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(The Dhaka University Studies Part-F)
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Submission

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

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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

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Journal Articles: Multiple Authors

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

Books: Single Author

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

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

Books: Multiple Authors

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

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

Books: Edited

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

Chapters in Edited Books

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

Books: Corporate Author

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

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

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

Theses

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

Working Paper, Conference Paper, and Similar Documents

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

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

Newspaper

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

Internet Materials

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

Cases

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

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

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

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

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

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

Statutes (Acts of Parliament)

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

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

Delegated Legislation

Family Courts Rules 1985, r 5.
Financial Institutions Regulations 1994, reg 3.
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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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Company Members' Meetings In Bangladesh And The United Kingdom: Convergence And Diversity

Md. Khurshid Alam*

1. Introduction

Members usually receive information about the management of companies through the annual general meeting, and this meeting is the best opportunity for members to role-play in different decisions regarding the performance of the company. In the annual general meeting (AGM), members can ask questions regarding the company's management and its audits. In almost every annual general meeting, the resolutions of the members are discussed and voted. When any resolution is successfully passed by the members, the board of directors is authorized and generally obliged to take necessary steps to make the resolution operative.

Other than an annual general meeting, companies are required to arrange extraordinary general meetings of members covering extraordinary circumstances including alteration of articles or memorandums. In addition, Bangladeshi law requires every public company to arrange a statutory meeting of members within six months of the commencement of its business. A statutory report containing facts about company's capital, shares, directors, auditors, management, contracts or modification of contracts, commission or brokerage paid, and a list of members must be presented in this meeting. The statutory meeting is held only once in the lifetime of a company. This sort of meetings also brings opportunities for members to contribute in the governance of the company. The present article revisits the company meetings on making a comparative study between the United Kingdom and Bangladesh, and tends to show how members' meetings play an importance role in the governance of companies.

2. Meeting in a Company

In every company, a member who has concerns about a company's management has only two choices: exit the company by selling the shares or voice the concerns.[1] Meeting is the forum where members can express their concerns about the business and management of the company; they can discuss, debate and vote on any resolution that has been duly notified before. Voting in general meeting is the most important rights of members which they traditionally enjoy as a property right.

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[1] Professor Albert O Hirschman coined this concept pair in his book *Exit, Voice and Loyalty*. To him, exit is an "economics" solution, like switching bakeries when the bread is stale, while voice is a "political" solution, like voting for a more responsive government official.

Generally, votes are counted on a show of hands unless a poll is demanded. Voting on a show of hands has gained popularity for its simplicity and speed which enables the company to take uncontroversial decisions rather quickly. However, this benefit does not protect this system of voting from criticism on the ground that it portrays an inaccurate picture of members' opinion and it may produce a result different from that which would be revealed by a poll.

Modern company law does not compel a member to attend the meeting in person. Members have the right to appoint another person as a proxy to attend and vote in the meeting on behalf of them. Company law gives a proxy the same rights like a member in voting, and they also can demand a poll. Company's constitution cannot deprive any member from this right though it can make procedural limitation upon it. Members are required to deposit proxy forms or other documents to validate the proxy to the company before the commencement of the meeting. In a meeting, proxies can demand a poll and even, in some jurisdiction, can become the chair of the meeting. A corporation which is a member of another company can appoint a proxy or authorize any person to act as its representative.

Usually the company convenes the meetings. Members can also call for a requisition meeting. Company law gives the court power to urge the company for convening a meeting in some special circumstances. The court may order to convene the meeting on the application of a director or any member of the company.

3. British Practice

Types of Resolution

As per the 2006 Act, there are only two types of resolution which the members may take: ordinary resolution and special resolution.[2] An ordinary resolution is the one which is passed by a simple majority of members voting, and is generally used for every decisions required under the Act.[3] However, a company's articles may stipulate a higher majority, up to and including unanimity, in the case of resolutions required by the Companies Act as well as the articles.[4]

A special resolution is the one which is passed by a three-fourths majority.[5] It is mostly used in bringing any significant constitutional changes of the company. In the case of a special resolution, the notice of the meeting must specify the intention to propose the resolution as a special resolution.[6] In both types of resolutions, the required majority is determined by a poll where those votes are counted which are

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[2] [UK] *Companies Act 2006* section 282 conatains provision for ordinary resolution and 283 is mainly devoted to the discussion of special resolution.

[3] Ibid. section 282 (1) An ordinary resolution of the members (or of a class of members) of a company means a resolution that is passed by a simple majority.

[4] Ibid. section 281 (3).

[5] Ibid. section 283(1) A special resolution of the members (or of a class of members) of a company means a resolution passed by a majority of not less than 75%.

[6] Ibid. section 283(6).

attached to the shares that are voted by members entitled to vote and actually voting either in person or by proxy, where proxy is allowed. In the case of a meeting of a class of members, the majority means that of the votes of the concerned class.[7] Most votes are counted on a show of hands, and deemed to be final if no one challenges the result. Though this system of voting is controversial, the statute facilitates it by providing that the majorities are then to be calculated by reference to those entitled to and actually voting, rather than to the votes attached to their shares.[8]

A form of minority protection is manifested in the requirement of the higher majority for special resolutions, as compared with the simple majority required for an ordinary resolution. For example, a person with more than 25 per cent of the votes in a company, which in practice often with many fewer votes, can block the adoption of a special resolution. The distinction between ordinary and special resolutions is important also in relation to the question of amendment of proposed resolutions at the meeting held to consider them.

Convening a Meeting of the Members Annual General Meetings

Though the law requires the holding of AGMs by public companies, it does not prescribe for the specific business which has to be conducted at the AGM. In addition, it does not say that the annual directors' report and the accounts must be laid before the AGM or that the directors due for re-election must be considered in the same event. It is quite usual for these matters to be taken at the AGM and for the members to have an opportunity to question the directors generally on the company's business and financial position. This is the practice which is theoretically laid down in the Corporate Governance Code 2010, formerly Combined Code, applying to Listed Companies. The Code states that 'boards should use the AGM to communicate with private investors and encourage their participation.' The business of an AGM may go beyond these matters. In fact, there seems to be no limit on the business which may be transacted at an AGM assuming only that it is business properly to be put before the members. For example, the fact that a special resolution is required to transact a particular piece of business does not mean that that business cannot be considered at an AGM.

The timing of the AGM is attached to the company's annual reporting cycle. The AGM must be held yearly within the six-month period beginning with the day following its accounting reference date,[9] which determines the beginning and end of its financial year.[10] One of the considerations behind the Company Law Review (CLR) recommendation was that this rule would facilitate the procedure by which members may introduce their own resolutions onto the agenda of the AGM. However, as we shall see below, the Government failed to pick up this opportunity. If a company fails to comply with this requirement, every officer in default is liable

[7] Ibid. section 281(1) and (2).
[8] Ibid. section 282(3) and 283(4).
[9] Ibid. section 336(1).
[10] Ibid. section 391.

to a fine.[11] The persons most obviously at risk for non-compliance are the directors since they have the power to convene a meeting of the members at any time.[12] However, the power, previously contained in the legislation, for the Secretary of State, of the application of any member, to call or direct the calling of a meeting has been removed. Thus, the member has no direct and easy way of securing compliance with the AGM requirement, but must rely on the indirect impact of the criminal sanctions.

Other General Meetings

The convening of meetings other than the AGM of a public company is not required at any specific time. The board may convene a meeting of the members of a private or public company at any time. The articles may provide any further provision for the calling of meetings, but they are unlikely to give the members an extensive right to do so. The draft model set of articles for public companies empowers the members to convene meetings only where the number of directors falls below two and the remaining director (if any) is unwilling to appoint a further director. No provision for members to convene meetings is made in the model articles for private companies.

The directors must convene a meeting on the requisition of holders of not less than one-tenth of the paid-up capital carrying voting rights.[13] However, that requirement is reduced to one-twentieth in the case of a private company which has not held a meeting within the twelve months from its last annual general meeting.[14] The request must state the general nature of the business to be dealt with at the meeting, and may include the text of a resolution intended to be moved at the meeting, which facility the members will normally be well advised to take up. However, the resolution must be one which may be "properly moved" at the meeting, otherwise the directors are under no obligation to circulate it.[15]

Section 305 of the Companies Act Act 2006 provides for the power of the members to call a meeting at company's expense. If the directors, having received the requisition to convene a meeting under section 303 and fail to convene a meeting within 21 days of the deposit of the requisition, the members who requested the meetings or any of them representing more than half of the total voting rights of all of them, may themselves convene the meeting. Their reasonable expenses must be paid by the company and recovered from fees or remuneration payable to the defaulting directors.[16]

Requisitioning a meeting seems to be far easy for the members of private companies, and also in public companies where, for instance, the co-operation of

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[11] Ibid. section 336(3), (4).
[12] Ibid. section 302.
[13] Ibid. section 303.
[14] Ibid. section 303(3).
[15] Ibid. section 303(5).
[16] Ibid. section 305 (1), (6), (7).

only two or three institutional shareholders is required to get across the 10 per cent threshold. However, individual members with small amount of shares in public companies face considerable difficulty and expense to enlist the support of a sufficient number of fellow members to be able to make a valid requisition.

Meetings Convened by the Court

Section 306(1) gives the court power to convene a meeting when "for any reason it is impracticable to call a meeting...in any manner in which meetings of that company may be called or to conduct the meeting in manner prescribed by the articles or this Act." This power may be exercised by the court "of its own motion or on the application—(a) of any director of the company or (b) of any member who would be entitled to vote at the meeting."[17] The meeting can be "called, held and conducted in any manner the court thinks fit" and the "court may give such ancillary or consequential directions as it thinks expedient and these may include a direction that one member of the company present in person or by proxy be deemed to constitute a meeting."[18]

Getting Items onto the Agenda and Expressing Views on Agenda Items

Rather than going through the process of requisitioning a meeting in order to discuss a particular piece of business, the members may wish simply to add an item to the agenda of a meeting which the board has called in any event. This is most likely to be attractive in relation to the AGM, which, as we have seen, a public company is obliged to hold. The CLR proposed to make this facility of much greater utility to members, but in the end the Government backed away from the proposal. Alternatively, some members may simply wish to make known to other members in advance of the meeting their views on a particular item which is already on the agenda, thereby hoping to encourage the other members to attend the meeting, in person or by proxy, and support those views. This has been looked in turn at these two possibilities.

Placing an Item on Agenda

The items included on the agenda of the meeting are generally stipulated by the board as the AGM is normally convened by it. Under section 338 members representing not less than 5 per cent of the total voting rights of the members who have a right to vote on the proposed resolution at the annual general meeting, or 100 members holding shares on which there has been paid up an average sum per shareholder of at least £100, may require the company to give, to members of the company entitled to receive notice of the next annual general meeting, notice of a resolution which may properly be moved and is intended to be moved at that meeting.

The second criterion for requiring a resolution to be placed on the agenda has also benefited from the steps which the Act has taken to protect the interests of "indirect"

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[17] Ibid. section 306(2).

[18] Ibid. section 306(2)-(4).

investors, i.e. those who hold their shares through nominees. Subject to safeguards, the 100 "members" may include those who are not members of the company but whose interest in the shares arises from the fact that a member of the company holds the shares on their behalf in the course of a business and—a very important limitation—the indirect investor has the right to instruct the member how to exercise the voting rights.[19]

However, the company is bound to give notice of the resolution only when certain of the conditions are met. First, the standard conditions relating to member's written resolutions to be properly moved at annual general meeting must be met.[20] The second condition requires the requisition, identifying the resolution of which notice is to be given, must be received by the company at least six weeks before the AGM to which the request relates or before the company gives notice to the members of the AGM.[21] The third condition stipulates that those requesting the circulation must pay for it unless the company resolves otherwise.[22]

The opinion of Company Law Review differs from the legislation regarding the expense of the circulation of requisition that members' resolutions received in time to be circulated with the notice of the AGM should be circulated free of charge. This opinion is not accepted in the final Act, and the Act makes only the limited concession that circulation shall be free if the request is received before the end of the financial year preceding the meeting, which may be up to six months before the meeting is held.[23]

One major problem with the members' resolution procedure is that it is all too likely that something in the AGM circulation from the board will trigger the wish to place a shareholders' resolution on the agenda. However since the minimum period of notice for calling the AGM is 21 days,[24] the company may in fact give longer notice, there may well not be time for the members to respond to the AGM documentation and get their resolution to the company within the six week limit. In addition, the company's costs of circulation would be much greater in such a case, for the proposed resolution would have to be circulated separately. The Company Law Review proposed to address the problem, at least in part, by requiring quoted companies to put their annual reports and accounts on their website within 120 days of the end of the financial year, after which there would be a "holding period" of 15

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[19] Ibid. section 153.

[20] Ibid. section 338(2).

[21] Ibid. section 338(4).

[22] Ibid. section 340(2).

[23] Ibid. sections 340(1), 437 and 442. However, the cost of circulation should not be large if the members' resolution can be circulated along witth the general circulation for the AGM. The company is obliged to circulate the resolution with the notice if this is possible: section339(1).

[24] Ibid. section 307(2) for listed companies the recommended period is rather longer (20 working days).

clear days, during which the company would be obliged to accept a members' resolution (having the support presently required) for circulation with the notice of the AGM and at the company's cost.

Circulation of Members' Statements

It is seen that members can circulate the expected resolution prior to the meeting. However, it is not enough for the members to have their resolution circulated in advance of the AGM. It will have much more effect if it is accompanied by a statement from the proposers setting out its merits. Alternatively, the members may wish to circulate only a statement and not a resolution, for example, where they wish to oppose a resolution from the board rather than to propose one of their own. The directors will undoubtedly make use of their power to circulate statements in support of their resolutions. Even if the directors do not directly control many votes, they are for the moment in control of the company and they can get their say in first and use all the facilities and funds of the company in putting their views across. They will have had all the time in the world in which to prepare a polished and closely reasoned circular and with it they will have been able to dispatch stamped and addressed proxy forms in their own favour. And all this, of course, is made at the company's expense.

Notice of Meetings and Information about the Agenda

Length of Notice

It is provided by section 307 of the 2006 Act that the company's articles must not contain any provision providing for the calling of a meeting by a shorter notice than 21 days' notice in the case of an annual general meeting or 14 days' notice in other cases. The company's articles may provide for longer notice but they cannot validly provide for shorter one.[25]

However, in the case of an AGM, a meeting can be called on shorter notice than the Act or the articles prescribe if it is agreed by all members entitled to attend and vote.[26] In other cases a somewhat lower level of agreement will suffice.[27] This is a majority in number of those having the right to attend and vote[28] who must also hold the "requisite percentage" of the nominal value of the shares giving the right to attend and vote. That required percentage is 95 per cent in the case of a public company and 90 per cent in the case of a private company.[29] The articles may increase the percentage to a level not beyond 95 per cent.[30]

The effect of requiring, other than for AGMs where unanimity is the rule, the agreement of both a majority in number of members as well as a high percentage of

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[25] Ibid. section 307(3).

[26] Ibid. section 337(2).

[27] Ibid. section 307(4), (7).

[28] Ibid. section 307(5).

[29] Ibid. section 307(5),(6).

[30] Ibid. section 307 (6).

the voting rights is that, where there is one or a small number of major shareholders and a number of small ones, at least some of small shareholders will need to concur in the major shareholders' view that short notice is appropriate.

Special Notice

As is seen, in certain circumstances a type of notice, unimaginatively and unhelpfully designated a "special notice," has to be given, the principal examples being when it is proposed to remove a director or to remove or not to reappoint the auditors.[31] It is not notice of a meeting given by the company but notice given to the company of the intention to move a resolution at the meeting. Under section 312, where any provision of the Act requires special notice of a resolution, the resolution is ineffective unless notice of the intention to move it has been given to the company at least 28 days before the meeting.[32] The company must then give notice (in the normal sense) of the resolution, with the notice of the meeting or, if that is not practicable, either by newspaper advertisement or by any other method allowed by the articles, at least 14 days before the meeting.[33]

All this achieves in itself is to ensure that the company and its members have plenty of time to consider the resolution. However, in the two principal cases where special notice is required supplementary provisions enable protective steps to be taken by the directors or auditors concerned. Under this heading it is also to be noted that the company's articles may require notice of certain types of resolution to be given to the company in advance of the meeting, and this requirement may limit shareholders' freedom of action at the meeting itself. For example, the articles may provide that no person shall be appointed as a director at a meeting of the company unless he or she is a director retiring by rotation, a person recommended by the board or a person of whose appointment the company has been given at least 14 days' (and not more than 35 days') notice, together with the proposed appointee's consent. At the general meeting of such a company it is thus not open to dissenting shareholders to put forward an alternative candidate for director on the spur of the moment, though it appears that the board could do so.

The Content of the Notice of the Meeting and Circulars

The notice of the meeting must state the time, date and place of the meeting; a statement of the general nature of the business to be dealt with at the meeting; and any other matters required by the company's articles.[34] The information about the business of the meeting which must be placed in the notice is a crucial factor for a member to determine whether he or she will attend it. But the specific contents

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[31] Ibid. sections 168 and 510.

[32] Ibid. section 321(1) this applies whether the resolution is proposed by the board or by a member. But the notice is effective if the meeting is called for a date 28 days or less after special notice has been given, so that the board can, in effect, forgive its own tardiness: section 312(4).

[33] Ibid. section 312(2),(3).

[34] Ibid. section 311.

depend much on the nature of the meeting. When the meeting is an AGM at which the "ordinary business" is to be undertaken, all that is necessary is to list those matters. However, when resolutions on other matters are to be proposed it is customary to make an indication that they are to be proposed as special or ordinary resolutions as the case may be. In the case of special resolutions section 283(6) requires that the notice of the meeting contains the text of the resolution and indicates the intention to propose it as a special resolution. Moreover, the notice may also indicate that the resolution shall not be passed unless passed as a special resolution.[35]

Communicating Notice of the Meeting to the Members

The Act specifies to whom the notice should be given, thus giving statutory form to something previously contained in the model articles.[36] Those entitled to receive notice of the meeting are every member of the company and every director.[37] Members include any person who is entitled to a share in consequence of the death or bankruptcy of a member, if the company has been notified of their entitlement.[38] However, these statutory provisions are subject to any provision in the company's articles, for example, it can exclude non-voting members from entitlement to receive notice.

The articles may also contain more straightforward matters, such as the rules identifying the address which the company will use to communicate with the members and removing the member's entitlement to be notified if the address so identified proves ineffective. Accidental failure to give notice to one or more members shall not affect the validity of the meeting or resolution, and the company's articles can expand this relaxation, except for meetings or resolutions required by the members.[39]

Attending the Meeting

Proxies

One of the important features of company meetings is that the members do not have to appear at the meeting in person; they may appoint another person (a proxy) to attend and vote on their behalf. At common law attending and voting had to be in person,[40] but it early became the normal practice to allow these duties to be under taken by an agent or "proxy."[41] It should be noted that the system of proxy voting is not the same as that of postal voting. With postal voting the vote is cast directly by

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[35] Ibid. sections 283(6)(b) and 282(5).

