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Part- F

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# **Dhaka University Law Journal**

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# Dhaka University Law Journal

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

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

#### **Journal Articles: Single Author**

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

#### **Journal Articles: Multiple Authors**

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

#### **Books: Single Author**

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

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

#### **Books: Multiple Authors**

Richard Nobles and David Schiff, *A Sociology of Jurisprudence* (Hart Publishing, 2006) 49. Paul Rishworth et al, *The New Zealand Bill of Rights* (Oxford University Press, 2003). [Note: when there are more than three authors, only first author's name should appear and 'et al' should be used instead of remaining authors' names.]

**Books: Edited**

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

**Chapters in Edited Books**

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

**Books: Corporate Author**

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

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

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

**Theses**

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

**Working Paper, Conference Paper, and Similar Documents**

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

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

**Newspaper**

Stephen Howard and Billy Briggs, 'Law Lords Back School's Ban on Islamic Dress', *The Herald* (Glasgow), 23 March 2006, 7. Imtiaz Omar and Zakir Hossain, 'Coup d' etat, constitution and legal continuity', *The Daily Star* (online), 24 September 2005 <<http://archive.thedailystar.net/law/2005/09/04/alter.htm>> accessed 9 March 2014.

**Internet Materials**

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

**Cases**

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

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

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

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

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

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

### **Statutes (Acts of Parliament)**

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

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

### **Delegated Legislation**

Family Courts Rules 1985, r 5.

Financial Institutions Regulations 1994, reg 3.

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

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# Revisiting the Consumer Rights Protection Act, 2009

Dr. Shima Zaman\*

## I. Introduction

While the age-old legal maxim ‘*cavet emptor*’<sup>1</sup> insisting on the responsibility of buyers to be watchful before making their purchasing decisions still holds, across the world, there has been an increasing push for laws providing for greater protection of the consumers. In this backdrop, in some economically advanced countries, there is even a call for special consumer rights for the protection of special groups such as linguistic minorities who may have some special vulnerabilities and therefore, for whose protection the general legal provisions may prove to be ineffective or inadequate.<sup>2</sup> More often than not a problem with consumers seeking to protect their rights from unfair and deceptive practices by businesses is that the low stake involved in the matter may not be able to sufficiently incentivize them to fight a legal battle in a regular court proceeding. Even worse, sometimes individual consumers may not be aware of their legal rights and remedies. There is also a big problem of disparity in the clout between individual consumers and businesses which may often militate against the chance of consumers successfully seeking remedies. In order to respond to these problems, Parliaments across the world have often drafted laws providing for expeditious legal remedy through some sort of a summary procedure.<sup>3</sup> These

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<sup>1</sup> For a classic overview of the maxim, see Walton H Hamilton, ‘The Ancient Maxim Caveat Emptor’ (1931) 40 *Yale Law Journal* 1133.

<sup>2</sup> See, for instance, Steven W Bender, ‘Consumer Protection for Latinos: Overcoming Language Fraud and English-only in the Marketplace’ (1996) 45 *American University Law Review* 1027 advocating special measures for the protection of many people of Latino origin living in the United States of America who may not have fluency in English and thus may fail to be adequately protected by various product and service information provided in English only.

<sup>3</sup> For instance, *Competition and Consumer Act 2010* (Australia), *Consumer Defense Code (Federal Law 8.078)1991* (Brazil), *Consumer Protection Act, 1986* (India), *Consumer Protection Act* (Malaysia), *Consumer Protection Act 1998* (Nepal),

laws would typically provide for setting up public bodies who would seek to espouse the claim of consumers and also undertake administrative measures for prevention and prosecution of unlawful practices by businesses and thus somewhat reduce the inherent disparity in the clout between consumers and the businesses. That, of course, is not to imply that consumers cannot file a legal claim against unfair practices of businesses in a regular court of law setting in motion legal provisions contained in a myriad of other laws<sup>4</sup> but the effectiveness of the summary procedure lies in its affordability and speed vis-à-vis a fight in the court of law.

Indeed, the Consumers International, a well-known confederation of consumer groups world-wide notes that the predominant mechanism that has been adopted by states for the administration of consumer protection is the passing of Consumer Protection Act with 78% of countries in the world resorting to such a mechanism.<sup>5</sup> It also finds that around 80% of countries in the high-income category and 90% of countries in the middle-income category have crafted Consumer Protection Acts, but only around 61% of countries in the low-income category have done so.<sup>6</sup> In a similar vein, in the economically backward Sub-Saharan African region, there is the lowest prevalence of such laws (63%) compared with 85% of countries in Western Europe and North America having such laws.<sup>7</sup>

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*Consumer Protection (Fair Trading) Act 2003* (Singapore), *Consumer Protection Act 2008* (South Africa), *Consumer Rights Act 2015* (United Kingdom), *Consumer Product Safety Act 1967* (United States of America). In many federal countries, there are various laws enacted for consumer protection too; see for instance, *Business Practices and Consumer Protection Act 2004* (British Columbia of Canada), *Fair Trading Act 1987* (New South Wales of Australia), *Punjab Consumer Protection Act 2005* (Punjab of Pakistan) etc.

<sup>4</sup> Various provisions contained in a myriad of laws such as *Contract Act 1872*, *Penal Code 1860*, *Sale of Goods Act 1930*, *Competition Act 2012* etc. can be set in motion for seeking remedies against illegal and unfair practices adopted by businesses.

<sup>5</sup> Consumers International, *The State of Consumer Protection around the World* <[http://www.consumersinternational.org/media/1137336/update\\_withlink\\_the%20state%20of%20consumer%20protection%20around%20the%20world.pdf](http://www.consumersinternational.org/media/1137336/update_withlink_the%20state%20of%20consumer%20protection%20around%20the%20world.pdf)> accessed 10 January 2017.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

Following the global trend, Bangladesh too has enacted the *Consumer Rights Protection Act, 2009* (CRPA).<sup>8</sup> It may be mentioned that before passing the law, the Law Commission of Bangladesh in 2000 passed a report proposing the enactment of a law on the protection of the rights of consumers<sup>9</sup> and where appropriate, a comparison would be made between the CRPA and the draft of the law as contained in the Law Commission's report. This paper would explore some features of this law and the practice of the Directorate of National Consumer Rights' Protection (DNCRP) who is entrusted with the task of implementing the various objectives of this law.<sup>10</sup> The paper is structured as follows: the second part of the paper would analyse some features of the law and where appropriate, would suggest some amendments to the existing law, the third part would discuss the practice of the DNCRP under the law, and the fourth part would conclude the paper.

## **II. Salient Features of the Act and the Scope for Amendments**

Section 2(19) of the CRPA defines consumer in the following words:

Any person, -

- (a) who, without resale or commercial purpose,
  - (i) buys any goods for a consideration which has been paid or promised to be paid;
  - (ii) buys any goods for a consideration which has been partly paid and partly promised; or
  - (iii) buys any goods for a consideration under any system of deferred payment or installment basis;
- (b) who uses any goods bought under clause (a) with the consent of the buyer;
- (c) who buys any goods and uses it commercially for the purpose of earning his livelihood by means of self-employment;
- (d) who, (i) hires or in any other means avails of any service for a consideration which has been paid or promised to be paid; or

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<sup>8</sup> *Consumer Rights Protection Act* (hereinafter CRPA) Act No. 26 of 2009.

<sup>9</sup> Law Commission of Bangladesh, 'Proposal for the enactment of Consumer Protection Act 2000' (Report No. 33, 29 October 2000) <<http://www.lawcommissionbangladesh.org/reports/33.pdf>> accessed 3 December 2016 [Law Commission Report No 33].

<sup>10</sup> CRPA, s 18(1).

- (ii) hires or in any other means avails of any service for a consideration which has been partly paid and partly promised; or
- (iii) hires or in any other means avails of any service for a consideration under any system of deferred payment or installment basis; or
- (e) who enjoys any service under clause (d), with the consent of the person who hires or avails it;

Thus, the above definition would exclude the possibility of a company bringing a claim as a consumer against another company invoking any provision of the CRPA. However, given that the Act is for the protection of consumer rights such an exclusion is perhaps hardly surprising. Having said that, the definition of consumers is crafted in a way that a literal reading would connote that only living persons would fall under the category. However, it is not impossible that in some cases, (for example, the legal representatives of a person who may have consumed adulterated food and died) someone on behalf of a deceased person may want to invoke the remedies afforded by the CRPA. It remains to be seen whether or not a court would be prepared to apply the definition of consumers to be applied in such a case and under the current scheme of the CRPA, it would require a very bold judge to do so.

Under Section 2(20) of the CRPA, there is a close-ended list of activities which are designated as anti-consumer right practices. These are as below:

- (a) selling or offering to sale any goods, medicine, or service at a price higher than the fixed price under any law;
- (b) selling or offering to sale adulterated goods or medicine knowingly;
- (c) selling or offering to sale any goods contains any ingredient extremely injurious to human health and the mixing of which with any food item is prohibited by law;
- (d) to deceive consumers by false advertisement for selling any goods or service;
- (e) not to sell or deliver properly any goods or services which has been promised to be sold or delivered in consideration of money;
- (f) to sell or deliver less quantity of goods than the weight which was offered to the consumers;
- (g) to inflate weight in selling or delivering goods;
- (h) to sell or deliver less quantity of goods than the promised amount while delivering or selling any goods to the consumers;

- (i) to falsify length in selling or delivering goods;
- (j) to create or manufacture any fake goods or medicine;
- (k) selling or offering to sale any goods or medicine after the date of expiry; or
- (l) to do an act which may endanger life or security of the consumer when the same is prohibited by any law.

Clearly, the requirement of knowledge as required in Section 2(20) (b) can pose some challenges in taking measures against businesses for selling adulterated food or medicine. While the knowledge requirement may be a necessary prerequisite for a successful criminal action, it should not be required for taking a civil action against businesses.<sup>11</sup> This is because proving the subjective knowledge requirement would make the threshold much higher for the consumers and diminish their chance of a successful litigation.<sup>12</sup> In any case, it would be too dangerous to allow businesses to claim that they were unaware of that the food or medicine in which they deal in was adulterated and thus, evade legal responsibility.<sup>13</sup>

Indeed, it may be forcefully argued that a trader who is so reckless that she/he does not do the proper checks to know what she/he is dealing in, is not performing her/his responsibilities properly and that in itself is so dangerous that it should be punishable by law.<sup>14</sup> Indeed, if the lack of knowledge in this case is allowed to be used as a ground for evading legal responsibility, then it would be like giving premium for negligence and would surely harm the interest of innocent consumers and for this reason, the element of knowledge should be dispensed with at least in cases in which civil remedies are being pursued. Instead, the CRPA may be amended by introducing a 'due diligence' defence for the traders which they can rightly invoke when they have taken all reasonable

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<sup>11</sup> S M Solaiman and Abu Noman M A Ali, 'Civil Liabilities for Unsafe Foods in Bangladesh and Australia: A Comparative Perspective on Consumer Protection' (2014) 13 *Comprehensive Review in Food Science and Food Safety* 656, 658 [Solaiman and Ali].

<sup>12</sup> Ibid.

<sup>13</sup> Ibid, 659.

<sup>14</sup> Ibid.



and practicable measures to avoid causing consumers harm and was not in manner negligent.<sup>15</sup>

Another problem with the acts designated as anti-consumer right practices and other offences enlisted in the CRPA is that unlike similar laws in operation in some other countries, the law does not provide for remedies for unconscionable conduct by businesses. While Section 2(20) (l) providing that to do an act which may endanger life or security of the consumer when the same is prohibited by any law would amount to anti-consumer right practice is somewhat open-ended and may cover a quite wide spectrum of errant practices; clearly this provision is much narrower in scope than *unconscionable conduct*. Because by nature unconscionable can be decided by judge in a relevant factual situation and for something to be unconscionable, it need endanger human life or security or fall foul of a statutory provision.

Thus, in practice, this coverage of unconscionable conduct can be important because in some cases businesses may engage in practices which though *unconscionable* and would inflict harm on consumers but would not otherwise fall foul of any other explicit statutory provision. For these reasons, it would appear that there is a need for the introduction of punishment for unconscionable conduct. Such a provision may be along the line of the following words that ‘taking advantage of a consumer by including in an agreement terms or conditions that are harsh, oppressive so as to be unconscionable or engaging in any conduct in the course of dealing with consumers which is unconscionable so as to harm the consumers’ would be an anti-consumer right practice. In particular, this type of a provision may aid consumers who may be trapped in unfair term/s in a service contract or would be deceived by some form of cunning marketing practice.

The scope of services defined under the CRPA is rather narrow. It only includes transport, telecommunication, water supply, drainage, fuel, gas, electricity, construction, residential hotel and restaurant and health services, which is made available to its users in exchange of price and when such a service is a gratis one, that would be excluded.<sup>16</sup> It is noticeable that some widely used services such as the banking, insurance, recreational services etc. are excluded from its scope.

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<sup>15</sup> Ibid.

<sup>16</sup> CRPA, s 2(22).

Given the increasing expansion of the various services industries, the rationale behind the rather narrow scope of the services covered under the CRPA is unclear. Indeed, the various service industries are growing so much in scope and diversity, a rather open-ended least seems to be desirable.<sup>17</sup> Even the scope of the term ‘service’ was much broader in the report of the Law Commission that is banking, financing, insurance, news and other information providing service, educational service, legal and other consultancy were included, none of which has found a place in the CRPA.<sup>18</sup> The rationale behind the exclusion of these services is not clear and this should be reconsidered by the policy makers. Otherwise, a substantial number of services which the consumers use on a routine basis would be outside the scope of the CRPA.

A consumer having any complaint regarding various matters under the CRPA, has three different avenues to pursue. Firstly, the consumer may opt for the remedy offered through the quasi-judicial procedure which is administered by the CRPA.<sup>19</sup> Such a complaint has to be lodged in writing and can be submitted not only in person but also via electronic means i.e. electronic mail or fax.<sup>20</sup> The complaint form which is downloadable from the DNCRP’s website is simple and only requires that the proof of purchase of the goods or service has to be submitted with it.<sup>21</sup> If upon investigation, a complaint lodged by a consumer is proved to be correct, the Director General of DNCRP or any officer empowered by her/him may impose fine upon the convicted person (both natural and juristic

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<sup>17</sup> For example, Section 2(o) of *Consumer Protection Act 1986* (India) states “service” means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service’.

<sup>18</sup> Law Commission Report No. 33; above n 9, CRPA, s 2(29).

<sup>19</sup> CRPA, s 76.

<sup>20</sup> DNCRP, *The Process of Lodging A Complaint* <<http://dngrp.portal.gov.bd/site/page/2e1c613d-e162-436c-b024-a0468fee2b6e/-/%E0%A6%85%E0%A6%AD%E0%A6%BF%E0%A6%AF%E0%A7%8B%E0%A6%97-%E0%A6%A6%E0%A6%BE%E0%A7%9F%E0%A7%87%E0%A6%B0%E0%A7%87%E0%A6%B0-%E0%A6%AA%E0%A6%A6%E0%A7%8D%E0%A6%A7%E0%A6%A4%E0%A6%BF>> accessed 12 December 2016.

<sup>21</sup> Ibid.

person) and the fine imposed is realised, 25% of such realized fine amount would immediately be paid to the complainant (unless if the complainant is an officer or an employee of the DNCRP who be ineligible to receive such 25%).<sup>22</sup>

Secondly, a criminal case may be pursued in the court of a Magistrate of the first class or a Metropolitan Magistrate having local jurisdiction.<sup>23</sup> It is important to note that a criminal case cannot be directly filed in the Court of a Magistrate of the first class or a Metropolitan Magistrate for any anti-consumer right practices under the CRPA.<sup>24</sup> A consumer can lodge a complaint to the Director General or any officer empowered by her/him or a District Magistrate (DM) or any Executive Magistrate who is empowered by the DM.<sup>25</sup> Interestingly, the limitation regarding the power of imposing fine by any Magistrate of the first class as stipulated in the *Code of Criminal Procedure*, 1898 (CrPC) would not bar her/him from imposing any amount of fine prescribed under this Act that is the Magistrate's pecuniary jurisdiction would be dictated by the relevant provision of the DNCRP, not by the CrPC.<sup>26</sup> In conducting the criminal trial, the Magistrate has to *mutatis mutandis*, follow the summary procedure as contained in Chapter XXII of the CrPC where applicable in the trial of offences under this Act.<sup>27</sup>

A civil suit seeking remedies for any anti-consumer right practice has to be filed in the court of a Joint District Judge having local jurisdiction. In appropriate cases, despite the initiation of criminal cases against a person, any affected consumer may also file a civil suit in a competent civil court for recovering civil remedies against the same person.<sup>28</sup> In awarding compensation to a plaintiff under the Act, a civil court is barred from exceeding the ceiling of five times of the amount assessed for the proven damage proved plus the cost of the suit. Tying in the court's hand in awarding compensation in matters cover under an Act like this does not seem to be consumer-friendly.<sup>29</sup> The loss of a consumer from the anti-consumer rights activities may be as varied as the price of the defective products

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<sup>22</sup> CRPA, S 76(2)-76(4).

<sup>23</sup> CRPA, S 57 (1).

<sup>24</sup> CRPA, S 71(1).

<sup>25</sup> CRPA, S 71(2).

<sup>26</sup> CRPA, S 57 (2).

<sup>27</sup> CRPA, S 58.

<sup>28</sup> CRPA, S 66(1).

<sup>29</sup> Soliaman and Ali, above n 11, 663.

purchased or shoddy service rendered, the cost borne for medical and/or psychological treatments, any consequential loss of employment and/or income generating capacity, the sufferings of family members for the loss or injuries of someone on whom they financially rely, the suffering of the injured person from anxiety, depression, embarrassment, emotional distress, the damage of self-esteem, the loss of amenities of life, and the loss of expectation of life etc.<sup>30</sup>

Thus, it is uncertain whether the uppermost limit of compensation payable under the CRPA would or would not always be able to cover all these various losses and damages.<sup>31</sup> Hence, Instead, of a fixed ceiling, a court should have the opportunity to provide the amount of compensation that could adequately compensate all these various sufferings of the victim.<sup>32</sup> It can be reasonably expected that once a suffering consumer would receive this sort of adequate compensation for all their travails from the businesses inflicting harm on them, the latter would be much more likely to be warier in protecting the interests of consumers.<sup>33</sup> It may be mentioned that apart from compensation, a civil court is granted with the power to order a business to replace the defective goods by appropriate goods or (b) to order the to take back the defective goods and pay back the price to the buyer.<sup>34</sup> However, in spite of these limited additional remedies, the current restriction on awarding compensation deserves a serious rethink by the policymakers.

When any decision is rendered by the Magistrate in a criminal case, it may be appealed to the Court of Sessions having local jurisdiction within a period of sixty days.<sup>35</sup> Similarly, an appeal against a decision or decree rendered by a civil court, may be preferred to the HCD within ninety days of the judgment or decree.<sup>36</sup> However, there is no right to appeal against any decision rendered by the DNCRP which deserves some rethinking. Whether or not all decisions rendered by the DNCRP should be appealable is uncertain but the total absence

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> CRPA, S 67.

<sup>35</sup> CRPA, S 65.

<sup>36</sup> CRPA, S 68.

of an appellate forum does not seem to be justifiable and in effect can tantamount to giving the DNCRP's decisions more weight than that of the Magistrate court's or Joint District Court's decisions. Thus, it would be argued here the decisions rendered by the DNCRP should also be appealable just as the decisions of the criminal and civil courts are.

It may be mentioned here that instead of three different for settling complaints lodged under the CRPA, the Law Commission's Report only envisaged the setting up of one or more District Level Consumer Tribunals in each district and a National Consumer Tribunal.<sup>37</sup> While the administrative/quasi-judicial remedy available through the DNCRP has the advantages of a simplified procedure and therefore, may offer something which may not be available in Tribunal-like legalistic forum, its retention may have merit. A sitting or retired District Judge was supposed to be appointed as the Judge of the District Tribunal and was to continue in office for three years.<sup>38</sup>

There being no equally efficacious remedy, it is possible that an aggrieved party may invoke the writ jurisdiction of the High Court Division (HCD) of the Supreme Court. However, the possibility of exploring such an option seems to be rather low from both the point of view of consumers and businesses. There being no reported case or seemingly not even any reported case on this matter in relation to the CRPA, the demarcation of the precise ambit and efficacy of invoking the writ jurisdiction is not possible. However, it has been decided by the HCD in many reported cases that in matters pertaining to which there is no right to appeal, a writ petition would lie.<sup>39</sup> Hence, by analogy, it may be safely concluded that a writ petition against the decision rendered by the DNCRP would be possible. Consumers may not have enough stake to fight a costly legal battle in the HCD. On the other hand, the businesses may be likely to avoid that option to avoid the possibility of drawing publicity to an alleged anti-consumer right practice. Thus, the argument for an appellate forum for decisions rendered by the DNCRP seems to have merit.

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<sup>37</sup> Law Commission's Report, No. 33 above n 9, Section 7.

<sup>38</sup> Ibid, Section 8.

<sup>39</sup> *Chittagong Engineering & Electric Supply Co. Ltd. vs. Certificate Officer, Dacca & ors* (1965) 17 DLR 404.

### III. Some Aspects of the Practice of the DNCRP

Since September 2014, (with a long break for more than a year) until now, the Directorate of DNCRP has developed a practice of circulating press releases on its market monitoring activities and the various public hearings on complaints lodged by consumers.<sup>40</sup> The author of this paper has reviewed 240 such press releases. These releases document the daily enforcement measures of the DNCRP that is the inspections its officials and the sanctions imposed on the businesses falling foul of the law and also the sanctions on the basis of hearings triggered by complaints lodged by individual consumers. A scrutiny of the press releases reveals that a very high percentage of the actions are driven by the public officials and punishments driven by consumer complaints are few and far between.

