. Just a couple of years after liberation, the SC had to grapple with the issue of a person aggrieved in *Kazi Mukhlesur Rahman v Bangladesh and another* (also known as Beru Bari case).[8] In this case, the petitioner, an advocate, challenged the legality of the *Delhi Treaty* of 1974, entered into between India and Bangladesh for the demarcation of the land boundaries between the two countries. According to the petitioner, the Treaty, involving inter alia, the cession of South Berubari and adjacent enclaves (though in exchange of Dahagram and Angarpota enclaves from India), was signed without any legal authority.

In the course of settling the matter, the *locus standi* of the petitioner was a critical issue because the government argued that the petitioner not being a resident in the respective area covered by the treaty, could not have been a proper person aggrieved to invoke the writ of certiorari.[9] Taking a liberal view, the Appellate Division disagreed. It held that the decision on the question of *locus standi* does not depend on the court's jurisdiction rather it depends on the competence of the petitioner to approach the court and the court has discretion to accept or reject a petition based on the facts and circumstances of a particular case.[10] According to the Court, the petition was premature (presumably because it was filed before the ratification of the treaty)[11] and hence, the appeal was dismissed. However, the court unequivocally held that the petitioner was a person aggrieved and observed:

> The fact that the appellant is not a resident of the southern half of South Berubari Union No 12 or of the adjacent enclaves involved in the Delhi Treaty need not

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[6] For some other cases dwelling on the issue, see for example, *Bangladesh Retired Government Employees Welfare Association and others v Bangladesh and another* (1994) 46 DLR (HCD) 426; *SN Goswami, Advocate and another v Government of the People's Republic of Bangladesh and others* (2003) 55 DLR (HCD) 332.

[7] For a detailed overview of the genesis of PIL in Bangladesh, see Naim Ahmed, *Public Interest Litigation: Constitutional Issues and Remedies* (Bangladesh Legal Aid and Services Trust, 1999) [Ahmed].

[8] (1974) 26 DLR (SC) 44.

[9] *Ibid*, paras 9-10.

[10] *Ibid*, para 17.

[11] *Ibid*, para 40.

> stand in the way of his claim to be heard in this case. We heard him in view of the constitutional issue of grave importance raised in the instant case involving an international treaty affecting the territory of Bangladesh and his complaint as to an impending threat to his certain fundamental rights guaranteed by the constitution, namely, to move freely throughout the territory of Bangladesh, to reside and settle in any place therein as well as his right of franchise. Evidently, these rights attached to a citizen are not local. They pervade and extend to every inch of the territory of Bangladesh stretching up to the continental shelf.[12]

The principle propounded in this case has been subsequently summarised in *Mohiuddin Farooque v Bangladesh* that when there is an infringement to a fundamental right of citizens, *any* citizen (i.e. although her/is rights may not be affected in any way) may invoke the jurisdiction of the HCD under Article 102 of the Constitution.[13] Secondly, when a gravely important legal issue of public importance is involved, any petitioner (presumably, citizens or legal persons having a base in Bangladesh but possibly not a foreigner)[14] would be entitled to approach the court as a person aggrieved. Commenting on the significance of this case, the AD in *Mohammad Tayeeb and another v Government of the People's Republic of Bangladesh and others*,[15] has observed that by allowing the petitioner *locus standi*, the Court has 'obliquely opened a new vista. But after such an initial glimpse, seemingly the constitutional PIL cases in Bangladesh lost its way and remained barren for the next 23 years.'[16]

It may be a question whether or not the virtual absence of a democratic rule in the intervening period may be a factor fueling this hiatus in this long period. Justice Mustafa Kamal (as he then was) has implied this to be the case when he commented in *Mohiuddin Farooque v Bangladesh* that there 'was a long period of slumber and inertia owing not to a lack of public spirit on the part of the lawyers and the Bench but owing to frequent interruptions with the working of the Constitution and owing to intermittent de-clothing of the Constitutional jurisdiction of the Superior Courts.'[17] However, a definitive finding on this matter as to what extent the military rule has impacted this would need both a quantitative and qualitative study of the writ petitions filed during this period which is beyond the scope of this article. However, it is clear from the

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[12] *Ibid*, para 18.