[36] Ibid. section 310.

[37] Ibid. section 310(1).

[38] Ibid. section 310(2).

[39] Ibid. section 313.

[40] Harben v Philips (1883) 23 Ch.D. 14 CA

[41] The word "proxy" is used indiscriminately to describe both the agent and the instrument appointing him.

the member who holds the vote and he or she votes without attending a meeting. With proxy voting, the proxy votes on behalf of the member and at a meeting. In practice there may not be much difference between the two when the proxy is given precise instructions and follows them, for then the member in effect makes up his or her mind on how the vote is to be cast in advance of the meeting. The Shareholders' Rights Directive requires Member States to permit companies to offer voting "by correspondence in advance of the general meeting" to their shareholders, but does not require companies to adopt this procedure.

Sections 324-331 of the Act enumerate the provisions relating to proxies. The articles cannot reduce the statutory entitlements unless the Act expressly allows derogation from its provisions, though the Act gives the articles a general permission to improve them.[42] Any member is entitled to appoint another person whether a member of the company or not as his proxy to attend, speak and vote instead of himself at a meeting of the company.[43] In the case of a company having a share capital the member may appoint more than one proxy, provided each proxy is appointed to exercise rights attached to different shares.[44]

Every notice calling a meeting of a company must contain, with reasonable prominence, a statement informing the members their statutory rights to attend, speak and vote by proxy and of any more extensive rights provided under the company's articles.[45] Moreover, if proxies are solicited at the company's expense the invitation must be sent to all members entitled to attend and vote.[46] Thus, it prevents the board from inviting only those from whom it expects a favourable response. The articles may not require that proxy forms or other documents required to validate the proxy must be lodged more than 48 hours before a meeting or adjourned meeting.[47]

Section 330 partly addresses the issue of termination of the proxy's authority. The provisions are inserted in order to give protection to things done by the proxy from being brought into question if the company has not received notification of the termination of the proxy's authority before the commencement of the meeting or the adjourned meeting at which the vote is given. Thus, the proxy's vote will still be valid and the proxy will still count towards the quorum and can still validly join in demanding a poll, unless the company receives notice of termination of the authority before the commencement of the meeting.[48] The company's articles may set an earlier time for the notification of the termination, but, in the case of a meeting, not

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[42] [UK] *Companies Act 2006* section 331.

[43] Ibid. section 324(1) the proxy may also demand a poll (s. 329) and may even be elected as the chair of the meeting (section 328).

[44] Ibid. section 324(2).

[45] Ibid. section 325.

[46] Ibid. section 326.

[47] Ibid. section 327.

[48] Ibid. section 330(2), (3) in the case of voting at a poll to be held more than 48 hours after it is demanded the relevant time is the time appointed for the poll (s.330(2)(b)).

so as to make it earlier than 48 hours before the meeting, and in the case of a poll taken more than 48 hours after it was demanded, 24 hours before the time appointed for the taking of the poll.[49] However, the section deals only with the termination of the proxy's authority by "notice of termination." It has been held that a member may attend and vote in person and the company must them accept his vote instead of the proxy's, i.e. that the proxy's authority may be terminated by a personal vote.

Corporation's Representative

Section 323 provides that a body corporate may, by a resolution of its directors or other governing body, authorise any person or persons to act as its representative at meetings of companies of which it is a member and that the representative may exercise the powers on behalf of the corporation as the body corporate could if it were an individual.[50] Unlike a proxy, the representative can simply turn up at the meeting and is not subject to any requirement for documentation to be lodged with the company in advance of the meeting. This may be particularly valuable where institutional investors are in discussion with the company's management right until the last minute about the acceptability or otherwise of a resolution to be proposed at a meeting and, if those discussions break down, where it will be too late to appoint a proxy.

Voting and Verification of Votes

Company law has traditionally proceeded on the basis that voting at a general meeting is a property right for those shareholders who have voting shares. This gives rise to two problems. Shareholders may choose not to exercise their votes at all: or they may vote at the behest of a non-shareholder. Both responses are capable of understanding the legitimacy of shareholder decisions, in the first case because the result is not representative of the shareholding body as a whole and in the second because it may reflect the interests of non-shareholders.

As to the first problem, we have seen for "fiduciary" investors the law of trusts may impose a duty to give consideration to the question of whether voting rights should be exercised in order to promote the interest of the beneficiaries of pension trusts. Under government pressure, the institutional shareholders generally have adopted a voluntary code on active engagement, including voting, with portfolio companies, so that for such shareholders voting is coming close to being a duty. Institutional shareholders can effectively monitor the management of the company and even oust it in some cases.[51]

Votes on a Show of Hands and Polls Companies' articles normally provide for voting to be on a show of hands, unless a poll is demanded. Proxies may vote on a

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[49] Ibid. section 330(5)-(7).

[50] Ibid. section 323(2).

[51] Omar Al Farooque et al, 'Co-deterministic relationship between ownership concentration and corporate performance: Evidence from an emerging economy' (2010) 23(3) *Accounting Research Journal* 172, 175.

show of hands, though previously this was a matter left to be regulated by the articles, though a proxy holding instructions both for and against a resolution may find it very difficult to know how to act. The result on a show of hands may give a very imperfect picture of where the majority of the voting rights lie. The alternative voting mechanism is that of the poll in which members and proxies vote the shares which they represent, though a person is not obliged to vote all the shares represented or to vote them all the same way.[52]

The voting process usually involves signing slips of paper indicating how many votes are being cast in each direction and the number of abstentions. This is a more cumbersome, if more accurate, voting process, and in large meetings it may not be practical to complete it during the meeting, because of the need to check proxy forms and the votes cast, though there must be scope for increasing the speed of the voting process by use of electronic technology. What is not permitted, unless the articles specifically provide for it, is voting by postal ballot. The latter may be thought strange since clearly such a referendum would be a better way of obtaining the views of the members. But the fiction is preserved that the result is determined after oral discussion at a meeting, although everybody knows that in the case of public companies the result is normally determined by proxies lodged before the meeting is held.

The speed and simplicity in vote by showing hand enables the company to take uncontroversial decisions quickly, though for completely uncontroversial decisions other techniques would do equally well, such as taking decisions without a vote, if no person present demands one. Where the resolution is controversial and where the voting process therefore comes under the strongest pressure, the show of hands has two main defects. The first is that it may disguise the level of opposition to the resolution, even if the show of hands produces the same result as a poll would have done. For example, a resolution may be passed on a show of hands by 80 to 20, but if a poll had been taken it might have been revealed that 500 were in favour of the resolution and 400 against. It is particularly likely that the chairman of the meeting will not vote on a show of hands and yet he or she may have been appointed the person to receive the proxies solicited by the company. Such situations in particular discourage institutional shareholders from voting by proxy, because they feel their votes have no impact

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The second potential defect in the show of hands is that it may produce a result different from that which would be revealed by a poll. This situation is addressed by the legislation through rules dealing with the question of who can demand that a poll be taken, even though a result has been achieved on a show of hands, or can demand a poll even before a decision on a show on hands, or can demand a poll even before a decision on a show of hands has been taken. The articles of companies invariably direct that a demand by the chairman shall be effective.

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[52] [UK] *Companies Act 2006* section 322; see also section 152.

A proxy may demand or join in demanding a poll.[53] This makes it difficult for the articles to hamstring a sizeable opposition by depriving them of their opportunity to exercise their full voting strength. Moreover, it is the duty of the chairman to exercise his right to demand a poll so that effect is given to the real sense of the meeting, and, if he realized that a poll might well produce a different result, it seems that he would be legally bound to direct that a poll should be taken.

Verifying Votes

The Company Law Review received evidence that the reliability of the results produced on a poll might not always be all it should be, because votes are "lost" somewhere in the chain between the person holding the voting power giving instructions as to how the votes are to be cast and the recording of those votes at the meeting. Following this, the Act hives the same percentage of the members (including indirect members) as can place a resolution on the agenda of an AGM the right to requisition an independent assessor's report (normally from the company's auditors) on a poll at a general meeting of the company (but without any cost to the requisitionists).[54]

This right applies only within "quoted companies" i.e. companies incorporated in one of the jurisdictions of the United Kingdom and listed on the Main Market of the London Stock Exchange or listed in another Member State of the European Economic Area (EEA) or having their shares traded on the New York Stock Exchange or Nasdaq.[55] The report must give the assessor's opinion, with supporting reasons, on a number of matters notably whether the procedures adopted in connection with the poll were adequate, whether the votes (including proxy votes) were fairly and accurately recorded and whether the validity of the members' appointment of proxies was fairly assessed.[56]

The rights which the assessor is given to support the discharge of reporting function are all rights against the company and associated persons. The assessor has the right to attend the meeting of the company at which the poll is to be taken or any subsequent proceedings if the poll is not taken at the meeting itself and to be given copies of the documentation sent out by the company in connection with the meeting.[57] The assessor have a right of access to the company's records relating to the meeting and the poll and a right to require directors, officers, employees, members and agents of the company (including the operators of its share register) to

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[53] Ibid. section 329.

[54] Ibid. section342.

[55] Ibid. section 385. Section 354 gives the Secretary of State the power by regulations, subject to affirmative resolution in Parliament, to extend the types of company to which the assessor's report requirement applies (but also to limit them)

[56] Ibid. section 347(1).

[57] Ibid. section 348.

provide information and explanation (unless this would involve a breach of legal professional privilege).[58] Non-compliance with the request for information or giving knowingly or recklessly misleading information is response to a request is a criminal offence.[59] The company must put on its website a copy of the report as soon as is reasonably practicable and keep the information there for two years and, at an earlier stage, must post some information about the appointment of the assessor.[60]

Non-compliance with the requirements for an assessor's report appears to have no impact on the validity of the resolution passed, though it is a criminal offence on the part of every officer in default for the company not to respond within one week of receiving a valid request by appointing an independent assessor to produce the report.[61] The request will normally be made before the meeting at which the poll is likely to be requested or conducted but a valid request may be made up to one week after the date on which the poll is held.[62] The appointed person must meet the statutory requirements for independence, which, however, are drawn so as not to exclude necessarily the company's auditors,[63] and the assessor must not have any other role in relation to the poll upon which a report is to be made.[64]

Publicity for Votes and Resolutions

Whether or not an independent assessor is requested by the members a quoted company is required to post on its website the text of any resolution voted of through a poll at a general meeting and give the details of the votes cast in favour of or against it.[65] This will include resolutions which are not passed. Again, failure to do so does not affect the validity of the resolution but does constitute a criminal offence on the part of every officer in default. The Combined Code goes a little further and suggests website publication of votes directed to be withheld and of the number of shares in respect of which valid proxy appointments were made. The purpose of the latter piece of information is presumably to indicate how important or, more likely, unimportant attending the meeting actually was.

Apart from this new requirement for quoted companies, the publicity requirements for the results of meetings are of a more traditional kind. Section 355 requires every company to keep records containing the minutes of all proceedings of general meetings and copies of resolutions passed otherwise than at meetings (for examples, as written resolutions or by unanimous consent), and to keep those records for ten years.[66] Those records must be open to inspection by any member of the company

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[58] Ibid. section 349.

[59] Ibid. section 350.

[60] Ibid. sections 351 and 353.

[61] Ibid. section 343.

[62] Ibid. section 342(4)(d).

[63] Ibid. section 344. See notably section 344(2).

[64] Ibid. section 343(3)(b).

[65] Ibid. section 341.

[66] Ibid. The provisions apply also to class meetings: section 359.

(but not by the public) free of charge, who, for a prescribed fee, may require a copy of them.[67] The place of inspection is the company's registered office or some other place permitted under regulations made by the Secretary of State.[68] However, some resolutions of the company will be available publicly because they have to be supplied to the Registrar. This is true in particular of special resolutions, including such resolutions passed by unanimous consent.[69]

The minutes of the meetings and the records of the resolutions have some legal significance. A record of a resolution passed other than at a meeting, if signed by a director or the company secretary, is evidence of the passing of the resolution, and the minutes of a meeting, if signed by the chart of that meeting or the following one, are evidence of the proceedings at the meeting. A record of proceedings at a meeting is deemed, unless the contrary is proved, to establish that the meeting was duly held, was conducted as recorded and all appointments made at it were valid. A record of a written resolution produces the same effect as to the requirements of the Act for passing written resolutions.[70]

Miscellaneous Matters

Chairman

The Act lays down the default rule that a member may be elected at the meeting by resolution to be its chair, but states that this provision is subject to any provisions in the articles as to how that person is to be chosen.[71] The articles invariably do deal with the matter. The draft model articles for public companies[72] sensibly take the view that the chairman ought to be a member of the board and accordingly provide that the chairman of the board shall also be the chairman of the meeting, which is what normally happens. However if the chairman of the board is not present within ten minutes of the time appointed of the start of the meeting, the directors present must appoint a director or member to preside and, if there are no directors present, then those constituting the meeting do that job.

The position of chairman is an important and onerous one, for he or she will be in charge of the meeting and will be responsible for ensuring that its business is properly conducted. As chairman, he owes a duty to the meeting, not to the board of directors, even if he is a director. He should see that the business of the meeting is efficiently conducted and that all shades of opinion are given a fair hearing. This may entail taking snap decisions on points of order, motions, amendments and questions, often deliberately designed to harass him, and upon the correctness of his ruling the validity of any resolution may depend. He will probably require the company's legal adviser to be at his elbow, and this is one of the occasions when

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[67] Ibid. section 358(3)
[68] Ibid. sections 358(1) and 1136.
[69] Ibid. sections 29-30.
[70] Ibid. section 356.
[71] Ibid. section 319.
[72] The draft model articles for public companies Article 30.

business. The board must prepare a report called as "statutory report" and send it to every member twenty one days before the meeting. The statutory report contains information about the company like the number of shares allotted, distinguishing the shares allotted as fully or partly paid-up, total amount of cash received showing the heads they are so received, an account or estimate of the preliminary expenses of the company, the names, addresses and occupations of the directors, managing agents, managers and secretaries, the particulars of any contract which should be submitted to the company for approval, the extent to which underwriting contract if any has not been carried out, the arrears if any due on calls from every director, managing agent and other specified persons, the particulars of any commission, brokerage etc. paid or to be paid in connection with the issue or sale of shares or debentures to any director and managing agent, and so on.

The statutory report has to be certified as correct by at least two directors including the managing director. After the report gets certified as correct by the directors, it then shall have to be certified by the auditors of the company so far as shares allotted by the company and the cash received by the company are concerned. A company may be wound up if default is made in holding the statutory meeting or in filing the statutory report,[80] but the Court, on a petition made to it, may instead of directing that the company be wound up, give directions for the statutory report to be filed.[81]

Extraordinary General Meeting

Section 84 requires the directors of a company to call an extraordinary general meeting on the requisition of, in the case of a company with share capital, holders of not less than one tenth of the issued share capital of the company, and in the case of a company not having a share capital, not less than one tenth of the total voting power. The requisition must state the objects of the meeting and must be signed and deposited at the registered office of the company by the requisitionists. If the directors do not, within twenty one days from the date of deposit of the requisition, proceed to call a meeting on a day not later than forty five days from the date of the requisition, then the requisitionists or a majority of them in value, may themselves call the meeting but any meeting shall not be held after the expiration of three months from the date of the deposit of the requisition. Giving the shareholders the right to demand extraordinary meeting "may also strengthen minority shareholders' incentives to monitor management."[82]

Convening of a Meeting

Extraordinary General Meeting

Section 84 provides for calling of extraordinary general meeting on requisition from members. The directors of a company which has a share capital must call an

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[80] *Companies Act 1994* section 241.

[81] Ibid section 83(10).

[82] Marina Martynova and Luc Renneboog, 'A Corporate Governance Index: Convergence and Diversity of National Corporate Governance Regulations' (Center Discussion Paper Series No. 2010-17, Tilburg University, February 2010) 16.

extraordinary general meeting of the company, on the requisition of the holders of not less than one tenth on the issued share capital of the company, and in the case of a company not having a share capital the directors may call such meeting on the requisition of such members as have, on the date of submitting the requisition, not less than one tenth of the total voting power in relation to the issues on which the meeting is called. The requisition must state the objects of the meeting and must be signed by the requisitionists and deposited at the registered office of the company.

If within twenty one days from the date of deposit of the requisition the directors do not proceed to call a meeting on a day within forty-five days from the date of the deposit of the requisition, then the requisitionists, or a majority of them may themselves call the meeting. Any meeting so called shall be held before the expiration of three months from the date of the deposit of the requisition. Any meeting called by the requisitionnists shall be called in the same manner, as nearly as possible, as that in which meetings are to be called by directors.

The expenses incurred by the requisitionists by reason of the failure of the directors duly to call a meeting shall be repaid to the requisitionists by the company. Any sum so repaid shall be retained by the company from the defaulting directors out of any sums due or to become due from the company by way of fees or other remuneration for their services.

By the Court

Section 81 further provides that the Court may, on the application of any member of the company, call or direct the calling of a general meeting of the company and give such ancillary or consequential direction as the Court thinks expedient in relation to the calling, holding and conducting of the meeting. Section 82 provides for a fine not exceeding take ten thousand and a continuing fine which may extend up to two hundred fifty taka for every day that the default continues.

Section 85(3) further provides that if for any reason it is impracticable to call a meeting of the company in the manner in which meetings of that company may be called or conducted in the manner prescribed by the articles or the Act the Court may, either on its own motion or on the application of any director or member who would be entitled to vote at the meeting, order a meeting of the company to be called, conducted and held in such a manner as the Court thinks fit, and may give such ancillary or consequential directions as it thinks expedient, and any meeting held and conducted in accordance with any such order shall for all purposes be deemed to be a meeting of the company duly called, held and conducted. There has been some extensive case law in this country touching disputes among shareholders for control of the company.

Business of Annual General Meeting

Annual general meeting is the biggest forum when members gets the opportunity of meeting the directors, raise questions on the accounts, on the reports made by the

directors, and on the company's future actions and prospects. Members exercise their power of electing the directors in annual general meeting.

The Act while making provision for holding annual general meeting by company, does not say what business which must be transacted at that meeting. However, as a practice the presentation of the accounts and reports and the appointment of auditors[83] are normally undertaken at regular intervals, and the company's articles will almost certainly provide for other matters of an annually recurring nature. Schedule I to the Companies Act indicates that the agenda of sanctioning a dividend, the consideration of the accounts, balance sheets and directors' reports, auditors, and election of directors and other officers in the place of those retiring by rotation,[84] and the fixing of the remuneration of auditors are matters that are usually taken up at the annual general meeting. That meeting may take up any other matter with prior notice that may be discussed at a general meeting.[85] No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds.

Notice of Meeting

An annual general meeting may be called by fourteen days' notice in writing and a meeting other than an annual general meeting or a meeting for the passing of a special resolution may be called by twenty one days' notice in writing. However, a meeting may be called by shorter notice if it is so agreed in writing in the case of an annual general meeting by all the members entitled to attend and vote and in the case of any other meeting, by the members of the company holding not less than 95 per cent of the paid up share capital and having a right to vote at the meeting. Notice of the meeting must be served on every member in the manner provided in Schedule I to the Act.