Of course, these press releases of the DNCRP may play a role in apprising the interested members of the public about the monitoring activities of the DNCRP. However, a closer scrutiny of the press releases would reveal that in their current form, they are quite unsystematically presented with scanty information, and thus, would have a very limited practical appeal.<sup>41</sup> This is because the press releases in most of the cases would only contain a very terse explanation of the reasons for imposing fines on the concerned businesses.<sup>42</sup> Even worse, in many cases, the errant businesses who are fined by the DNCRP are not even named in the respective press releases; only the respective locality in which they are located and the amount of fine collectively levied is mentioned.<sup>43</sup>

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<sup>40</sup> Directorate of National Consumer Rights' Protection, *Press Releases* <[http://dnrcp.portal.gov.bd/site/view/press\\_release/-%E0%A6%AC%E0%A6%BE%E0%A6%9C%E0%A6%BE%E0%A6%B0%E0%A6%85%E0%A6%AD%E0%A6%BF%E0%A6%AF%E0%A6%BE%E0%A6%A8?page=1&rows=20](http://dnrcp.portal.gov.bd/site/view/press_release/-%E0%A6%AC%E0%A6%BE%E0%A6%9C%E0%A6%BE%E0%A6%B0%E0%A6%85%E0%A6%AD%E0%A6%BF%E0%A6%AF%E0%A6%BE%E0%A6%A8?page=1&rows=20)> accessed 4 January 2017.

<sup>41</sup> Md. Rizwanul Islam, 'For Greater Protection of Consumers', *The Daily Star* (Dhaka.), 20 December 2016, 12 [Islam].

<sup>42</sup> Ibid.

<sup>43</sup> See for example, the DNCRP's press release of 25 October 2016 < [http://dnrcp.portal.gov.bd/sites/default/files/files/dnrcp.portal.gov.bd/press\\_release/5bb05762\\_0a76\\_4ffa\\_94df\\_0b64fc46de40/Press%20Release%2025-10-2016.pdf](http://dnrcp.portal.gov.bd/sites/default/files/files/dnrcp.portal.gov.bd/press_release/5bb05762_0a76_4ffa_94df_0b64fc46de40/Press%20Release%2025-10-2016.pdf)> accessed 4 January 2017, mentioning the imposition of fine on business based in various parts of Sylhet, Rajshahi, Chuadnaga, Hobignaj, Narail, Jhalkathi, Naogaon, Tangail, Bogra, Patuakhali, Satkhira, Kishorganj, Sunamganj, Shariatpur districts without naming the respective businesses and mentioning in a generic way that the causes for the imposition of fine being the preparation

Any interested person willing to know about the record of a particular business entity would have no alternative but to check the hundreds of individual press releases and surely in coming days, the ever escalating number of press releases would make the task even more challenging.<sup>44</sup> A much better way to present such information would be a business-specific listing of the sanctions imposed and the reasons that triggered them which would allow anyone interested in having a readily accessible record of the various business entities.<sup>45</sup> Such a list of sanctions inflicted on large businesses and the reasons which triggered such sanctions may be used by consumers, researchers, investigative journalists etc. and in this case, it is very much reasonable to expect that the concern for protecting business reputation would likely force businesses to be wearier of resorting to illegal practices.<sup>46</sup> Such a systematically presented information may also be used by the policy makers for more informed policy intervention.<sup>47</sup> Unless and until information communicated through the press releases are presented in a more methodical and detailed manner as charted here, they would hardly achieve their real potential.

Another problem with the Act is the unfettered discretionary powers of the bureaucrats in imposing sanctions under the Act. This would appear from the fact that even for large retail chain stores like Agora,<sup>48</sup> Meena Bazar,<sup>49</sup> Shwapno<sup>50</sup> etc. have been fined very paltry amounts ranging from as low as 1,000 taka to 10,000 taka which can at best be described as a slap on the wrist and at worst inexplicable or dubious. Of course, as a counter-argument, one may contend that it is not the size of the business, rather the gravity of the violation of the law which should be the decisive factor in the imposition of the fine. While

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of food in unhealthy conditions, not mentioning the MRP on the package, not displaying the price list of products and for negligence etc.

<sup>44</sup> Islam, above n 41.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> The DNCRP's press release of 7 December 2016 < [http://dngrp.portal.gov.bd/sites/default/files/files/dngrp.portal.gov.bd/press\\_release/a5c89797\\_1761\\_44be\\_9e6c\\_287118d3e669/Press%20Release%207-12-2016.pdf](http://dngrp.portal.gov.bd/sites/default/files/files/dngrp.portal.gov.bd/press_release/a5c89797_1761_44be_9e6c_287118d3e669/Press%20Release%207-12-2016.pdf)> accessed 4 January 2017.

<sup>49</sup> The DNCRP's press release of 2 November 2016 < [http://dngrp.portal.gov.bd/sites/default/files/files/dngrp.portal.gov.bd/press\\_release/879dcd7b\\_4df2\\_4ac8\\_8ca1\\_80289d4af619/Press%20Release%202-11-2016.pdf](http://dngrp.portal.gov.bd/sites/default/files/files/dngrp.portal.gov.bd/press_release/879dcd7b_4df2_4ac8_8ca1_80289d4af619/Press%20Release%202-11-2016.pdf)> accessed 4 January 2017.

<sup>50</sup> The DNCRP's press release of 9 November 2016 < [http://dngrp.portal.gov.bd/sites/default/files/files/dngrp.portal.gov.bd/press\\_release/67c5ead8\\_26cc\\_4029\\_a1c1\\_6dc05ec72e7a/Press%20Release%209-11-2016.pdf](http://dngrp.portal.gov.bd/sites/default/files/files/dngrp.portal.gov.bd/press_release/67c5ead8_26cc_4029_a1c1_6dc05ec72e7a/Press%20Release%209-11-2016.pdf)> accessed 4 January 2017.

there may be truth in the argument, it appears to be rather startling that large retailers or big manufacturers have been imposed such paltry amount of fines. It is a conventional wisdom that many businesses would take risks and may not follow the law when the risk of punishment for non-compliance is negligible compared to the cost of compliance.<sup>51</sup> Thus, the lower amount of fine would not only disappoint the consumers who would have lodged the respective complaints but also fail to send a strong message to the businesses resorting to errant practices.

While because of the lack of the public available drafting history, a definitive conclusion cannot be drawn, it can be safely assumed that the Parliament may have kept the wide spectrum of options available in imposing fine because a very diverse spectrum of businesses can come under the scope of the CRPA. This would be evident from the definition of 'sellers' as enshrined in Section 2(16) of the CRPA which includes 'any manufacturer, maker and supplier of any goods and also includes wholesaler and retailer'. Thus, it can be logically inferred that in crafting the provision on fine, the legislature did not only think of the big business but also very small businesses for whom a fine of fifty thousand taka can be a substantial amount. However, even if that is so, the law in its current shape contains no such explicit pronouncement. Hence, it would be suggested that the Parliament amend the various provisions dealing with the imposition of fines and the existing 'one size fits all' approach is dispensed with.

Such amendment should not only review and revise the amount of fine upwards but should also seriously consider drawing some sort of classifications among the various categories. For example, the manufacturing companies, big retailers, wholesalers, and small retailers may be subjected to different amount of fines. And in this case, the existing unlimited discretionary powers should be abolished. Such an abolishment may serve two purposes. Firstly, it should afford consumers greater incentives to be more vigilant in enforcing their rights which should, in turn, mean more pressure on the businesses to abide by the law. Secondly, by reducing the discretionary powers of the law enforcers, the chance of them being engaged in corruption in the course of imposing may be somewhat restrained.

This is probable because under the existing provisions, the law enforcers have the incentive to be projected as vigilant but at the same time not to impose any really painful fine on the business that engage in corrupt practices. This is because while they may take actions against illegal practices (both on their own initiative or on the basis of complaints lodged by the consumers), unlike consumers they cannot get any share of the fine imposed on businesses. Hence,

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<sup>51</sup> Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Constable, 2004).



given the widespread and endemic culture of corruption in Bangladesh,<sup>52</sup> it is not improbable that in imposing fine, some of the government officials would in exchange of bribe impose a substantially lower amount of money than what is the highest permissible limit under the law.

Apart from reducing the scope of discretion in imposing amount, the above propensity of corruption may be curtailed by incentivizing the government officials in the same way as consumers are that is to give the government officials a defined portion of the amount of fine imposed on traders. However, as in the case of the summary procedure, the government officials are effectively administrators and arbiters, incentivizing them like the consumers seem to raise the obvious and unavoidable concern of conflict of interest and is likely yield undesirable outcomes. If government officials are incentivized in this manner, there may be a genuine risk that in some cases some traders may be unduly harassed by some overzealous public officers.

### **Conclusion**

The passing of the CRPA in 2009 is at least a modestly a positive event. It has made at least two important contributions. Firstly, it has set up the DNCRP for giving effect to the objectives of the Act, albeit its role possibly so far being unflattering. Although it is routinely conducting its operations and disposing of the few claims brought by the consumers, it does not seem to have raised the awareness among consumers to any substantial degree or able to gain the confidence of the consumers that they are capable of protecting their rights. This lack of awareness or lack of confidence in the DNCRP is arguably evident from the relatively low number of complaints raised by the consumers in a country where the allegations of breach of the rights of consumers is quite commonplace. Having said that, the DNCRP itself being in place creates an opportunity for operating a dedicated governmental body to work for a greater protection of the consumers. And secondly, it has given consumers an option to be proactive in seeking remedies which should be much more expeditious. However, as has been tried to showcase that there are some areas in the existing provisions of the CRPA. It may be hoped that amendments to the CRPA would be able to protect the consumers from the various errant practices of the businesses.

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<sup>52</sup> See for instance, 'Bangladesh 13th Most Corrupt' *The Daily Star* (online), 28 January 2016, <<http://www.thedailystar.net/backpage/bangladesh-13th-most-corrupt-208522>> accessed 12 December 2016.

## Accrediting divergent professionals in ADR: How a shift from pedagogy to andragogy can make a difference?

Dr. Jamila A. Chowdhury\*

### Introduction

Delay in litigation and the consequent high cost of litigation vividly persists in many developing countries of the world<sup>53</sup>. Along the same lines, the high cost and delay make justice inaccessible to the poor, despite its literal presence in many laws of Bangladesh<sup>54</sup>. For example, according to one UNDP survey in 2013 on an average around 69 thousand and around 25.5 thousand cases respectively were pending before the subordinate courts and magistrates courts of different districts of Bangladesh<sup>55</sup>. Similarly, in 2010, 31 million cases were pending in different Indian courts, amounting to a 'case-load' of 2,147 cases for each of the 14,576 judges available in the Indian judiciary at that time<sup>56</sup>. The

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<sup>53</sup> Archana Agarwal, 'Lok Adalat and Judicial reform in India', in Amit Singh and Nasir Aslam Zahid (eds), *Strengthening Governance through Access to Justice* (PHI Learning, 2009) 38.

<sup>54</sup> Asian Development Bank (ADB), *Asian Development Outlook-2002-Bangladesh* <<https://www.adb.org/publications/asian-development-outlook-2002-preferential-trade-agreements-asia-and-pacific>> accessed 25 Feb 2017. Nusrat Ameen, 'Dispensing Justice to the Poor: The Village Court, Arbitration Council vis-a-vis NGO' (2005) 6(2) *The Dhaka University Studies Part F* 103; Archana Agarwal, *Ibid*.

<sup>55</sup> United Nations Development Programme, *Summary report on court services situation analysis* (UNDP Bangladesh, 2013) p. 29. The report showed that from 2010 to 2013, there is increasing trend of filing cases where as not until recently only around 10% cases filed in the Supreme Court was disposed of in the same year. For example, during the period 2010 to 2011 the average rate of disposal of cases in Supreme Court was 9.7, 10.2 and 10.1 respectively. Though in 2013 the rate of disposal was raised to 28%, still more than 70% cases are getting pending each year. See also, Supreme Court of Bangladesh 2013, *Annual Report*, The Supreme Court of Bangladesh, Dhaka.

<sup>56</sup> Thomas A Russo, and Aaron Katzal, *The 2008 Financial Crisis and Its Aftermath: Confronting the Next Debt Challenge* (26 October 2010) <<https://ssrn.com/abstract=1697896>> accessed 22 Feb 2017.

backlog situation is even more serious in other developing countries. For instance, as reported by Calleros<sup>57</sup>, the volume of total case backlog in Brazil once reached an unmanageable level of 4,850 cases per judge. The situation was even worse in Egypt where nearly 8,000 cases were pending per judge in 2000. Due to such a high ‘*case-load*,’ the clearance rate of pending cases was only 36 percent in Egypt, compared with 80 to 100 percent attained by other developed countries<sup>58</sup>. Similar problems of case backlog also exist in Tanzania, Pakistan, Sri Lanka, and many other developing countries around the world<sup>59</sup>.

Apart from the case backlog and delay, the high-cost of litigation also restrains access to justice for the poor<sup>60</sup>. As the disposal of cases is delayed in many developed countries, total charges paid to the lawyers increase with consecutive court appearances<sup>61</sup>. As indicated by Bergoglio, there is a negative relationship between judicial costs and rates for eviction in Argentina. The extent of such a negative relationship is higher for cases where a large number of litigants represent the ordinary people of the society<sup>62</sup>. All of these judicial costs pose an additional burden and may cause economic hardship for the poor. For example, in Bangladesh, the “*existing judicial system cannot ensure justice for the poor; many people are never produced before the court because of their poverty and the loopholes in [the judicial] system*”<sup>63</sup>.

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<sup>57</sup> Carlos J Calleros, *The Unfinished Transition to Democracy in Latin America* (Routledge, 2009).

<sup>58</sup> Khalid Ikram, *The Egyptian Economy 1952-2000: Performance, Policies, and Issues* (Routledge, 2009).

<sup>59</sup> Shabbir G Cheema, *Building Democratic Institutions: Governance Reform in Developing Countries* (Kumarian Press, 2005); Jake Dizard, Christopher Walker, and Venessa Tucker (eds.), *Countries at the Cross Roads* 2012 (Freedom House, 2012); *Rwanda-Poverty Reduction Strategy Paper-Progress Report*, IMF country report no. 11/154 (June 2011) <<https://www.imf.org/external/pubs/ft/scr/2011/cr11154.pdf>> accessed 07 March 2017.

<sup>60</sup> Shepherd S Tate, ‘Access to Justice’ 65(6) *American Bar Association Journal* 904-7; Brian Dickson, ‘Access to Justice: Connecting Principles to Practice’ (2003-04) 17(3) *Georgetown Journal of Legal Ethics* 369-422.

<sup>61</sup> Jamila A Chowdhury 2010, *Women Access to Justice in Bangladesh: Is Family Mediation a Virtue or a Vice?* (Unpublished Ph.D. thesis, University of Sydney, Australia, 2010).

<sup>62</sup> Maria I Bergoglio, ‘Argentina: the Effects of Democratic Institutionalization’ in Friedman, a Lawrence M and Perez-Perdomo, Rogelio (eds) *Legal Culture in the Age of Globalization: Latin America and Latin Europe* (2003) 20-63.

<sup>63</sup> Muduod Ahmed 2003, the former Minister of Law Justice and Parliamentary Affairs, Bangladesh, addressed as chief guest at the inaugural function of a division-level training workshop on *Mediation techniques: Alternative Dispute Resolution (ADR) in the civil*

As formal court procedures remain inaccessible to many poor and disadvantaged people in the developing world, they could easily be deprived of justice altogether. Thus, the need to find alternatives that provide access to justice for the economically vulnerable is evident. Given all the major limitations of the formal court system, ADR could be a good “complementary method” for ensuring access to justice in poor developing countries that commonly face huge backlogs in their judiciaries and can only provide limited access to legal aid<sup>64</sup>. It can ensure a quick resolution of the dispute at a much lower cost<sup>65</sup>. To reap all these benefits of ADR in providing low-cost accessible justice to the poor, a reformed ADR movement was introduced in the Family Courts of Bangladesh in 2000<sup>66</sup>. Following the success of ADR in family courts, a court-annexed ADR has also been introduced in the Code of Civil Procedure (CPC)<sup>67</sup> and in other laws in Bangladesh.<sup>68</sup> However, ADR failed to attain its desired success due largely to the lower response from practicing lawyers. One recent study indicates that *lawyers rarely initiate resolution of disputes through mediation before filing*

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*justice delivery system in Bangladesh*, held at a city hotel on July 24.

<sup>64</sup> Faye J Crosby, Margaret S Stockdale, and AnnRopp, ‘*Sex Discrimination in the Workplace: Multidisciplinary Perspectives*’; Lois Gold’ in Jay Folberg, Ann Milne, and Peter Salem (eds.), *The Healthy Divorce: Keys to Ending Your Marriage while Preserving Your Emotional Well-Being* (Spninx Publication 2009), Jay Folberg, Ann L. Milne, and Peter Salem, *Divorce and Family Mediation: Models, Techniques, and Applications*(Gilford Pres, 2004).

<sup>65</sup> Crosby, Ibid.; Joel Lee, and Teh H Hwee, ‘The Quest for an “Asian” Perspective in Mediation’ in Joel Lee and The HHwee (eds.), *An Asian Perspective on Mediation*(Academy Publishing, 2009).

<sup>66</sup> Jamila A Chowdhury, *Women’s Access to Justice in Bangladesh through ADR in Family Disputes* (Modern Bookshop, Egypt, 2005).

<sup>67</sup> Section 89A and 89B were inserted to introduce mediation and arbitration under the *Code of Civil Procedure (Amendment) Act 2003*. To motivate judges to resolve disputes through mediation, similar circular family cases also came into effect which provided that for one successful civil mediation case, the judges concerned would get two credits, i.e. the equivalent to the holding of two litigation cases, and for every two failed civil mediation cases, they would get one credit (Circular no 59(KA)G dated June 23, 2003). In addition, by insertion of section 89C through the *Code of Civil Procedure (Amendment) Act 2003*, mediation can even be practiced in civil cases at the stage of appeal.

<sup>68</sup> The provision of mediation has been introduced in the *Money Loan Courts Act 2003* (Act VIII of 2003) and the *Money Loan Courts (Amendment) Act 2010* (Act XVI of 2010) to resolve commercial disputes relating to financial institutions under Sections 21 and 22. The *Labour Act 2006* (Act XLII of 2006) also inserted ADR provisions to resolve labour disputes under Section 210. The *Arbitration Act 2001* (Act I of 2001) (later amended in 2004) has been introduced to resolve commercial disputes relating to domestic and international trade issues through arbitration. Recently, mediation is also incorporated in the *Income Tax (Amendment) Ordinance 2011* (Sections 152F to 152S) to resolve income tax disputes.

*a suit, nor do they try to resolve them outside court prior to court proceedings*<sup>69</sup>. It was also argued by many judges in family courts and civil courts that lawyers allegedly hinder the quick progress of cases through ADR due to consideration of their business interest.

Therefore, it seems that the lawyers practicing in Bangladesh have not yet adopted the culture of accelerated dispute resolution via ADR. One reason usually mentioned by scholars to explain such detachment is the inadequate presence of ADR in the legal curriculum that only teaches black letter laws and promotes an adversarial stereo-type among lawyers<sup>70</sup>. ADR is so far included in only a very few tertiary education institutions in Bangladesh. Further, only a few institutions developed limited facilities to train adult professionals on ADR. Hence, it is unlikely that a huge number of ADR practitioners required for quick resolution of all different forms of disputes can be produced in a very short time. Hence, the objective of this paper is to discuss the importance of short-term professional training courses and the accreditation of ADR for a divergent group of professionals. It also discusses the importance and the challenges of such accreditation in Bangladesh, and how an application of adult learning theories may minimize some of those challenges by producing a large number of ADR professionals within a short period of time in order to attain better results.

### **Accreditation to ADR practitioners: What and Why?**

Due to the fact that different techniques of ADR involve an art of making compromise between disputing parties<sup>71</sup>, without having some broad guidelines on who can use ADR, in which manner, and what are the pre-requisite qualifications for that, disputants seeking quick disposal through ADR may not be able to get an equitable outcome due to the non-uniform practices by

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<sup>69</sup> Jamila A Chowdhury, *Women Access to Justice in Bangladesh: Is Family Mediation a Virtue or a Vice?* (Ph.D. thesis, University of Sydney, 2011). The former Chief Justice K. M. Hasan also asserts that '*the lawyers and bar council should change their mindset and come forward to strengthen the mediation system in the judiciary*'. See more on 'ADR can ensure speedy justice for poor litigants', *The Daily Star*, 23 April 2008.

<sup>70</sup> Kathy Douglas, 'The Teaching of ADR in Australian Law Schools: Promoting Non-Adversarial Practice in Law' (2011) 22 *Australian Dispute Resolution Journal* 49.

<sup>71</sup> Michael A Cardozo, 'Use of ADR involving local governments: the perspective of the New York City counsel' (Paper presented at Fordham dispute resolution society symposium, October 13).

different practitioners conducting ADR. Therefore, accreditation of ADR involves two broad issues: firstly, the practitioners have a minimum level of education and training to serve as ADR professionals, and secondly, they follow a broad practice guideline to maintain the quality of practice<sup>72</sup>. According to Tyler and Bornstein, “*Accreditation involves a practitioner meeting certain levels of education, training or performance in order for that person to practice ADR*”.<sup>73</sup> It is pertinent that the accreditation of ADR practitioners with minimum standards involves a range of benefits including the confidence of disputants regarding the quality of professionals who may be able to handle their disputes properly. Further, it provides a protection of consumers by guaranteeing a minimum quality of services and a value for money. More significantly, the practice guideline and training requirements bring an equality of skill level among practitioners involved in ADR.<sup>74</sup>

Though accreditation is sometimes criticized on the grounds that over standardization and the need for compulsory training may reduce creativity<sup>75</sup> and confine the practice only to those who may be able to afford expensive training courses, considering the need for a more equitable justice that can substitute court decrees, nevertheless certain minimum accreditation standards for ADR practitioners are being followed all over the world. However, the balance between initial accreditation standards and rigorous evaluation of practice standards may vary depending on the context of the socio-legal system where ADR is being implemented in practice. Based on the combination of strict guidelines in initial accreditation standards and rigor in the maintenance of practice quality, the following grid for accreditation that organizations may follow:<sup>76</sup>

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<sup>72</sup> Mellica Tyler, and Jakie Bornstein ‘Accreditation of online dispute resolution practitioners’ (2006) 23(3) *Conflict Resolution Quarterly* 383.