[13] *Dr. Mohiuddin Farooque v Bangladesh and others* (1997) 49 DLR (AD) 1, para 6 [*Mohiuddin Farooque*].

[14] The observation of the court in ibid, para 48 that 'any citizen or an indigenous association, as distinguished from a local component of a foreign organisation, espousing that particular cause is a person aggrieved and has the right to invoke the jurisdiction under Article 102' would imply that in its view a foreigner would be ineligible to file a PIL in Bangladesh.

[15] (2015) 23 BLT (AD) 10.

[16] *Ibid*, para 13.

[17] *Mohiuddin Farooque*, above n 13, para 34; Ahmed, above n 7, 22-25.

decisions in a few cases during this intervening period that the SC took a too strict and literal view of the person aggrieved during this period which is hardly surprising during military rule (either de jure or de facto)[18] and in some way this poses a question mark on the suggestion by some that after the 4th Amendment to the Constitution, the military rule eventually promoted the independence of the judiciary.[19]

However, then in 1994, a PIL case was filed by late Dr Mohiuddin Farooque, the founder secretary of Bangladesh Environmental Lawyers' Association (BELA) invoking Article 102 of the *Constitution*. According to the petitioner, the activities undertaken as per the FAP20 project through the setting up of a Flood Plan Co-ordination Organisation (FPCO), aimed at controlling of flood would have an adverse impact on the life of more than a million people and also on natural resources in the project area in Tangail District. The HCD took a very rigid view and rejected his petition holding that he was not a person aggrieved within the meaning of Article 102 of the *Constitution*. The AD reversed that holding of the HCD that the petitioner lacked *locus standi* and remanded the case back to the HCD for its hearing on merit.

In the course of its decision, the AD observed that 'interpreting the words "any person aggrieved" meaning only and exclusively individuals and excluding the consideration of people as a collective and consolidated personality will be a stand taken against the Constitution.'[20] The AD found that the HCD cannot 'adhere to the traditional concept that to invoke its jurisdiction under Article 102 only a person who has suffered a legal grievance or injury or an adverse decision or a wrongful deprivation or wrongful refusal

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[18] See for example, *Dada Match Workers Union (Bargaining Agent) v Govt. of Bangladesh and others* (1977) 29 DLR (HCD) 188; *Mohammad Giasuddin Bhuiyan v Bangladesh*, (1981) 1 BCR (AD) 81.

[19] See for instance, *Aftab Uddin (Md) v Bangladesh and others* (1996) 48 DLR (HCD) 1 observing that:

> There is no dispute that the original Article 116 enacted in the Constitution of 1972 was perfectly in conformity with the independence of the judiciary and the concept of separation of the judiciary from the executive as enshrined in Article 22 of the Constitution and also the pledge of the people of Bangladesh embodied in the third paragraph of the Preamble to the Constitution. It is clear that all these concepts including the concept of independence of the judiciary and the separation of the judiciary from the executive organ of the State were done away with by enacting section 19 of Act II of 1975. It also appears that by a further amendment of Article 116 of the Constitution, although by a Martial Law dispensation, the concept of independence of the judiciary and the concept of the separation of powers as enshrined in Article 22 of the Constitution as well as in the pledge embodied in the third paragraph of the preamble thereof were partially restored. (para 49).
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> While factually, the above statement is correct, the paucity of constitutional PIL (possibly also other kind of writ petitions) would imply that the so-called impendence of the judiciary during military rule was at least to some extent ceremonial or a mirage.

[20] *Mohiuddin Farooque*, above n 13, para 47.

of his title to something is a person aggrieved.'[21] The AD did not entirely abandon the orthodox view that only a person affected by an act or inaction would be a proper plaintiff to seek redress from the court. But it reserved the applicability of that traditional view only to cases where 'individual rights and individual infraction thereof are concerned.'[22] Then came the classic pronouncement on the question of the person aggrieved in the following words which has been restated in many subsequent PIL cases in Bangladesh:

> [W]hen a public injury or public wrong or infraction of a fundamental right affecting an indeterminate number of people is involved it is not necessary, in the scheme of our Constitution, that the multitude of individuals who has [sic] been collectively wronged or injured or whose collective fundamental rights have been invaded are to invoke the jurisdiction under Article 102 in a multitude of individual writ petitions, each representing his own portion of concern. Insofar as it concerns public wrong or public injury or invasion of fundamental rights of an indeterminate number of people, any member of the public, being a citizen, suffering the common injury or common invasion in common with others or any citizen or an indigenous association, as distinguished from a local component of a foreign organisation, espousing that particular cause is a person aggrieved and has the right to invoke the jurisdiction under Article 102.
>
> It is, therefore, the cause that the citizen-applicant or the indigenous and native association espouses which will determine whether the applicant has the competency to claim a hearing or not. If he espouses a purely individual cause, he is a person aggrieved if his own interests are affected. If he espouses a public cause involving public wrong or public injury, he need not be personally affected. The public wrong or injury is very much a primary concern of the Supreme Court which in the scheme of our Constitution is a constitutional vehicle for exercising the judicial power of the people.[23]

The above is clearly a more direct and exhaustive pronouncement on the elaboration of the meaning of person aggrieved in constitutional PIL cases than what has happened in the earlier decision in *Mukhlesur Rahman*.

Irreconcilable Interpretations of 'Person Aggrieved' Decisions in PIL Cases:

In *Ekushey Television Ltd and others v Dr Chowdhury Mahmood Hasan & others*,[24] the petitioners approached the court challenging the grant of license to operate a terrestrial television license to Ekushey television. They claimed that in granting the license the relevant legal procedure was not followed. Of the petitioners, two were Professors of

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[21] *Ibid.*

[22] *Ibid*, para 48.

[23] *Ibid*, para 48-49.

[24] (2002) 54 DLR (AD) 130.

Dhaka University and another one was the President of Bangladesh Federal Union of Journalists (BFUJ). They alleged that the matters involved in the case amounted to breaches of constitutional obligations and statutory duties in dealing with public property. As conscious citizens, they approached the court to perform their public duty under the *Constitution* and other laws of Bangladesh. Both the HCD and AD took their case. The AD observed:

> …Ekushey Television is an example of wanton license with a shady deal in every step of the licensing process… If abuse of power in the ETV affairs is not allowed to be challenged before this court, it will undermine the constitutional provisions that establish the relevance of executive adherence to rule of law. What happened in this case must open the eyes of both the Government as well as the people at large to the uncontrolled exercise of executive power. Providing immunity will be against the rule of law that requires accountability and transparency in running the Government…The duty which is breached, causing injury, is owed by the state, as a public authority, not to any specific or determinate class or group of people or to a particular individual, but to the general public. Such cases of public injury cannot necessarily be shown to affect the rights of a determinate class or a group of people. No one can possibly be shown to be in a position to claim that a specific legal injury is caused to him alone. If [the] breach of [a] public duty of this kind and proportion, is allowed to go without any redress the failure to perform such public duty would go unchecked and would open the door for corruption. There would be no check on the house of power. It will also result in a denial of constitutional rights of the general public.[25]

In disposing of the review petition of the same case, *Ekushey Television Ltd. and another v Dr Chowdhury Mahmood Hasan and ors,*[26] the AD held:

> The nature of public interest litigation (called PIL hereinafter) is completely different from a traditional case which is adversarial in nature whereas PIL is intended to vindicate rights of the people. In such a case benefit will be derived by a large number of people in contrast to a few. PIL considers the interest of others and therefore, the court in a public interest litigation acts as the guardian of all the people whereas in a private case the Court does not have such power. Therefore, in public interest litigation[,] the Court will lean to protect the interest of the general public and the rule of law vis-a-vis the private interest. Where the rule of law comes into conflict with third party interest the rule of law will, of course, prevail.[27]

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[25] *Ibid*, paras 70-71.

[26] (2003) 55 DLR (AD) 26.

[27] Ibid, para 34.