There are only two methods of sending notice provided in the Schedule I, either personally or by registered post to the registered address of the member. If any member has no registered address in Bangladesh, the notice shall be served to the address, if any, within Bangladesh supplied by the member to the company. The modern methods of communicating by email or fax etc. are totally forgotten. This is important as more and more foreign investors are coming into the country. Sending notice to them by registered post has been proved to be an inconvenient process.

Attending the Meeting

Proxies

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[83] Above n 79, 8.

[84] However, Muhammad Zahirul Islam found that '[A]lthough the Companies Act 1994 provides that at least two-third of directors shall retire by rotation in the annual general meeting the process of reelection continues for years.' Muhammad Zahirul Islam et al, 'Agency Problem and the Role of Audit Committee: Implications for Corporate Sector in Bangladesh' (2010) 2(3) *International Journal of Economics and Finance* 177, 180.

[85] *Companies Act 1994* Regulations 50 and 51 of Schedule I.

Section 85(2)(e) empowers the members to appoint a proxy who may or may not be a member of the company. The instrument appointing a proxy must be in writing under the hand of the appointing member or of his attorney duly authorised in writing or if the appointor is a corporation or a company, either under seal or under the hands of an officer, or an attorney duly authorised. The instrument appointing a proxy and the power of attorney or other authority shall be deposited at the registered office of the company at least forty-eight hours before the commencement of the meeting at which the person named in the instrument proposes to vote. A study conducted by Joseph A. McCahery, Zacharias Sautner and Laura T. Starks shows that 53% of institutional investors do not employ proxy voting.[86]

Corporation's Representative

A company which is a member of another company may, by resolution of the directors, authorise any of its official or any other person to act as its representative at any meeting of that other company, and the person so authorised shall be entitled to exercise the same powers on behalf of the company which he represents as if he were an individual shareholder of that other company.[87] A company shall not vote by proxy so long a resolution of its directors in accordance with the provisions of section 86 of the Companies Act is in force.[88]

Votes and Polls

On a show of hands every member present shall have one vote. On a poll, every member shall have one vote in respect of each share or each hundred taka of stock held by him.[89] In the case of joint-holders the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint-holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of members.

A member of unsound mind, or in respect of whom an order has been made by any court having jurisdiction in lunacy, may vote whether on a show of hands or on a poll, by his committee or other legal guardian, and any such committee or guardian may vote by proxy. No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the

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[86] Joseph A McCahery, Zacharias Sautner and Laura T Starks, *Behind the Scenes: The Corporate Governance Preferences of Institutional Investors* (2010) 12.

[87] *Companies Act 1994* Section 86.

[88] Ibid. Regulation 65 of Schedule I.

[89] Interestingly, many European countries made laws that allow unequal voting rights which is specially designed to protect family control. See, Toru Yoshikawa and Abdul A. Rasheed, 'Convergence of Corporate Governance: Critical Review and Future Directions' 2009 17(3) *Corporate Governance: An International Review* 388, 393.

company have been paid. There is no provision for vote by mail which requires the members to be present in the meeting either personally or by proxy. The absent of voting by mail "virtually guarantees nonvoting by small investors."[90]

5. Convergences and Divergences

Types of Resolution

In the UK there are only two types of resolution namely, ordinary resolution and special resolution. An ordinary resolution may be passed by a simple majority of members. A three-fourth majority is needed for a special resolution.

Bangladeshi law recognizes three types of resolution: ordinary resolution, special resolution and extraordinary resolution. A special resolution is the one that is usually passed in meetings with simple majority. An extraordinary resolution is passed with three-fourth majority of total votes. For a special resolution, a twenty one days' notice is required along with a three-fourth majority.

Convening a Meeting of the Members

Meetings Convened by the Court

The UK Companies Act provided in section 306(1) the court's power to convene a meeting when for any reason it seems to be impracticable to call a meeting in any manner in which meetings may be called or to conduct the meeting in manner prescribed by the articles or the Act. The court may exercise this power on its own motion or on the application (a) of any director of the company or (b) of any member who would be entitled to vote at the meeting. The meeting can be called, held and conducted in any manner the court thinks fit and the court may give such ancillary or consequential directions as it thinks expedient and these may include a direction that one member of the company present in person or by proxy be deemed to constitute a meeting

In Bangladesh, section 81 of the Companies Act provides that the Court may, on the application of any member of the company, call or direct the calling of a general meeting of the company and give such ancillary or consequential direction as the Court thinks expedient in relation to the calling, holding and conducting of the meeting. Section 82 provides for a fine not exceeding take ten thousand and a continuing fine which may extend up to two hundred fifty taka for every day that the default continues.

Getting Items onto the Agenda and Expressing Views on Agenda Items

Placing an Item on Agenda

In the UK under section 338 members representing not less than one-twentieth of the total voting rights of the members entitled to vote on the proposed resolution, or 100 members holding shares on which there has been paid up an average sum per shareholder of not less than £100, may require the company to give notice of their

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[90] Andrei Shleifer and Robert W Vishny, 'A Survey of Corporate Governance' (1997) 52(2) *Journal of Finance* 737, 751.

resolutions which can then be considered at the next AGM. In Bangladesh, no such opportunity for members is provided by the statute.

Notice of Meetings

Length of Notice

It is provided by s. 307 of the 2006 of the UK Companies Act that the company's articles must not contain any provision providing for the calling of a meeting by a shorter notice than 21 days' notice in the case of an annual general meeting or 14 days' notice in other cases. The company's articles may provide for longer notice but they cannot validly provide for shorter one.

However, an AGM can be called on shorter notice than the Act or the articles prescribe if it is agreed by all members entitled to attend and vote. In other cases a somewhat lower level of agreement will suffice. This is a majority in number of those having the right to attend and vote who must also hold the "requisite percentage" of the nominal value of the shares giving the right to attend and vote. That required percentage is 95 per cent in the case of a public company and 90 per cent in the case of a private company. The articles may increase the percentage to a level not beyond 95 per cent.

In Bangladesh, an annual general meeting may be called by fourteen days' notice in writing and a meeting other than an annual general meeting or a meeting for the passing of a special resolution may be called by twenty one days' notice in writing. However, a meeting may be called by shorter notice if it is so agreed in writing in the case of an annual general meeting by all the members entitled to attend and vote and in the case of any other meeting, by the members of the company holding not less than 95 per cent of the paid up share capital and having a right to vote at the meeting. Notice of the meeting must be served on every member in the manner provided in Schedule I to the Act.

Attending the Meeting

Proxies

In the UK, any member is entitled to appoint another person whether a member of the company or not as his proxy to attend, speak and vote instead of himself at a meeting of the company. In the case of a company having a share capital the member may appoint more than one proxy, provided each proxy is appointed to exercise rights attached to different shares. Previously, this facility was subject to the articles of the company permitting it. It is now mandatory and is useful in the case for fund managers or nominee custodians who may hold shares on behalf of a number of different beneficial owners who may hold different views on the matters at issue.

Bangladeshi company legislation also empowers the members to appoint a proxy who may or may not be a member of the company. The instrument appointing a proxy must be in writing under the hand of the appointing member or of his attorney duly authorised in writing or if the appointor is a corporation or a company, either

under seal or under the hands of an officer, or an attorney duly authorised. The instrument appointing a proxy and the power of attorney or other authority shall be deposited at the registered office of the company at least forty-eight hours before the commencement of the meeting at which the person named in the instrument proposes to vote.

Corporation's Representative

In the UK, section 323 of the Companies Act provides that a body corporate may, by a resolution of its directors or other governing body, authorise such person or persons as it thinks fit to act as its representative at meetings of companies of which it is a member (or creditor) and that the representative may exercise the same powers as could the body corporate if it were an individual.

On the other hand, in Bangladesh, a company may attend to the meeting of another company of which it is a member, by a proxy or corporate representatives. A company which is a member of another company may, by resolution of the directors, authorise any of its official or any other person to act as its representative at any meeting of that other company, and the person so authorised shall be entitled to exercise the same powers on behalf of the company which he represents as if he were an individual shareholder of that other company. A company cannot vote by proxy so long a resolution of its directors in accordance with the provisions of section 86 of the Companies Act is in force.

Voting and Verification of Votes

Votes and Polls

In the UK, companies' articles normally provide for voting to be on a show of hands, unless a poll is demanded. Proxies may vote on a show of hands, though previously this was a matter left to be regulated by the articles, though a proxy holding instructions both for and against a resolution may find it very difficult to know how to act. The result on a show of hands may give a very imperfect picture of where the majority of the voting rights lie. The alternative voting mechanism is that of the poll in which members and proxies vote the shares which they represent, though a person is not obliged to vote all the shares represented or to vote them all the same way.

Bangladeshi company law provided for a similar provision for vote by showing of hands. On a show of hands every member present shall have one vote. On a poll, every member shall have one vote in respect of each share or each hundred taka of stock held by him. In the case of joint-holders the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint-holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of members. A member of unsound mind, or in respect of whom an order has been made by any court having jurisdiction in lunacy, may vote whether on a show of hands or on a poll, by his committee or other legal guardian, and any such committee or guardian may vote by proxy. No member shall be entitled to vote at any general meeting unless all calls or

other sums presently payable by him in respect of shares in the company have been paid.

Miscellaneous

Chairman

The UK company statute lays down the default rule that a member may be elected at the meeting by resolution to be its chair. But it also states that this provision is subject to any provisions in the articles as to how that person is to be chosen. The articles invariably do deal with the matter. The draft model articles for public companies sensibly take the view that the chairman ought to be a member of the board and accordingly provide that the chairman of the board shall also be the chairman of the meeting, which is what normally happens.

The Bangladeshi statute provides similarly that any member elected by the members present may be the chairman of that meeting. However, Schedule I provides that the board shall select one of their members as its chairman who will preside at every general meeting of the company. The managing director cannot be the chairman of the board and meetings.

6. Recommendations

The company statutes of the UK and Bangladesh differ on some substantial and procedural issues regarding members' meeting, which reflects the capacity and competency of the two legal systems to prepare an effective set of rules in this matter. In the light of our forgoing comparative discussion of the two statutes, following points are recommended for the reform of Bangladeshi company law:

(i) Members of public companies should get the power to place any item on the agenda of the meeting. The agenda of the meeting prepared by the board may not always contain the preferences of members or a group of them. Members may want to include any particular item in the agenda which they want to be discussed in the general meeting.

(ii) Using electronic communications to circulate notices is the demand of the time. The Act does not recognize communication methods other than registered post and personal communication. But modern innovations in communication system have been proved to be more effective, cost-effective and environment-friendly. Electronic means of communication is also useful for foreign members and other members with high mobility.

(iii) The present Act does not contain anything about the businesses which are to be transacted in the AGM. It seems that the Act gives unlimited power to the board and the management to settle the issue. However, this might create negative outcome as the board might escape any particular point to be carried out in the AGM and deprive the members. To avoid such a situation, the Act should enumerate some fundamental items to be transacted in the AGM and leave the articles to provide for further.

(iv) The 1994 Act does not have any provision regarding the termination of proxy. Provisions in this regard should be included in the Act.

(v) There is no specific provision as to what a member or group of members can do when they have doubt in the result coming out of vote by show of hands. The Act must provide for a demand of poll in this situation.

(vi) Postal voting is considered by many as "instruments that ensure better representation of the shareholder interests in the boardroom."[91] Our Act does not provide any room for postal votes though it may be an efficient way to ensure shareholders' voting rights in this era of instant communication.

7. Concluding Remarks

Members' participation in corporate governance is ensured through company meetings. In fact, a company is compelled by law to hold certain general meetings of shareholders, i.e. annual general meetings, and in exceptional cases extraordinary general meetings. The general meeting is the primary decision-making body for shareholders. The form of the meeting allows a large number of people to share information and make comments on the statements of others. Electronic data transfer and proxy voting made it much easier for members to attend the debate of meetings. Thanks to technological advancement, members are not required to go to a convention hall to participate in the meeting, rather they can observe, in real time, the meeting from distance using audio-visual data transfer. By stipulating rules on meeting, modern company law tries to create a more democratic environment for members to exercise their limited rights against the management.

[91] Above n 82, 12.

Development Of Corporate Governance Regulations: Convergence And Diversity Between The United Kingdom And Bangladesh

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Dalia Pervin**

1. Introduction

Corporate governance is an expression used to describe the way companies are governed, i.e. directed and managed. The governance in companies encourages transparency and accountability in the management of companies, allows for the effective exercise of membership rights, and generally contributes to investor protection, in widely held companies. Such practices of governance in companies give rise to regulations in different jurisdictions.

The usual practice for managing the company's business lies in the hands of directors, acting collectively as a board. In larger companies, and particularly where the board of directors includes non-executive directors, the directors delegate their responsibility for managing the company's business to a managing director. Day-to-day decision-making is delegated further through the company's executive management. In addition, the particular management structure of an individual company depends on many factors and there remain at least slight differences in that structure of each individual company. However, the ultimate concern of the practices that govern companies is the alignment of information, incentives and capacity to act.[1] It involves the monitoring of the corporation's performance and the monitor's ability to observe and respond to that performance. Insufficient and / or unclear information may hamper the ability of the markets to function, increase volatility and the cost of capital, and result in poor allocation of resources.[2]

In recent years, the way in which managerial responsibility is allocated and exercised within companies has become a matter of considerable academic and practical concern. The concern is not only with the responsibility of company managers, but also is with the definition and subject-matter of governance itself.

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[1] Monks, R, and N Minow, *Corporate Governance* (Blackwell Publishers, 1995) 1.

[2] La Porta *et al.*, (2000) 58(1) *Journal of Financial Economics* 1-25

Such concern makes company lawyers and managerialist economists feel the necessity of framing balanced and workable corporate governance regulations.

This article makes a comparative study of development of corporate governance regulations in the United Kingdom and Bangladesh. While doing this, the article tends to show why corporate governance regulations are necessary to protect shareholders' interests vis-à-vis to improving relationship between the company and shareholders in Bangladesh.

2. Defining Corporate Governance

Corporate governance attracts a good deal of public interest because of its apparent importance for the economic health of corporations and the society in general. However, the literature of corporate governance perceives a dis-agreement about the boundaries of the subject of corporate governance. Depending on the perspective, corporate governance is defined in different ways.

In its narrowest sense, corporate governance can be viewed as a set of arrangements, internal to the corporation that define the relationship between the owners and managers of the corporation. Robert Monks and Nell Minow describe corporate governance as "… … the relationship among various participants in determining the direction and performance of corporations."[3] In their view, the primary participants are (1) the shareholders, (2) the management, and (3) the board of directors.

The World Bank defines corporate governance from two different perspectives. From the standpoint of a corporation, the definition puts the emphasis on the relations between the owners, management board and other stakeholders (the employees, customers, suppliers, investors and communities). This definition gives major significance, in corporate governance, to the board of directors and its ability to attain long-term sustained value by balancing these interests. From a public policy perspective, this definition refers corporate governance to providing for the survival, growth and development of the company and at the same time its accountability, in the exercise of power and control over companies. This means that the corporate governance regulation role-plays as a public policy and disciplines companies and, at the same time, stimulates them to minimize differences between private and social interests.[4]

International organizations also attempt to define corporate governance. The Organization for Economic Cooperation and Development (OECD) is one of them.

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[3] R Monks, and N Minow, *Corporate Governance* (Blackwell Publishers, 2nd edition 2001) 37.

[4] (World Bank, 19 January 1999) <http://www.worldbank.org/ifa/rosc_cgoverview.html> 8 January 2014.

It says: "Corporate governance is the system by which business corporations are directed and controlled."[5] It finds the corporate governance structure responsible for specifying the distribution of rights and responsibilities among different participants in the corporation. It includes participants such as the board, managers, shareholders and other stakeholders, and spells out the rules and procedures contained in the corporate governance for making decisions on corporate affairs. By doing this, it also finds the structure provided therein through which the company objectives are set, and the means of attaining those objectives and monitoring performance. The OECD also offers a broader definition: "...corporate governance refers to the private and public institutions, including laws, regulations and accepted business practices, which together govern the relationship, in a market economy, between corporate managers and entrepreneurs ('corporate insiders') on one hand, and those who invest resources in corporations, on the other." [6]

This OECD definition tends to ensure that the board of directors is accountable for the pursuit of corporate objectives and that the corporation itself conforms to the law and regulations. This means, corporate governance maintains the relationship between corporate managers, directors and the providers of equity, people and institutions who save and invest their capital to earn a return.[7] This definition has a similarity with the definition of Monks and Minow, since both the definitions show corporate governance to set the relationship among various participants [chief executive officer, management, shareholders, and employees] in determining the direction and performance of corporations.[8]

Sir Adrian Cadbury defines corporate governance as holding the balance between economic and social goals and between individual and communal goals.[9] The aim is to align as nearly as possible the interests of individuals, corporations and society. The incentive to corporations is to achieve their corporate aims and to attract investment. The incentive for states is to strengthen their economics and discourage fraud and mismanagement. Margaret Blair states that Corporate governance is about "...the whole set of legal, cultural, and institutional arrangements that determine what public corporations can do, who controls them, how that control is exercised, and how the risks and return from the activities they undertake are allocated."[10] To summarize, it can be said that a precise definition of corporate governance

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[5] Organisation for Economic Co-operation and Development (OECD), *OECD Principles of Corporate Governance* (1999) <http://www.oecd.org>.
[6] OECD (2001).
[7] OECD (2004).
[8] Monks and Minow, above n 1.
[9] Sir Adrian Cadbury, 'Global *Corporate Governance* Forum' (World Bank, 2000).
[10] Monks and Minow, above n 1, 19.

does not exist, even in developed market economies. Moreover, scholars have not, to date, given sufficient attention to providing a policy-oriented definition suitable for transition countries like Bangladesh and responding to the on-going fundamental structural reform prevailing therein.

3. Corporate Governance Concerned with

The corporate governance is concerned with internal and external forces facing one another and affecting the behaviour and activities of existing corporations. The internal forces including the constituting agreements and registering authorities define the relationship among the key players in the corporation. The external forces are used as amplification for disciplining the behaviour of insiders. In developed market economies like the United Kingdom, these forces are institutions and policies that ensure greater transparency, monitoring and discipline for corporations. Specific examples of external forces include the legal framework for competition policy, the legal machinery for enforcing shareholders' rights, the system of accounting and auditing, a well regulated financial system, the bankruptcy system and the market for corporate control. These internal and external features have come together in different ways to create a range of corporate governance standards that reflect market structures, legal systems, traditions, regulations and cultural and social values.

Thus it appears that corporate governance is concerned with the way in which companies are directed and controlled. Among other things, the term is used to describe the way in which a company's internal arrangements, combined with external factors such as legal requirements or commercial or market pressures, provide:

- For responsibility for decision-making to be divided between the company's members, its board and its executive management;
- For decisions to be taken and implemented;
- For the exercise by decision-makers of their powers to be monitored and reviewed; and
- Incentives for decision-makers to act in the interests of the company and dis-incentives to act in a manner that harms the company.