<sup>73</sup> Ibid, 383.

<sup>74</sup> Ibid. See also NADRAC, ‘Who Says You’re Mediator? Towards a national system for accrediting mediators’ (National Alternative Dispute Resolution Advisory Council, 2004).

<sup>75</sup> Barry Simon ‘Smoke and Mirrors : The Importance of Credibility’ (2002) <[www.mediate.com/articles/simon3.cfm](http://www.mediate.com/articles/simon3.cfm)> accessed 12 March 2017.

<sup>76</sup> American Bar Association, *Discussion Draft: Report on Mediator Credentialing and Quality Assurance* (2002) <[www.abanet.org/dispute/taksforce\\_report\\_2003.pdf](http://www.abanet.org/dispute/taksforce_report_2003.pdf)> accessed 11 March 2017.

**Table 1: Grid on accreditation hurdles to ADR practitioners**

<b>A. Low Hurdles/Low Maintenance</b> <ul style="list-style-type: none"> <li>• High practitioner diversity</li> <li>• No significant bureaucracy</li> <li>• Minimal support structures for practitioners</li> <li>• Variation of practitioner skill levels</li> <li>• Some assurance of quality practice and adherence to ethics</li> <li>• Reduced emphasis on "reflective practice" and professional development</li> <li>• Less public credibility</li> <li>• New practitioners easily accepted within the ADR field</li> </ul>	<b>A. High Hurdles/Low Maintenance</b> <ul style="list-style-type: none"> <li>• Reduction of practitioner diversity</li> <li>• Moderate level of bureaucracy</li> <li>• Moderate support structures for practitioners</li> <li>• Good mediator skill levels</li> <li>• Reduced emphasis on "reflective practice" and development</li> <li>• High public credibility</li> <li>• Unlikely to be universally acceptable within the ADR field</li> <li>• Harder for new practitioners to gain entry into the ADR field</li> </ul>
<b>A. High Hurdles/High Maintenance</b> <ul style="list-style-type: none"> <li>• Reduction of practitioner diversity</li> <li>• High level of bureaucracy</li> <li>• Significant support structures for practitioners</li> <li>• High mediator skill levels</li> <li>• Promotion of particular ADR styles</li> <li>• Reduced emphasis on responding to the individual client's needs due to the promotion of particular ADR styles or requirements to follow rigid or complex maintenance procedures</li> <li>• High public credibility</li> <li>• Unlikely to be universally acceptable within the ADR field</li> </ul>	<b>A. Low Hurdles/High Maintenance</b> <ul style="list-style-type: none"> <li>• High practitioner diversity</li> <li>• Moderate level of bureaucracy</li> <li>• Moderate support structures for practitioners</li> <li>• High mediator skill levels</li> <li>• Long-term commitment to practitioners and from practitioners</li> <li>• Substantial public credibility if:               <ol style="list-style-type: none"> <li>a. implemented with support structures addressing the developmental needs of practitioners; and</li> <li>b. consumer education is provided explaining the inadequacies of "hurdles" as appropriate indicators of practitioner quality</li> </ol> </li> <li>• Easily accepted within the ADR field</li> </ul>

### Importance of accreditation of ADR practitioners: Bangladesh perspective

As mentioned, ADR has already been included in different laws of Bangladesh<sup>77</sup> and also different amendments were made for its extensive use in dispute resolution<sup>78</sup>. Whilst the different laws include a slightly different mode and practice of ADR none explicitly mention that a law degree or legal background is required to act as a mediator or an arbitrator. For example, both mediation and arbitration are included as modes of ADR under the CPC of Bangladesh and the District Judge in every district shall prepare a panel of mediators for their respective districts, after consultation with the President of the District Bar Association. This Panel shall consist of pleaders, retired judges, as well as persons who have received training in the art of dispute resolution, and any other person deemed appropriate for this purpose. Hence, any practitioner trained in dispute resolution may satisfy the vacuum of required ADR practitioners in their respective fields, since regular law students with a background in dispute resolution would not be able to fill the gap of a sufficient number of competent ADR practitioners in a number of divergent fields (e.g. banking sectors, health care service, income tax, construction, industrial sectors, and so on) over a short period of time.

Further, the accreditation of ADR practitioners from a diverse field is becoming more realistic under the liberal inclusion of ADR in different legislations of Bangladesh. For instance, even though CPC has put a provision for consultation with President of the District Bar Association before appointing Panel mediators (i.e. ADR practitioners)<sup>79</sup>, the Money Loan Courts Act 2003 (MLCA) of Bangladesh has taken an even more liberal view with regard to the appointment of mediators from a non-legal background<sup>80</sup>. As mentioned in MLCA, mediation can be conducted by any third party mediator appointed only on the basis of

<sup>77</sup> The *Code of Civil Procedure (amendment) Act* 2003; the *Family Courts Ordinance*, 1985 (Ordinance XVIII of 1985); the *Artha Rin Adalat Ain (Money Loan Courts Act* 2003) (Act XIX of 2003); *Village Courts Act* 2006 (Act XIX of 2006); *Income Tax Ordinance* 1984 (Finance Act 2011); *Dispute Settlement Board Act* 2010; *Labour Act* 2006; the *Arbitration Act*, 2001 (Act I of 2001); the *Muslim Family Laws Ordinance*, 1961 (Ordinance VIII of 1961)

<sup>78</sup> After insertion of ADR in 2003, the *Code of Civil Procedure, (amendment) Act* 2006 and the *Code of Civil Procedure, (amendment) Act* 2012 expanded the use of ADR by incorporating mandatory ADR both in pre-trial stage and post-trial stage. Similarly, the *Money Loan Courts (amendment) Act* 2010 also inserted mandatory ADR provision for dispute resolution.

<sup>79</sup> *Code of Civil Procedure, 1908* (amendment 2003) sec 89A (10),

<sup>80</sup> Jamila A Chowdhury, 'ADR in legal curriculum: a daunting progress towards a pressing need in Bangladesh' (2015) 18 *Korea University Law Review* 3.



consensus between parties and their lawyers; or through a consensus between the parties themselves<sup>81</sup>. Thus, under the formal laws relating to ADR (e.g. CPC and MLCA), there is no restriction in appointing ADR practitioners from professionals with a legal background. In other words, a divergent group of professionals from non-legal backgrounds can also be mediators under the existing laws of Bangladesh (excepting resolution of family disputes in the family courts where only Assistant judges (i.e. persons with a law degree) can act as mediators). Also under the *quasi*-formal laws relating to ADR (e.g., *Muslim Family Laws Ordinance, 1961*; *Dispute Settlement (Municipal Areas) Board Act 2004*, *Village Courts Act 2006*) also take a liberal approach by allowing some persons to act as conciliators/arbitrators who do not have a legal background.

Since there is no legal restriction for choosing ADR professionals from a divergent number of fields, and since many professionals are required to fill the current vacuum of ADR professionals in divergent fields, the best approach that fits the current context of Bangladesh is to have an accreditation criteria with a low barrier, following the grid in Table 1—that is low in hurdles, and high in terms of maintenance. Given the context of Bangladesh, it requires a low-barrier accreditation to fill the gap quickly so that those from divergent professions with non-legal background can act as ADR practitioners in their respective fields (e.g. banking sectors, health care service, income tax, construction, industrial sectors, and so on) over a short period of time. In addition, a high maintenance accreditation standard is necessary to ensure that ADR clients have more confidence in using this comparatively new technique of dispute resolution.

### **Accrediting divergent professionals in ADR: Need for a shift from pedagogy to andragogy**

While it is necessary that a large number of professionals from divergent fields be accredited within the shortest possible time, as mentioned, it is a challenge to do the same through formal academic courses. Therefore, a viable option is to offer professional training courses that professionals from diversified fields may attend to get ADR qualifications suitable to their respective fields<sup>82</sup>. However, the challenge is to orient adult professionals who have already gained considerable expertise in their respective fields, and in many cases,

<sup>81</sup> *Money Loan Courts Act, 2003*, sec 22.2.

<sup>82</sup> Chartered Institute of Arbitrators, *Why train with CI Arb?* <<http://www.ciarb.org/training-and-development/why-train-with-ci-arb>> accessed 11 March 2017.

have experience related to an adversarial mind-set. Hence, appropriate training is required that will not undo their existing knowledge and experiences, rather it will train them building on their existing knowledge and expertise. A number of adult learning theories are developed to serve this purpose. The following part discusses some of the special characteristics of adult learners that make them distinct from other learners who may go through regular academic courses. This part leads to a discussion of the different adult learning theories and how suitable learning environments can be developed to train a number of professionals with divergent backgrounds, who are already established and shape their practices on ADR in their respective field.

All of us who are related with academic field must have heard of the term ‘pedagogy’ that simply means the way of teaching. The literal meaning of this German word is teaching and learning method for kids. Though we use ‘pedagogy’ as a generic term to indicate teaching, there is a considerable difference between effective teaching techniques that can be applied to children/youth and adults.<sup>83</sup> Therefore, a different term ‘andragogy’ is used to indicate learning techniques for adults. The term ‘andragogy’ was originally formulated by a German teacher, Alexander Kapp, in 1833.<sup>84</sup> The basic difference between pedagogy and andragogy lies on the fact that the teaching and learning methods for adults with the diverse world cannot be served properly through pedagogy that usually deals with the learning methods of children<sup>85</sup>. While the purpose of pedagogy is to create an effective transmission of knowledge, the purpose of andragogy is to ensure a ‘*proper facilitation*’ to promote adult learners’ motivation to learn<sup>86</sup>. Though the concept of andragogy is disputed and criticized by some scholars, the notion is being extensively used in different countries of the world, in designing their adult learning environments. An adult learner is distinct from a young learner due to some unique characteristics. Adult learners are:

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<sup>83</sup> Mark K Smith, *Malcolm Knowles, informal adult education, self-direction and andragogy* (2002) <<http://www.infed.org/thinkers/et-knowl.htm>> accessed 07 March 2017.

<sup>84</sup> Malcom Knowles et al. *Andragogy in Action. Applying modern principles of adult education* (Jossey Bass, 1984)

<sup>85</sup> Malcom S. Davenport, ‘Is there any way out of the andragogy mess?’ in Mary Thorpe, Richard Edwards and Ann Hanson (eds.), *Culture and Processes of Adult Learning* (Routledge, 1993).

<sup>86</sup> Holt, DD.

- **Self-directed** – Adult learners are self-directed individuals who take initiative and responsibilities for their own learning. Unlike young learners, adult learners select learning courses of their own and fulfill their learning commitments. They also decide on what to learn, and in what pace.
- **Experience** – Adults always prefer to apply what they know already<sup>87</sup>. As each and every adult learners have some life experiences that help them to understand the learning problem and make real-life solutions, learners' prior experience are always considered as an opportunity for learning<sup>88</sup>.
- **Readiness to learn** – Unlike young learners, adult learners do not learn to tap future work opportunities, rather apply learning readily to their current tasks<sup>89</sup>. Therefore, '*learning by doing*' is always considered as a better choice to teach adult learners.
- **Orientation to learning** – Adults move from subject-centred to task-centred or problem-centred learning.<sup>90</sup>Hence, we see many adults taking short courses or diplomas in their respective fields, rather than doing specializations through post-graduation degree.
- **Motivation**– As adult learners are self-directed, their motivation to learn is internal<sup>91</sup>. Though internal, the motivation to learn for adult learners may depend on some intrinsic rewards, like pay increase, or get a promotion.

### **Adult learning theories in context: Integrating theories into practice of accreditation to ADR practitioners**

It is often stated that '*learning styles*' are key factors by which adult learners approach their learning tasks. According to Felder (1996), "*learning styles are characteristic strengths and preferences in the way [learners] take in and process information*"<sup>92</sup>. Silver, Strong, and Perini (1997) also explained that learning styles are not static rather they relate to the different ways people think

<sup>87</sup> Dolores Fidishun, 'Andragogy and technology: Integrating adult learning theory as we teach with technology' Proceedings of the 2000 Mid-South Instructional Technology Conference (Middle Tennessee State University, April 2000).

<sup>88</sup> Kathleen Cercone, 'Characteristics of adult learners with implications for online learning design 16(2) *Association for the Advancement of Computing in Education Journal* 137.

<sup>89</sup> Lela Vandenberg, *Five principles to adult learning: how to teach so people learn* <[http://od.msue.msu.edu/uploads/files/pd/facilitating\\_adult\\_learning.pdf](http://od.msue.msu.edu/uploads/files/pd/facilitating_adult_learning.pdf)> accessed 12 March 2017.

<sup>90</sup> Sharen B Merriam, Rosemary S Caffarella and Lisa M Baumgartner, *Learning in adulthood* (Jossey-Bass, 2<sup>nd</sup> ed, 1999).

<sup>91</sup> Ibid. Merriam, Caffarella and Lisa (1999).

<sup>92</sup> Richard MFelder, 'Matters of style' (1996) 6(4) *ASEE prism* 18.

and feel as they solve problems, create products, and interact<sup>93</sup>. As discussed in the last section, adult learners have a set of characteristics that make them distinct from other young learners going through their regular academic courses. Even though all adults do not learn in the same way, generally the way adults learn is emphasized while developing these adult learning theories.

Many relevant adult learning theories were developed so far to improve this cognitive process of learning. The objective of all these theories is to facilitate adult learning in such a way so that adult can learn effectively and productively. However, there is no single adult learning theory that would be a good match and uniformly apply to every adult learning contexts<sup>94</sup>. Since all of these theories cannot be explained in this limited space, the following section will delineate the three key adult learning theories that, in combination, would be suitable for creating an effective learning environment for adults going through training courses on ADR for diverse/diverged professionals.

**(a) The living consensus theory:** It is one of the most comprehensive learning theories propounded by Bruce<sup>95</sup>. This theory has three premises. Firstly, facilitators should consider the life experience of the participants before delivering new lessons<sup>96</sup>. And new lessons will be provided by linking those with the prior life experiences of the participants. Secondly, it should also consider the prior learning experiences of the learners before developing new lessons, and finally, it should value the diversity in terms of the individual values among the participants, while delivering new lessons.

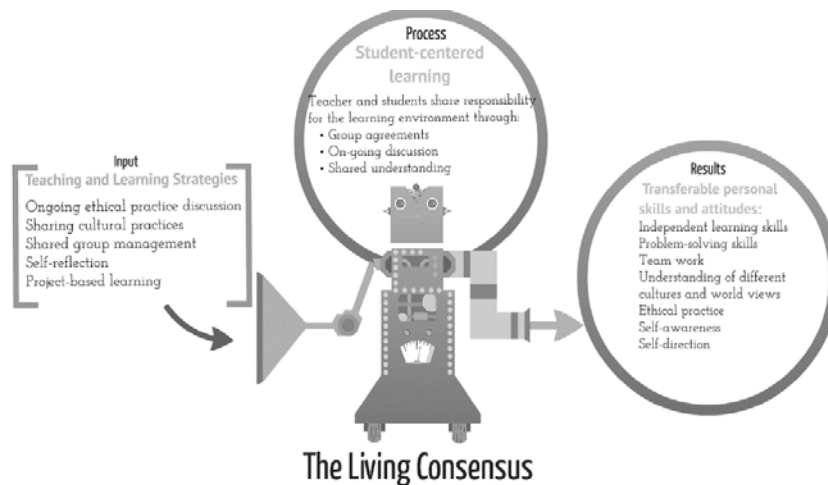
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<sup>93</sup> Harvey F Silver, Richard W Strong, and Matthew J Perini, 'Integrating Learning Styles and Multiple Intelligences' (1997) 55(1) *Educational Leadership* 22.

<sup>94</sup> Barbara A. Frey and Susan Walman, 'Applying adult learning theory to the online classroom' (2003) 17(1) *New Horizons in Adult Education* 4.

<sup>95</sup> Julia Bruce-Maine, *Engaging challenging learners* (Ako Aotearoa Centre of Tertiary Teaching Excellence Auckland, 2013).

<sup>96</sup> Margaret Franken, 'Re-situation challenges for international students 'becoming' researchers' (2012) 64(6) *Higher Education* 845.

**Figure 1: Living consensus theory<sup>97</sup>**

Based on these premises, the theory suggests five different strategies to create a better cognitive learning environment. These strategies are:

- **Ethical agreement:** Participants should come with an ethical agreement about their learning environment;
- **Reflective practice:** Improvement of current practice on the basis of prior experience in terms of what works or what does not work;
- **Shared leadership:** The leadership as it relates to the learning process is shared between the learners and the teachers;
- **Project team:** Learners can learn better while they work as a project team and get engaged in '*learning by doing*', where ownership and responsibility of the work is shared between the participants;
- **Cultural inquiry:** Diversity in cultural values by individual participants should be taken into account by the facilitators, and *vice-versa*.

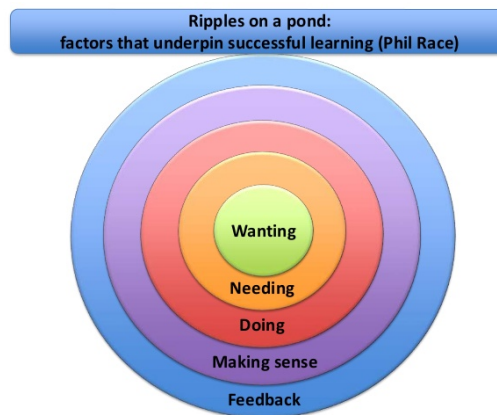
#### (b) Ripple on a pond theory

As perceived by Phil Race<sup>98</sup>, the learning starts following the need/want of the participants. According to this theory, while learners learn through a process of learning by doing, the facilitators should design the lesson topics to reflect the

<sup>97</sup> Julia Bruce-Mayne, 'The living consensus' in Sino New Zealand Research Forum: Excellence in Vocational Teaching Symposium, (Qingdao, China 2013).

<sup>98</sup> Phil Race, *Making Learning Happen* (Sage Publications, 2005).

learners' wants and need, so that they can relate the learning to their real-life context, and therefore, ensure it all makes sense<sup>99</sup>. Learners gain greater interest in learning since it makes sense in their real-life context.



**Figure 2: Ripple on a pond theory<sup>100</sup>**

In 1993, the British educational and training developer Phil Race presented this new and radically different model of learning. While developing his theory, Race has made it much simpler and practicable for the professionals' dealing with adult learning.

As adult learners are always inclined to apply their learning into real-life contexts, Race's adult learning theory is based on the premise that adults can effectively learn through doing<sup>101</sup>. In his adult learning theory, Race has proposed '*learning by doing*' that is similar to Kolb's experiential learning theory discussed below (Fig.3). Though mentioned in a different mode, '*learning by doing*' is also emphasized in Bruce's living consensus theory. However, what is unique in Race's theory is his special mention of '**needing/wanting**' from a learners' perspective. It is not that adult learners come to learn with diversified knowledge and understanding, their purpose of learning also varies. Even when taking the same course by two professionals with the same profession, their purpose of attending the course may vary.

<sup>99</sup> Ibid.

<sup>100</sup> Phil Race, *How Students Really Learn 'Ripples' model of learning* (14 October 2015) <<https://www.slideshare.net/elearningsupport/phil-race-ripples>> accessed 03 March 2017.

<sup>101</sup> Ibid.

For instance, if we provide training on ADR to legal professionals, some lawyers who might have got some lessons on ADR in their law schools may come to refresh their learning or to get ready for a test to pass accreditation. On the other hand, the same training course may be taken to gain some initial understanding on ADR by an elderly lawyer, for whom ADR may remain as a completely new area for understanding. Hence, while designing an adult learning lesson, an adult learner must know first his/ her motivation to learning. This is the reason why we always see adult learners to fill-in an evaluation sheet to mention their expectations from the course. Once expectations are done, facilitators progress with their facilitation for learning with different stages as follows:

**Needing/Wanting** - motivation

- **Doing** - practice; trial and error
- **Feedback** - seeing the results; other people's reactions
- **Digesting** - making sense of it; gaining ownership.

As mentioned earlier, once the need/wants of participants are known to the facilitators, they get participants involved in some practice lessons to learn through trial and errors. Because, lessons plans are developed following participants' prior experience and learning while learning by doing participants can link their learning with their existing knowledge and expertise, and therefore get more interest to learn. Nevertheless, at some times, learning experience for some adult learners may be frustrating, because they are struggling with their new learning lessons. Thus, to enhance their learning experiences further, a facilitator ought to provide positive feedback and encourage adult learners to improve their performance. In summary, five factors that are the basis for effective learning and increase an adult learner's learning experience like a ripple in the pond are (1) Wanting to learn (2) Need to learn (3) Learning by doing (4) Making sense and (5) Learning from feedback.