However, the above decision is a striking U-turn from what the AD held in *BRAC v Professor Mozaffar Ahmed and others*,[28] in the preceding year. In that case, Professor Mozaffar Ahmed, a Professor of Economics mounted a constitutional challenge to the granting of license to BRAC to launch a bank named 'BRAC Bank Ltd.' Professor Ahmed argued inter alia, that Bangladesh Rural Advancement Committee (as BRAC then was known as) being a charitable society registered under Section 20 of the *Societies Registration Act*, 1860 could not venture into a profit-making activity such as the launching of a bank. The appellant also argued that this was also incompatible with clause 1 of the memorandum of BRAC. The Registrar of Joint Stock Companies and Bangladesh Bank have flouted statutory provisions by giving BRAC the permission to launch the bank, the argument went. BRAC in essence argued that money invested in the Bank would come from the surplus money of BRAC and the money earned from the profit of the bank would be reinvested for charitable purposes. And one key issue in this case too was the *locus standi* of the petitioner. Professor Ahmed's claim prevailed in the HCD. However, BRAC appealed and in a three-one majority decision (Justice Md. Ruhul Amin dissenting), the AD reversed the holding of the HCD. It held:

> Herein the present case before us we have found how the writ petitioner tried to agitate the point at issue before the High Court Division in this type of public interest litigation. The writ petitioner has not mentioned anywhere in his petition how less fortune [sic] people are being prevented in moving the High Court Division in such a matter and it has not been mentioned how the petitioner himself and other less fortune [sic] people and affected by the impugned order…In the entire writ petition there is nothing to show that the writ petitioner moved the High Court Division for and on behalf of himself and also of other less fortunate persons of the society who have no source and means to invoke the jurisdiction of the High Court Division or these less fortunate people are in any way affected by the impugned orders. The main contention or concern of the writ petitioner is that these impugned orders may cause serious financial indiscipline in Bangladesh and other objection is that the legitimate and otherwise qualified entity of persons will be precluded from undertaking commercial banking activities. This means that those who are capable of establishing a banking company may have a cause against the issuance of the impugned orders. This indicate[s] that well to do people of the country who are capable of establishing banking companies or financial undertakings will be affected by the impugned orders and these people sure are not less fortunate people in our society. So the petitioner cannot move the High Court Division under article 102 of the Constitution to protect the interest of these so called less fortunate people in the society…
>
> The averment made in the writ petition and decision arrived at by the High Court Division clearly indicate that this case can not be construed as a public interest litigation as propounded in Dr. Mohiuddin Farooques's case. The writ petition has

[28] (2002) 22 BLD (AD) 41.

> been filed just to protect the alleged interest of intending promoters of banking companies who by no stretch of imagination can be styled as less fortunate persons.[29]

It is rather striking that within a relatively short span of time, the same court has delivered two judgements which are so strikingly opposite to each other. Just as in the *Ekushey Television*, the petitioners have claimed that the actions of regulatory bodies were not in compliance with the law, so did Professor Ahmed in this case. And by the same token, it would be respectfully submitted that Professor Ahmed's *locus standi* seems to be irrefutable. It is also striking that the majority decision of the AD concluded that Professor Ahmed's petition was only to protect the interest of the 'promoters of banking companies' because it is acknowledged in the judgment itself that the petitioner's argument was that if BRAC were to be 'allowed to own, control, manage and operate the business of banking in violation of the terms, conditions and laws of incorporation, there will be a serious undermining of the commercial, financial and more importantly legal framework in the country' – this clearly speaks of the interest of wide segment of the society (i.e. for sure it would include the interest of shareholders and depositors in banks and non-bank financial institutions). And for sure this group of people are large enough to be taken into account and deserved protection through this PIL if we follow the ratio of the decision in *Mohiuddin Farooque*.

Indeed, it can be argued that by applying the reasoning of the decision in *Mozaffar Ahmed*, the petitioner, in this case, could not have been said to be a person aggrieved. This is because if just a license granted to a banking company could not have been a matter of interest for the petitioner; by the same token, the petitioners in this case, could not have been in any way victims of abuse of power by the public authorities, irrespective of the gravity of the abuse. Again, if Professor Mozaffar Ahmed's petition was to be vitiated because he was not espousing the case of less fortunate sections of the community, it is opaque that how the petition in *Ekushey Television* had anything to do with the interest of the less fortunate section of the public. For sure, the petitioners in *Ekushey Television* were Professors of Dhaka University and the President of BFUJ, but it was the potential promoters of satellite television who were the ultimate beneficiary of the decision, and these latter group could not qualify in this category of less fortunate sections of the community.