4. Necessity to Have Corporate Governance Regulations

Effective governance needs stem from the structure of huge corporations, the fundamental conflict arising from the separation of ownership and control.[11] Clearly, good corporate governance practices will emerge from effective application of full transparency, sound auditing and compliance mechanisms.[12]

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[11] A Berle, 'Control in Corporate Law' (1958) 58 *Columbia Law Review* 1212.

[12] J Pound, 'The Rise of the Political Model of Corporate Governance and Corporate Control' (1993) 68 *New York University Law Review* 1003.

Weaknesses in standards of transparency and accountability allow corporate management (therefore major shareholders) to avoid disclosure and manipulate markets by mis-information. These weaknesses act as channels to asset transfers and asset stripping. To get rid of these practices, effective disclosure can role-play. However, effective disclosure requires legally mandated disclosure requirements, good accounting standards, independent auditors, and enforcement. These standards are highly significant in ensuring that stakeholders have sufficient, timely, credible, comprehensible and cost-effective information to monitor the company's performance.[13]

Several studies, including empirical and theoretical researches, have been and are still being undertaken in the area of corporate governance. These studies emphasize on the fact that no single corporate governance regulation model is valid for every country.[14] Accordingly, the model to be established should be compatible with the conditions peculiar to each country.[15] However, the concepts of equality, transparency, accountability and responsibility appear to construct the main models in all international corporate governance regulations that are widely accepted.[16]

The concept of equality acts as a major component of corporate governance regulations. It bears the meaning of equal treatment of share and stakeholders by the management in all activities of the company. This aims to prevent all possible conflicts of interest. Transparency, on the other hand, aims to disclose company related financial and non-financial information to the public in a timely, accurate, complete, clear, construable manner and easy to reach at low cost, excluding the trade secrets and undisclosed information.

Further, the concept of accountability also forms the very basis of corporate governance regulations. It ensures the obligation of the board to account to the company as a corporate body and to the shareholders. Finally, the concept 'responsibility' defines the conformity of all operations carried out on behalf of the company with the legislation, articles of association and in-house regulations together with the audit thereof.

Several empirical studies also show the importance of the sound corporate governance regulations. Such studies indicate that international investors now

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[13] R J Gilson, 'Corporate Governance and Economic Efficiency: When Do Institutions Matter?' (2006) 74 *Washington University Law Quarterly* 327.

[14] M J Roe, 'Some Differences in Corporate Structure in Germany, Japan, and the United States' (1993) 102 *Yale Law Journal* 1927.

[15] S Bernard, B S Black, and Reinier Kraakman, 'A Self-Enforcing Model of Corporate Law' (1996) 109
Harvard Law Review 1911.

[16] A Shleifer, and Robert W Vishny, 'A Survey of Corporate Governance' (1997) 52(2) *Journal of Finance*737.

realize the significance of corporate governance practices on the financial performance of companies and while adopting investment decisions, international investors believe that this issue bears more importance for countries that are in need of reforms, and that they are more ready to pay higher premiums for companies having sound corporate governance.[17]

So, it appears that the purpose of implementing and devising good corporate governance regulations is to ensure that companies are directed and controlled in a manner that most efficiently protects and promotes the interests of its participants. It can also be said that corporate governance is the divergence of interests of the various stakeholders in companies which makes the corporate governance debate crucial. A good corporate governance practice is also something that protects and balances the interests of stakeholders by setting up the appropriate mechanisms to align these divergent interests where possible and to ensure adequate monitoring of management.

5. Development of Corporate Governance Regulations in the United Kingdom

The development of corporate governance in the United Kingdom has its roots in a series of corporate collapses and scandals in the late 1980s and early 1990s. The business community of the United Kingdom recognised the need to put its house in order. This led to the setting up in 1991 of a committee chaired by Sir Adrian Cadbury, which issued a series of recommendations, known as the Cadbury Report – in 1992. The Cadbury Report addressed issues such as the relationship between the chairman and chief executive, the role of non-executive directors and the reporting on internal control and on the company's position.

A requirement was added to the Listing Rules of the London Stock Exchange, that companies should report whether they had followed the recommendations or, if not, explain why they had not done so (this is known as 'comply or explain').

The recommendations in the Cadbury Report have been added to at regular intervals since 1992. In 1995 a separate report set out recommendations on the remuneration of directors, and in 1998 the two reports were brought together in a single code (initially known as the Combined Code and now as the United Kingdom Corporate Governance Code). In 1999 separate guidance was issued to directors on how to develop risk management and internal control systems, which has subsequently been updated. In 2003 the Code was updated to incorporate recommendations from reports on the role of non-executive directors and the role of the audit committee. At this time, the United Kingdom Government decided that the Financial Reporting

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[17] M Lipton, 'Corporate Governance in the Age of Finance Corporatism (1987) 136 University *of* Pennsylvania Law Review 1; Cuneyt Yuksel, 'Recent Developments of Corporate Governance in the Global Economy and the New Turkish Commercial Draft Law Reforms' (2008) 3(2) *Journal of International Commercial Law and Technology* 38.

Council (FRC), the independent regulator responsible for corporate governance and reporting, was to take responsibility for publishing and maintaining the United Kingdom Approach to Corporate Governance (October 2010) Code. The FRC has updated the Code at regular intervals, most recently and most substantially in 2010 to reflect lessons learnt from the problems in the United Kingdom's financial services sector.

Throughout all of these changes, the 'comply or explain' approach first set out in the Cadbury Report has been retained. In 2010, it was reinforced by the United Kingdom Stewardship Code, under which institutional investors report on their policies for monitoring and engaging with the companies in which they invest.

In addition, In the United Kingdom, the Companies Act 2006 requires directors to focus on enlightened shareholder value. This means that boards must ensure that the business is sustainable and take account of long-term consequences in setting its business model and strategies.

5. 1. The Rationale behind the United Kingdom Approach

The corporate governance regulation plays a central role in the development of equity markets. In short, the regulation is essential in securing the property rights of shareholders. Strong legal protections shield shareholders, especially minority shareholders, from having their investments expropriated by insiders, including directors, officers, entrepreneurs, and controlling shareholders.

Various researches including the "law matters" thesis raises the necessity to protect the shareholders from agency problems, such as excessive executive compensation, insider trading, self-dealing transactions, and shirking, they will be discouraged from investing. The thesis holds that those who do invest will pay a discount for shares in order to compensate them, for the risk of opportunism, they are otherwise forced to shoulder.[18] The thesis maintains that by protecting shareholders from insider abuses, the law can build in shareholders the confidence needed to invest. This confidence-building, as the thesis holds, leads to thicker and more highly valued equity markets. The "law matters" thesis is supported by an extensive body of empirical studies, led by the work of La Porta, Lopez-de-Silanes, Shleifer, and Vishny.[19] In other

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[18] Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, Robert W. Vishny, 'Legal determinants of external finance' (1997) 52 *Journal of Finance* 1131.

[19] La Porta. Lopez-de-Silanes. Shleifer. and Vishny, 'Legal determinants of external finance' (1997) 52 *Journal of Finance* 1131; La Porta, Lopez-de-Silanes, Shleifer, and Vishny, 'Law and Finance' (1998) 106(6) Journal of Political Economy 1113; La Porta. Lopez. Shleifer and Vishny 'Corporate ownership around the world (1999) 54*Journal of Finance* 471; La Porta. Lopez. La Porta. Lopez. Shleifer and Vishny, 'Investor protection and corporate governance' (2000) 58 *Journal of Financial Economics* 3; La Porta. Lopez.

jurisdictions, for example, the United States (US) corporate law and Delaware corporate law in particular, reflect an enabling approach to corporate law made up largely of default rules that parties can opt out of to privately order their governance affairs. The law on the books is supplemented by the judge-made law of fiduciary duties. This is designed to ensure that directors and officers, who are in charge of managing the corporation's business and affairs, exercise their authority over the business with due care, in good faith, and in the best interests of the corporation and its shareholders. While far from trivial, Delaware corporate law provides shareholders relatively few protections from insider abuses. Indeed, Delaware corporate law affords directors and officers, a great deal of discretion in managing the business free from the interference of shareholders and judges. The gaps in the law are filled by a host of other formal and informal mechanisms that hold management accountable. The market for corporate control and incentive-based compensation, such as stock options, are frequently cited as examples of non-law components that contribute to the United States' corporate governance system. At bottom, instead of depending primarily on substantive corporate law to protect shareholders, the market-based approach of the United States corporate governance, relies on markets, contracts, and norms, supported by a host of other institutions, to discipline directors and officers.

In the United Kingdom, the Companies Act 2006 read with the Corporate Governance Code 2010 gives the impression that good corporate governance is the vital factor to prevent collapses, flourish business, and to make economic development. In fact, good governance can improve the board's ability to manage the company effectively, to deliver long-term success, as well as, provide accountability to shareholders. To quote from the Cadbury Report:

> The effectiveness with which boards discharge their responsibilities determines Britain's competitive position. They must be free to drive their companies forward, but exercise that freedom within a framework of effective accountability. This is the essence of any system of good corporate governance.[20]

Studies find that a regulatory framework, that aims to improve standards of corporate governance, is more likely to succeed, if it recognises that governanceshould support, not constrain, the entrepreneurial leadership of the company, while ensuring that risk is properly managed.

Shleifer and Vishny, 'Investor protection and corporate valuation (2002) 3 *Journal of Finance* 1147.

[20] Sir Adrian Cadbury, 'The UK Approach to Corporate Governance' <https://frc.org.uk/Our-Work/Publications/Corporate-Governance/The-UK-Approach-to-Corporate-Governance-(1).pdf> 8 January 2014.

However, this requires a degree of flexibility in the way companies adopt and adapt governance practices. Boards must see good governance as a means to improve their performance, not just a compliance exercise. To be effective, it needs to be implemented in a way that fits the culture and organisation of the individual company. This can vary enormously from company to company, depending on factors, such as size, ownership structure and the complexity of its activities.

The assessment of whether the company's governance practices are effective in underpinning the sustainable success of the company should be made by the intended beneficiaries, i.e. the shareholders. Well-informed and engaged investors are able to take a pragmatic approach about how to apply best practices in a way that is in the best long-term interests of the company. The FRC's role as a regulator is to ensure that the investors have the information they need to make that assessment.

5. 2. The United Kingdom Regulatory Framework for Corporate Governance

The United Kingdom has developed a market-based approach that enables the board to retain flexibility in the way in which it organises itself and exercises its responsibilities, while ensuring that it is properly accountable to its shareholders.

This is done primarily through the United Kingdom Corporate Governance Code which is maintained by the FRC. The Code operates on the basis of 'comply or explain'. It identifies good governance practices relating to, for example, the board and its committees and risk management and internal control. The companies can choose to adopt a different approach, if that is more appropriate to their circumstances. In that case, they are required to explain the reason for doing so, to their shareholders, who must decide whether they are content with the approach that has been taken.

This 'comply or explain' approach enables judgements about, for example, the composition and performance of the board to be made on a case by case basis. It is supported by companies, investors and regulators in the United Kingdom, and has increasingly been adopted as a model in other markets.

For the system to work effectively, the shareholders need to have appropriate and relevant information to enable them to make a judgement on the governance practices of the companies in which they invest. They also need the rights to enable them to influence the behaviour of the board when they are not content, and the willingness to use them. 'Comply or explain' therefore needs to be underpinned by an appropriate regulatory framework. Under the United Kingdom law, shareholders have comparatively extensive voting rights, including the rights to appoint and dismiss individual directors and, in certain circumstances, to call a general meeting of the company. Certain requirements relating to general meetings, including the provision of information to shareholders and arrangements for voting on resolutions,

are also set out in law, as are some requirements for information to be disclosed in the annual report and accounts. These include requirements for a Business Review (in which the board sets out its assessment of the company's future prospects) and a report on directors' remuneration, on which shareholders have an advisory vote.

There are also additional regulatory requirements for some specific sectors, such as financial services.

This framework is reinforced by the rules that must be followed by companies listed on the London Stock Exchange. The rules provide further rights to shareholders (for example, by requiring that major transactions are put to a vote), and require certain information to be disclosed to the market.

For companies with a Premium Listing, this includes the requirement to provide a 'comply or explain' statement in the annual report explaining how the company has applied the United Kingdom Corporate Governance Code.[21]

For their part, institutional investors are encouraged to report on the extent to which they have applied the United Kingdom Stewardship Code 2010. The Code sets out good practice principles for monitoring and engagement with the companies in which they invest including, for example, disclosure of their voting policy and how any potential conflicts of interest are managed.[22]

5. 3. The Essential Features of the United Kingdom Corporate Governance Regulations

An Effective Board to Provide Leadership

A single board with members is made collectively responsible for the long term success of the company. The regulations contain a clear division of responsibilities for running the board and running the company with a separate chairman and chief executive. The regulations also contain appropriate balance of skills, experience and independence on the board and its committees. The regulations provide for formal and transparent procedures for appointing directors, with all appointments and re-appointments to be ratified by shareholders. Regular evaluation of the effectiveness of the board, its committees and individual directors is also required.

Accountability

The board must present a balanced assessment of the company's position. It also determines the nature and extent of the significant risks it is willing to take, and oversee sound risk management and internal control systems. The regulations provide formal and transparent procedures for carrying out these responsibilities,

[21]Financial Reporting Council, 'UK Corporate Governance Code' (2012)< http://www.frc.org.uk/corporate/ukcgcode.cfm> 8 January 2014.

[22]Financial Reporting Council, 'UK Stewardship Code' <https://www.frc.org.uk/Our-Work/Codes-Standards/Corporate-governance/UK-Stewardship-Code.aspx> 8 January 2014.

including an audit committee made up of independent directors and with the necessary experience.

Remuneration

Formal and transparent procedures for setting executive remuneration, including a remuneration committee made up of independent directors and an advisory vote for shareholders are contained in the regulations. The regulations also provide for a significant proportion of remuneration to be linked to performance conditions designed to promote the long-term success of the company.

Relations with Shareholders

The regulations mandate for regular contact with shareholders to understand their opinions and concerns. The regulations also provide for separate resolutions on all substantial issues at general meetings. Shareholders are also put under obligation to monitor and engage with the companies in which they invest.

6. Development of Corporate Governance Regulations in Bangladesh

Corporate governance in Bangladesh receives increasing attention from trade regulatory bodies and corporate practitioners. The attention draws up with the creation of the World Trade Organization in 1990 and relies on free trade policy, meaning setting up of corporations by either local investment or foreign direct investment (FDI). However, the country's corporate sector stands still in its initial stage and errant company managers dominate, due to lack of effective corporate governance mechanisms.

To mention, Bangladesh does have some legal measures in practice.[23] They are as follows, in order of chronology:

(a) Securities and Exchange Ordinance 1969
(b) Bangladesh Bank Order 1972
(c) Bank Companies Act 1991
(d) Financial Institutions Act 1993
(e) Bangladesh Securities and Exchange Commission Act 1993
(f) Companies Act 1994
(g) Bankruptcy Act 1997

However, to institutionalize the practice of corporate governance in Bangladesh, first initiative was undertaken by the Bangladesh Securities and Exchange Commission (BSEC). The BSEC issued a notification on Corporate Governance Guidelines (corporate governance Guidelines) for the publicly listed companies of Bangladesh, under the power vested on the Commission by Section 2CC of the

[23] 'Corporate Governance Practices in Bangladesh' <http://www.docstoc.com/docs/11893954/Corporate-Governance-Practices-In-Bangladesh> 10 February 2012.

Securities and Exchange Ordinance, 1969. The corporate governance Guidelines were issued on a 'comply or explain' basis, providing some 'breathing space' for the companies to implement on the basis of their capabilities.

Nevertheless, the overall framework for corporate governance has a number of important weaknesses that neither offers investor protection, nor ensures proper capital market development. As a result, most of the companies depend on the banks, as their major source of financing. The capital market remains still at an emerging stage, with market capitalization amounting to only 6.5 per cent of GDP. Studies find the linkage with low investor confidence on corporate governance and financial disclosure practices in many companies listed in the stock exchanges. Studies also show that the neighbouring countries are a bit forward compared to Bangladesh, in terms of depth of capital market. For example, in India, Pakistan and Sri Lanka, the market capitalization is 56%, 30% and 18% of their GDP respectively.[24]

In order to strengthen the capital market as well as to discipline the corporate sector, corporate governance practices in Bangladesh are gradually being introduced in companies and organizations. 66.7% of the companies have so far adopted corporate governance and 43.3% compliance policy with national or international benchmarks.[25] However, a considerable percentage of the top management does not fully understand the concept of corporate governance. Given this, Bangladesh is lagging behind its neighbours and the global economy in corporate governance. One reason for the slow progress in adopting corporate governance is that most companies are family oriented. Such concentrated ownership structures, affects the effectiveness of corporate governance mechanisms. This weakness cannot be rectified by laws and regulations only. Motivation to disclose information and improve governance practices by companies is also felt negatively. There is neither any value judgment, nor any consequences for corporate governance practices are properly identified. Further, the current system does not provide sufficient legal, institutional and economic motivation for stakeholders to encourage and enforce corporate governance practices.

6. 1. Rationale for Having Corporate Governance Regulations in Bangladesh

The main objective of having corporate governance regulations in Bangladesh is establishing transparency and accountability in corporations. The practice of effective corporate governance, therefore, benefits everyone – entrepreneurs, investors, suppliers, lenders, managers, auditors, and regulators. It plays an important role in attracting and holding the foreign investment, for building a transparent capital market and for maintaining or restoring confidence among both

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[24] <http://www.academia.edu/2137428/Comparative_study_between_Bangladesh_and_UK_corporate_governance> 10 February 2012.

[25] Ibid.

to domestic and foreign investors. For framing regulations, Bangladesh has brought a number of changes in its laws over the decades. However, these reforms are not enough compared to the reforms of neighbouring countries.

Table – 2.1

FDI follows to regional countries:

	1985- 95	2001	2002	2003	2004
Bangladesh	5 -	79 0.7%	52 -	268 2.2%	460 3.5%
SirLanka	77 3.o%	172 5.0%	197 5.6%	229 5.6%	233 5.1%
Pakistan	265 3.2%	383 3.6%	423 7.2%	534 4.3%	952 6.2%
India	452 1.90%	3,403 3.2%	3.449 3.0%	4,264 3.2%	5,335 3.4%

Percentage figures are proportion of gross fixed capital formation.[26]

It may be evident from table 2.1 that the FDI flow to Bangladesh had been one of the lowest in the region, both in absolute dollar value and gross capital formation. Without going into the details, one can easily predict that it is the competitiveness of corporate governance that is responsible for low FDI in Bangladesh.

Further, the global competitiveness report prepared in 2005 by the World Economic Forum finds Bangladesh's growth ranked 110th in business competitiveness ranking among 117 countries of the world. It indicates that Bangladesh is not only at the bottom of the list, but its ranking is also deteriorating, while India and Pakistan are improving. Among the elements, corruption and governance are the major reasons for this decline.

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[26] UNCTAD, 'World Investment Report 2005' <unctad.org/en/docs/wir2005_en.pdf> 8 January 2012.