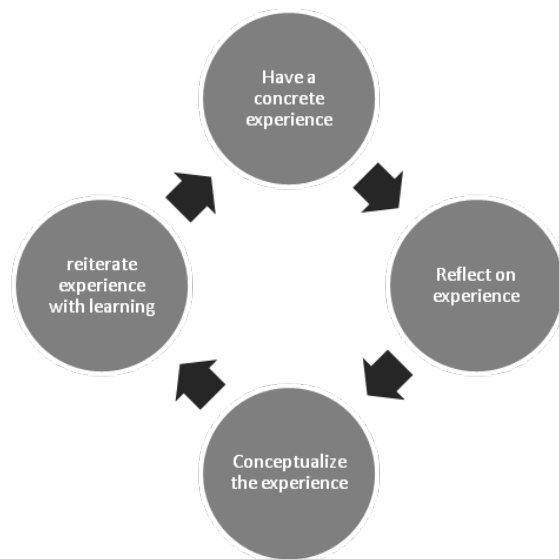
**(c) Experiential learning theory**

*"Learning is the process whereby knowledge is created through the transformation of experience"*<sup>102</sup>. As promulgated by David Kolb, this theory

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<sup>102</sup> David A Kolb, *Experiential learning: Experience as the source of learning and development* (Prentice-Hall, 1984) 38.

emphasizes “*learning by doing*” and such learning process involves four stages: (1) Concrete experience (2) Reflective observation (3) Forming abstract concept and (4) Testing concepts in new situations. Though all other theories discussed above have an emphasis on “*learning by doing*”, the uniqueness of Kolb’s theory is that he extended the discussion by providing some specific steps that need to be followed to complete this learning process. It is a good method to teach professionals, for example, doctor, nurses or teachers. However, it is not enough just to learn from experience, because without the generalization of learning by doing, people may forget what they learned earlier.



**Figure 3: Kolb’s experiential learning theory<sup>103</sup>**

Thus, while many other adult learning theories discussed about learning by doing, Kolb (1984) has generalized the process of learning by doing with four definite steps that can be used to generate new knowledge through experience.

### **Facilitating adult learning: Further consideration**

Once we set the tone of adult learning and develop some effective techniques to facilitate learning for adults, a few more factors we need to consider include (1) how to set effective and SMART learning objectives or lesson plans for adults,

<sup>103</sup> Ibid. Adapted from Kolb 1984.



(2) how to effectively transform the mindset and prior learning experience of adult learners to a new, and sometimes, contrasting learning domain, and (3) how facilitators may improve their facilitation skills to better serve the need of adult learners, and ensure a better transformation, as required. The following discussion in this section highlights these issues.

While developing learning and lesson plans, the first aspect that is necessary is to employ the SMART approach, that is to say:

- **S**– specific
- **M** – measurable
- **A**– attainable
- **R**– relevantand
- **T**– time-based.<sup>104</sup>

As we know, adult practitioners of ADR are busy and havemany responsibilities and life commitments both to their family and profession. Hence, any lessons developed for them should tell them very specifically about what they are going to learn and where they may apply it in practice. Further, the learning objectives should be measurable through objective observations, and not only reflect the subjective opinion of the assessor. For instance, we should not set our objectives as *‘learners will know about different types of ADR’*, rather it might be *‘learners can identify and distinguish different types of ADR from pictures/videos demonstrated in their classes’*. Most pertinently, such objectives should be attainable – not overlyambitious that cannot be attained within thelimited time and resources. And since adult learners always like to link their learningwith their real-life context, learning objectives should also be relevant. Finally, learning objectives will be time-basedso that we may assess our learners after some specified time interval and provide appropriate feedback how to improve their skills further.

While formulating lesson planswith explicit learning objectives for adult learners on ADR, we need to be careful about one implicit objective to change their adversarial mind-setby applyingthe new transformative learningstyle. For instance, one challenge involved with the adaptation of ADR by adult legal practitioners is to change the adversarial mind-set that they learned and practiced

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<sup>104</sup> University of North Carolina Wilmington , *Writing Smart Learning Objectives* <<http://uncw.edu/career/documents/WritingSMARTLearningObjectives.pdf>> accessed 17Feb 2017.

sincee.g. their law school days. The idea of transformative learning is based on the idea of Jack Mezirow who proposed that the objective of transformational learning is to change our frame of mind to see our material world<sup>105</sup>. *We transform our frames of reference through critical reflection on the assumptions upon which our interpretations, beliefs, and habits of mind or points of view are based*<sup>106</sup>. Therefore, while facilitating learning for adult learners, we should always encourage them to challenge their set assumption of ADR and rather change their mind-set thatthe effective application of ADR over an adversarial trial may create a win-win solution for both clients and practitioners (i.e., resolving disputes quickly without causing financial loss to the practitioners).

Further, adult learning facilitators should always **INSPIRE** learners by making the **[I]**ntent clear through unambiguous lesson plans, always focusing on the **[N]**eed for adult practitioners to attend the course and keep out learning staff that are not very relevant to them, **[S]**upport learners as much as possible to learn, and consider them as **[P]**eople with other life commitments rather than as regular students. The facilitator of adult learners should **[I]**nteract with learners more frequently and use different media,for example, an on-line forum, email, text messaging, and informal greetings. Furthermore, as many of the adult learnerinADR could be well established in their respective fields, it is a good practice for adult teaching facilitators of ADR to **[R]**emember the name, faces, and last communication topics with them, to show them respect and that they are valued. On top of this, adult learners should always be made aware of some **[E]**vidence relating to how the new knowledge would assist them to thrive on their career path so that they never feel the training is worthless in their strive to success<sup>107</sup>.

Last and not least, since the facilitatorsplay an important role in adult learning, they should always seek to be a reflective practitionerin that theyevaluate their own facilitation technique and learn from past mistakes to improve further in their next go. As shown in the self-explanatory Figure 4 which is propounded by Gibbs,adult learning facilitators should always be self-reflective in terms of their existing practices, identify the good points and loopholes, analyze the situation

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<sup>105</sup> Jack Mezirow, 'Transformative learning theory to practice' (1997) 74 *New Directions for Adult and Continuing Education* 1.

<sup>106</sup> Ibid, 7.

<sup>107</sup> See Race, above n 43.

that might have caused it, develop learning points related to what more could be done to avoid wrongs or to enhance good practices, for the next go, accordingly.



**Figure: 4 Gibbs' reflective cycle for adult learning facilitators<sup>108</sup>**

**Conclusion:** As adults are different in their needs and demands for learning, and always prefer to apply their learning to their real-life context, policy makers and organizations designing courses for the accreditation of adult professionals from different fields to ADR should take care of issues that revolve around adult learning opportunities and challenges. The objective would be to train a large number of professionals from a variety of divergent backgrounds to ADR within a short period of time, to conduct ADR in their respective fields. Therefore, accreditation training on ADR will not only link the existing knowledge of professionals to create a better learning experience for them, it will also meet the need of disputants who may look for ADR professionals from different specialized fields to handle their disputes properly. In addition, the core essence of adult learning theories is to ensure a learning environment that is participatory, so that a variety of practitioners from divergent fields who get sufficient opportunity to bring their own perspectives to their learning can make their training much more meaningful and effective for their purpose. The only change that is required is to transform their adversarial mindset and assist them to think more constructively to attain a win-win solution for their clients.

<sup>108</sup> Graham Gibbs, *Learning by Doing: A guide to teaching and learning methods*, (Further Education Unit, Oxford Polytechnic, 1988).

# Justification for Providing Legal Aid: A Right-based Approach or a Welfare Concern?

Dr. Farzana Akter\*

## 1. Introduction

Legal aid commonly means providing lawyers to persons who lack the financial resources to represent themselves before the courts.<sup>109</sup> It has been even said that access to justice can be briefly defined as providing legal aid which guarantees judicial remedies to those living in poverty by meeting up the cost of lawyers and other ancillary expenses of the administration of justice.<sup>110</sup> Thus, legal aid is the contact point between the law and the poor, and plays a crucial role in ensuring access to justice.<sup>111</sup> The traditional approach towards legal aid refers to the protection of individual rights as a part of state responsibility; there must be a fixed and objective standard for enjoying this right with the prevalence of corresponding remedies if such state obligations are not fulfilled.<sup>112</sup> It also requires impartiality in the administration of the scheme.<sup>113</sup> Legal aid, therefore, is a right and asks for affirmative state action for its protection. State is required to ensure the right not only in formal way, such right must also be actual and effective.<sup>114</sup>

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<sup>109</sup> Stephen Golub, *Access to Justice, in Africa and Beyond: Making the Rule of Law a Reality* (Penal Reform International, 2007)xv; Geoffrey C. Hazard, Jr., 'After Legal Aid is Abolished' (1999) 2 *Journal of the Institute for the Study of Legal Ethics* 375, 386.

<sup>110</sup> Francesco Francioni, 'The Development of Access to Justice in Customary Law' in Francesco Francioni (ed.), *Access to Justice as a Human right* (Oxford University Press, 2007) 1.

<sup>111</sup> Gabriela Knäul, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/23/43* (15 March 2013), paras. 27 and 35 < <http://www.wave-network.org/sites/default/files/UN%20Special%20Rapporteur%20on%20the%20Independence%20of%20Judges%20and%20Lawyers.pdf> > accessed 2 March 2016.

<sup>112</sup> Mauro Cappelletti and James Gordley, 'Legal Aid: Modern Themes and Variations' (1972) 24 *Stanford Law Review* 387, 392.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid, 362-363.

On the other side, present modern state is entrusted with various responsibilities. State is under an obligation to protect the rights of individuals as well as to ensure their social and economic welfare.<sup>115</sup> This marks a shift from the traditional philosophy about legal aid and considers it a concept of political and social right.<sup>116</sup> Modern conception of legal aid, therefore, embodies dualist approaches, a juridical right or a welfare right.<sup>117</sup> Moreover, legal aid is not only a right for the purpose of accessing the courts, it also functions to struggle against poverty and this represents the second approach towards legal aid.<sup>118</sup> Therefore, in discussing the justifications for providing legal aid to the poor and disadvantaged, the author explains two distinct approaches – first one is the right based approach on the part of individual; another is welfare approach of the state towards its citizens. The present article examines these two prevailing approaches based on their properties and finally makes recommendations.

## 2. The Right- based Approach to Legal Aid

The justification for providing legal aid, as a part of state responsibility, can be described from a theory of access to rights that obligates the state to provide legal assistance to those individuals who are in need to use society's dispute resolution process.<sup>119</sup> According to Auerbach, dispute settlement procedures reflect the most basic values of a society.<sup>120</sup> In a well-ordered society, the basic social institutions<sup>121</sup> operate to satisfy the principles of mutual rights and duties for the advantages of social life. Legal system is one of them and, it plays a

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<sup>115</sup> Mauro Cappelletti, 'The Emergence of a Modern Theme' in Mauro Cappelletti, James Gordley and Earl Johnson, Jr., (eds.), *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies* (Oceana Publications, 1975) 27-28.

<sup>116</sup> Herman I. Pollock, 'Equal Justice in Practice' (1961) 45 *Minnesota Law Review* 737, 744.

<sup>117</sup> See above n 4, 392.

<sup>118</sup> Ibid, 406-407.

<sup>119</sup> Marshall J. Breger, 'Legal Aid for the Poor: A Conceptual Analysis' (1982) 60 *North Carolina Law Review* 282, 287.

<sup>120</sup> Jerold S. Auerbach, *Justice Without Law?* (Oxford University Press, 1983) 3.

<sup>121</sup> The basic social institutions define and protect the equal liberties of citizenship. John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 61.

crucial role through its dispute settlement system for the proper regulation of the society.<sup>122</sup>

The right based approach implies individualistic notion, like Dworkin defines right as an individual claim or entitlement without contemplating the collective goals.<sup>123</sup> According to Dworkin, individuals possess rights embracing the considerations of equal respect and concern of human dignity.<sup>124</sup> A person's claim, thus, is treated as a right founded not on the conception of aggregate or collective good; it is individuated in nature and deprivation from it cannot be justified.<sup>125</sup> However, sometimes rights may not stand absolute on policy grounds, but rights always prevail against the consideration of collective goals in general.<sup>126</sup> Moreover, an individual's right to be treated as an equal suggests his potential loss must be treated as a matter of concern; infringement of his right implies he is treated as less than a man or as less concern. Such apprehension obliges the government to treat people not only with concern and respect but with equal concern and respect.<sup>127</sup> The institution of rights, therefore, is compelling and the invasion of rights amounts to grave injustice.<sup>128</sup>

This individualistic approach is also found in Nozick's view; he mentions about the inviolability of the persons and declares their separate existence.<sup>129</sup> Nozick states that rights of individual are so strong and far-reaching even to the extent of limiting actions by the state and its officials.<sup>130</sup> An individual has the right to enforce or defend his rights. Similarly he can also take action for punishing those

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<sup>122</sup> Harry C. Bredemeier, 'Law as an Integrative Mechanism' in Vilhelm Aubert (ed.), *Sociology of Law* (Penguin Books, 1969) 65; T. Parsons, *The System of Modern Societies* (1971) 8 cited in above n 11, 287.

<sup>123</sup> Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 94-96; James W Nickel, 'Dworkin on the Nature and Consequence of Rights' (1977) 11 *Georgia Law Review* 1115.

<sup>124</sup> Dworkin, see above n 15, 272-273.

<sup>125</sup> Ibid, 91.

<sup>126</sup> Ibid, 92.

<sup>127</sup> Ibid, 199, 227.

<sup>128</sup> Ibid, 199, 205.

<sup>129</sup> Robert Nozick, *Anarchy, State and Utopia* (Basil Blackwell 1974) 32-33; H.L.A. Hart, 'Between Utility and Rights' (1979) 79 *Columbia Law Review* 828, 832.

<sup>130</sup> Nozick, see above n 21, ix.

who violate his right.<sup>131</sup> This suggests that rights are inviolable and absolute and not merely functions as deterrence for other's actions.<sup>132</sup> Moreover, Nozick's concept of a "minimalist" state requires a reliable and fair public system of justice. This system must be available to all people and must follow a similar process for everyone.<sup>133</sup> Thus, justice is ensured when people can exercise their rights and entitlements.<sup>134</sup>

The distinction of persons along with their separateness of living and experience is also the foundation of Rawls' conception of justice.<sup>135</sup> According to Rawls, justice is the first virtue of social institutions; each person possesses an inviolability endowed on this notion of justice.<sup>136</sup> In his principles of justice, Rawls talks about an original agreement where free and rational persons in furtherance of their own interests approve the equal position of all for prescribing the terms of their association.<sup>137</sup> Rawls states, "All social values- liberty and opportunity, income and wealth, and the bases of self-respect- are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage," and "injustice, then, is simply inequalities that are not to the benefit of all."<sup>138</sup> More particularly, Rawls first principle of justice clearly indicates that each person must have an equal right to the most extensive basic liberty compatible with a similar liberty for others.<sup>139</sup>

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<sup>131</sup> Ibid, 12.

<sup>132</sup> Robert Paul Wolff, 'Robert Nozick's Derivation of the Minimal State' (1977) 19 *Arizona Law Review* 7,8.

<sup>133</sup> Nozick, see above n 21, 102.

<sup>134</sup> Kelly Frels, 'Books Reviewed: Anarchy, State and Utopia' (1975) 12 *Houston Law Review* 1190.

<sup>135</sup> Rawls, see above n 13, 191; See also, Charles Frankel, 'Book Review, A Theory of Justice' (1973) 5 *Columbia Human Rights Law Review* 559.

<sup>136</sup> Rawls, see above n 13, 3-4; James S. Fishkin, 'Books, Justice versus Utility' (1984) 84 *Columbia Law Review* 263.

<sup>137</sup> Rawls, see above n 13, 11, 118-130; Edward E. Zajac, *Political Economy of Fairness* (Cambridge, 1995) 82-83.

<sup>138</sup> Rawls, see above n 13, 62.

<sup>139</sup> Rawls, see above n 13, 60; For Rawls, "The basic liberties of citizens are, roughly speaking, political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property, and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law. Rawls, see above n 13, 61;

Liberty considers that an individual is independent and sovereign, and his independence is absolute over his body and mind. He has freedom over his conscience, thought, action and no compulsion can be made in violation of his liberty. Liberty implies the idea all human beings are by nature free and equal. Again being inviolable, it demands protection for individual concerns.<sup>140</sup> Justice requires that liberty may be restricted or unequally distributed for the sake of liberty only and not for any kind of social or economic advantage.<sup>141</sup> However, as Mill notes, there is only one purpose for which liberty can be curtailed, that is for preventing harm to others.<sup>142</sup>

As a part of the concept of individual right, the notion of equality is also the key to liberty and calls on the government to treat all citizens as free, independent, and possessed of equal dignity. The government is under an obligation not merely to show impartiality, but also to ensure goods, services and opportunities are distributed in accordance with the values of equality and autonomy of individuals.<sup>143</sup> Therefore, the conception of liberty is imbued by the idea of just assignment of rights and responsibilities to individuals, and the conception of equality by the idea of uniform standards impartially applied to all.<sup>144</sup>

According to Breger, Rawls has not specifically referred to legal aid. Yet rights of individuals coupled with liberty for getting legal assistance can be attributed to his theory in three aspects.<sup>145</sup> Firstly, in contemplation with the notion of

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Dworkin has also in substantiating his idea of right declared about individual's right of liberty for one's own cause. Dworkin, see above n 15, 199, 205; Zajac, see above n 29, 84-85.

<sup>140</sup> John Stuart Mill, 'Introductory' in David Spitz (ed.), *On Liberty, Annotated Text, Sources and Background Criticism, A Norton Critical Edition* (W. W. Norton & Company, 1975) 10; Peter Berkowitz, 'Freedom and The Vulnerabilities of Virtue' (2000) 45 *The American Journal of Jurisprudence* 51, 53; Ch. Perelman, 'Books Reviewed', 9 *Natural Law Forum* (1964) 126; Stephen L. Newman, *Liberalism at Wits' End, The Libertarian Revolt against the Modern State* (Cornell University Press, 1984) 19-20.

<sup>141</sup> Hart, see above n 21, 536.

<sup>142</sup> Mill, see above n 32, 10-13.

<sup>143</sup> Jack Donnelly, 'Book Review: A Matter of Principle' (1986) 8 *Human Rights Quarterly* 340-341.

<sup>144</sup> See above n 4, 392.

<sup>145</sup> See above n 11, 293.



primary goods,<sup>146</sup> a link could be made with the idea of access to legal institutions alongside with all the basic liberties<sup>147</sup> that has to be protected by the state. Access to legal system, in this connection, turns itself to be a primary social good embodying the right to legal assistance, it is a means by which individuals protect and define their access to opportunities and power.<sup>148</sup> Secondly, as it is essential for the realization of other rights and interests, access to legal system is elementary similar to public education. This access will ensure principle of fair equality of opportunity<sup>149</sup> and hence can be claimed by individuals from the state. Lastly, Rawls has obligated the state to maintain arrangements to fulfill its responsibility for ensuring the appropriate conception of the principles of justice. At the same time, it is essential that fixed constitutional rules must be in existence for the purpose of regulating conducts of the people in society.<sup>150</sup> The assistance of lawyer is crucial to determine effectively the rights and interests of individuals in the dispute resolution process. Therefore, individuals in the constitutional stage can demand this right from the state.<sup>151</sup>

Moreover, the notion of substantive principles of justice conjoined with the idea of “the integrity of the judicial process”<sup>152</sup> also asks for the assistance of lawyers encompassing the system of legal aid in an adversarial system. The legal system must have provisions for the regulation of orderly trials, and hearings in that

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<sup>146</sup> According to Rawls, “Primary goods are things that every rational man is presumed to want. These goods normally have a use whatever a person’s rational plan of life. For simplicity, assume that the chief primary goods at the disposition of society are rights and liberties, powers and opportunities, income and wealth.... These are the social primary goods.” Rawls, see above n 13, 62.

<sup>147</sup> For the description of basic liberties, see above n 31 and the accompanying texts.

<sup>148</sup> Joseph Franaszek, ‘Justice and the Reduction of Litigation Cost: A Different Perspective’ (1985) 37 *Rutgers Law Review* 337, 358.

<sup>149</sup> The principle of fair equality of opportunity suggests the prohibition of formal caste or class barriers along with the affirmative action by government for ensuring the rights of persons from unequal background. This principle allows such persons equal opportunity in order to contest for the rewards of life based on their talent. As a result, this might call on the government to provide subsidy or other provision of education to those who cannot bear it. Thomas C. Grey, ‘Property and Need: The Welfare State and Theories of Distributive Justice’ (1976) 28 *Stanford Law Review* 877, 879.

<sup>150</sup> Rawls, see above n 13, 12.

<sup>151</sup> See above n 11, 293-294.

<sup>152</sup> Rawls, see above n 13, 239.

must be fair and open including the provisions of rules of evidence and inquiry.<sup>153</sup> This idea of orderly trials and hearings requires the existence of both parties to the dispute before the court and also the assistance of lawyers as of right.

In accordance with this individualistic right based approach, the poor can have access to lawyers and the courts,<sup>154</sup> thus to the legal system in any lawful pursuit, civil or criminal, whether as a plaintiff or defendant in all proceedings. It enables them to take action for the infringement of rights and therefore, must follow a uniform standard and impartial administration.<sup>155</sup> At the same time, it puts emphasis on individual responsibility in alleging such right.<sup>156</sup> Not only that, legal aid if established on a right based approach will confer on the poor a sense of dignity and make them assertive for their rights<sup>157</sup> through lawful channels. This consequently will change the philosophy of lawyer-client relationship.<sup>158</sup> Furthermore, the system of state compensated lawyer for delivering legal services to the poor is based on the conception of legal aid as a matter of right, not charity.<sup>159</sup>

In sum, the right based approach to legal aid obligates the state to provide the service to individuals considering that all are equal and sovereign, and therefore, are entitled to demand protection for individual concerns. This individualistic approach enables the poor to have access to lawyers and the legal system to prevent the violation of their rights. Consequently, legal aid system makes the

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<sup>153</sup> Ibid.

<sup>154</sup> As Abell notes, the development of the legal aid system in Saskatchewan during the 1970's incited the poor to represent them before the courts, it also had a significant impact on the representation of the Aboriginal people. Furthermore, it increased the appearance of women lawyers as advocates in the court. Jennie Abell, 'Ideology and the Emergence of Legal Aid in Saskatchewan' (1993) 16 *Dalhousie Law Journal* 125, 126.

<sup>155</sup> See above n 4, 400, 402; Paul S Muther, 'The Reform of Legal Aid in Sweden' (1975) 9 *International Lawyer* 475, 477.

<sup>156</sup> See above n 4, 400, 402.