Again, the simple fact that Professor Ahmed had no personal interest in either BRAC or the proposed BRAC Bank should have worked for his standing as a PIL petitioner, rather than undermining it. Had Professor Ahmed had any personal interest in the subject matter of the case, he would have ceased to be entitled to file the PIL. Thus, it would be difficult to not agree with the reasoning adopted by the dissenting judgment in which it was opined that since the petitioner has argued that in this matter, public functionaries have failed to perform their legal obligations before granting BRAC the necessary permission to launch BRAC Bank, his *locus standi* cannot be impeached.

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[29] *Ibid*, paras 12-13.

Thus, it would be respectfully submitted here that the majority decision on the point of *locus standi* of Professor Ahmed is impugnable at best and unconvincing at worst.

***Abu Saeed Khan*: A Rebalancing?**

In *Abu Saeed Khan,*[30] a writ petition in the form of a constitutional PIL was filed by the petitioner, Abu Saeed Khan, a freelance journalist, challenging the re-fixing of tariff value, the imposition of supplementary duty, and value added tax on subscriber's identity module card (SIM card) and removable user identification module card (RUIM card). He alleged that the arbitrary fixation of tariff value and the imposition of supplementary duty based on such tariff value on the SIM card/RUIM card shot up the cost of mobile phone connection beyond the affordability of ordinary citizens.

One fundamental issue in the case was the *locus standi* of the petitioner and the HCD held that he had the *locus standi*. The AD reversed decision holding, inter alia, that this case was not a PIL and that an executive policy decision like the ones involved in this case is not amenable to judicial review. It seemed to have been influenced by the involvement of the mobile phone operators interpleading in the case whose business was clearly affected by the taxation policy involved in this case and it is implicitly in its decision to have treated the petitioner as a pawn of the mobile operators, rather than a bona fide petitioner espousing public cause.[31] The AD also expressed its dismay on a too liberal acceptance of PIL cases or importantly private interest litigation masquerading as PIL. The AD observed that:

> Now-a-days, it is noticeable that a group of lawyers have developed a tendency of filing PIL petitions on behalf of persons or organisations challenging the propriety of the Government in taking decision relating to policy matter, its development works, Orders of promotion and transfer of public servants, imposition of taxes and fixation of tariff value by the authority for achieving dubious goal for generating publicity for themselves or to create public sensation. The High Court Division has been taking cognizance of those petitions without looking at whether or not such petitions are at all maintainable in the light of the principles settled by this Division in Mohiuddin Farooque, Professor Mozaffor Ahmed, and Ms Syeda Rizwana Hasan. It is also noticeable that after seeking an order from the High Court Division by filing a PIL, the lawyers are appearing before the electronic and print medias propagating that the Court has made such and such directions, which suggest that those petitions had not been made for the cause of the needy or underprivileged or less opportunate [sic] people, who could not seek redress for a wrong done by the Government or a local authority, rather it were [sic] moved for achieving [a] dubious goal for generating personal publicity.[32]

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[30] *Abu Saeed Khan*, above n 5.

[31] *Ibid*, para 7.

[32] *Ibid*, para 11.

The AD then sought to draw the line between a person seeking to vindicate personal interest and public interest through a PIL. This distinction is important because when this line is blurred, the distinction between PIL and other cases may disappear. The AD observed:

> Once again, we would like to make it clear that a person or organization who has personal interest or directly affected by reason of wrong done by the Government is not entitled to move such petition. A person who has filed a petition for personal gain or for private profit or personal propaganda or Political motive or any other extraneous consideration will not be entertained. It is only such person who is acting *bonafide* having no personal interest to the cause involving public wrong or public injury will alone has [sic] a *locus-standi* and can approach the court to wipe out the tears of the poor and needy ones.[33]

The AD in this case has also formulated some principles on the admissibility and inadmissibility of PIL which in some ways may work to some limited extent, reshaping of the notion of person aggrieved in constitutional PIL. The guidelines include the followings:

> We reemphasize the parameters within which the High Court Division should extend its discretionary jurisdiction in entertaining a PIL...
>
> If a petition is filed to represent opulent members who were directly affected by the decision of the Government or public authority, such petition would not be entertained…
>
> The Court is under an obligation to guard that the filing of a PIL does not convert into a publicity interest litigation or private interest litigation…
>
> The court should also guard that its processes are not abused by any person...
>
> The court should also guard that the petition is initiated for the benefit of the poor or for any number of people who have been suffering from common injury but their grievances cannot be redressed as they are not able to reach the Court.
>
> It must also be guarded that every wrong or curiosity is not and cannot be the subject matter of PIL…
>
> No petitions will be entertained challenging the policy matters of the Government, development works being implemented by the Government, Orders of promotion or transfer of public servants, [the] imposition of taxes by the competent authority…
>
> The Court has no power to entertain a petition which trespasses into the areas which are reserved to the executive and legislative by the Constitution.[34]

On the other hand, the AD has also emphasised certain categories of PIL cases which in its view, should be particularly encouraged. It observed:

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[33] *Ibid*, para 12.

[34] *Ibid*, para 38.

> Apart from the above, the following some categories of cases which will be entertained;
>
> a) for protection of the neglected children.
>
> b) non-payment of minimum wages to workers and exploitation of casual workers complaints of violation of labour laws (except in individual case).
>
> c) petitions complaining death in jail or police custody; or caused by law; enforcing [sic] agencies.
>
> d) petitions against law enforcing agencies for refusing to register a case despite there are existing allegations of commission of cognizable offences.
>
> e) petitions against atrocities on women such as, bride burning, rape, murder for dowry, kidnapping.
>
> f) petitions complaining harassment or torture of citizens by police or other law enforcing agencies.
>
> g) petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance or heritage and culture, antiques, forest and wild life.
>
> h) petitions from riot victions [sic].[35]

Obviously, the court cannot provide an exhaustive list of matters on which a PIL would be encouraged. And indeed, by the use of the words 'some categories of cases', the AD has left no doubt as to its intention of keeping the list an open-ended one. Thus, the positive list here may be taken as a list of matters in which a petitioner filing a PIL has an easier case to meet the threshold of *locus standi*. The above guidelines are worded in a judicious manner, they do not shut the door for filing PIL by bona fide persons avenging public wrongs, but they seem to have sought to shut the door of PIL as a cavalier and cheap avenue for publicity. When an individual or a group of individuals is wronged and the individual or that group is not constrained by any hardship from approaching the court, the PIL should not be an option for redressing the wrong. It may be mentioned here that following the pronouncement of the AD in this case, a string of cases have referred to its ratio.[36] It may be expected that the guidelines set by the AD in this case would filter out the publicity mongering-petitioners.

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[35] *Ibid.*

[36] See *Mohammad Emrul Kayes and Others v Government of the People's Republic of Bangladesh and Others* (2015) 35 BLD (HCD) 94; *Advocate Asaduzzaman Siddiqui and others. v Bangladesh and others* (2016) 24 BLT (HCD) (Special Issue) 1; *Maulana Chadpuri*, above n 1; *M. Qumrul Haque Siddique v The Secretary, Ministry of Finance and ors* (2107), LEX/BDHC/0061/2017; *Shakwat Hossain Bhuiyan v Bangladesh and others* [2018] Writ Petition No 5556 of 2014 (unreported).

Conclusion

The issue of the definition of the term 'person aggrieved' in constitutional PIL presents a tricky challenge for the court. Too liberal an approach runs the risk of increasing the number of cases to an unmanageable level and may encourage the filing of cases on frivolous grounds and at worst, at times cases by publicity mongering busybodies. Thus, the court may become a venue for policy making, or perhaps, even worse, a venue for settling academic issues. On the other hand, the public interest litigation can be a potent vehicle for seeking justice for those people in the marginalised sections of the community for whom approaching the constitutional court to vindicate their rights is limited. The proper balance on this point is very delicate but we would argue that the AD in *Abu Saeed Khan* has struck the balance right. And if the ratio of this case is followed in the subsequent cases, while the bar of falling in the category of a person aggrieved may have been somewhat raised, public-minded constitutional PIL cases would be possible, but private interest masquerading as PIL or essentially publicity-mongering PIL could be a little more difficult. And that should not be a force for bad. And without a scrupulous approach as charted in this case, with the growing number of law-related NGOs, the number of constitutional PILs may reach a level unmanageable for the SC. Even aside from them, too liberal approach to *locus standi*, may render PIL to become a cottage industry of many busybodies hankering after publicity in sheer desperation.