Table -2.2

	Bangladesh	Pakistan	Siri Lanka	India
A. Growth competitive ness index				
Overall ranking 2005	110	83	98	50
Overall ranking 2004	102	41	73	55
Elements :				
1.Technology index	101	88	80	55
2. Public institution	117	100	103	52
3. Macro environment.	83	94	64	50
Business competitive ness index				
Overall ranking 2005	100	66	72	31
Elements:				
1. Company operation of strategy ranking	99	68	73	30
2. Business environment ranking	101	68	73	31

Global competitiveness ranking of regional countries.[27]

[27] World Economic Forum, *The Global Competitiveness Report 2005-2006* <http://www3.weforum.org/docs/WEF_GCR_CountryProfilHighlights_2011-12.pdf> 8 February 2014.

Further, the rapid growth of private sector and the shift of dominance from public to private sector over the years, also highlight the cause for establishment of good governance structure in the corporation. This is intended for the sake of attaining higher economic growth in Bangladesh. The comparative status of public and private sector in terms of employment, investment, fixed assist, value addition and exports over the two decades of 20th century are presented in the following table.

Table -2.3

Areas	1980-81 public	1980-81 Private	1998-99 public	1998-99 Private
Employment Total: Percentage:	325,549 74.3%	112495 25.7%	192,664 7.4%	2,398,091 92.6%
Investment (in million TK) Total: Percentage:	16,711 29.4%	4,517 39.2%	88,213 41.1%	126,491 58.9%
Fixed assets (in million TK) Total: Percentage:	6,992 60.8%	4,517 39.2%	88,213 41.1%	126,491 58.9%
Value addition (in million TK) Present age	8,584 60.8%	5,546 39.2%	32,769 16.1%	171,190 83.9%
Exports (in million TK) Total: Percentage:	6,426 56.0%	5,058 44.0%	725 0.3%	2.44,895 99.7%

Relation contribution of public and private sector in Bangladesh.[28]

[28] 1. Foreign Table statisics of Bangladesh 1980-81 and 1998-99,
2. National accounts statistics of Bangladesh 1980-81 and 1998-99,
3. Report on Census of Manufacturing Industries (CMI) 1980-81 and 1998-99.

The above table clearly reveals that private sector has become very dominate in all the five areas and the issue of good corporate governance practices is also taking the lead subject of debate among the policy market, financial institutions, business leaders, employees, customers and general public. For example, the poor corporate structure is taken to be the major factor for the Asian economic crisis in the late nineties. So, installing proper corporate governance system in Bangladesh aiming at fostering culture and ensuring socially and environmentally friendly operations has become an agenda recently.

6. 2. Regulatory Framework for Corporate Governance in Bangladesh

6. 2. 1. Legal framework in Bangladesh

In Bangladesh, companies are registered, and their affairs are governed, under the Companies Act, 1994. In addition to this major legislation, the Banking Companies Act 1991 governs the banking companies. Besides, a number of corporate and securities laws, along with delegated legislation made by the Bangladesh Securities and Exchange Commission (SEC) and the Stock Exchanges constitutes the whole rubric of corporate governance laws of Bangladesh and provides the legal framework for the country's capital market.

In addition, companies owe their origin to the constituent charter 'Memorandum of Association' and are run in accordance with the terms and condition described in the other corporate charter, that is, Article of Association. The Article of Association entrusts the duty of managing the company upon the board of directors and gives the member of shareholders of the company power to describe who sit on the board.[29] However, in practice, the board of directors of the company does not engage in day-to-day corporate decision making activities, which are, pursuant to a usual clause in the Articles of Association. Rather, these are delegated to a handful of skilled chief executive offers (CEO) or the managing directors (MD).

Further, the Companies Act 1994 sets out a thick bundle of rules touching upon every aspect of a corporation, covering management and administration, composition and power of board of directors, financials aspects, disclosure by companies of necessary information etc. In addition, the Supreme Court sets guidelines as to how companies should operate, live and die, through precedents made time to time.

6. 2. 2. Regulatory Bodies Responsible for Corporate Governance

Regulatory bodies responsible for enforcing corporate governance standard include the Bangladesh Securities and Exchange Commission (BSEC), Stock Exchanges, Bangladesh Bank, Registrar of the Joint Stock Companies, and National Board of Revenue (NBR). In addition, the Ministry of Finance, with the parliament, sit occasionally at the top of the regulatory pyramid.

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[29] Companies Act, 1994 Sections 91.1 and 91.1b.

However, the BSEC, established in 1993, by replacing its predecessor 'Controller of Capital Issue,' to extend statutory protection to investors in securities market, remains to be the premier regulatory body and is responsible for overall oversight of companies and development of securities market. More categorically, the basic responsibilities assigned to the BSEC are:

(i) Protect the interest of the investors through regulating the capital market;
(ii) To develop and maintain far, transparent and efficient securities market;
(iii) Ensure proper issuance of securities;
(iv) Monitor and control companies; and
(v) Prohibit insider trading, fraudulent and unfair business practices and promote investors education and trading etc.

Over the years, the BSEC has formulated a range of rules and regulations as a central regulatory body of the capital market, for example, the Securities and Exchange Rule 1987 and the Securities and Exchange Commission Public Issue Rules 1998. These have defined respectively the periodic reporting disclosure requirement for public trade companies.

6. 2. 3. Listing of Companies with the Stock Exchange

The history of corporate sector in Bangladesh dates back to 1950s, when the country's first jute mill the Adamjee Jute Mills Ltd. was jointly established by the then Pakistan Industrial Development Corporation (PIDC) and the Adamjee family. At that point of time, East Pakistan did not have Stock Exchange. As a result, the share of the listed companies domiciled in the East Pakistan was traded in Calcutta stock Exchange.[30]

In 1954, the first stock exchange of East Pakistan was created as East Pakistan Stock Exchange Association Ltd., which commenced formal trading in early 1956. Since then East Pakistan Industrial Development Corporation (EPIDC) took initiative to promote a number of jute, textile, sugar and chemical plants through the stock exchange. After the liberation of Bangladesh, the industrial unit left and abandoned by the West Pakistan owners where taken over by the Bangladesh Government. Later, as part of the nationalization policy of the government, to save the undertakings and prevent economic hardships, those were placed under public sector corporations. In 1976, the government chose the private sector, as an alternative engine of growth and thus took a number of steps to receive the stock exchange and it was activated in 1976 with nine issues. However, the government maintained the public sector enterprises in parallel to the private sector. This did not bring in

[30] <www.slideshare.net/imashraf/dhaka-stock-exchange> 8 February 2014.

expected growth in the market, but kept the stock market in active existence through the 1980. In the early of 1990s, government took a dis-investment policy with a view to handing over public sector undertakings to private sector entrepreneurs and at the same time, it also drew attention of the foreign investors through direct and portfolio investment. This resulted in the arrival of the first international portfolio investment in Bangladesh in 1992.

Table – 2.4

	1986	1994	1996	2001	2002	2003	2004	2005
No. of listed securities	82	170	250	249	257	267	256	286
No of listed companies	72	157	187	230	241	249	237	147
Issued capital (Mil. TK.)	2.653	11,674	23,052	33,254	35,203	46,055	49.533	70,313
Capital Raised through IPO (mil.TK)	81.15	1,093	11,269	572	450	1,376	568	1,412
Market capitalization	5,731	44,771	168,106	63,769	71.262	897,587	224,923	233,075
Annual Turnover	47.85	4,288	6,381	39,869	34,987	19,154	53,181	64.835
DSE GENERAL INDEX	512.28	845.65	2300.15	716.00	814.70	967.88	1,971.31	1677.35
PE Ratio	NA	NA	NA	7,75	7.15	8.57	18.40	13.835
GDP	442	1,354	1,663	2,536	2,732	3,006	3,330	3685

Dhaka stock exchange (DSE) from 1986 to 2005. [31]

[31] <abrjournal.weebly.com/uploads/1/1/3/2/.../3.17_abr_template.pdf> 8 February 2014; <mof.gov.bd/en/budget/13.../Key%20Socio-economic%20Indicators.pdf> 8 February 2014; <*www.dcci.org.bd/economic_policy/Access_to_finance.pdf*> 8 February 2014.

6. 2. 3. Essential Features of the Corporate Governance Regulations in Bangladesh

Constitution of Companies

The Companies Act 1994 enlists the requirements that articles of association must contain pertaining to establishment of a limited liability company. Thus, founders may include any provision in the company's articles of association, provided that it does not violate mandatory provisions.

Members shall be responsible for protecting confidential information of the company, and this responsibility cannot be eliminated through provisions of the articles of association or general assembly decisions. Members will not act in a manner detrimental to company interests. They will not be allowed to conduct transactions that bring private gains or be harmful to the goals of the company.

Shareholders

The scope of the shareholders' right to obtain accurate information is mandated in the BSEC guidelines. Companies also have in-house regulations consisting of provisions that would enable important decisions to be adopted at the general shareholders' meeting only. The effectiveness of voting rights and voting privileges of shares are also included. In addition, sound record keeping practices and the update of these records lies in several provisions.

In accordance with the Companies Act 1994 and other ancillary provisions shareholders are not allowed to become indebted to their own companies, except for debt arising from capital subscriptions. It reads these provisions intend to prevent the bad and faulty practice, which is widespread in the business world. The object is to prevent shareholders from using the company's money in various transactions, from making their personal expenditures using this channel and from drawing money from the company. The Companies Act 1994 also maintains that shareholders cannot be denied their rights related to their shares through general meeting decisions, or through other arrangements or administrative acts.

Single-Member Limited Liability Companies

The number of Members in a limited liability company will not exceed 50. Establishment and operation of single-member limited liability companies are allowed. In case, the number of Members decreases to one, this will be registered and published in seven days. Otherwise, managers will be held responsible for resultant damages. A single-member limited liability company will be a sub-category of limited liability companies, not a new category of companies.

Members will not be responsible for company debts, but only for their capital subscriptions, additional payment and secondary performance liabilities. A limited

liability company may be established for all economic areas of activity if these are not specifically prohibited under any law(s).

Board of Directors

The board of directors represents the company within the framework of the Companies Act, the articles of association and the in-house regulations and policies. In conducting its business, the board requires to pay special attention to maintaining the balance between the interests of the shareholders and the company's growth prospects. It is also under an obligation to perform its functions in a rational manner and act in accordance with the rules of good faith through maintaining the balance between interests of the company and the shareholders and stakeholders. It is also required to perform its decision-making, management and representation duties independently, free of any conflicts of interest and influence

Company Managers

Company managers will be held liable for damages and losses arising from unlawful, incorrect, misleading or obscured statements in the documents or deeds concerning the establishment of a company, capital increase or decrease and issuing securities.

Public Disclosure and Transparency

Shareholders and investors of a company are given regular access to reliable and accurate information about the management and legal and financial status of the company. The aim of the principle on public disclosure and transparency is to provide shareholders and investors accurate, complete, and comprehensible and easy-to-analyse information, which is also accessible at a low cost and in a timely manner. While disclosing information, the company is asked to use most basic concepts and terminology and avoid using vague or indefinite expressions that would result in confusion. These information shall be un-biased and shall not give any undue benefit to a particular group of shareholders as opposed to others. In addition, under no circumstances can a company refuse to disclose information, which is required to be publicly disclosed, even if such information may be detrimental to the company. However this information shall not contain trade secrets.

Audits

In Bangladesh, compliance with requirements is assured by internal audits, external audits and regulatory audits. The internal audit framework is contained in different provisions, but the provisions are vague. External audits are required only for listed companies. External auditors have to be certified by the Registrar of Joint Stock Companies and Firms (RJSCF). It is arguable that the audits are credible and objective. In case of failures, the stock exchange and the RJSCF can issue private

and public warnings, impose penalties, suspend trading or may put the companies on a ''watch list''. Regulatory audits are conducted by the RJSCF or by external auditors appointed by the RJSCF in case of complaints, suspects or when there is a need, such as in the case of mergers and acquisitions.

7. Convergence and Diversity between the United Kingdom and Bangladesh in relation to the Evolution of Corporate Governance Regulations

Long corporate governance practices give rise to a set of regulations and it improves over the years with experiences. This also happens in the cases of the United Kingdom and Bangladesh for their respective corporate governance with an exception of scandals taken place in United Kingdom that accelerated the development.

The development of the United Kingdom corporate governance regulations did not take place over night. It developed step by step and took a lot of experiences as the foundation stone. Currently the United Kingdom corporate governance regulations are well established and also working as a model for effective governance regulations. However, the development started in late 1980s and early on 1990s and matured with a code. To be noted that several corporate scandals including big corporate governance scandals of the Polly Peck and Maxwell paved the gradual development of corporate governance.

The development of corporate governance regulations in Bangladesh cannot be tagged with any big corporate scandal. However, some cases of fraudulent activities are reported and this may have some linkages with the development of corporate governance regulations in Bangladesh. Further, Bangladesh does not have a compact code yet but only have some scattered laws and executive circulars.

To be mentioned, Bangladesh Enterprise Institution (BEI), a non–governmental research centre engaged an advocacy work on corporation governance. This published a report in August 2003 titled 'A Comparative Analysis of Corporate Governance in South Asia: Charting Map for Bangladesh'. Later, on the basis of the report, the BEI published 'The Code of Corporate Governance for Bangladesh' in April 2004.

Historical Line of Forming Governance Regulations

The United Kingdom is always considered to be a trading nation. It maintains a historical line of forming companies, managing companies and contesting decisions of the companies in common law courts. This helps the United Kingdom forming a balanced code of corporate governance regulations. Most of its corporate governance regulations are regulated by a single code. It plays a significant role in finding all behaviour of governance players ready made. This can help in finding the

players more accountable, more transparent, more responsible and more attentive to flourish businesses.

In Bangladesh, corporate governance principles are regulated by some scattered laws and executive circulars as mentioned earlier. Even if the regulatory framework became satisfactory after amendments in some relevant laws, some challenges still remain. Family-controlled groups of companies are a common feature of the country's business scene, often with a high degree of cross-ownership between companies. Controlling shareholders often play a leading role in the management and strategic direction of company groups, many of which include companies that are listed on the Dhaka Stock Exchange and Chittagong Stock Exchange. Without effective safeguards provided in a single code, there is potential for abuse, for example in situations where controlling shareholders impose commercial conditions that go against the interests of the company, as a whole, and also against minority shareholders.

Further, in Bangladesh, market discipline which is defined as the power of financial markets is still relatively weak. This is intended to persuade companies to meet corporate governance standards otherwise the companies may risk public criticism, lawsuits or a sell-off in their shares.

Accommodating Shareholders' Rights with International Standards

The United Kingdom Code that keeps in line with the European Union aims to increase the employee participation in the governance of companies and there is a gradual shift within companies to incorporate this issue within their principles of corporate governance. It deals with stakeholders' rights under a separate heading within the principles of corporate governance.

In Bangladesh, the fundamental document governing the shareholders' rights is the company's articles of association, which provide them the rights to participate in the general meeting, to vote and acquire information, to have the company audited, to lodge a complaint, and to take legal action. The Companies Act, 1994 provides for privileged shares. However, the Act imposes practically no limit to the extent of privileges that may be granted, including multiple voting rights, pre-determined dividend rate, priority entitlement at the time of liquidation etc. Further, the Act contains no separate division devoted to stakeholders' rights within the principles of corporate governance.

Streamlining the Directors' Liability

In the United Kingdom, the Corporate Governance Code requires shareholders to elect their preferred representatives to the board, shareholders could be allowed to nominate directors and to include their nominees on the company's ballot at the company's expense, instead of being presented with only the management-sponsored slate of nominees or the nominees chosen by the board's nominating committee. The

Code also streamlines self-dealing transactions since interested-party transactions pose sometimes a serious risk of insider abuse and provide a blatant opportunity for insiders to expropriate value. It permits such transactions if they are ratified by an informed vote of a company's disinterested directors or shareholders or if they are otherwise fair to the company.

Further, the Code requires that independent directors fill at least a majority of the seats on the board, and 'independence' could be defined very strictly. Policymakers could also mandate term limits for directors. For example, directors could be prohibited from serving more than five years on a company's board, with a possible exception for shareholder-nominated directors. In terms of the board's structure, boards could be required to have separate audit, compensation, and nominating committees that are composed entirely of independent directors, with the chairman of each committee rotating at least every three years. The corporation code could also require that boards meet regularly, such as once a month, with the independent directors meeting separately. It also requires separate people to serve as chairman of the board and chief executive officer, with the chairman of the board possibly rotating at least every three years.

In Bangladesh, self-dealing transactions are regulated by the Companies Act, 1994. It contains similar provisions to the United Kingdom Code. However, the laws are silent here as regards whether the same person could serve as chairman of the board and chief executive officer/managing director of the company. Further, there is no separate auditing for the board. In addition, there is a proposal here to make amendment to the Companies Act, 1994 for appointing independent directors as per the Government's choice. This move is being criticised, since it may lead to the government intervention to politically opposition-held companies.

Ensuring Effective Disclosure and Auditing

In the United Kingdom, the Corporate Governance Code requires that auditing of joint stock corporations of all sizes shall be conducted by independent auditing companies, or alternatively, in small-scale joint stock corporations, by a minimum of two independent sworn-in auditors or public accountants. The Code also prohibits insider trading on the basis of material non-public information. The Code further limits the number of shares an insider can either purchase or sell during a given time.

In Bangladesh, the Companies Act, 1994 requires auditing of the companies each year by independent auditors but it lacks adequate monitoring processes. The Act also provides for disclosures adequately, so that investors might know with whom they are trading and putting their investments. However, the Act is silent over the insider trading; there are a small indication in the Securities and Exchange Ordinance 1969.

8. Concluding Remarks

The development of corporate governance regulations did not come all of a sudden; it develops through differing situations, ups and downs are in its way forward. It matures through experiences of scandals and still is developing. The United Kingdom has already put forward a corporate governance code and tries to minimise the causes that led to the corporate scandals, corporate failures and death of companies. However, Bangladesh has not yet witnessed any death of a company, but undergoes corporate scandals and sickening companies. This gives rise to the necessity of a compact corporate governance guide rather than having scattered laws. This might serve multifarious purposes. So, the need of effective corporate governance is for the separation of ownership and control in big or publicly held companies. The transparency and adequate auditing standards shall be accompanied by compliance mechanisms in order to prevent misuse of control on the ownership.

Introducing Geographical Indications In Bangladesh

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Introduction

As a means of protecting intellectual property in cultural goods, geographical indications (GIs) have been developed to boost a country's local and root level entrepreneurs by giving them both horizontal (i.e. ensuring that the bona fide producers' are being benefited) and vertical (i.e. ensuring trans-boundary protection) protection. GIs also prevent free-riding of cultural goods wich often face widespread notoriety due to their geo-human conditions. Countries from the South like Bangladesh having enriched in traditional and cultural intellectual properties hold huge potentials of socio-economic development by proper management of traditional and cultural intellectual properties. The World Trade Organization (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) while giving higher status to wines and spirits has let the parties to adopt its own method of protecting geographical indicative goods. However, since it does not provide for an international and uniform registration system for GIs, countries with inadequate capacity are facing challenges to protect its GIs in the foreign jurisdictions.