<sup>157</sup> Jerome E Carlin and Jan Howard, 'Legal Representation and Class Justice' (1965) 12 *UCLA Law Review* 381, 437.

<sup>158</sup> Daniel H Lowenstein and Michael J Waggoner, 'Neighborhood Law Offices: The New Wave in Legal Services for the Poor' (1967) 80 *Harvard Law Review* 805, 809; See above n 49.

<sup>159</sup> Sidney B Jacoby, 'Legal Aid to the Poor' (1940) 53 *Harvard Law Review* 940, 955.

poor assertive for their rights. Moreover, this approach acknowledges legal aid a matter of right, not charity. Finally it obligates the government to render legal services impartially and equally. However, as has been discussed in the following paragraphs, the individualistic right based approach to legal aid has some negative features also.

When the right of legal aid is held by citizens, it becomes apparent that all acquire the same and equal claim of it,<sup>160</sup> and the state cannot define category of recipients by imposing certain characteristics to it.<sup>161</sup> Under this approach, the responsibility lies on the state to provide apposite legal services for fulfilling the demands of its citizens. Even if it does not have enough resources and ability, it is imperative on the state to make funds available and this service cannot be a mere advertised agenda.<sup>162</sup> On the other hand, the involvement of non-governmental and private actors in the running of this programme, then, might become a crossing issue, since the exclusive responsibility vests on the government itself.

It is also claimed that the right based approach guarantees equal access to justice for all but at the same time will increase court congestion and therefore, a flood of litigation will be created.<sup>163</sup> Moreover, such kind of state operated mechanism has the risk of encouraging petty claims.<sup>164</sup> The traditional belief is that the legal system enforces numerous rights but few individuals actually take resort to it for the purpose of enforcing their rights. The legal system guarantees the access to court on market oriented approach. Thus higher cost of litigation allegedly ensures that only very diligent and important cases arrive before the court.<sup>165</sup>

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<sup>160</sup> See above n 50.

<sup>161</sup> See above n 11, 295.

<sup>162</sup> See above n 11, 294; See above n 4, 387. Unger states that the exercise of rights does not depend on the resource allocation of the welfare state. Roberto Manabeira Unger, *Democracy Realised, The Progressive Alternative* (Verso, 1998) 268.

<sup>163</sup> Hedieh Nasheri and David L Rudolph, 'Equal Protection under the Law: Improving Access to Civil Justice' (1996-1997) 20 *American Journal of Trial Advocacy* 331, 340; "Barrister": *Justice in England* (1938) cited in Robert Egerton, Dr. Karl Mannheim (ed.), *Legal Aid* (Kegan Paul, Trench, Trubner & Co., Ltd., 1945) 5.

<sup>164</sup> Nasheri and Rudolph, see above n 55, 340.

<sup>165</sup> Franaszek, see above n 40, 340.

Reduced cost, therefore, is able to worsen the overload and delay problems in the court.<sup>166</sup>

When emphasis is made on ensuring uniformity for all who qualify for legal aid, it can affect the national budget of a country.<sup>167</sup> The government attenuates the eligibility criteria or reduces the level of aid in times of unavailable funds.<sup>168</sup> It adopts eligibility criteria and applies them in a non-discriminatory procedure. The state cannot distribute resources according to the needs of the claimants; all get the same share in respective situations.<sup>169</sup> This prevents the programme to run effectively as it becomes impossible to take decisions on a flexible ad hoc basis even when the interests of efficiency require it.<sup>170</sup> Such individualistic approach also limits the capacity to advance the interests of a social group or class unless these interests are consistent with individual interests of the members.<sup>171</sup>

### 3. The Welfare Approach to Legal Aid

As mentioned earlier, the justification for providing legal aid can also be described from the welfare approach of the state. This approach suggests the establishment of a government programme, subject to the limits of the state, political or economical<sup>172</sup> for the purpose of ensuring welfare of the target group. The programme seeks to distribute limited state resources in the best possible way and thus promotes equality among the citizens.<sup>173</sup> According to Cappelletti and Gordley, this is the modern “legal answer” in dealing with the questions of legal aid.<sup>174</sup> This approach is dynamic and social in nature and acknowledges the

<sup>166</sup> Johnson, ‘Promising Institutions: A Synthesis Essay’, in ‘Access to Justice: Promising Institutions’ (1979) 871, 876 cited in Franaszek, see above n 40, 341.

<sup>167</sup> Nasheri and Rudolph, see above n 55, 340.

<sup>168</sup> Wickenden, ‘Administration of Welfare Rights’ (National Conference on Law and Poverty, Conference Proceedings, 1965) 31, 32-33 cited in Geoffrey C. Hazard, Jr, ‘Social Justice through Civil Justice’ (1969) 36 *The University of Chicago Law Review* 699, 704; See above n 4, 393.

<sup>169</sup> See above n 4, 393, 404; Hazard, see above n 60, 704.

<sup>170</sup> See above n 4, 393, 402.

<sup>171</sup> See above n 4, 393.

<sup>172</sup> Ann Oakley, ‘Introduction’ in Ann Oakley & A. Susan Williams (eds.), *The Politics of the Welfare State* (UCL Press, 1994) 6, 15.

<sup>173</sup> See above n 4, 406-407; Muther, see above n 47, 477.

<sup>174</sup> See above n 4, 363.

right in legal provisions.<sup>175</sup> Under this approach, the government can share its responsibility with other private and non-governmental sectors through various partnership mechanisms when the state suffers from budgetary or other problems. This kind of partnership is prevalent in different countries.<sup>176</sup>

Modern states are undertaking various functions for its commitment towards the citizens. When citizens become unable to advance their interests as their powers are undeveloped, or because of some misfortune or accident, other persons or authorities are authorized to act on their behalf for their protection and development.<sup>177</sup> In addition, differences exist with regard to wealth, education and other qualities between citizens and it inevitably results in inequalities among them.<sup>178</sup> Also, individuals lack adequate knowledge, capacity and the ability to carry out their decisions in particular spheres.<sup>179</sup> State interference, then, is justified for promoting the welfare, needs, interests or values of such descriptions.<sup>180</sup> As Rawls' says, "In order to treat all persons equally, to provide

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<sup>175</sup> See above n 4, 408.

<sup>176</sup> Deborah M Weissman, 'Law as Largess: Shifting Paradigms of Law for the Poor' (2003) 44 *William and Mary Law Review* 737, 828; Alan A Paterson, 'Community Legal Services- An Inter-Jurisdictional Comparison' ( Paper presented at the ILAG 2001, International Legal Aid Group, Melbourne, Australia, 13-16 July, 2001) 1-15 < <http://www.ilagnet.org/papers.php?searchTerm=%22Community%20Legal%20Services%22> > accessed 24 June 2011; Richard Moorhead, 'Third Way Regulation? Community Legal Service Partnerships' (2001) 64 *Modern Law Review* 543, 553-562.

<sup>177</sup> Rawls, see above n 13, 248-249.

<sup>178</sup> James Fitzjames Stephen in Stuart D. Warner (ed.), *Liberty, Equality, Fraternity* (Liberty Fund, 1993) 152-153; Arthur R. Mathews, Jr., Jonathon A. Weiss, 'What Can be Done: A Neighborhood Lawyer's Credo' (1967) 47 *Boston University Law Review* 231, 233-234; Robert Egerton in Dr. Karl Mannheim (ed.), *Legal Aid* (Kegan Paul, Trench, Trubner & Co., Ltd., 1945) 4.

<sup>179</sup> Gerald Dworkin, 'Paternalism' in Richard A. Wasserstrom (ed.), *Morality and the Law* (Wadsworth Publishing Co., 1971) 108-119. It is an accepted fact that the poor and the disadvantaged groups suffer from incapacity, both knowledge and resources, to access the formal legal system. 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) 211; See above n 4, 414.

<sup>180</sup> Dworkin, see above n 71, 108-109; Arneson, 'Mill versus Paternalism' (1980), 90(4) *Ethics* 471(1980) cited in Eileen King, 'Paternalism and the Law: Taking a Closer Look' (2004) 4 *University College Dublin Law Review* 134, 135; Richard Abel, 'The

genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favorable social positions.”<sup>181</sup> Dworkin in this regard suggests three situations in which rational people presumably would require the societal protection- when they are unable to act according to values which are acknowledged by them to be goods; during the existence of extreme situations of fear or depression, or when they do not realize the dangers of any activity.<sup>182</sup> Thus, the state undertakes the responsibility for its citizens in upholding their interests when they lack the requisite qualities and capacities.<sup>183</sup> Moreover, it is an established fact that “basic material needs be guaranteed by government to those who cannot meet them through their own efforts”.<sup>184</sup>

The welfare approach considers the poor as a victim of existing social circumstances and then seeks to stimulate his confidence for the purpose of dealing with his social and economical problems.<sup>185</sup> This is because assisting the poor in redressing their legal grievances is a means to combat poverty.<sup>186</sup> The welfare approach provides the service according to the need of persons concerned.<sup>187</sup> Such organization of legal aid places emphasis on the pursuit of class interests, and has a focus on social change and reform of laws. It connects the problem of accessibility to the legal services with other broad contexts, and deals with the matters of individual grievances.<sup>188</sup> Thus, this approach does not

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Paradoxes of Legal Aid’ in Jeremy Copper and Rajeev Dhavan(eds.), *Public Interest Law* (Basil Blackwell, 1986) 384.

<sup>181</sup> Rawls, see above n 13, 100.

<sup>182</sup> Dworkin, see above n 71, 120-125; Mark D. Needle, ‘Book Reviews’ (1984-1985) 13 *New York University Review of Law and Social Change* 992-993.

<sup>183</sup> Feinberg, *The Moral Limits of the Criminal Law*, 3 Harm to Self, (Oxford University Press, 1986) 4-5 cited in King, see above n 72, 135-136.

<sup>184</sup> See above n 41, 901.

<sup>185</sup> See above n 4, 408, 417.

<sup>186</sup> Hazard, see above n 60, 699, 701, 709.

<sup>187</sup> Amy Gutmann, ‘Justice Across the Spheres’ in David Miller and Michael Walzer (ed.), *Pluralism, Justice and Equality* (Oxford University Press, 1995) 100.

<sup>188</sup> See above n 4, 407-408.

emphasize on individual responsibility in the retribution of his legal resentments.<sup>189</sup>

It becomes clear that the welfare approach to legal aid advances the interests of the unprivileged and poor taking into account their lack of capacity and resources. Under this approach, legal aid functions as a means to combat poverty and seeks to bring social change as well as reform of laws. More precisely, the government undertakes the responsibility to establish a programme in order to ensure the welfare of the target group. Such programme is designed to use the limited state resources in the best possible way to promote equality among the citizens. However, like the individualistic right based approach, the welfare approach to legal aid also suffers from various negative features.

The Welfare approach uses the eligibility threshold of recipients for the rational allocation and the most effective use of state resources. This induces more potential recipients than the funds could really provide assistance. The approach sets its priorities and distributes resources to meet the needs. As a result, it becomes uncertain who will be granted the aid,<sup>190</sup> and the exercise of such discretionary power<sup>191</sup> is not unquestionable.<sup>192</sup> In addition, this paradigm fixes the standard considering local variations and other contingencies, and also allows experimentation and flexible adaptation to these local standards.

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<sup>189</sup> Ibid, 417.

<sup>190</sup> See above n 4, 411; A. Kenneth Pye, 'The Role of the Legal Services in the Antipoverty Program' (1966) 31 *Law and Contemporary Problems* 211, 244.

<sup>191</sup> E. J. Cohn, 'Legal Aid for the Poor: A Study in Comparative Law and Legal Reform' (1943) 59 *Law Quarterly Review* 250, 257; Simon Rice, 'A Human Right to Legal Aid' (Paper presented at the Conference on the Protection and Promotion of Human Rights through Provision of Legal Services: Best Practices from Africa, Asia and Eastern Europe Kyiv, Ukraine, 27-30 March 2007) 2< <http://ssrn.com/abstract=1061541>> accessed 8 January 2011.

<sup>192</sup> Under this mechanism, the state is empowered to allow, reject or even to withdraw such services. The law only guarantees that specific procedures are maintained in order to certify whether an applicant is entitled to a particular benefit or not. Richard Abel, 'The Paradoxes of Legal Aid' in Jeremy Copper and Rajeev Dhavan(eds.), *Public Interest Law* (Basil Blackwell, 1986) 384.

However, such flexibility can face abuse of the authority in the proper functioning of the programme.<sup>193</sup>

#### 4. Conclusion

The above expositions indicate that all approaches have positive and negative traits. If we intend to place emphasis on one approach, it is likely to deemphasize the other. The two approaches of legal aid are found to differ in their methods and objectives; yet they are not always contradictory.<sup>194</sup> Each state is required to decide whether it would follow the right based or welfare approach towards legal aid and thus will undertake its responsibility. Even within a state, there can be a legal aid scheme combining the two approaches; the state might award legal aid in particular cases as of right and in some other areas it could follow the welfare approach, depending on particular facts, circumstances and available resources. There might be an arrangement where the decision to award legal aid service can be made based on the specific problem of the claimant. Provisions of legal aid, thus, could be different in societies depending on the understandings and capacity of each state.<sup>195</sup> It might also lead to similar situations but is able to carry particular understandings and features of states concerning the subject.<sup>196</sup>

The reason for this contextual approach towards legal aid is that the distribution of resources in a particular society is dependent on the notion of justice of that particular society or state.<sup>197</sup> Variance is found in societies in their thoughts and ideas as well as the definition and distribution of social goods and evils. These differences are pluralistic in nature which forms the notion of justice. Societies are found to apply different norms and standards of distribution for different types of goods or service. This is why, societies prescribe specific criteria for providing services like medical care or other schemes. It is important to consider

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<sup>193</sup> See above n 4, 407-408, 416-418.

<sup>194</sup> See above n 34, 419-421.

<sup>195</sup> Richard Young and David Wall, 'Criminal Justice, Legal Aid, and the Defence of Liberty' in Richard Young and David Wall (eds.), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press Ltd., 1996) 10.

<sup>196</sup> David Miller, 'Introduction' in Miller and Michael Walzer (ed.), *Pluralism, Justice and Equality* (Oxford University Press, 1995) 4-5.

<sup>197</sup> Franaszek, see above n 40, 360.



these differences in deciding the criteria for the distribution of such services.<sup>198</sup> In other words, respective understandings of society concerning particular goods or service define the means of distribution among its potential claimants.<sup>199</sup> Likewise, the factual characteristics, such as the number of the poor, the nature and procedures followed in the formal legal system, the size, quality and organization of the legal profession are crucial while deciding how the right to legal aid should be guaranteed.<sup>200</sup> Moreover, other structural arrangements involving the court practice, litigation trend, crime problems and other factors are important for this purpose.<sup>201</sup> In such approach, the responsibility of the government to provide legal aid can be shared with other non-governmental organizations;<sup>202</sup> this arrangement can be made to complement each other in providing the service.<sup>203</sup> The approach is also required to follow periodic review for the purpose of developing the service in order to satisfy the needs of the beneficiaries.<sup>204</sup>

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<sup>198</sup> Miller, see above n 88, 2.

<sup>199</sup> Ibid, 4-5.

<sup>200</sup> Barry Metzger, *Legal Services to the Poor and National Development Objectives, Legal aid and World Poverty: A Survey of Asia, Africa, and Latin America* (Praeger, New York, 1974) 3.

<sup>201</sup> Abell, see above n 46, 125; Charles J. Ogletree, Jr., 'The Challenge of Providing "Legal Representation" in the United States, South Africa and China' (2001) 7 *Washington University Journal of Law and Policy* 47.

<sup>202</sup> Francis Regan, 'Legal Aid without the State: Assessing the Rise of Pro Bono Schemes' (2000) 33 *University of British Columbia Law Review* 383, 399; Michael Zander, 'The First Wave' in Mauro Cappelletti, John Weisner and Monica Seccombe (eds.), *Access to Justice and the Welfare State* (Sijthoff: Alphen aan den Rijn, Klett-Cotta: Stuttgart, 1981) 31-32.

<sup>203</sup> Zander, See above n 94, 31-32.

<sup>204</sup> Jon. T. Johnsen, 'How has the complexity of the Law and the Market for Legal Expertise Impacted on the Development of Legal Aid in Norway?' (2006) 13 *International Journal of the Legal Profession* 19.

# The Tension between Culture and Women's Human Rights: Towards Harmonization

Mohammad Golam Sarwar\*

## 1. Introduction

The (in) compatibility of women's human rights and culture is one of the contested areas where women's rights have historically been mediated through cultural practices.<sup>205</sup> Cultural norms are also being used to justify discrimination against women. The close examination of cultural practices in relation to women's human rights reveals the divergences of opinions. While some authors argue that culture and tradition undermines women's rights, some others favour the culture and tradition that protects women's human rights. Before discussing the debate, this paper attempts to clarify the construction of the term 'culture'. The term 'culture' refers to a society or group where many people live and think in the same ways.<sup>206</sup> It includes inherited ideas, beliefs, values and knowledge that constitute the shared bases of social action. Regarding the impact of human rights norms based on cultural practices, there exists two rival models of culture: Static and Dynamic.<sup>207</sup> In case of static model, culture is understood as the way of life of a discrete people and the spirit of people is reflected in an integrated system of ideas and practices.<sup>208</sup> In this model, culture is found to be fragile and organic structure that can be destroyed through even small changes.<sup>209</sup> On the other hand, the dynamic model of culture can be described as a shifting set of texts, images and practices that has no central core features and this notion of culture implies that change in cultural norms is inevitable.<sup>210</sup> In addition, within

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<sup>205</sup> Madhu Mehra, 'Women's equality and culture in the Context of Identity Politics' (2007) 2 *Journal of Comparative Law* 6.

<sup>206</sup> Manisuli Ssenyonjo, 'Culture and the Human Rights of Women in Africa: Between Light and Shadow' (2007) 51 *Journal of African Law* 39.

<sup>207</sup> *Gender and Human Rights in the Commonwealth: Some Critical issues for action in the decade 2005-2015*, (New Gender Mainstreaming series on gender issues, Commonwealth Secretariat, London, United Kingdom 2004).

<sup>208</sup> Ibid, 36.

<sup>209</sup> Ibid, 36.

<sup>210</sup> Ibid, 37.

the discourse of human rights activism culture refers to traditions and customs, ways of doing things which are justified by their roots in the past.<sup>211</sup>

## **2. Culture and tradition undermines women's human rights**

Before going to the elaboration how culture and tradition undermines women's rights, it is necessary to highlight how women are often associated more closely with the idealizations of cultural traditions than men in a given society. While women, being excluded from public spheres of work and politics, are found to be more traditional and home bound, Men with the help of employment opportunities and migration may abandon their traditional practices. So it is the societal structure and opportunities made and enjoyed by men that creates a 'cultural' subordination of women undermining their rights. The cultural and traditional factors that perpetuate discrimination and hamper women's human rights are not only confined to traditional communities and societies rather the practice of patriarchal norms are found everywhere including the western cultures. Examples in the West among others include, inconsistency of Christian religious ideology with the recognition of women's human rights to abortion and contraception, disharmony between women's rights to be free from physical and sexual violence and values of family intimacy and solidarity, which suggest that exploitation of women is prevalent in every culture.<sup>212</sup>

### **2.2 Human rights standards disregard negative culture and traditions**

The question whether culture is a legitimate justification for violations of women's human rights is part of broader human rights discourse on universalism and cultural relativism.<sup>213</sup> While Universalists emphasized about the absolute and immutable nature of human rights regardless of context in which they are invoked<sup>214</sup>, relativists claimed that all moral values including human rights are relative to the cultural context in which they arise.<sup>215</sup> These competing claims of universalists and relativists indicate a crucial challenge regarding the implementation of human rights standards in the face of profound cultural diversity. This debate also represents a continuing tension between cultural

<sup>211</sup> Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (The University of Chicago Press, 2006) 12.

<sup>212</sup> Ibid, 44.

<sup>213</sup> Simone Cusack, Lisa Pusey, 'Women's Human Rights and Culture: From Deadlock to Dialogue (review)' (2012), 34 *Human Rights Quarterly* 2, 657-667.

<sup>214</sup> Maria Beatrice Berna, 'The cultural defense: possible correlations and applications within the framework of women's rights' (2015) 4 *Journal of Law and Administrative Sciences* 191.

<sup>215</sup> Douglas Lee Donoho, 'Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards' (1990-91) 27 *Stanford Journal of International Law* 345.

rights and human rights in general that has obvious impact on the realization of women's rights.

However, the following part of the paper discusses how culture and tradition that violates women's human rights is being dealt under the international human rights framework. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), considered as Women's Bill of Rights, adopted a universal instead of relativist approach to culture and custom.<sup>216</sup> Under the CEDAW Convention, States Parties are obliged to "modify or abolish customs and practices which constitute discrimination against women. Based on the provision of the Convention, General Recommendations of the Committee on the Elimination of Discrimination against Women are being adopted in order to interpret the scope of Convention standards. In line with this, General Recommendation No. 14 focuses on the elimination of female genital mutilation and cultural practices that are harmful to the health of women and children."<sup>217</sup>

General Recommendation No. 19 underscored that traditional practices including dietary restrictions for pregnant women, preference for male children and female circumcision or genital mutilation perpetuated by culture and tradition are harmful to the health of women and children.<sup>218</sup> General Recommendation No 21 recognized the importance of culture and tradition in shaping the thinking and behaviour of men and women and the significant part they play in restricting the exercise of basic rights by women.<sup>219</sup> General Recommendation No. 24 also addressed that harmful traditional practices, such as female genital mutilation,

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<sup>216</sup> 'Harmful traditional practices in three countries of South Asia: Culture, human rights and violence against women' (Gender and Development discussion Paper series no 21, United Nations Economic and Social Commission for Asia and the Pacific) <[http://www.unescapsdd.org/files/documents/SDD\\_pub\\_2530.pdf](http://www.unescapsdd.org/files/documents/SDD_pub_2530.pdf)> accessed 20 March 2017.