Given that the international legal regime on GIs has been far than adequate to ensure efficient trans-boundary protection of GIs, different countries have adopted diverse institutions to protect their GIs. In the absence. With the purpose of protecting its cultural goods, Bangladesh has adopted a *sui generis* GI legislation to protect its geographically indicative goods. By extending special protection to the goods other than wines and spirits it has translated Doha Round claims into its GI regime. As expected by the GI practitioners it has adopted the reciprocal National Treatment Principle (NPT) of the Paris Convention offering foreign GIs to be protected here. In line with the Act, the GI Rules are adopted in 2015 outlining the details of the GI registration system. However, more often than not a *sui generis* GI regime has been cost incentive and highly centralized requiring pro-active role of the government in the protection mechanism.

The paper analyzes the pros and cons of the GI regime of Bangladesh to assess its feasibility to protect both the cultural legacy and real producers of geographically

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indicative goods of Bangladesh in an ever expanding local and global market of GI goods. The note has also portrayed the plausible challenges, horizontal and vertical, to enforce the putative GI regime. This paper has also introduced some GI goods of Bangladesh to make it sensible how GI goods can change the fate of millions of marginalized ingenious Bangladeshis. Finally, it has suggested some way-outs to combat the challenges.

A. Legal Protection of Geographical Indications

Since the latter half of the Nineteenth Century international mechanisms for the protection of GI had been adopted in response to the ever expanding trans-boundary trade and commerce in geographical indicative goods. However, in the domestic market protection of geographical indications through appropriate legal mechanisms was not a new phenomenon. There are several international instruments offering protection of geographical indications.

(1) The Paris Convention for the Protection of Industrial Property 1883

The Paris Convention for the Protection of Industrial Property1883[1] identified GI as a separate intellectual property. Article 10 of the Paris Convention, 1883 categorically prohibits the unlawful use of "indications of source"[2] on goods and provides some remedies for the suppression of such practices. Article 10*bis* of the Paris Convention gives protection against unfair competition and thus alternatively lays down the basis for protection against misleading indications of source, including appellations of origin. Under the Paris regime, the national treatment principle will be available for the protection of "indications of source" and "appellation of origin"(AO) in the Paris Union.

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[1] Paris Convention for the Protection of Industrial Property, as last revised at Stockholm on July 14, 1967, 21 UST 1583, 828 UNTS 305 (entered into force 26 April 1970). The Paris Convention was the first multilateral agreement, which included "indications of source or appellations of origin" as objects of protection. Article 1(2) of the Paris Convention states: "The protection of industrial property has as its object patents, utilitymodels, industrial designs, trademarks, service marks, trade names, *indications of source or appellation of origin*, and the repression of unfair competition".

[2] Article 10 of the Paris Convention does not mention appellations of origin expressly. However, they are covered by the term "indications of source" as all appellations of origin are considered to be indications of the source of goods. Two international agreements (Paris Convention for the Protection of Industrial Property and the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods) use the term *indications of source*. Neither gives a formal definition, but the language used in the latter Agreement makes clear that an indication of source is more general and refers simply to a country, or location in that country, as being the place of origin, e.g. French wine or Thai rice. They are not GIs. See, for example, B O'Connor, 'Geographical indications and TRIPs: 10 Years Later… A roadmap for EU GI holders to get protection in other WTO Members' (*Brussels: European Commission* , 2007). See also, Daniele Giovannucci et al, *Guide to Geographical Indications: Linking Products and Their Origins* (International Trade Centre, 2009).

(2) Madrid Agreement on Indications of Source 1891

The Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods[3] which is a special agreement administered by the WIPO aims at the repression not only of false, but also of deceptive indications of source.[4] A deceptive indication of source can be the true name of the place where the good originates from, but still it may be confusing to the purchaser in respect to the true origin and quality of the good.[5] Article 1(1) of the Madrid Agreement provides that any product bearing a false or deceptive indication by which one of the Member States to the Madrid Agreement or a place situated therein is directly or indirectly indicated as being the country or place of origin, must be seized on importation into any of the Member States to the Madrid Agreement.[6] Article 3*bis* obliges the Member States to the Madrid Agreement to prohibit the use, in connection with the sale or display or offering for sale of any goods, of all indications capable of deceiving the public as to the source of the goods. Article 4 provides that the courts of each country have to decide what appellations, on account of their generic character, do not fall within the provisions of the Madrid Agreement. Under the Madrid System an indication of source can be protected through an international registration.[7]

Since "indication of source" is a wide concept, the 1891 Agreement fairly covers both geographical indications and appellation of origin. So signing of this agreement by an LDC like Bangladesh binds all Parties to the Agreement to take border measures against goods using false or deceptive marks. This agreement is also beneficial for the LDCs since they possess the least capacity to monitor their GI goods overseas.

(3) The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration 1958[8]

The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration was adopted in 1958. It became operational in 1966, was

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[3] This Agreement is a part of the "Madrid System". See, for details, Giovannucci et al, above note 2, 42-43.

[4] World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use* (World Intellectual Property Organization, 2004) 489.

[5] O'Connor, above note 2, 4.

[6] WIPO, above note 4, 126.

[7] The system of international registration of marks is governed by two treaties: the Madrid Agreement Concerning the International Registration of Marks, which dates from 1891, and the Protocol Relating to the Madrid Agreement, which was adopted in 1989, entered into force on December 1, 1995, and came into operation on April 1, 1996. Visit, for details, <http://www.wipo.int/madrid/en/> 05 December 2014.

[8] The Lisbon System for the International Registration of Appellations of Origin offers a means of obtaining protection for an appellation of origin (AO) in the contracting parties to the Lisbon Agreement through a single registration. See, for details, <http://www.wipo.int/lisbon/en/> 15 December 2015.

revised in 1967 (Stockholm), and the Regulations under the Agreement were last amended in 2002. The Lisbon System, established under the Agreement, is the counterpart of Madrid and also administered by WIPO. It is used to help recognize and protect Appellations of Origin[9] in countries other than their country of origin. It does so by using one single registration procedure for an Appellation, and by incorporating substantive law, such as defining the content of the protection that Member States must undertake. Article 3 of the Agreement contemplates wide protection for appellation of origin enumerating that "protection shall be ensured against any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as "kind," "type," "make," "imitation", or the like." The Agreement has provided for an international registration system for "appellations of origin" provided that they have to be first registered in the country of origin.[10] Registration of an appellation under the Agreement shields it from becoming generic in the Madrid Union.[11] The

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[9] As per Article 2(1) of the Lisbon Agreement "appellation of origin" means the geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.
The system of international registration of marks is governed by two treaties: the Madrid Agreement Concerning the International Registration of Marks, which dates from 1891, and the Protocol Relating to the Madrid Agreement, which was adopted in 1989, entered into force on December 1, 1995, and came into operation on April 1, 1996. Visit, for details, <http://www.wipo.int/madrid/en/> 05 December 2014.

[9] The Lisbon System for the International Registration of Appellations of Origin offers a means of obtaining protection for an appellation of origin (AO) in the contracting parties to the Lisbon Agreement through a single registration. See, for details, <http://www.wipo.int/lisbon/en/> 05 December 2014.

[9] As per Article 2(1) of the Lisbon Agreement "appellation of origin" means the geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality.
The first element of the definition is that the appellation must be the geographical name of a country, region or locality. The second element of the definition is that the appellation of origin must serve to designate a product originating in the country, region or locality referred to. The third element of the definition is that there must be a qualitative link between the product and the geographical area: the "quality and characteristics" must be due exclusively or essentially to the geographical environment; if the qualitative link is insufficient, that is, if the characteristic qualities are not due essentially, but only to a small extent, to the geographical environment, the name is not an appellation of origin but merely an indication of source; as for the geographical environment, it includes natural factors, such as soil or climate, and human factors, such as the special professional traditions of the producers established in the geographical area concerned.

[10] *Lisbon Agreement* Article 5.

[11] Ibid. Article 6.

sixth session of the WIPO Working Group on the Development of the Lisbon System (Lisbon System for the International Registration of Appellations of Origin) met from 3-7 December, 2014 discussed a possible "new instrument," which would be an amendment or revision to the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration to include geographical indications.[12]

The Lisbon System for the International Registration of Appellations of Origin offers a means of obtaining protection for an appellation of origin in the contracting parties to the Lisbon Agreement through a single registration. So if an LDC like Bangladesh becomes a party to it, a single registration would protect Bangladeshi AOs across the Lisbon umbrella. This would be tremendously helpful for Bangladeshi AOs to be protected in foreign jurisdictions which would otherwise be difficult for Bangladesh due to cost and other relevant factors. Further, there are other concerns for LDCs such as Bangladesh because they have a very insignificant voice for amending the Lisbon AO regime to extend its protective projection for all GIs besides AO.

(4) The Madrid Agreement Concerning the International Registration of Marks 1891 and the Protocol Relating to the Madrid Agreement 1989

Similar to a GI, a certification mark certifies the nature or origin of the goods or services to which it has been applied. So, if Bangladesh decides to protect its GIs through certification marks, collective marks or guarantee marks under the trademark system, it may take resort to Madrid System on the protection of marks which gives a plenary protection in the Madrid Union through a single registration. More so relevant marks involving GIs i.e. signs or logos may be protected under the Madrid regime on marks. This means that an international registration system for trademarks, established by the Madrid Agreement of 1891 and the Protocol relating to the Madrid Agreement Concerning the International Registration of Marks of 1989, can also serve as a means of protection of GIs internationally.[13]

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[12] Catherine Saez, 'Geographical Indications Catching up with Appellations of Origin at WIPO' <http://www.ip-watch.org/2012/12/07/geographical-indications-catching-up-with-appellations-of-origin-at-wipo/'> 7 December 2012. The Assembly of the Lisbon Union takes note of the progress made in the preparation of the Diplomatic Conference for the adoption of a revised Lisbon Agreement in 2015 and is also informed of the content of the WIPO Coordination Committee discussion concerning the procedures of such Diplomatic Conference and other preparatory matters (Tenth session Lisbon Working Group ,October 27-31, 2014). Draft Revised Lisbon Agreement on Appellations of Origin and Geographical Indications is available at <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=284339> 15 December 2015.

[13] O'Connor, above note 2, 5.

(5) The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1994

Article 22.1 of the TRIPS defines "geographical indications" as "... indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin". This definition expands the concept of appellation of origin contained in Article 2 of the Lisbon Agreement to protect goods which merely derive a reputation from their place of origin without possessing a given quality or other characteristics which are due to that place. For example, *Jamdani* for *saree* (Bangladesh) or *Basmati* for rice (India) is GI goods which do not possess a geographical denomination but have reputation due to their geographical origin. So under the WTO regime on GI "indication of source" has transcended beyond geographical name and recognized quality, reputation and other characteristics as indications of source to be qualified as Geographical Indications. To sum up, to be protected a geographical indication needs to be "an indication", but not necessarily the name of a geographical place.

Article 22.2 prohibits "the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of the origin in a manner which misleads the public as to the geographical origin of the good." This clause also prohibits unfair commercial practices in respect of GI within the meaning of Art.10*bis* of the Paris Convention.

Article 22.3 categorically prohibits the registration of trademarks, containing or consisting of a geographical indication, for goods not originating in the territory indicated, if the use of those trademarks for such goods would be misleading as to the true place of origin of the goods. Further, Article 22.4 stipulates that the protection under Article 22.1 to 3 must also be made available in respect of the use of deceptive geographical indications, i.e., geographical indications that are literally true, although they falsely represent to the public that the goods on which they are used originate in a different territory. Article 23 provides special protection for wines and spirits. Article 22.4 enumerates three categories of exceptions, namely, continued and similar use of geographical indications for wines and spirits, prior good faith trademark rights, and generic designations.

Bangladesh has already joined this Agreement. However, worries await for LDCs such Bangladesh since the WTO is still unmoved to extend special protection regime (Art.23) beyond wines and spirits. LDCs do have further worries that the traditional knowledge (TK) and TK based products are not yet brought under the protective umbrella of GI.

B. GI protection in European Union (EU)

The EU has adopted two sui generis regimes for the protection of GIs in agricultural goods (and foodstuffs) and wines and spirits.

On 3 January 2013, Regulation 1151/12 of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs came into force, repealing and replacing Regulations 509/06 and 510/06. The Regulation revises the legal regime for Protected Denomination of Origin [14] (PDO), Protected Geographical Indications[15] (PGI), Traditional Specialties Guaranteed (TSG), and introduces Optional Quality Terms (OQT). Quality schemes for wines and spirits fall outside the remit of this legislative act. The EU system seems to have limited the scope of GI protection since it only covers goods related to agriculture and foodstuffs. An application for the registration of a good or product as PDO or PGI must be supported by a specification[16]-the main evidence in support of the application. The protection of both PGIs and PDOs is provided through a registration system. Registered names shall be protected against "any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as 'style', 'type', 'method', 'as produced in', 'imitation' or similar..."[17]. GI registrations can be obtained under the EU system on the basis of an application filed with the EU Commission via the competent national authorities.[18] The application must include a product specification which describes all relevant factors for the GI such as the territory, the product and its raw materials, the methods used, etc.[19] Further requirements include the existence of at least one control body which is accredited in

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[14] Article 5(1) defines PDO as a name which identifies a product: (a) originating in a specific place, region or, in exceptional cases, a country; (b) whose quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors; and (c) the production steps of which all take place in the defined geographical area.

[15] Article 5(2) of the Regulation defines PGI as a name which identifies a product: (a) originating in a specific place, region or country; (b) whose given quality, reputation or other characteristic is essentially attributable to its geographical origin; and (c) at least one of the production steps of which take place in the defined geographical area.

[16] A specification must contain name, description, geographical area, proof of origin, method of production, link and labeling. see for details ,European commission directorate-general for agriculture food quality policy in the European Union, protection of geographical indications, designations of origin and certificates of specific character for agricultural products and foodstuffs, working document of the commission services <http://ec.europa.eu/agriculture/publi/gi/broch_en.pdf> 15 December 2015.

[17] Article 13 (1)(b), EU Regulation no.1151/2012. Article 13(1)(c) further protects any GI against "any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product that is used on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin..."

[18] Peter Munzinger, 'Blue jeans and other GIs: an overview of protection systems for geographical indications' (2012) 7(4) *Journal of Intellectual Property Law & Practice* 283-290.

[19] Ibid.

accordance with European standard EN 45011 or ISO/IEC Guide 65 (General requirements for bodies operating product certification systems).[20] A registered GI is protected from being generic.[21] In case of conflict between GI and trademarks, the former will have precedence.[22]A scheme for traditional specialties guaranteed (TSG) has been established to safeguard traditional methods of production and recipes by helping producers of traditional product in marketing and communicating the value-adding attributes of their traditional recipes and products to consumers.[23] This is a special regime for the protection geographically indicative foodstuffs. Further, the 2012 Regulation has uniquely offered optional protection regime for the agricultural goods and foodstuffs from mountains[24] and island[25].

In addition, Regulation (EU) No 1151/2012 provides for the possibility of transitional periods for the phasing-out of the registered name for products which do not comply with the specifications. For instance, where a statement of objection has been declared admissible on the grounds that the registration of the proposed name

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[20] Ibid.

[21] Art.13(2) of the regulation (1151/2012).

[22] Art.14 of the Regulation 1151/2012 helps to solve the conflicts arising when a trademark that includes a geographical name clashes with a protected geographical indication or a protected designation of origin. The regulation distinguishes between three situations:

(i) The simplest case is the first one, referred to in Article 14.1. Any application for a conflicting trademark for the same type of product made after the date of application for protection of the geographical name at Community level will be refused. In this case, the regulation gives priority to the geographical name.

(ii) The second case, referred to in Article 14.2, provides for coexistence in certain cases. However, a conflicting trademark can only continue to be used, in accordance with Community law, if:

- the trademark was applied for, registered or established by use in good faith before the date ofprotection in the country of origin or the date of submission to the Commission of the
- application for registration of the protected geographical indication or protected designation oforigin;
- there are no grounds for invalidity or revocation of the trademark under applicable Communitylegislation.

(iii) The third circumstance, referred to in Article 14.3, is the application to register the geographical name refused. This is if, in the light of the trademark's reputation and renown and the length of time it has been used, registration of a geographical name would be liable to mislead the consumer as to the true identity of the product. In all other cases, the name can be registered notwithstanding the existence of the registered trademark. The regulation deals with possible cases where conflict could arise between a trademark and a geographical name, seeking to strike the right balance between both intellectual property rights.

[23] Article 17 of the regulation. Article 18 has laid down the criteria to be protected under the regime.

[24] Art.31.

[25] Art.32.

would jeopardize the existence of an entirely or partially identical name or trademark, or the existence of products which have been legally on the market for at least five years preceding the date of publication of the main elements of the application.[26]

C. Protection of Geographical Indications at the National Level

At the national level different mechanisms have been adopted to protect GIs, including sui generis system, trademark, certification marks, collective marks, and unfair competition law.

Under the unfair competition law principles, GI right would be enforced through the mechanism of passing off. In order to be protected under this regime, a given GI must have acquired a certain reputation or goodwill. In other words, consumers must associate the GI with the place of origin of its products or services. Furthermore, it is required that the use of a certain GI on goods or services not originating from the geographic area is misleading, so that consumers are deceived against the true place of the product or service. In this regard, proof of damages caused by such misleading practices is required. The problem associated with the system is that when a GI loses its reputation action through passing-off may not be invoked.

Under the trade mark (TM) law, a GI may be protected by refusing or invalidating TMs that consist wholly or partly of a GI which misleads consumers about the real geographic origin of the goods. This kind of protection may be accorded in members countries pursuant to Article 22(3) of the TRIPS Agreement.[27] The problem associated with the system is that, most TM Laws, in general, prohibit the registration of a geographical name because of being descriptive. However, under certain conditions, a geographical name can be registered as a TM, for instance, if it has acquired a —secondarymeaning. If this is not the case, GI producers have often been forced to seek a limited protection - for their logo only - via a figurative TM registration.[28]

A GI may also be registered as a collective mark which would give the members of the relevant association with the exclusive right to use the mark. When GI is registered as a certification mark a government authority would be the arbiter to determine the quality of a GI to be certified. GI protection under collective mark or certification mark regime bears the risk being *genericide.*

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[26] European Commission, above n 15.

[27] Emily Nation, 'Geographical Indications: The International Debate Over Intellectual Property Rights for Local Producers' (2011) 82 *University of Colorado Law Review* 959.

[28] Ibid.

(1) Protection of Geographical Indications in Switzerland: General Protection Regime

In Switzerland, the term 'indication of source' is used for all direct (such as 'Bern') or indirect (such as 'the Matterhorn' or 'William Tell') references to the geographical origins of products or services, including reference to properties or qualities associated with the source.[29] Geographical indications enjoy general *sui generis* protection; regardless of any registration provided they are recognized by the relevant public as GIs for the relevant goods.[30] As such, all products, whether agricultural or not, are protected provided the conditions referred to above set out in Section 2 of the Federal Act of 28 August 1992 on the Protection of Trade Marks and Indications of Source. The Act provides wide range of civil[31] and criminal[32] remedies as enforcement measures. A draft revision of the Federal Act on the Protection of Trade Marks and Indications of Source has been adopted on 21 June 2013 which envisions criteria for more precise regulation of the geographical source of a product or service, thereby defining how much— "Switzerland" must be in a product for it to be labelled as being Swiss. This amendment would be applicable to the natural goods, processed natural goods, industrial goods[33] and services[34] and such goods have to maintain certain criteria to use the label "Made in Switzerland" or "Swiss".[35]

(2) Special Protection Regime for Agricultural Products and Processed Agricultural Products

The Ordinance of 28 May 1997 on the Protection of Designations of Origin and Geographical Indications for Agricultural Products and Processed Agricultural Products (PDO/PGI Ordinance) offers special legal protection for GIs in agricultural

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[29] Swiss Federal Institute of Intellectual Property, 'Frequently asked questions' (in file with the author)

[30] Ibid.

[31] Civil remedies include Action for declaratory judgment, action for assignment, claim for damages, action for performance including injunctive relief, provisional measures including temporary injunction, forfeiture. See sections 52-60 of the Federal Act on the Protection of Trade Marks and Indications of Source, of 28 August 1992 (Status as of 1 July 2011.

[32] Ss. 62-69 of the Act of 28 August 1992.

[33] For industrial goods, at least 60% of the manufacturing costs must occur in Switzerland, whereby research and development costs may also be included in the calculation.

[34] A company can offer Swiss services as long as its headquarters and an actual administrative centre is located in Switzerland.

[35] Swiss Federal Institute of Intellectual Property, *Swissness" Legislative Amendment: background, goal and content*
<https://www.ige.ch/fileadmin/user_upload/Juristische_Infos/e/Swissness_Legislative_Amen dment Content.pdf> 5 December 2015.

products and processed agricultural products. This regime mainly follows the EU regime for the protection of Agricultural goods and foodstuffs. Additionally, PDOs that contain the traditional names for agricultural products or processed agricultural products that meet the criteria set out for PDOs may also be protected under the regime.[36]Accordingly, traditional names for agricultural products or processed agricultural products that meet the criteria of PGIs may be protected as PGIs.[37]

(D) Necessity of GI protection in Bangladesh

Article 24.9 of the TRIPS Agreement categorically provides that: "There shall be no obligation under this Agreement to protect geographical indications which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country." So to invoke a violation of the WTO TRIPS Agreement a member concerned must have to first protect its GI in a form or another. Alternatively, any one may be a free rider of a GI if it is not legally protected in its country of origin or it has become generic or otherwise "has ceased to be protected". For example India could not approach to the WTO Dispute Settlement System or to any Member of the WTO in the absence of a law to protect the GI in "Basmati rice".[38] One may argue that GI would be protected even in the absence of a protection mechanism through unfair competition law or through the tort of passing off. But, more often than not passing off action is very unpredictable and complicated to prove. GIs can never become generic once registered.[39] A registered GI serves the functions of distinctiveness and consumer assurance as to quality. Proponents of GI registration may argue that it has pro-competitive effects, as it enables small and family-based rural industries to resist industrial consolidation.[40] Moreover, the ever expanding horizon of globalization is now affecting the pedigree of traditional practices and indigenous lifestyles. Protection of traditional GIs through registration is an inevitable mechanism to prevent bio-piracy and similar unfair practices.

One may argue that traditional geographical indicative names could be protected under the trademark regime. But, there are at least two major differences between Trademarks and GI. Firstly, while Trademarks can be owned individually or by a group of people, GIs are collective rights owned by the concerned communities.

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[36] Art.2(2) of the Ordinance on the Protection of Designations of Origin and Geographical Indications for Agricultural Products and Processed Agricultural Products.

[37] Article 3 of the Ordinance on the Protection of Designations of Origin and Geographical Indications for Agricultural Products and Processed Agricultural Products.

[38] Utsav Mukherjee, 'A Study of the Basmati Case (India-US Basmati Rice Dispute): The Geographical Indication Perspective' *SSRN 1143209*.

[39] William vanCaenegem, 'Registered Geographical Indications: Between Intellectual Property and Rural Policy-Part I' (2003) *Law Papers* 3.

[40] Ibid.

Secondly, Trademarks can be transferred or assigned to another right holder but GI rights are perpetual collective rights. Besides, since most of these GI goods or potential GI goods have their origin in rural areas, the increased sales of these goods as a result of protection under the GI Act has the potential to lead to enhanced income to the producers' communities and hence to rural development.[41]

Without adequate legal armor, competitors might free-ride on the reputation of an appellation. GI status can also help in securing a premium price in the market. Notably, the willingness of at least a niche section of the consumers to pay a premium for GI-products has been revealed in quite a few empirical studies, though predominantly in the context of developed countries. As a developing country with a strong agricultural sector, artistry and traditional knowledge, GI law can be an extremely important public policy tool for economic development and the livelihood of farmers and skilled worker in the field.[42]

(E) GI in Bangladesh

Bangladesh is rich in flora and fauna, culture and traditional outfits. Its flora and fauna, culture, and traditional knowledge very often contribute to manufacturing goods. In consideration of its valuable contribution made out of natural and artificial resources, it has enacted the Geographical Indication of Goods (Registration and Protection) Act 2013.

The prominent GI goods of Bangladesh are as follows:

(1) *Nakshi Kantha*: the Ingenuity of the Women Folk of Bangladesh

Nakshi kantha[43] or embroidered quilt is a type of folk art of Bangladesh and West Bengal, India. The art has been practiced in rural Bengal for centuries. The basic material used is thread and old cloth. *Kanthas* are made throughout Bangladesh, but the greater Mymensingh, Rajshahi, Faridpur and Jessore areas are most famous for this craft. The colourful patterns and designs that are embroidered resulted in the name "NakshiKantha", which was derived from the Bengali word "naksha", which refers to artistic patterns. The early *kanthas* had a white background accented with red, blue and black embroidery; later yellow, green, pink and other colours were also included. The running stitch called "kantha stitch" is the main stitch used for the

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[41] Kasturi Das, *Socio-economic implications of protecting geographical indications in India* (Centre for WTO studies , 2009)

[42] D Rangnekar, 'The Law and Economics of Geographical Indications: Introduction' (2010) 13(2) *Journal of World Intellectual Property* 77–80

[43] On *Nakshi Kantha,* see for example, Perveen Ahmed, *The Aesthetics and Vocabulary of Nakshi Kantha* (Bangladesh National Museum, 1997); Niaz Zaman, *The Art of Kantha Embroidery* (UPL, Dhaka, 1981).

purpose. Traditionally, *kantha* was produced for the use of the family. Today, after the revival of the *nakshi kantha*, they are produced commercially.

Nakshi Kantha (embroidered quilt), said to be indigenous to Bangladesh, is made from old cotton clothes, predominantly discarded sari, dhoti and lungi. The term nakshikantha, popularly used in Bangladesh, is found even in medieval literature. The name *nakshikantha* became particularly popular among literate people after the publication poet of Jasimuddin's poem *Naskhi Kanthar Math* (Field of Embroidered Quilt) (1929). A large number of *kanthas* show the ingenious use of the running stitch for working motifs and border patterns. The *Chatai Nakshi Kantha* stitches are found in some places of Jessore, Kushtia, Pabna, Rajshahi, Rangpur and Mymensingh. Other types of *kanthas* include the pad tolakantha, which is embroidered entirely with sari border patterns, and the *lohori kantha*, in which thick yarn is used for close pattern darning. In the most intricate of pad *tola kanthas*, there is no space between the concentric border patterns, so that the entire kantha seems apparently to be a piece of woven cloth.[44]*Nakshi Kantha*, embroidered quilt said to be indigenous to Bangladesh.[45]Nakshikanta is in no way the sole property of India, Bangladesh has also common legacy in this regard. As India and Pakistan has made joint claim to the GI in "Basmati" rice, Bangladesh and India can jointly claim GI in "Nakshi Kantha".

(2) Jamdani

Jamdani, a fine cloth of "muslin"group. A nationally and internationally famous fabric, jamdani is characterised by geometric or floral designs. [46]*Jamdani sarees* have multicoloured linear or floral motifs all over the body and have an exquisitely designed elaborate *pallu*. The jamdani is woven painstakingly by hand on the old fashioned *jala loom*, and many take even up to one year to weave a single *saree*. It feels supple to the touch and drapes gently to reveal the contours of wearer. About 300 A.D. Kautilya, in his book *Arthashastra*, referred to this fine cloth and said it was made in Pundra (now Bangladesh). Arab, Chinese and Italian traders had also given detailed account of this fabric coming from what is now Bangladesh. Around that time a similar fabric was made in Mosul, Iraq, called *Mousoulin*. The Arab geographer Sulaiman mentions that *Mousoulin* fabric was developed simultaneously inBengalandwascalledmuslin.[47] When the Moroccan traveler IbnBatuta visited Bangladesh in the 14th century he also saw the *jamdani* made here and praised its

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[44] <http://www.independent-bangladesh.com/culture/nakshi-kantha.html> 20 Dec 2014.

[45] <http://www.banglapedia.org/HT/N_0028.htm> 20 Dec 2014.

[46] Zinat Mahrukh Banu and Masood Reza , *Jamdani, (1ST January 2015)* <http://www.banglapedia.org/HT/J_0056.htm> 20 Dec 2014.

[47] Ibid.

quality.[48] An English traveler, Ralph Finch, also spoke highly about muslin and *jamdani*made in Sonargoan, near Dhaka. The fabric, however, attained its zenith during the reign of Akbar, the great Mughal Emperor. It had by then become such a sought after item that the British East India Company who came in later had to post a high official in Dhaka to buy mulmulkhas. He was called the "Daroga-Mulmul." He was commissioned to also supervise the production of jamdani in each weaving factory.[49]

Studies have revealed that the name *jamdani* exclusively belong to Bangladesh since the geo-ecological, climatic and human factor of Dhaka exclusively suits for its production. The terms "uppadajamdani" have come in currency recently and Indian Andhra Pradesh village *uppada* has no historical link with Jamdani.[50] UNESCO has recently declared the traditional art of *Jamdani* weaving in Dhaka as an intangible heritage of mankind.[51]

(3) Fazli Mango: the King of Fruits!

Fazli is an import mango cultivar from the Eastern regions of South Asia(West Bengal and Bihar in India, and Bangladesh).[52] It is a late maturing fruit, available after other varieties have much prized in the region. The District of Rajshahi in Bangladesh is a major producer of this mango. An important commercial variety, it is increasingly being exported. India has filed a Geographical Indication for the name *Fazli*, but Bangladesh can also make a claim of GI on *Fazli*.

(4) Medicinal plants of Bangladesh

In traditional and alternative medicinal practices like *Unani and Ayurvedic* systems traditional medicinal plants have been widely used roots in Bangladesh.[53] Apparently the recipients of these systems of medicine appear to be the rural people, but practically a good proportion of the urban population still continues to use these traditional medicines, although organised modern health care facilities are available to them.[54]Medicinal preparations, almost all of which are multi-componential, used in these two systems are invariably made from plant materials, sometimes with the addition of some animal products and also some natural or synthetic organic and

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[48] Ibid.
[49] Ibid.
[50] Iftekhar Iqbal, 'Protection of jamdani as a Geographical Indication in Bangladesh' (Paper presented at CPD Seminar on 17 June 2014).
[51] UNESCO, 'Traditional Art of Jamdani Weaving' (1st January 2015), <http://www.unesco.org/culture/ich/en/RL/traditional-art-of-jamdani-weaving-00879>
[52] <http://en.wikipedia.org/wiki/Fazli_(mango)> 20 Dec 2014.
[53] Mohammad Abdur Rahman, 'Conservation of Medicinal Plants in Bangladesh' (Paper prepared for presentation at the Annual Bangladesh Botanical Conference, 2006).
[54] Ibid.

inorganic chemical substances,[55]major active compound currently or once derived from (or patterned after) compounds derived from biological diversity. About 500 medicinal plants grow in Bangladesh, where 80 per cent of the rural population depends on traditional remedies for ailments such as cough, cold, fever, headache and dysentery.[56] Widely used medicinal plants are Amloki (*Embelicaofficnalis*); Ashok (*Saracaindica*); Ashwagandha (*Withaniasomnifera*, Bael (*Aeglemermelos),* Gulancha (*Tinosporacordifolia)* Miers, Shatomuli (*Asparagus racemosus*), Ashwagandh (*Withaniasomnifera).*Apang (*achyranthespaniculata*), Kalomegh (*androghaphispariculata*), crown flower *(calotropisgigantia)*, anantamul (*hemidesmusindicus*), arjun (*termanaliaarjuna*), gritokumari (*Aloe indica),*Ulotkombol (*abromaaugusta*).

(5) Hilsa: the National Fish of Bangladesh

Hilsa (*ilish)* any of the members of the genus *Tenualosa*of the family *Clupeidae,* order *Clupeiformes*. Locally known as *Ilish*, the fish has been designated as the national fish of Bangladesh.[57]Hilsa has a wide range of distribution and occurs in marine, estuarine and riverine environments. The fish is found in the Persian Gulf, Red Sea, Arabian Sea, Bay of Bengal, Vietnam Sea and China Sea. The riverine habitat covers the Satil Arab, and the Tigris and Euphrates of Iran and Iraq, the Indus of Pakistan, the rivers of Eastern and Western India, the Irrawaddy of Myanmar, and the Padma, Jamuna, Meghna, Karnafully and other coastal rivers of Bangladesh.[58]The fish is exploited by intensive fishery for the mature migrating adults in the estuaries and river channels, and to a lesser extent by the capture of the jatkain the river. Nearly 16.4 percent of the country's total fish production is contributed by this fishery. In terms of production and quantity exported, hilsa has played a significant role in the economy of Bangladesh in recent years. An amount of Tk 1,34,79 million was earned by the fish and fisheries commodities in 1996-97, with hilsa alone contributing about Tk 4,88 million. It is estimated that about 2 million fishermen and traders engage in his fishing in the country.[59]In 2013-14 year 3 lakh 85 Metric tons Hilsha has been caught in Bangladesh.[60] Bangladesh contributes 60 percent of the World's total supply of Hilsha.[61] So Bangladesh has a strong case to register a GI over Hilsha. It should be protected under additional protection scheme.

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[55] Ibid.
[56] Ibid.
[57] SM Humayun Kabir, Hilsaha, (1st January 2015) <http://www.ebanglapedia.com/en/article.php?id=2426#.Vo5wClJFXIU>
[58] Ibid.
[59] <http://www.banglapedia.org/HT/H_0153.htm> 19 Dec, 2014.
[60] <http://www.prothom-alo.com/todays-paper> 19 Dec, 2014.
[61] Ibid.

(6) Khadi: the Eco-friendly textile from Bangladesh

Khadi or Khaddar is kind of handspun or hand-woven textile primarily made out of cotton. The cloth is primarily made out of hemp and may also include silk or wool, which are all spun into yarn on a spinning wheel called a *charka*. It is a versatile fabric, cool in summer and warm in winter. It is a fashion fabric. *Khadi* has a long historical pedigree in Bangladesh. In 6th century a local variation of *Khadi* cloth was described by Huen Tsang of China and Marco Polo in 12th century AD describes a fabrics, most probably khadiMuslin in the Bengal region to be as fine as the spider's web.[62]Romans were great aficionados of Bengal *khadi*Muslin and imported vast amounts of fabrics. The *khadi* weaves of Comilla during the *Mughal* period were renowned as valuable textiles with distinctive characteristics.[63]The waves of Comilla during the *Mughal* period were renowned as valuable textiles with distinctive characteristics. In 1890 the Tripura Gazetteer reported accounts on the textiles and the weavers of Comilla. The articles made clear reference to the high quality sari, dhoti, lungi and gamcha produced with locally spun yarns and weaves.[64]In 1921 Gandhi came to Chandina Upazila in comilla to inspire the local weavers and consequently a branch of 'Nikhil Bharat Tantubai Samity' was established to self-seed and proliferate the sale of goods to other major cities in India.[65] In greater Comilla region the weaving centers were particularly developed in Mainamati, Muradnagar, Gauripur and Chandina.[66]

(F) GI Registration System in Bangladesh

Section 2.9 of the Geographical Indications of Goods (Registration and Protection) Act, 2013 (hereinafter GI Act) runs as:

> "Geographical indication of goods" means an indication of agricultural or natural or manufactured goods which identifies its originating country or territory, or a region or locality of that country or territory , where a given quality, reputation or other characteristic of the goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods, one of the activities of either production or processing or preparation of the goods concerned conceivably takes place in such territory, region or locality."Apparently, protective projection of the Act covers both GI and Appellation of origin. Goods qualified for

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[62] "Cosy Comfort: Khadi". <bdnewslive.com> 14 Dec, 2014.

[63] Tithi Farhana, 'Khadi: Reviving the Heritage' *The Daily Star* (Online) 14 December 2015 < http://archive.thedailystar.net/magazine/2009/06/01/special_feature.htm>

[64] < http://archive.thedailystar.net/lifestyle/2011/12/02/centre.htm> 14 December 2014.

[65] Naved Naushad , 'The story of Khadi' *The Daily Star* (online) , 14 December 2014 <http://www.thedailystar.net/lifestyle/spotlight/the-story-khadi-179848>

[66] Ibid.

protection may include natural e.g. certain CORAL species of ornamental value found in the coastal area, agricultural e.g. traditional aromatic rice species and products of handicraft or industry including foodstuffs e.g. "Jamdani", "nakshikantha", "Mangoes from Rajshahi", "Yoghurt from Bogra", "Monda from Muktagacha"(Mymenshing).

For the purpose of registration goods will be classified as per the WIPO NICE classification regime.[67]

Section 20 of the Act incorporates the National Treatment Principle which requires equal protection of foreign GIs. However, the international regimes which are to come under the NT rule are subject to the official notifications by the government.This provision will help the foreign GIs to be registered in Bangladesh and vice-versa.In case of foreign GI applications, an accredited certificate stating that such GI has been duly registered in such foreign country, must be accompanied with the GI application.[68] Foreigners shall apply in "GI-Form-2" appended to the GI Rules.[69] They can also claim right to priority where applicable.[70]

GI registration is not compulsory in Bangladesh.[71]The unregistered GI holder can bring action for passing off to protect his GI against a misleading or fraudulent GI.[72]The unregistered GI holder can also bring an action under the Competition Act, 2013.

The Geographical Indications Unit at the Department of Patent, Design and Trademarks under the Ministry of Industry is the GI registration and superintendent authority in Bangladesh.[73] There shall be a seal of the Geographical Indications Wing having inscribed in the margin words "Registrar of Geographical Indications, Bangladesh" and impressions of such seal shall be judicially noticed and admitted in evidence.[74] The Registrar of Patent, Designs&Trademarks is the *ex officio* Registrar of GIs and the administrative head of the GI Unit.[75]

Which GIs are Disqualified for Registration?