<sup>217</sup> General recommendations made by the Committee on the Elimination of Discrimination against Women, <<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom14>> accessed 20 March 2017.

<sup>218</sup> General recommendations made by the Committee on the Elimination of Discrimination against Women, <<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>> accessed 20 March 2017.

<sup>219</sup> General recommendations made by the Committee on the Elimination of Discrimination against Women, <<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>> accessed 20 March 2017.

polygamy, as well as marital rape, may also expose girls and women to the risk of contracting HIV/AIDS and other sexually transmitted diseases.<sup>220</sup> Besides these general recommendations, the United Nations Declarations on the Elimination of Violence against Women (1993), also recognized the harmful traditional practices as infringing on women's human rights.<sup>221</sup>

In addition, the International Covenants on Civil and Political Rights and Economic, social and Cultural Rights Committees' General Comments highlighted the conflicting aspects of traditional cultural practices and women's human rights.<sup>222</sup>

### 2.3 Examples of cultural practices that undermine women's human rights

Throughout the world there are numbers of cultural practices mostly in the family, which are sanctioned by dominant ideologies and perpetuated by social and state structures, curtail and regulate the human rights of women.<sup>223</sup> These harmful cultural and traditional practices successfully bypass the national and international scrutiny because they are justified in the name of 'tolerance' and 'respect' towards culture. Followings are few harmful traditional and cultural practices:

- **Female Genital Mutilation:** Female genital mutilation (FGM), a deeply rooted traditional practices, includes procedures that intentionally alter or cause injury to the female genital organs for non-medical reasons.<sup>224</sup> While the exact number of girls and women in the world who have undergone FGM is not known, it is estimated that at least 200 million girls and women in 30 countries are subjected to the practice.<sup>225</sup> FGM is widely practised in contemporary societies mostly in South and South

<sup>220</sup> General recommendations made by the Committee on the Elimination of Discrimination against Women,  
<<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom24>>  
accessed 20 March 2017.

<sup>221</sup> Above n 12, 9.

<sup>222</sup> Ibid, 11.

<sup>223</sup> 'Intersections between Women's equality, Culture, and Cultural Rights' (Report of the South Asia Plus Consultation on Culture, Women and Human Rights, Published by Partners for Law in Development) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2690172](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2690172)>  
21 March 2017.

<sup>224</sup> 'Female Genital Mutilation' (fact sheet),  
<<http://www.who.int/mediacentre/factsheets/fs241/en/>> accessed 21 March 2017.

<sup>225</sup> 'Female Genital Mutilation/ Cutting: A Global Concern'  
<[http://www.unicef.org/media/files/FGMC\\_2016\\_brochure\\_final\\_UNICEF\\_SPREAD.pdf](http://www.unicef.org/media/files/FGMC_2016_brochure_final_UNICEF_SPREAD.pdf)>  
accessed 21 March 2017.

east Muslim Asia and Africa and this is applied at all ages from a day old infant to young children, adolescents and adults.<sup>226</sup> The continuation of this practice, though involves short –term and long-term serious health hazards to girls and women, is justified by custom and tradition.<sup>227</sup>

- **Honour Killings:** In every year an increasing number of women (5,000 women and girls approximately) around the world are reported killed by their male relatives in the name of ‘honour’.<sup>228</sup> Honour killings are reported not only in Pakistan and other South Asian countries but also in Turkey, Jordan, Syria, Egypt, Lebanon, Iran, Yemen, Morocco and other Mediterranean and Gulf countries and surprisingly it also takes place in countries such as Germany, France, United Kingdom and even in United States of America.<sup>229</sup> These killings are influenced by cultural beliefs that are deeply rooted in the societies where the concept of women is regarded as commodities not as human beings.<sup>230</sup> While woman’s body is considered to be the ‘repository of family honour’, any kind of defiance by women in the family translated into undermining male honour for which the lives of women are compromised.<sup>231</sup>
- **Marriage Practices**

Culture often invoked in many societies to validate the marriage of girls at an early age even before reaching puberty.<sup>232</sup> The cultural and perceived religious justification by families lies on the ground that early marriages foreclosed the possibilities of sexual contact that would tarnish the family honour.<sup>233</sup> In addition, it would be easier to control a child or adolescent by her husband or family in order to sustain unequal power

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<sup>226</sup> ‘Above n 12, 24.

<sup>227</sup> ‘Cultural practices in the family that are violent towards women’ (Report of the Special Rapporteur on violence against women, its causes and consequences’ Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G02/104/28/PDF/G0210428.pdf?OpenElement>> accessed 21 March 2017.

<sup>228</sup> ‘The Horror of ‘Honor Killings’, Even in US’ <<http://blog.amnestyusa.org/women/the-horror-of-honor-killings-even-in-us/>> accessed 21 March 2017.

<sup>229</sup> Above n 23, 12. Also above n 24).

<sup>230</sup> Ibid, 12.

<sup>231</sup> Ibid, 13.

<sup>232</sup> Above n 3, 37.

<sup>233</sup> Above n 12, 18.

relations within the family making the male members supreme.<sup>234</sup> Early Marriages often turned into forced marriages where relentless pressure and emotional blackmail are applied by parents and relatives to force the young girl into an undesirable marriage.<sup>235</sup> Other marriage related practices that violate women's rights include polygyny (a husband taking more than one wife), levirate marriage (a widow being required to have sexual relations with and/or marry another member of her husband's family) and abduction for the purposes of rape that is legitimized afterwards by marriage between the victim and perpetrator.<sup>236</sup>

- **Son Preference:** In compliance with patriarchal norms, son preference is prevalent among the parents and families in many countries mostly in Asia and Africa and the reason behind is that son was perceived to be the breadwinner and the best supporter of parents in their old age.<sup>237</sup> The preference of son by large number of parents not only indicates masculine superiority but also jeopardizes the position of girl child in a family where she would be treated as unwanted and burden.<sup>238</sup> The traditional practice of son preference also leads to discriminatory treatment of girls in terms of their health and education.
- **Widowhood rituals:** Widowhood rituals are widespread in the region of Africa particularly in Nigeria where widows were compelled to marry their dead husband's brother, blamed for their husband's death, and forced to suffer ordeals such as drinking the water that used to clean the corpse.<sup>239</sup> Rituals also include: widows were compelled to stay in a room and sit on ashes, supposed to wear tattered clothes, and their food was given in a broken plate.<sup>240</sup> It is astonishingly true that village women who undergone these ordeals do not really mind these rituals that clearly indicate how cultural practices were embedded in those societies.<sup>241</sup>

In addition to these practices, there are also a good number of cultural practices that undermine the rights of women such as witch hunting or burning, caste,

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<sup>234</sup> Ibid, 18.

<sup>235</sup> Above n 23, 19.

<sup>236</sup> Above n 3, 37.

<sup>237</sup> Above n 12, 16.

<sup>238</sup> Ibid, 16.

<sup>239</sup> Above n 7, 17.

<sup>240</sup> Ibid, 17.

<sup>241</sup> Ibid, 18.

dowry, incest, and practices that violate women's reproductive rights.<sup>242</sup> In addition, violation of women rights in the name of culture is often perpetuated by dominant ideologies and structures in the societies.<sup>243</sup> These ideologies and structures, favouring the superiority of men and dominating the voice of women, prevents the elimination of aforesaid harmful cultural practices.

### 3. Positive culture and women's human rights

While this is true that cultural practices and attitudes undermine the rights of women in most of the cases, it is also improper to deny the rights of women to live in a positive cultural context.<sup>244</sup> In this regard, the Maputo protocol<sup>245</sup> contains a provision obliging the state to ensure enhanced participation of women in the formulation of cultural policies at all levels.<sup>246</sup> While not condemning the culture, this provision recognizes the potential of culture and its underlying necessity in order to ensure equal participation of women in the decision making.<sup>247</sup> The Maputo Protocol deserves significance on the ground that while CEDAW only refers the negative aspects of culture, the protocol contains both negative and positive aspects of culture. The reason behind the emphasis on positive culture is that if we see 'culture' and 'rights' as polar opposites, then there remains no possibility of common ground and this approach has been questioned.<sup>248</sup> This opposing view of culture and rights indicates that with a view to realizing women's rights, the moral codes and practices that they abide by have to be displaced first.<sup>249</sup> This approach also implies the narrow interpretations of culture that assume the customs and traditions to be natural and unchangeable.<sup>250</sup>

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<sup>242</sup> Above n 23, 16-28.

<sup>243</sup> Ibid, 28.

<sup>244</sup> Celestine Nyamu Musembi, 'Pulling apart: Treatment of Pluralism in the CEDAW and the Maputo Protocol' in Hellum, A. and Aasen, H. S., (eds) *Women's Human Rights: CEDAW in the International, Regional, and National Law* Studies on Human Rights Conventions (Cambridge University Press 2013).

<sup>245</sup> The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol) was adopted by African Union in 2003 and came into force in 2005.

<sup>246</sup> Maputo Protocol, Art 17.

<sup>247</sup> Sylvia Tamale, 'The right to culture and the culture of rights: a critical perspective on women's sexual rights in Africa' 2008 16 *Feminist Legal Studies* 1, 47-69.

<sup>248</sup> Ibid, 205.

<sup>249</sup> Ibid, 205.

<sup>250</sup> Above n 43, 47.



However, culture also contains potentials that can be used as emancipatory tool to improve the quality of women's lives and to expand the domain of rights as well.<sup>251</sup> Cultures involve both positive and negative dimensions as they can be oppressive, colonised, exploited and submerged and they also may be liberating, uplifting and empowering.<sup>252</sup> Though right to culture has been recognised by UDHR<sup>253</sup>, the legal contents and enforceability status of cultural rights have remained least developed till date.<sup>254</sup> This is because culture is unbounded and is in constant flow with new customs, traditions and experiences. In most of the cases the potentiality of positive culture got buried when it compared with the barbaric cultural practices including female genital mutilation. But the close examination of positive culture particularly in the African context reveals that the gendered space of the family is vital to cultural rights that must be understood based on the context in which women can pursue their rights.<sup>255</sup> It is also commented that majority of African women (and men) can easily abide by their cultural systems better than the list of rights outlined in various bill of rights.<sup>256</sup> Considering this harmonious perception of cultural rights among Africans, authors like Abdullahi An-Na'im and Jeffrey Hammond advocated for the dynamic concept of internal cultural transformation that was considered as the most practical guarantee of establishing human rights in African societies.<sup>257</sup>

The importance of using culture as a tool for realizing rights is expanding with the rapidly changing socio-economic life of Africans. For example: Though the practice of elongating the labia minora is condemned by the World Health Organization (WHO) as type IV FGM on the ground of posing health hazards to women, the study revealed that W.H.O. completely ignores the ways in which this practice has enhanced sexual pleasure for women and how this practice extended the perceptions of women as active sexual beings.<sup>258</sup> While this practice has been identified by W.H.O. as harmful cultural practices that violates rights of women and children, the research study indicated that this 'lived experience' of Baganda women denies the negative blanket characterisation of

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<sup>251</sup> Above n 40, 205.

<sup>252</sup> Above n 43, 48.

<sup>253</sup> Universal Declaration of Human Rights 1948.

<sup>254</sup> Above n 43, 51.

<sup>255</sup> Ibid, 55.

<sup>256</sup> Ibid, 55.

<sup>257</sup> Ibid, 56.

<sup>258</sup> Ibid, 62.

the cultural practice of labia elongation as understood by the W.H.O.<sup>259</sup> In addition, the customary practice of ‘women to women marriage’<sup>260</sup> was being practiced while asserting ‘right to culture’ particularly in Kenya.<sup>261</sup> By virtue of this practice, older women resorted to secure her own position in a male defined inherited system as well as avoid the stigma of childlessness or sonlessness.<sup>262</sup> Despite of its criticism, this practice considered as empowering for women particularly for those destitute women for whom this was the only basis for entitlement.<sup>263</sup>

In addition, the customary practice called *bulubulu*<sup>264</sup> in Fiji was being used to reconcile differences outside the courts and considered as a better tool to protect women from rape.<sup>265</sup> Moreover, it has been also found from the studies of organizations that work at the grassroots level that cultural practices, as a resource, can be utilized to bring social change.<sup>266</sup>

Furthermore, the cultural concept of *cura personalis* (care for the person) is being used as an asset to address gender violence in various (Jesuit) colleges and universities in the United States.<sup>267</sup> This cultural tradition is dedicated to provide students with a caring and supportive environment for the person and the community affected by gender violence.<sup>268</sup> With a view to redressing the suffering of women in the aftermath of sexual assaults, this culture of caring reminds all the members of the community (at universities and institutions) about their shared responsibility to care for each other particularly for the victims

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<sup>259</sup> Ibid, 63.

<sup>260</sup> Custom allows the childless or sonless woman to enter into an arrangement with a younger, upon an exchange of gifts with her family, who then bears children for her. This is because older woman without having son were deprived from the property since property was handed down through male decedents. See. Musembi, above n 40, 206.

<sup>261</sup> Musembi, above n 40, 205.

<sup>262</sup> Ibid 209.

<sup>263</sup> Ibid 212.

<sup>264</sup> *Bulubulu*-a custom where disputes were settled with the offer of a whale’s tooth (tabua), a gift or compensation and asking for forgiveness. The historic outcome of accepting *bulubulu* was to break the cycle of vengeance. Explained in ‘The Role of Culture in Shaping Judicial Opinions in Sexual & Gender Based Violence (SGBV) Cases: Fiji Case Law Survey’ <<http://www.icaadglobal.org/mediaItem.php?id=16029>> Accessed 20 March, 2017.

<sup>265</sup> Merry, above n 7, 4.

<sup>266</sup> Ibid, 15.

<sup>267</sup> Madelaine Adelman1, Hillary Haldane, and Jennifer R Wies, ‘Mobilizing Culture as an Asset: A Transdisciplinary Effort to Rethink Gender Violence’ (2012) 18(6) *Violence Against Women* 691 –700.

<sup>268</sup> Ibid, 696.

and survivors.<sup>269</sup> This example again proves that all cultures have meaningful cultural concepts that can be mobilized in the movement against the violation of women's rights.<sup>270</sup>

#### **4.Culture versus Women's human rights: Towards harmonization**

From the above discussion we have found the conflicting positions of both the discourses of culture and women's human rights. In the one hand, this paper explored the negative connotation of culture and traditional practices that violates the rights women and on the other hand, it underscored the essence of culture as a resource to advance the discourse of women rights. This opposing approach of culture against/for women's human rights, being a deadlock, ultimately diminishes the potentials of each discourse without leaving any common ground. To come out from this gridlock and to reduce the tension between competing claims of culture and women's human rights, approaches need to be advanced that include among others cross-cultural dialogue, analysing how cultural discourses are created and reproduced, emphasising women's internal resistance to patriarchal cultural practices and exploring the role of women in shaping culture as agents of cultural change.<sup>271</sup>

In order to negotiate with the claims of culture, it is necessary to address how conceptualization of culture influences the advancement of women's human rights.<sup>272</sup> When culture is presented as static and unchanging it appears as a barrier to achieve the full implementation of women's human rights in one hand and on the other hand, if culture is viewed as dynamic, contested and evolving then it creates space to recognize the role of women as bearer of cultural rights.<sup>273</sup> While it has been emphasized for dynamic and progressive aspects of culture, it has been equally noted that women's human rights are also subject to continuous progressive interpretations based on context and time.<sup>274</sup> One such evolving issue lies on the fact that since many violations of women's basic human rights in the name of culture and tradition occur within families, it

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<sup>269</sup> Ibid, 696.

<sup>270</sup> Ibid, 698.

<sup>271</sup> Cusack and Pusey, above n 9, 657.

<sup>272</sup> Ibid, 659.

<sup>273</sup> Ibid, 659.

<sup>274</sup> Ibid, 661.

becomes significant to look at the institutions of family along with culture and tradition in a new light.<sup>275</sup>

The critical role of women in a family, starting from upbringing of children to managing household works, often ignored and underestimated which creates a sense of subordination attached to women and restricts also the full participation of women in society.<sup>276</sup> While this restrictive practice is justified by culture and tradition mostly in non-western societies, the claims of women's freedom and equality are often understood as clear symbols of western values.<sup>277</sup> This view is also related with the universality debate where application of human rights are contested on the ground that they are a product of western culture and cannot be exercised universally.<sup>278</sup> It has been also claimed by developing countries particularly African and Asian nations that human rights standards failed to reflect the diverse cultural traditions and social heritages of non-western world.<sup>279</sup>

It is interesting to note that though culture and tradition has been used to justify the violation of women's rights mostly occurred in developing countries (Non-western), it is quite obvious that traditions of both western (as discussed above also) and non-western perpetuate injustice against women in many ways that include central features of human being's quality life like health, education, liberty, employment, self-respect and life itself.<sup>280</sup> However, the degree of domination and oppression against women was obviously greater in the global south particularly in the colonized countries.<sup>281</sup> Colonial powers, by virtue of imperialist/hegemonic projects, selectively addressed some women's concerns to validate their 'civilizing' mission prioritizing the discourse of western women's

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<sup>275</sup> Susan Moller Okin, 'Feminism, Women's Human Rights, and Cultural Differences' (1998), 13 *Hypatia*, 2, 32-52.

<sup>276</sup> *Ibid*, 40.

<sup>277</sup> *Ibid*, 37.

<sup>278</sup> Jari Pirjola, Culture, 'Western Origin and the Universality of Human rights' (2005), 23 *Nordisk Tidsskrift for Menneskerettigheter* 1.

<sup>279</sup> Donoho, above n 11, 352.

<sup>280</sup> Martha C Nussbaum, *Sex & Social Justice* (Oxford University Press, 1999) 30.

<sup>281</sup> Yakin Ertürk, 'Report of the Special Rapporteur on violence against women, its causes and consequences: Intersections between culture and violence against women' A/HRC/4/34, 2007, <<http://www.refworld.org/pdfid/461e2c602.pdf>> Accessed 29 March 2017.

movement in order to promote their colonial agenda even if that movement led to discrimination.<sup>282</sup> This selective women's rights campaigns that caused colonial oppression has been instrumentalized later to undermine the local women's rights advocacy today.<sup>283</sup>

Another way to negotiate with cultural claims may be described based on the fact that while equality between man and women is enshrined as a constitutional essential particularly in the region of South Asia, unfortunately this constitutional essential has often lost out to the claims of culture.<sup>284</sup> In order to negotiate with these claims of culture a dual track approach is essential that recognises the need for an expanded moral-political dialogue on constitutional essential of equality, on the meaning and scope of human rights principles, and the requirements of cultural traditions.<sup>285</sup> This dialogue can be advanced through the initiatives of courts at the domestic level because we have seen in many cases<sup>286</sup> where the courts used the norms of human rights (women rights in particular) to mediate the competing claims of culture that contradict with the equality provisions.<sup>287</sup>

While negotiating with the claim of culture, another concern is that cultural discourses are often influenced by the underlying politics that defines and reflects the hegemonic and patriarchal power relations in a given society.<sup>288</sup> Such cultural discourses are found to be contradictory with the universal human rights standards, in particular, that no custom or tradition can be invoked to justify the violence against women.<sup>289</sup> An effective dialogue should address and

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<sup>282</sup> Ibid, 17.

<sup>283</sup> Ibid, 17.

<sup>284</sup> Siobhan Mullally, *Gender, Culture, and Human Rights: Reclaiming Universalism* (Hart Publishing 2006) 181. Also in Mehra, above n 1, 6.

<sup>285</sup> Ibid, 181.

<sup>286</sup> *Humaira Mehmud v State* [1999], PLD, Lahore 494, *Muhamamd Siddique V State* [2001], PLD, 449, *Samia v the State*, [2003], PLD, Lahore, 747, (three Pakistani cases), *Mohammed Ahmed Khan v Shah Banu*, [1985], AIR SC 945, *Daniel Latifi v Union of India* [2000], AIR SC 3958 (Indian cases), these cases among others highlighted the possibility of cultural mediation of human rights norms while dealing with the conflicts of gender equality and religious-cultural claims. Cited in Mullally, above n 80, 181-209.

<sup>287</sup> Ibid, 182.

<sup>288</sup> Ertrk, above n 77, 19.

<sup>289</sup> Ibid, 19.

understand the reasons, why culture and tradition is invoked to justify violations and this is required for both harnessing the positive cultural elements as well as demystifying the oppressive elements in a culture.<sup>290</sup>

In addition, customary traditional practices can also be mediated by the positive elements of a culture. For example the customary marriage of polygyny as determined by the South African Law Commission was not inconsistent with civil notions of civil marriage but it has impact on economic well-being of prior wives because they were deprived from family properties when husband took new wives.<sup>291</sup> The Law commission tried to mediate with this customary tradition on the ground that husbands would be required to divide their existing assets with their first wife before taking a second wife.<sup>292</sup> In this way, customary practice of polygyny was retained and at the same time economic deprivation of the first wives was also diminished.<sup>293</sup> Here it can be said that the practice of polygyny may contradicts with equality provision of human rights discourse but it is also true that outright rejection of a traditional norm may lead to cultural disharmony followed by social instability. So a gradual approach while admitting the positive elements of a culture can harmonize the problem. Furthermore, since effective implementation of women's rights relies on a particular cultural context, so without mediating (presumably positive) with the cultural practices it would be difficult to realize the rights of women. So instead of assuming that cultural rights invariably undermine women's rights, the role of women in shaping and modifying cultural practices should be advanced so that they can contribute to the social change as well as exercise their rights.

#### **4. Conclusion**

It would be an exaggeration to conclude by saying that culture and tradition 'always' undermines women's human rights, though, this paper admits the fact that culture is often used as an excuse to justify the violation of rights of women. The polar opposition of culture and women's rights without leaving any common

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<sup>290</sup> Ibid, 19.

<sup>291</sup> Above n 3, 44.

<sup>292</sup> Ibid, 44.

<sup>293</sup> Ibid, 44.

ground hampers both the discourses by perpetuating injustice against women in the name of culture on the one hand and diminishing the potentials of a positive culture on the other hand. Culture demands to be fashioned in a dynamic and unritualised way while examining the linkages between its positive elements and the emancipation of women. Culture and tradition, being abstract things, cannot go on its own way rather shaped by human agencies, who are responsible to construct and (re) interpret the plurality of a culture considering relevant socio-economic circumstances.

We have seen from the above examples how culture has been used negatively as well as positively against/for women's rights in different contexts which indicate that culture is a double edged sword that can be utilized creatively and resourcefully to advance the rights of women. While cultural practices that discriminate against women must be grasped not as static objects but as historical processes, at the same time, non-discriminatory customary law and human rights should be analysed in a way that complement each other. The engagement with culture must not be uncritical or in other words, when we are talking about cultural life and diversity, we must bear in mind that it is equally essential to uphold the dignity of all women. Finally, engaging in a real dialogue about women's human rights and culture can be the most effective strategy to stimulate the necessary cultural change that will be conducive to realize the rights of women.

# Rights of Minorities and Indigenous Peoples as Collective Rights: A Critical Appraisal

Aminul Islam\*

## 1. Introduction

The last few decades have witnessed a remarkable interest amongst political philosophers and legal theorists in the recognition of collective or group rights to minorities and indigenous peoples. As a category different from that of individual rights, group rights are seen as an instrument legitimating a wide range of claims raised by minorities in the States.<sup>294</sup> Historically, these peoples have been subjected to the unjust and inhuman dispossession from their land, were deprived of their own culture, and their rights have been denied both by the national and international legal system.<sup>295</sup> This concern for minorities and indigenous peoples has led the international community to articulate norms for the protection and promotion of their rights, which is now an integral part of the international movement for the protection and promotion of human rights.<sup>296</sup> Progressive view is that these people should have the ability to assert collective rights against those who attempt to undermine their beliefs, cultures and traditions.<sup>297</sup> Many nations recognise the individual rights of minorities and indigenous peoples to own property, to be free from discrimination, and so forth, but very few countries recognise the collective rights of groups to the same.<sup>298</sup> Therefore, the debate over collective rights for minorities and

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<sup>294</sup> Neus Torbisco Casals (ed), *Group Rights As Human Rights: A Liberal Approach to Multiculturalism* (Springer, 2006) 1.

<sup>295</sup> Abdullah Al Faruque and Najnin Begum, 'Conceptualising Indigenous Peoples' Rights: An Emerging New Category of Third-Generation Rights' (2004) 5(2) *Asia-Pacific Journal on Human Rights and the Law* 1, 1.

<sup>296</sup> Ibid.

<sup>297</sup> Melanie Riccobene Jarboe, 'Collective Rights to Indigenous Land in *Carcieri v. Salazar*' (2010) 30(2) *Boston College Third World Law Journal* 395, 398.

<sup>298</sup> Ibid.



indigenous peoples unfolded the multiple perspectives. The purpose of this article is to examine the extent of rights of these people that can be regarded as collective rights. To that end, section 2 of this article reviews the theoretical and legal framework on the definitions of minorities and indigenous peoples. Section 3 examines the historical evolution of minorities and indigenous peoples' rights, in particular in the context of the global movement for universal human rights that occurred after the Second World War. After then, the article focuses on the debates over individual and collective rights in the theory and practice in the field in section 4 to figure out the rights of minorities and indigenous peoples that can be regarded as collective rights under the current legal regime. Finally, section 5 draws the conclusion.

## **2. Definitional Clarity: Minorities and Indigenous Peoples in International Law**

The factual existence of minorities and indigenous peoples raises, *inter alia*, the essential question of how to define these groups. Aukerman claims that 'there is as little agreement on the definition of the term "minority", as there is on the meaning of "indigenous people".<sup>299</sup> The lack of generally accepted definition, though, does not leave us completely empty-handed.<sup>300</sup>

### **2.1 Definition of 'Minority'**

The term 'minority' is surrounded by a significant degree of vagueness, and this explains the lack of consensus on a legal – or meta legal – definition.<sup>301</sup> Casals says, 'In a broader description, we could say that the idea of minority refers to a group of individuals which, for a variety of circumstances, find themselves in a disadvantaged position compared to the larger group with which they contingently form a society.'<sup>302</sup> The issue was dealt in two important studies: the first one conducted by Francesco Capotorti (as Special Rapporteur of the United Nations), concerning the various legal aspects of the minority question; the second one, entrusted to Julius Deschênes, aimed at a further clarification of the concept of minority.<sup>303</sup> After the study, Capotorti proposed a definition directed

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<sup>299</sup> Miriam J Aukerman, 'Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context' (2000) 22(4) *Human Rights Quarterly* 1011, 1013.

<sup>300</sup> Anna Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law* (Intersentia, 2001) 70.

<sup>301</sup> See above n 1, 20.

<sup>302</sup> *Ibid.*

<sup>303</sup> Gaetano Pentassuglia, *Minorities in International Law: An Introductory Study* (Council of Europe Publishing, 2002) 57.

toward the application of Article 27 of the International Covenant on Civil and Political Rights (ICCPR).<sup>304</sup> He defined a minority group as:

[A] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their cultures, traditions, religion or language.<sup>305</sup>

In 1985, Deschênes gave a similar definition.<sup>306</sup> He defined a minority group as:

[A] group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.<sup>307</sup>

Though occasionally showing slight differences, Pentassuglia claims, the definitions elaborated above reflect the core conviction that the term ‘minority’ means a group historically rooted in the territory of a State and whose specific ethno-cultural features (with the respective claims of protection) markedly distinguish it from the rest of the population of the State.<sup>308</sup>

## 2.2 Definition of ‘Indigenous Peoples’

The question as to who are indigenous peoples and by which criteria they should be defined has generated a great deal of controversy.<sup>309</sup> The 1989 ILO Convention considers the self-identification as indigenous or tribal as a

<sup>304</sup> Natan Lerner, *Group Rights and Discrimination in International Law* (Martinus Nijhoff Publishers, 1991) 8.

<sup>305</sup> Francesco Capotorti, ‘Report on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities’ (UN Doc E/CN.4/Sub.2/384/Rev.1, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1979) para568.

<sup>306</sup> See above n 7, 71.

<sup>307</sup> Julius Deschênes, ‘Report on the Proposal concerning a Definition of the term ‘Minority’’ (UN Doc E/CN.4/Sub.2/1985/31, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 14 May 1985) para181.

<sup>308</sup> See above n 10, 58-59.

<sup>309</sup> See above n 2, 3.

fundamental criterion for determining the groups.<sup>310</sup> It says that tribal peoples' are those 'whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations';<sup>311</sup> and 'indigenous peoples' are those who are regarded as such

[O]n account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.<sup>312</sup>

On the other hand, the World Bank has adopted a functional approach to the definition of indigenous peoples, which defines them as 'social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process.'<sup>313</sup> The United Nations, although it has not formally adopted a definition of 'indigenous peoples,' has been guided by the definition developed by Special Rapporteur José R Martínez Cobo – so far, the definition has been accepted by most legal scholars dealing with indigenous peoples as a working definition.<sup>314</sup> Cobo defines indigenous peoples as

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples,

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<sup>310</sup> *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (adopted 27 June 1989, entered into force 05 September 1991) C169 (ILO Convention No 169) art 2.

<sup>311</sup> *Ibid*, art 1(a).

<sup>312</sup> *Ibid*, art 1(b).

<sup>313</sup> The World Bank Operational Manual, *Operational Directive on Indigenous Peoples* (September 1991) OD 4.20 Dir 3.

<sup>314</sup> See above n7, 74.

in accordance with their own cultural patterns, social institutions and legal systems.<sup>315</sup>

From the above discussion it is evident that minorities and indigenous peoples are different and the rights that they currently enjoy under international law, and those that they seek, also differ.<sup>316</sup> However, it is not the purpose of this article to examine their differences; rather it focuses on the collective rights that both groups claim for survival as distinct entities and to find themselves in a non-dominant position in the society.

### **3. From Protection of Minorities and Indigenous Peoples to Group Rights: An Historical Overview**

The history of the international protection of groups – domestic protection is to a large extent the result of international protection – can be divided into the following three periods:

#### **3.1 An early period of non-systematic protection**

It consists mainly of the incorporation of protective clauses ensuring certain rights to individuals or groups with a religion different from that of majority in international treaties.<sup>317</sup> For example, the Treaty of Westphalia (1648) granted religious rights to the Protestants in Germany;<sup>318</sup> the Treaty of Paris (1763) provided religious rights in favour of Roman Catholics in Canadian territories ceded by France.<sup>319</sup> After the downfall of Napoleon Bonaparte, the historic Congress of Vienna (1815) expanded the protection of minority groups for the first time beyond the purely religious field, reflecting the influence of the new egalitarian principles.<sup>320</sup> Subsequently, the protection afforded to the minorities set out by the Congress of Berlin (1878) featured prominently as ‘a corollary of the rise of new States and thus as part of the price of the Great Powers for their

<sup>315</sup> José R Martínez Cobo, ‘Report on the Problem of Discrimination against Indigenous Populations’ (UN Doc E/CN.4/Sub.2/1986/7/Add. 4, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1986) para379.

<sup>316</sup> Harriet Ketley, ‘Exclusion by Definition: Access to International Tribunals for the Enforcement of the Collective Rights of Indigenous Peoples’ (2001) 8(4) *International Journal on Minority and Group Rights* 331, 334.

<sup>317</sup> See above n 11, 7.

<sup>318</sup> *Treaty of Westphalia 1648* (Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies).

<sup>319</sup> *Treaty of Paris 1763*, 42 CTS 279 (Definitive Treaty of Peace between France, Great Britain and Spain).

<sup>320</sup> Nathan Feinberg, ‘The International Protection of Human Rights and the Jewish Question (An Historical Survey)’ (1968) 3 *Israel Law Review* 487ff.

acquiescence to border changes in the Balkans.’<sup>321</sup> However, in this early period no real system was developed; the protection extended to minorities was partial; no machinery was established.<sup>322</sup>

### **3.2 The system established after First World War – within the framework of the League of Nations**

The first genuine ‘system’ of minority rights protection was set up by the League of Nations, though a proposed provision on minorities was in the end omitted from the League Covenant.<sup>323</sup> The system was established consisting of a set of treaties, such as the treaties between the Principal Allied and Associated Powers – the British Empire, France, Italy, Japan and the United States – on the one hand, and Poland, Czechoslovakia, the Serb-Croat-Slovene State, Rumania, and Greece, on the other.<sup>324</sup> In this system the minority protection ‘guarantee’ was vested in the League instead of the Great Powers.<sup>325</sup> It recognised collective rights of various kinds (for example, equal rights for individual members of minority collectivities, special rights for minority collectivities and collective rights to cultural autonomy) and thereby weakened the dogma of State sovereignty in favour of human rights concerns.<sup>326</sup> Freeman writes, ‘It was, however, neither universal in principle nor effective in practice, and it vanished with the League after the World War II.’<sup>327</sup>

### **3.3 Developments following Second World War – in the United Nations era**

After the establishment of the United Nations, a completely new situation and a new approach developed to the issue of group rights and their protection.<sup>328</sup> The new approach was that, whenever someone’s rights were violated or restricted because of a group characteristic – race, religion, ethnic or national origin, or culture – the matter could be taken care of by protecting the rights of the individual, on a purely individual basis, mainly by the principle of non-

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<sup>321</sup> See above n 10, 26.

<sup>322</sup> See above n 11, 8.

<sup>323</sup> See above n 10, 26.

<sup>324</sup> *Minorities Treaty between the Principal Allied and Associated Powers and Poland* 1919, 225 CTS 412; *Treaty of Saint-Germain-en-Laye* 1919, 226 CTS 170; 226 CTS 182; *Treaty of Paris* 1919, 226 CTS 447; *Treaty of Sevres* 1920, 28 LNTS 243.

<sup>325</sup> See above n 10, 26.

<sup>326</sup> Michael Freeman, ‘Are there Collective Human Rights?’ in David Beetham (ed), *Politics and Human Rights* (Blackwell Publishers, 1996) 27.

<sup>327</sup> Ibid.

<sup>328</sup> Jacob Robinson, ‘International Protection of Minorities, A Global View’ (1971) 1 *Israel Yearbook on Human Rights* 61, 80-82.

discrimination.<sup>329</sup> The UN Charter<sup>330</sup> and the Universal Declaration of Human Rights (UDHR)<sup>331</sup> does not contain a specific minority provision – the emphasis is on the human rights in general. Therefore, the UN felt the need to state that the fate of minorities had to be considered and it referred the matter to the Economic and Social Council to ask the Commission of Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to make a ‘thorough study’ on the problems of minority groups.<sup>332</sup> This Sub-Commission has appointed Special Rapporteur Capotorti to conduct a comprehensive study on minority rights, as discussed above, and played a role in the preparation of Article 27 of ICCPR<sup>333</sup> – by which the international protection of minorities is governed today.<sup>334</sup> One of the important instruments in the area of group rights and racial discrimination was adopted in this period: the International Convention on the Elimination of All Forms of Racial Discrimination (1965), which authorizes special measures necessary to secure adequate advancement of certain racial or ethnic groups or individuals who suffer discrimination.<sup>335</sup>

However, the basic difference between the two periods is that the League of Nations believed that its minority-rights regime would contribute to peace as well as to justice; on the other hand, UN State elites have considered minority rights to be threats to national unity, territorial State integrity, peace and economic development.<sup>336</sup> Nonetheless, in the face of increasingly insistent minority demands and violent ethnic conflicts, cautious changes have taken place in recent times. For example, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) (hereafter UN Declaration on the Rights of Minorities) imposes on States the

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<sup>329</sup> See above n 11, 14.

<sup>330</sup> *Charter of the United Nations* (adopted 24 October 1945) 1 UNTS XVI (UN Charter).

<sup>331</sup> *Universal Declaration of Human Rights* (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

<sup>332</sup> *International Bill of Human Rights on Fate of Minorities* (adopted 10 December 1948) UNGA Res 217 C(III).

<sup>333</sup> *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 27.

<sup>334</sup> Philip Vuciri Ramaga, ‘The Group Concept in Minority Protection’ (1993) 15(3) *Human Rights Quarterly* 575, 575.

<sup>335</sup> *International Convention on the Elimination of All Forms of Racial Discrimination* (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 art 1(4).

<sup>336</sup> See above n 33, 28.

obligation to protect the existence and identity of minorities.<sup>337</sup> The more recent developments in international law is the differentiation of the groups of minorities and indigenous peoples – yet prior to the 1970s, indigenous groups were commonly treated as any other minority group under both domestic and international law.<sup>338</sup> Recently, in 2007, UN Declaration on the Rights of Indigenous Peoples is adopted, which recognises the group rights of indigenous peoples in addition to individual rights.<sup>339</sup> In the regional context, in Europe, the Framework Convention for the Protection of National Minorities (1994) is adopted to protect the rights of minorities, and in Africa, the African Charter on Human and Peoples Rights is adopted to protect the ‘peoples’ rights’.

#### **4. Group Rights of Minorities and Indigenous Peoples: Debates over Individual and Collective Rights**

Rights are a socio-cultural artifact of a particular historical phase of development of human societies. In legal philosophy, ‘rights’ are usually understood as legal rights, namely interests protected by law and supported by a legitimate justification (or ‘just claim’).<sup>340</sup> From the enjoyment perspective, rights can be divided into two broad categories: individual rights and collective rights. Individual rights are ascribed to an individual, who can wield the right independently, in his or her own name, on his or her own authority;<sup>341</sup> in contrast, collective rights are ascribed to a group of people and can only be invoked by the group and its authorized agents.<sup>342</sup> The most revolutionary element in the discourse of minorities and indigenous peoples’ rights movement is the emphasis on group or collective rights, which constitutes a fundamental challenge to the core normative assumption of post-Second World War international law: that a regime of individual human rights is sufficient for achieving an acceptable international legal order.<sup>343</sup> Some commentators reject the notion of group rights because, in their view, it would pose threat to the territorial integrity of States or to individual rights; whereas others accept it on purely empirical grounds (they

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<sup>337</sup> *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (adopted 18 December 1992) UNGA Res 47/135 (UN Declaration on the Rights of Minorities) art 1.

<sup>338</sup> See above n 23, 337.

<sup>339</sup> *United Nations Declaration on the Rights of Indigenous Peoples* (adopted 13 September 2007) UNGA Res 61/295 (UN Declaration on the Rights of Indigenous Peoples) art 1.

<sup>340</sup> See above n 10, 39.

<sup>341</sup> Allen Buchanan, ‘The Role of Collective Rights in the Theory of Indigenous Peoples’ Rights’ (1993) 3 *Transnational Law and Contemporary Problems* 89, 93.

<sup>342</sup> See above n 10, 47.

<sup>343</sup> See above n 48, 91.

contended that national and international law have recognised rights of groups such as peoples and minorities).<sup>344</sup>

#### **4.1 Minorities and Indigenous Peoples' Collective Rights within the framework of International Human Rights**

It is well accepted that the minority rights form an integral part of the international protection of human rights, but they are not identical notions.<sup>345</sup> Pentassuglia argues, 'Human rights means equal enjoyment of basic rights for everybody, whereas minority rights can be described as special rights recognised to the exclusive benefit of minority groups.'<sup>346</sup> However, this special treatment to minority groups does not violate the principle of 'equality in law', which has been brilliantly described by the Permanent Court of International Justice (PCIJ) in its Advisory Opinion on *Minority Schools in Albania*<sup>347</sup> in 1935 arguing that combining 'perfect equality' (equality in law) within the polity with the protection of cultural differences brought about by the minority population within the State would lead to 'true equality' between the majority and the minority, including most notably securing the minority's own institutions.<sup>348</sup> This notion, which became entrenched in the history of the field, permeates discussions about the structural impact of the equality argument on arrangements designed to protect minority groups.<sup>349</sup>

After the Second World War, both the Universal Declaration of Human Rights (UDHR) of 1948 and the European Convention on Human Rights (ECHR)<sup>350</sup> of 1950 were adopted based on the principle of 'equality in law',<sup>351</sup> which meant equal promotion and protection of human rights for everyone rather than the protection of some specific individuals or groups; in other words, do not refer to minorities, neither to minorities as 'individual belonging to a minority' nor to minorities 'as such'.<sup>352</sup> However, Meijknecht claims that to a certain extent, the need of individuals belonging to a minority can be satisfied by means of

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<sup>344</sup> See above n 10, 47.

<sup>345</sup> Ibid.

<sup>346</sup> Ibid.

<sup>347</sup> *Minority Schools in Albania* (Advisory Opinion) PCIJ Rep Series A/B No 64 [1935] 17.

<sup>348</sup> Gaetano Pentassuglia, 'Ethnocultural Diversity and Human Rights: Legal Categories, Claims, and the Hybridity of Group Protection' (2015) VI *The Yearbook of Polar Law* 250, 258.

<sup>349</sup> Ibid.

<sup>350</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)* (4 November 1950) ETS 5 (ECHR).

<sup>351</sup> See above n 38, art 2.

<sup>352</sup> See above n 7, 130.



individual rights such as the rights to freedom of opinion and expression,<sup>353</sup> right to education, right to take part in the government of one's country.<sup>354</sup> Freeman argues that UDHR, however, have some collectivist features, as for example, families have the right to protection by society and the State (Article 16), parents have the right to choose the kind of education that shall be given to their children (Article 26).<sup>355</sup> Further, Article 20 of UDHR and Article 11 of ECHR contain the right of everyone to freedom of peaceful assembly and association with others. Meijknecht argues that 'the right of assembly and association are rights with an inherent collective dimension, which means that the exercise of these rights cannot be reduced to individual human beings.'<sup>356</sup>

Nevertheless, Article 27 of ICCPR can be seen as a first direct attempt to deal with group dimension within the individualistic framework. This Article reads as follows:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.<sup>357</sup>

Some commentators, as for example, Tomuschat, argued that Article 27 protects basically individual persons and not minority groups as such. Their main argument is that, the context of the ICCPR, as reflected in the other rights recognised therein, its *travaux préparatoires* and the First Optional Protocol of 1966 (establishing a procedure which allows communications from individuals), substantiate the widely shared argument that Article 27 provides for individual rights, not rights of minorities *qua* groups.<sup>358</sup> On the contrary, many scholars, as for example, Ramaga, Dinstein, argued that Article 27 is clearly meant to apply where there is group identity.<sup>359</sup> However, from the third angle, Capotorti argued that it is the individual as member of a minority group, and not just any individual, who is destined to benefit from the protection granted by Article

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<sup>353</sup> See above n 38, art 19; See also above n 57, art 10.

<sup>354</sup> See above n 38, arts 26, 21.

<sup>355</sup> See above n 33, 27.

<sup>356</sup> See above n 7, 131.

<sup>357</sup> See above n 40, art 27.

<sup>358</sup> See above n 11, 15; See also above n 10, 48.

<sup>359</sup> See above n 41, 575; See also above n 11, 15.

27.<sup>360</sup> Therefore, Article 27 prescribes such as a group right, where the individual is the subject, but aspects of this right require a collectivity to exercise it. Similarly, after assessing the natures of ICCPR and the objectives of Article 27 Pentassuglia writes, ‘it appears unquestionable that Article 27 is designed to protect a collective interest, since the rights are to be exercised in community with the group members.’<sup>361</sup> The Human Rights Committee (HRC) has also confirmed this interpretation of Article 27 in the *Lubicon Lake Band v Canada* case, where it stated that ‘the rights protected by Article 27 include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.’<sup>362</sup>

#### 4.2 Collective Rights of Minorities and Indigenous Peoples in International Law

There are lots of international law instruments which recognise collective rights of minorities and indigenous peoples. For example, the 1948 Genocide Convention is a widely recognised instrument which directly benefits the minorities and indigenous peoples’ right to existence as a group.<sup>363</sup> Being a distinctive cultural and linguistic group, minorities and indigenous peoples have the right to establish, preserve and use their own institutions, traditions and education. The UNESCO Convention against Discrimination in Education (1960) recognises ‘the right of members of national minorities to carry on their own educational activities, including the maintenance of school.’<sup>364</sup> The 1989 ILO Convention No. 169 provides provisions recognizing the group rights of indigenous populations for the preservation and use of their institutions, traditions, languages, land rights, and asks the States to take special measures in favor of the protected populations.<sup>365</sup> In accordance with Article 6 of the UN Declaration on Religious Intolerance (1981), minorities and indigenous peoples have also the collective rights to establish and maintain charitable and humanitarian institutions, profess and practice their own religious beliefs and customs.<sup>366</sup> Moreover, the UN Declaration on the Rights of Minorities (1992)

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<sup>360</sup> See above n 12, paras 206-10.

<sup>361</sup> See above n 10, 48-49.

<sup>362</sup> *Lubicon Lake Band v Canada* (HRC Communication No 167/1984) UN Doc CCPR/C/38/D/167/1984 (1990) para 32.2.

<sup>363</sup> See above n 11, 34-35.

<sup>364</sup> *Convention against Discrimination in Education* (adopted 14 December 1960, entered into force 22 May 1962) 429 UNTS 93, art 5(c).

<sup>365</sup> See above n 17, arts 2, 5-8.

<sup>366</sup> *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (adopted 25 November 1981) UNGA Res 36/55 art 6.

imposes obligation on the States to protect the distinctive identity of minority groups. Article 3(1) of this UN Declaration provides that ‘Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination.’<sup>367</sup>

However, in most of other cases international law instruments recognise, as we have seen above the trends of post-Second World War, only the individual rights of minorities and indigenous peoples. Some commentators argue that to a certain extent, the problem experienced by indigenous peoples and minorities could be, and in fact are, solved by means of the individual approach.<sup>368</sup> Differing with this argument ACM Report has pointed out that there are some group claims which cannot easily be translated into individual rights; as for example, claims of indigenous peoples to self-determination, to collective rights to lands and fishing grounds, to natural resources and to some cultural rights – the simple fact that these rights cannot be accommodated in the framework of individual rights does not in itself constitute grounds for ignoring such claims altogether.<sup>369</sup> To accommodate these rights, however, the UN adopted the Declaration on the Rights of Indigenous Peoples in 2007, following the 1989 ILO convention, which has adopted an approach in which the collectivity ‘as such’ is the bearer of rights and duties. Exploring the nature of these group rights, Jones says that individuals can only hold these rights in combination with others.<sup>370</sup> He argues that there are several rights of minorities and indigenous peoples (for example, rights to profess and practice their own religion, to use their own language, and to enjoy their own culture) that, in addition to the right of popular self-determination, we can plausibly conceive as collective rights.<sup>371</sup>

### 4.3 Claims of Collective Rights: Discourse and Justifications

Minorities, especially indigenous peoples, are easily distinguishable from the majority people of the society by their distinctive cultures, and thus, they claim the ‘right to be different’ to lead their own ways of life. Faruque and Begum write that cultural rights include ‘respect and protection of cultural and religious

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<sup>367</sup> See above n 44, art 3(1).

<sup>368</sup> See above n 7, 154.

<sup>369</sup> Advisory Committee on Human Rights and Foreign Policy, ‘The Hague on Indigenous Peoples’ (Report No 16, Ministry of Foreign Affairs, 1993) 16-17.

<sup>370</sup> Peter Jones, ‘Groups and human rights’ in Cindy Holder and David Reidy (eds), *Human Rights: The Hard Questions* (Cambridge University Press, 2013) 106.

<sup>371</sup> *Ibid*, 107.

integrity, preservation of sacred sites, respect for their spirituality, language, and their traditional ways of life.’<sup>372</sup> In the case of *Ivan Kitok v Sweden*, HRC stated that traditional economic activities and ways of living, such as reindeer breeding, may fall under the scope of Article 27 ICCPR ie, under the right to enjoy one’s culture in community with others.<sup>373</sup> However, in international law cultural rights are normally seen from the perspective of universal individual rights as in the context of Article 15 ICESCR – the right of everyone ‘to take part in cultural life’ – or, Article 27 UDHR – everyone’s right ‘to participate in the cultural life of the community.’<sup>374</sup> Countering this traditional view, Faruque and Begum identified the cultural rights as group rights and argued that ‘A central aspect of self-determination for indigenous peoples is that they should be entitled to maintain and develop their distinct cultural identity.’<sup>375</sup> Overall with the emphasis on equality in fact and the protection of cultural identity, it is evident that minority rights constitute a separate category.

Indigenous representatives always emphasis the importance of recognizing the collective rights of indigenous peoples, such as those pertaining to land, language and education and, in particular, the right to self-determination.<sup>376</sup> On the other hand, States like the United States, Japan, and France have difficulties with accepting collective rights of indigenous peoples and prefer to indigenous peoples exclusively in terms of ‘persons belonging to indigenous groups.’<sup>377</sup> In response to this approach, Gray writes that their identity as peoples stems from their sense of being collectiveness and a refusal of collective rights is discriminatory as it refuses to recognise indigenous peoples as equal to other peoples.<sup>378</sup> He also states that group rights are neither in opposition nor a threat to individual rights.<sup>379</sup> Recognizing the collective right of self-determination, Naqvi terms it as an irreducible minimum encompasses right of all ethnic and

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<sup>372</sup> See above n 2, 25.

<sup>373</sup> *Ivan Kitok v Sweden* (HRC Communication No 197/1985) UN Doc CCPR/C/33/D/197/1985 (1988) para 9.5.

<sup>374</sup> See above n 10, 51.

<sup>375</sup> See above n 2, 25.

<sup>376</sup> See above n 7, 155.

<sup>377</sup> Ibid, 155-56.

<sup>378</sup> Andrew Gray, *The United Nations’ Declaration on the Rights of Indigenous Peoples is still Intact: Report on the 4<sup>th</sup> Session of the Open-Ended Inter-Sessional Working Group of the UN Commission on Human Rights on the Draft Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs, 1999) 3-4.

<sup>379</sup> Ibid, 4.

indigenous communities to continue to exist.<sup>380</sup> Article 3 of the UN Declaration on the Rights of Indigenous Peoples categorically says that ‘Indigenous peoples have the right to self-determination.’<sup>381</sup> But most States are willing to concede some degree of control over indigenous affairs, such as the power to administer special programmes designed by the State – and States will not generally recognise self-determination claims involving secession. Therefore, Article 4 of the UN Declaration on the Rights of Indigenous Peoples sets the limit of such self-determination: ‘Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.’<sup>382</sup>

Minorities, especially indigenous peoples’ lives and economy are very much attached to their lands, though they are still deprived of their lands and access to life sustaining resources in many countries. However, the importance of land and resources to the survival of minority and indigenous cultures is widely acknowledged in international human rights instruments, particularly, in ICCPR, which affirms that ‘In no case may a people be deprived of its own means of subsistence.’<sup>383</sup> Article 25 of the UN Declaration on the Rights of Indigenous People acknowledges the indigenous peoples’ collective rights to land:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.<sup>384</sup>

The international community recognises the indigenous peoples’ collective right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.<sup>385</sup> Recognising the collective land rights of Sawhoyamaxa Indigenous Community, the Inter-American Court of Human Rights held in the case of *Sawhoyamaxa Indigenous Community v Paraguay*

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<sup>380</sup> Feisal Hussain Naqvi, ‘People’s Rights or Victim’s Rights: Re-examining the Conceptualisation of Indigenous Rights in International Law’ (1996) 71 *Indiana Law Journal* 673, 726.

<sup>381</sup> See above n 46, art 3.

<sup>382</sup> Ibid, art 4.

<sup>383</sup> See above n 40, arts 1-2.

<sup>384</sup> See above n 46, art 25.

<sup>385</sup> Ibid, art 26 (1).

that ‘1) traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title; 2) traditional possession entitles indigenous people to demand official recognition and registration of property title.’<sup>386</sup> In another case of *The Kichwa Indigenous People of Sarayaku v Ecuador*, the Court held that, ‘The indigenous peoples have a community-based tradition related to a form of communal collective land ownership; thus, land is not owned by individuals but by the group and their community.’<sup>387</sup>

Another collective rights claim of minorities and indigenous peoples is to get there cognition of their legal personality, first nationally and then internationally.<sup>388</sup> Outlining the reason, Faruque and Begum write that since these people have to live in the states in which they find themselves, and since these same states may deny them their rights, it is essential that they should have the attribute of international personality under national and international legal frameworks so that they can present their claims and grievances in arenas outside the national legal system.<sup>389</sup> To certain extent, Article 40 of the UN Declaration on the Rights of Indigenous Peoples recognises the legal personality of indigenous people, which provides, ‘Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights.’ Minorities and indigenous peoples nowadays as a group are filing cases to protect their collective rights in the national and supra-national courts, against their own States. For example, in the case of *D H and others v The Czech Republic* Roma minority group of Czech Republic got the decision in their favour from the European Court of Human Rights that their children are facing ‘indirect discrimination’ due to government’s education policy.<sup>390</sup>

## 5. Conclusion

This article has sought to figure out the extent of minorities and indigenous peoples’ rights that can be regarded as collective rights on the basis of international legal instruments in the field. In doing so, the article has focused on the ongoing debates in the theory and practice over individual and collective

<sup>386</sup> *Sawhoyamaya Indigenous Community v Paraguay* (Merits, Reparations and Costs) [2006] IACHR Series C No 146, para 128.

<sup>387</sup> *The Kichwa Indigenous People of Sarayaku v Ecuador* (Merits, Reparations and Costs) [2012] IACHR Series C No 245, para 145.

<sup>388</sup> See above n 11, 36.

<sup>389</sup> See above n 2, 24.

<sup>390</sup> *D H and others v Czech Republic* (Merits) [2007] ECtHR Case No 57325/00

rights. What has revealed from the study is that, not all rights of minorities and indigenous peoples can be treated as collective rights, just those rights which cannot be exercised individually – which are essential part of their ways of life – as for example, right to self-determination, right to lands and access natural resources, right to existence and preserve identity, right of non-discrimination, right to perform and practice religion, rituals and customs, right to preserve and practice cultures and languages, right to education etc., can be regarded as group or collective rights. However, there are also some collective rights, such as the right to engage in cultural or religious ceremonies and to wear cultural dress, that any individual who is a member of the group can wield, either on his or her own behalf or on behalf of any other member or members of the group, and the right may also be wielded by a collective mechanism or by an agent or agents of the group. Despite the ongoing debates on the necessity and legality of collective rights of minorities and indigenous peoples, the recent developments in international law and the contemporary practices in the field increases the justification of the claims of collective rights of minorities and indigenous peoples.

## **BOOK REVIEW**

### **Supreme Court Decisions and Women's Rights: Milestones to Equality (2nd ed., C. Cushman (ed.), Washington, DC: CQ Press, 2011)**

**Sushmita Choudhury\***

#### **Introduction**

This reference work through the legal decisions titled 'Supreme Court Decisions and Women's Rights: Milestones to Equality' edited by Clare Cushman defines women's turbulent saga of strive. Reading this book would be a roller coaster ride as it encompasses the important U.S. Supreme Court Decisions during the horizon of time such as in 1800 while male friendly legislations reached triumph, women have been enduring their journey towards justice till today considering legal instruments as a powerful conduit. For instance, this illustrated reference tool delineates challenging the social taboo how an abortion rights activist drove a robust movement and smoothened women's journey regarding getting reproductive rights. Leaping the boundary Cushman takes us on a journey from past to present just not experiencing the past deprivation but witnessing the recent glory of women impacting the Supreme Court's blockbuster decisions.

The book contains eleven comprehensive chapters which cover chronologically wide ranges of domains such as jury duty, women's rights within the family, single-sex schools, workplace discrimination, sexual harassment, and reproductive rights, wherein women being discriminated, afterwards stood up and defied the patriarchal mindset. The last Chapter, "Leading the Way" sparks

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the self-esteem of women activists around the globe through chronicling female attorneys who first appeared in the Supreme Court, the first female clerks and the women who have worked or are working presently on the high court. Thus the book's description of the Supreme Court as a pivotal role player for shaping the women's rights movement will allow readers to learn the thriving growth of women activism and changing patterns of laws within the diverse social, economic and political landscapes.

### **Salient Features of The Book**

The depiction of the concept 'Romantic Paternalism' in Chapter 1, a timely endeavour invites readers to know how owing to the paternalistic attitude women got trapped in maintaining household chores singlehandedly and devoted their lives to raising child. Moreover, this chapter also includes the attributes of old fashioned patriarchal hierarchy that ruthlessly denies women's rights to unleash their potentials and self-worth in the fullest extent. In addition to that this book allows folks to expand the horizon of thought to realise how through the notion of 'romantic paternalism' patriarchal stereotypes prove women as a weaker and gentler counterpart of the society and have been leading the legacy of supremacy introducing legal instruments as a shield. For example, this chapter includes the term 'coverture' which ceases women's separate entity after marriage and make them legally subordinate to the husbands. Readers will get this principle finely explained by the prolific jurist William Blackstone in Chapter 1.

In Chapter 1 readers will also find some historical pictures presented with a brief caption. Fundamentally this chapter is a culmination of landmark cases such as *Bradwell v Illinois*, *Minor v Happersett*, *Muller v Oregon* and so on. Each and every legendary case and ground-breaking enactments came out as a result of the heroism of women reformers. For instances, Bradwell continued her vision to combat the noxious practice of excluding women from occupation, profession or employment. On the other hand, Susan B Anthony as a suffragist was fighting hard to add the 19<sup>th</sup> amendment to the constitution to make women's eligible to cast a vote.

Despite the women's tireless struggle preventing the axiomatic romantic paternalism notion highlighted in Chapter 1, it will be a twisting shock for readers to see the dogma continued robustly in the 2<sup>nd</sup> chapter titled Jury Duty. Displaying women counterpart as an impoverished section with the aim to protect them from the harshness of a criminal trial, patriarchal society hindered women to perform one of the basic rights of citizenship, that is jury membership. However, along with *Taylor v. Louisiana* case and *Ballard v. the United States* (1946) case, women felt the wind of change. Then, through the Sixth Amendment of the Constitution Supreme Court declared that defendants in federal cases had entitled to be judged by juries where women were represented. Therefore, it apparently seemed that the era of tyranny had ended.

In Chapter 3, readers will find the *Reed v Reed* case considered as a compelling case in defying the sex discrimination. In this case, readers will also come across the outrage of a mother named Reed whose deceased son's assets had directly been handed over to his husband and put him as an administrator of the property surpassing her rights. It is thrilling to read how confronting all the unfavourable legal phenomenon, the grieving mother got the justice and the Supreme Court declared this state law unconstitutional since it is just not only a clear case of sex discrimination but also the violation of equal protection clause. In contrast to that although promulgation of Fourteenth Amendment initially appeared as the restorer of equality, most of the cases it did not manifest the principle of equality rather offering men extra benefits. Briefly, this chapter is a gateway to learning the Supreme Court's striking decision such as forcing the all-male Virginia Military Institute to get women in. On the Other hand, this chapter contains the text about Ruth Bader Ginsburg who has been reminisced as the legendary figure of women's rights movement. Chapter 3 also introduces some inclusive litigation strategies to abolish sex discrimination crafted by Ruth Bader Ginsburg.

If readers shed light on Chapter 4 of the book they can explore women's role in the family as well as the society. This chapter portrays women have always been viewed as a caregiver and men as breadwinner, even typical gender roles neither allowed women to become the economic backbone of the household nor

encouraged them to take any financial decision for the family. In this regard, readers will encounter many cases such as *Weinberger v. Wiesenfeld*, *Kahn v. Shevin*, and *Califano v. Webster* where due to the tyranny over women seldom men's rights had been infringed too. However, Chapter 5 features the strong women rights movement which guides girls to get access to the educational institutions despite the then antipathic environment. Referring to the Charles Darwin's theory that describes women as an inferior fraction of the society, this chapter synthesises the concept of gender equality through demolishing the single-sex school. Later, the chapter will lead readers to experience the momentous change of educational landscape which struck by the leading Supreme Court Case, *Mississippi University for women v. Hogan*. It is worth mentioning that the women's activism in late 1960 and 1970 drove this case, and the Supreme Court compelled the constitution to ensure equal protection for men and women. While Chapter 5 spells out abolishing biased sex approach in the realm of education, Chapter 6 discusses the female participation in the job sector equally with their male counterpart. This chapter also emphasised the Supreme Court's plausible effort to repeal the federal laws that violated equal protection notions. For instances, the court provided a ruling, through *United States v. Virginia* case where women gained the permission in combat missions and the ruling also ensured father's effective role in rearing children.

On the other hand, Chapter 7 represents series of necessary legislations that proves the reflexive association between law and Judicial actions. The interspersed discussions on instrumental enactments like the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964 and the Lilly Ledbetter Fair Pay Act of 2009 are quite fascinating for readers. Moreover, it must be mentioned that Chapter 7 includes the *Ledbetter v. Goodyear Rubber & Tire Co. (2007)* case, acted as a primary vehicle in passing Lilly Ledbetter Fair Pay Act which considers every paycheck provides discriminatory compensation is a wrong actionable without taking into account the starting point of discrimination. Keeping tune with that concept, Chapter 9 talks about the *At & T Corp. v. Hulteen (2009)* case which held companies that treated pregnant women unfairly before implementation of the Pregnancy Discrimination Act of 1978 which could

carry that disparity over into calculating pension pay under specific circumstances.

While Chapter 9 concerns pregnancy and childbirth, Chapter 10 revolves around the several Supreme Court decisions regarding women's reproductive rights. To do this, the chapter unfolds the backstory of *Roe v. Wade* case which would be a thrilling episode for the readers. The story revealed to escape the media's scrutiny and social stigma how McCorvey remained in disguise of Jane Roe and she continued this fake identity for a long time after *Roe v. Wade* was decided. Precisely through this chapter readers will experience the relentless struggle of McCorvey's advocacy as an activist of abortion rights movement.

The final chapter titled 'Leading the Way' sketches the biographical profiles of eloquent and revered women who showcased their brevity declining the rosy life. They embraced hardships and made their way to the Supreme Court, led its door to open for women attorneys, law clerks and justices. This chapter allows readers to grasp the historical contribution of these women who helped the Supreme Court to be turned out as a friendly and comfortable compound for females. In this regard, the powerful name Belva A. Lockwood must not be under cover as she put tireless endeavour to achieve permission to argue before the court for women. Her bold personality also sparked when being economical she chose tricycle as a vehicle instead conventional Horse and Carriage. Besides, in this edition, readers will see the picture of Lucy Terry Prince and experience the tale of her life, as the first African woman addressed the U.S. Supreme Court. The adventures journey of a first female law clerk named Lucie Lomen written by Ruth Bader Ginsburg has also been embedded in the book. In addition to that, the book also includes the thrilling story of Sandra Day O'Connor, the first woman Justice appointed to the Supreme Court, who by defeating the patriarchal attitude and mockery finally made her way to accomplishing the goal.

### **Evaluation**

The unique attribute of the book is instead of providing a skewed view, it enlightens us through offering the holistic aspect of women empowerment. Particularly, the appearance of gender neutral approach makes the book more

acceptable to the readers. For instances, in many chapters, the names of the male activists have also been found who assisted women to speed up the movements. Regarding this, it is worth mentioning the struggle of a male resident general council of Mayo Clinic ignoring the death intimidation, and regular hate emails, who continued his efforts to assemble medical and historical information in favour of women's right to abortion. Alongside, Chapter 9 includes the activism of Justice William J. Brennan Jr who worked hard to build a bridge between two concepts pregnancy and sex discrimination. Hence the book sometimes has turned its spotlight on male contributors and endured gender neutral approach. The book is not aseptically either although the primary content of the book highlights the women's rights. This is because it contains the cases which elucidate the legal codifications of typical gender role and how these gender role assumptions adversely affect the men's rights as well. In this respect, Chapter 4 puts up several cases elaborately.

My primary criticism involves the biographical sketches added in the book. Comparing to the biographical depiction of Ruth Bader Ginsburg (duly appreciated for her lifelong engagement in women's rights activism) and Justice Sandra Day O'Connor, the biographical profiles of Kagan and Sotomayor seem scant. These shortcomings look less prominent if we provide our insight to assess the Cushman's efforts regarding accumulating the landmark cases decided in the past decade and also descriptions of the Supreme Court's newest appointees. Although this edition has come up with some new cases such as *Ledbetter v. Goodyear Tire and Rubber Company* (2007); *Gonzales v. Carhart* (2007); and *AT&T Corps v. Hu/teen* (2009) the scarcity of many more notable cases cannot be overlooked. However, while introduction by Leon Silverman (Chairman of the Supreme Court Historical Society) and Justice Ginsburg's forward effectively contextualized the book's aim and scope, it would be useful for the volume if it would have a closing chapter synthesizing the achievements in the vicinity of the law and women's rights as well as some speculation focusing on the future, especially regarding the evolving trend of the Supreme Court membership.

Finally considering the flaws and potencies, I highly recommend this book as it is a resourceful handy reference tool for lawyers, gender studies students and teachers.

### **Conclusion**

Being an editor of biographies of the Justices of the United State Supreme Court and also director of publication for the Supreme Court Historical Society through this book Clare Cushman invites the broad audience to understand the gender and women's rights. Significantly the inclusion of photos around 150, plentiful cartoons and illustrations, portrays of women legal reformers as importantly most of these have never been published serve to make the book more accessible to the legal enthusiasts. I believe this book can work as a unique handy reference tool for women activists, teachers and students. Besides, edifying sidebars offer tempting supplementary information. Although the book illuminates the remarkable cases and rulings of the Supreme Court of the United States, it has a global impact since readers figure out this as the echo of hearts and voices of women across the globe.