A GI is not entitled to registration if it does not satisfy the definition of GI stipulated in the Act. Similarly, a misleading, deceiving or confusing GI is also disqualified for registration. For example, "Monda" from Muktagacha is a GI entitled to

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[67] *Geographical Indication of Goods (Registration and Protection) Act 2013,* s 2(15).
[68] GI Rules 2015, r 5.
[69] Ibid.
[70] Ibid.
[71] *Geographcal Indication of Goods (Registration and Protection) Act 2013*, ss.9, 28(7).
[72] Ibid.
[73] Ibid s 4(1).
[74] Ibid s 4(2).
[75] Ibid s 5.

registration as it falls within the criteria of GI mentioned in the Act. If a trader markets a sweetmeat manufactured in Dhaka under the brand "Monda like/style", it would be misleading and confusing. A GI nugatory of any law of Bangladesh is also disqualified. A GI contrary to public order or morality or derogatory of religious susceptibilities or otherwise disentitled to judicial protection is also not qualified for registration. The last but not the least cause of disqualification is that the GI has become generic.Section 2.4 of the Act defines generic GI "the name which is generally known as designation of any kind of goods *and* also relates to the place or region where the goods was originally produced or manufactured..." (Emphasis added).

The Act has provided for two types of registration – one is for GIs[76] and another for "authorized users"[77] .

To protect GIs with worldwide notoriety, they should be registered under the "additional protection" scheme of the Act.[78] A GI registered under such scheme would be protected against the use of any GIs accompanied by terms such as "kind", "type", "style", "imitation" or other like expressions.

An association or society of producers, trade organization and competent authority, i.e. government or statutory body acting on behalf of the government can file an application to register a GI.[79]

The application procedure includes filing of application, examination, publication, objection, counter-objection and reply, registration (if objection does not sustain) and non-registration (if objects sustain).

Filing of an application

Every application for the registration of a geographical indication shall be made in the prescribed form and shall be signed by the applicant or his agent and must be made in triplicate along with three copies of a Statement of Case.[80] An application to register a geographical indication for a specification of goods included in any one class shall be made in **GI-1 Form.**[81] A single application for the registration of a geographical indication for different classes of goods or a single application for the registration of a geographical indication for different classes of goods from a convention country under Section 20 shall be made in **GI-2 Form.**[82] When an

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[76] Ibid s9.

[77] S.10 of the GI Act read with Rules 30 and 31 of the GI Rules, 2015. The persons, who are claiming to produce, extract or processing relevant GI goods may get them registered as authorized user of such goods. This provision requires individual producers to have registration as authorized user.

[78] Section 21(2) of the GI Act read with Rule 45 of the GI Rules 2015.

[79] *Geographical Indication of Goods (Registration and Protection) Act*, s 9.

[80] *Geographical Indications of Goods (Registration and Protection) Rules 2015*, r 4.

[81] Ibid.

[82] Ibid.

application claims some dominant peculiar characteristics of relevant GI goods it must be accompanied by photos of the good -black –white and coloured.[83] Every application for the registration of a geographical indication for goods must satisfy certain conditions.[84] An amendment to divide an application for registration shall be made in **GI-7 Form.**[85] For one GI only one application can be filed.[86] Where a colour combination is claimed as an element of a geographical indication in an application for the registration, it shall not be acted upon as such unless the application contains a statement to that effect and specifies the colours.[87]

Application under conventional arrangement

Where an application for registration of a geographical indications is filed by an applicant from a convention country[88] under section 20, a certificate by the Registry or competent authority of the Geographical Indications Office of the convention country shall be included in the application for registration under sub-rule (2) or (3) of Rule 18, as the case may be, and it shall include the particulars of the geographical indication, the country and the date or dates of filing of the first application in the convention country and such other particulars as may be required by the Registrar.[89]In default the requisites may also be filed within next two months of filing the application certifying or verifying to the satisfaction of the Registrar the date of the filing of the application, the country, the representation of geographical indication, the class and goods covered by the application.[90]The application relied under sub-rule (1) must be the applicants' first application in a

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[83] Ibid.

[84] Rule 4(5) lays down following conditions:

a) The geographical indication must be defined with sufficient precision so that the right to obtain relief in respect of infringement of geographical indication can be determined;

b) The graphical representation must be able to stand in place of the geographical indication without the need for supporting samples;

c) It must be reasonably practicable for persons inspecting the Register or reading the Geographical Indications Journals to understand from the graphical representation what the geographical indications is;

d) An application for the registration of a three dimensional geographical indication shall not be acted upon as such unless the application for registration contains a statement to that effect;

e) Where a colour combination is claimed as an element of a geographical indication in an application for the registration, it shall not be acted upon as such unless the application contains a statement to that effect and specifies the colours.

[85] Ibid.

[86]Ibid.

[87] Ibid.

[88] Under Rule 2 (c) "Convention" means "Paris Convention".

[89] Geographical Indications of Goods(Registration and Protection) Rules 2015 , r 5.

[90] Ibid.

convention country for the same geographical indications and for all or some of the goods under that application.[91]

Statement of user in applications

An application to register a geographical indication or as an authorized user shall, contain a statement of the period during which, and the person by whom it has been used in respect of the goods mentioned in the application. The applicant shall file an affidavit testifying to such user with exhibits showing the geographical indication as used, the volume of sales under that geographical indication, the defined territory of the country, region or locality in the country to which geographical indication relates and such other particulars as the Registrar on perusal of the application may call for from the applicants.[92]

A specimen of GI shall be appended with every application to register a GI. Such specimen shall be supported with additional three copies of such specimen.[93]

Procedure on Receipt of Application for Registration of a Geographical Indication

Every application for the registration of a geographical indication shall be made in the prescribed forms and shall contain the following:

(1) a statement as to how the geographical indication serves to designate the goods as originating from the concerned territory of the country or region or locality in the country, as the case may be, in respect of specific quality, reputation or other characteristics which are due exclusively or essentially to the geographical environment, with its inherent natural and human factors, and the production, processing or preparation of which takes place in such territory, region or locality as the case may be;

(2) the class of goods to which the geographical indication relates shall apply;

(3) the geographical map of the territory of the country or region or locality in the country in which the goods are produced of originate or are being manufactured;

(4) the particulars regarding the appearance of the geographical indication as to whether it is comprised of the words or figurative elements or both;

(5) A statement containing such particulars of the producers of the concerned goods proposed to be initially registered.[94]

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[91] Ibid.
[92] Ibid r 6.
[93] Ibid r 7.
[94] Ibid r 12.

The statement contained in the application shall also include the following:

a) an affidavit as to how the applicant claim to represent the interest of theassociation of persons or producers or any organization or authority established byor under any law;

b) The standards benchmark for the use of the geographical indication or theindustry standard as regards the production, exploitation, making ormanufacture of the goods having specific quality, reputation, or othercharacteristic of such goods that is essentially attributable to its geographicalorigin with the detailed description of the human creativity involved, if any orother characteristic from the definite territory of the country, region or locality in thecountry, as the case may be;

c) three certified copies of the map of the territory, region or locality showing thetitle, name of publisher and date of issue along with the application;

d) the particulars of special human skill involved or the uniqueness of the geographical environment or other inherent characteristics associated with thegeographical indication to which the application relates;

e) particulars of the inspection structure, if any, to regulate the use of the GI

f) where the geographical indication is a homonymous indication to an already registered geographical indication, the material factors differentiating the application from the registered geographical indications and particulars of protective measures adopted by the applicant to ensure consumers of such goods are not confused or mislead or confused in consequence of such registration.[95]

Examination of application

Upon receipt of an application, the Registrar shall examine the application and the accompanying Statement of Case as required under rule 25(1) as to whether it meets the requirements of the Act and the Rules and for this purpose, he shall ordinarily constitute a "Consultative Group" of not more than seven representatives chaired by him from organization or authority or persons well versed in the varied intricacies of this law or field to ascertain the correctness of the particulars furnished in the Statement of Case referred to in rule 25(1) which shall ordinarily be finalised within three months from the date of constitution of the Consultative Group. Thereupon, the Registrar shall issue an "Examination Report" on the application to the applicant.[96]

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[95] Ibid r 9.
[96] Ibid r 17.

Objection to acceptance-Hearing

If, on consideration of the application on merits and of any evidence of use or of a given quality, reputation or other characteristic of such goods that are essentially attributable to its geographical origin or of any other matter relevant which the applicant may be required to furnish, the Registrar has any objection to the acceptance of the application or proposes to accept it subject to such conditions, amendments, modifications or limitations as he may think right to impose, the Registrar shall communicate such objection or proposal to the applicant within one month of receipt of application through issuing notice in Form-1mentioned in the third Schedule appended to the GI Rules 2015.[97]

If within two months from the date of communication mentioned in sub-rule (1), the applicant does not amend his application according to the proposal aforesaid, or submit his observations to the Registrar or apply for a hearing or fails to attend the hearing, as the case may be, the application shall be dismissed.[98]

The decision of the Registrar under rule 28 or section 11 (provision on withdrawal of acceptance) after a hearing or without a hearing if the applicant has duly communicated his observations in writing and has stated that he does not desire to be heard, shall be communicated to the applicant in writing and if the applicant intends to appeal from such decision he may within one month from the date of receipt of such communication request the Registrar to state in writing the grounds of, and the materials used by him in arriving at his decision.[99]

Correction and amendment of application

An applicant for registration of a geographical indication may, whether before or after acceptance of his application but before the registration of the geographical indication, apply on **GI-7 Form** accompanied by the prescribed fee for the correction of any error in or in connection with his application or any amendment of his application provided such proposed amendment does not relates to amendment of the geographical indication or amendment in the description of goods or to the definite, territory, region or locality, as the case may be, that would have the effect of substantially altering or substituting the original application.

Withdrawal of Acceptance

Subject to proper hearing of the applicant or the parties, if it appears to the Registrar that the application has been accepted in error or that the circumstance of the case force the geographical indication should not be registered

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[97] Ibid r 18.
[98] Ibid.
[99] Ibid.

subject to conditions or limitations, even after acceptance of an application for registration of a geographical indication, the Registrar may refuse to admit any registration.[100]

Publication

Section 12 of the GI Act, 2013 provides that the Registrar shall cause the application to be advertised if he is satisfied that the application has complied all the requirements of the geographical indication sought to be registered. An application for the registration of a geographical indication required or permitted to be advertised or to be re-advertised shall be ordinarily advertised in the Journal within three months of the acceptance of an application for advertisement.[101] The Registrar may make the e-version of the Journal available to the public.[102] The Registrar may if he so decides, instead of causing the application to be advertised again, insert in the Journal a notification setting out the number of the application, the class in which it was made, the name and address of the principal place of business in Bangladesh, if any, of the applicant or where the applicant has no principal place of business in Bangladesh his address for service in Bangladesh.

Opposition to Registration

A notice of opposition to the registration of a geographical indication under sub-section (1) of section 13 shall be given in triplicate on **GI-3 Form** within two months from the date when such Journal was made available to the public (which date shall be certified as such by the Registrar) as the case may be, of the application for registration in the Journal.[103]The opponents shall include a statement of the grounds upon which the opponents objects to the registration of the geographical indication or of the authorised user, as the case may be.[104] An application for an extension of the period within which a notice of opposition to the registration of a geographical indication or an authorised user may be given under subsection (2) of section 13, shall be made on **Form GI-2** accompanied by the prescribed fee before the expiry of the period of two months under sub-section (1) of section 13.[105] A copy of notice of opposition shall be ordinarily served by the Registrar to the applicants within two months of the receipt of the same by the appropriate office.[106]The notice of verification shall be verified by the Registrar or by the Officer authorized by him.[107]

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[100] Ibid.
[101] Ibid r 19.
[102] Ibid.
[103] Ibid r 21.
[104] Ibid.
[105] Ibid.
[106] Ibid.
[107] Ibid.

Counter-statement

The counter-statement required by sub-section (1) of section 14 shall be sent in triplicate on **GI-4 Form** within two months from the receipt by the applicant of the copy of the notice of opposition from the Registrar and shall set out what facts, if any, alleged in the notice of opposition, are admitted by the applicant.[108]

Evidence in support of application by the applicant

Within two months from services on him of a copy of the counterstatement or within such further period not exceeding one month in the aggregate thereafter as the Registrar may on request allow, the opponent shall either leave with the Registrar such evidence by way of affidavit as he may desire to adduce in support of his opposition or shall intimate to the Registrar and to the applicant in writing that he does not desire to adduce evidence in support of his opposition but intends to rely on the facts stated in the notice of opposition.[109] Within two months or within such further period not exceeding one months thereafter in the aggregate as the Registrar may on request allow, on the receipt by the applicant of the copies of affidavits in support of opposition or of the intimation that the opponent does not desire to adduce any evidence in support of his opposition, the applicant shall leave with the Registrar such evidence by way of affidavit as he desires to adduce in support of his application.[110]

Evidence in reply by opponent

Within one month from the receipt by the opponent of the copies of the applicant's affidavit or within such further period not exceeding one month in the aggregate thereafter as the Registrar may on request on **GI Form-5** accompanied by the prescribed fee allow, the opponent may leave with the Registrar evidence by affidavit in reply and shall deliver to the applicant copies thereof. This evidence shall be confined to matters strictly in reply.[111]

Where there are exhibits to affidavits filed in an opposition, a copy of the exhibitor impression of each exhibit shall be sent to the other party in his request and at his expense, or, if such copies or impression cannot conveniently be furnished, the original shall be left in the Registry in order that they may be open to inspection. The original exhibits shall be produced at the hearing unless the Registrar otherwise directs.[112]

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[108] Ibid r 22.
[109] Ibid r 23.
[110] Rule 38(1) of the Draft Rules
[111] Ibid.
[112] Ibid.

Hearing and decision[113]

Upon completion of the evidence (if any), the Registrar shall give notice to the parties of a date when he will hear the arguments in the case within 3 months of completion of evidence. An adjournment may be given at the request of the party, but the Agent is busy at another court is not a cause for adjournment. The registrar shall give his decision in writing.

Notice as to Non-grant of the Application for Registration

If an application for registration is refused u/s 11 or non-granted u/s 14 (5) then the Registrar shall serve a notice in the **Form -2** appended to the third schedule to the applicant or his duly authorized agent.[114]

Entry in the Register[115]

When a GI is registered u/s17 it shall be entered into the Register mentioned therein. The entry of a geographical indication in the register shall specify the date of filing of application, the actual date of the registration, the goods and the class in respect of which it is registered. In addition to that the following shall also be mentioned:

a) The name, address, the main place of business in Bangladesh, authorized user etc;
b) If the authorized user has no business in Bangladesh then the address of correspondence in Bangladesh;
c) In case of foreign institution or association in case where the institution or association has no place of business in Bangladesh then its address of correspondence with its address in country of origin;
d) The business, occupation or trade of the authorized user;
e) The rights vested and divested as a result of the registration;
f) In case of Convention application the right of priority with the date of priority.

In case of death of any applicant for the registration of a geographical indication after the date of his application and before the geographical indication has been entered in the register, the Registrar may, on proof of the applicant's death and on proof of the transmission of the interest of the deceased person, substitute in the application his successor in interest in place of the name of such deceased applicant and the application may proceed thereafter as so amended.[116]

Certificate of Registration

On the application of the applicant for registration in GI-14 Form with the prescribed fees, the Registrar shall issue the certificate of the GI registration in

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[113] Ibid r 26.
[114] Ibid.
[115] Ibid r 27.
[116] Ibid r 29.

Form-3 appended to the Third Schedule.[117] On the application of a registered user of a GI the Registrar shall provide a certified copy of the GI registration certificate.[118]

Registration as Authorized User

An authorized user shall apply with the affidavit in GI-6 Form. At the entrance of the name of the registered user the date of application and registration of the GI, relevant product and class has to be mentioned. Additionally, following have to be mentioned:

(a) The address of the principal place of business in Bangladesh, if any, of the registered proprietor of the geographical indication;
(b) Particulars of the geographical indication registered including the specification of goods and the class in which it is registered;
(c) The address of the principal place of business in Bangladesh, if any, of the authorized user;
(d) Where the authorized user of a registered geographical indication has no place of business in Bangladesh his address for service in Bangladesh as entered in the application for registration together with his address in his home country;
(e) Particulars of the trade, business, profession, occupation, dealership or other description of the authorized user of the geographical indication as entered in the application for registration;
(f) The priority date, if any, to be accorded pursuant to a convention application made under section 20.

A certificate shall also be given by the Registrar to a registered authorized user in the Form-3 in pursuance of an application made in GI-8 Form.[119]

Renewal of Registration[120]

The initial validity of the registration of a GI is for 5 years. It can be renewed for a period of 3 years. Renewal can be carried on perpetually unless cancelled or declared void. Application for renewal has to be made in GI Form-9. Procedure of renewal has been outlined in Rule 50.

(G) Critique of the GI regime of Bangladesh

The Act categorically disentitles a GI from the protection which has become generic. The TRIPS Agreement has not used the term "generic" to disentitle a GI from protection rather used the expressions "cease to be protected" "have fallen into disuse". Apparently Bangladesh has failed to use the flexibility offered by the TRIPS Agreement. The ambit of "*genericide*" is wider than the expressions used by

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[117] Ibid r 28.
[118] Ibid.
[119] Ibid.
[120] Ibid r 32.

the WTO TRIPS Agreement. In the definition of the Act the modalities for "genericide" have been used widely both for territorial and subject matter aspects. The Act does not define the geographical area limit to determine "genericide" making a GI with worldwide notoriety vulnerable to "genericide". For example, the Bangladeshi GI "Jamdani" has also been claimed by India under the name "Uppada Jamdani". If we had a legislation provisioning that Bangladeshi GIs would be considered generic if they become generic within the territory of Bangladesh, India could have not claimed such. To simply put, the Act has not defined the geographical area limit to determine "genericide" making a GI with worldwide notoriety vulnerable to "genericide". From a subject-matter perspective, having used the modalities "designation of goods" and "place of origin" conjunctively, the Act has made both "appellation of origin" and GI vulnerable to "genericide".

The Act has made provision for two types of registration i.e. registration for GI and registration as authorized user. The persons, who is claiming to produce, extract or processing relevant GI foods may get them registered as an authorized user of such goods. These two types of registration have to be accomplished through separate applications.[121] It is submitted that provisions for registration as an authorized user have been adequately outlined neither in the Act nor in the Rules. The issues like the relation between registered proprietor and authorized user of the GI, when can a registered proprietor appoint an authorized user, whether an authorized user should have got a letter of consent from the authorized user or whether the notion of authorized user is only limited to foreign GIs are still unresolved. It is also not clear when an authorized user would be considered as "a producer, extractor, processor or manufacturer of a GI"

(II) Recommendations

1) To protect GIs with worldwide notoriety, they should be registered under the "additional protection" scheme of the Act. A GI registered under such scheme would be protected against the use of any GIs accompanied by terms such as "kind", "type", "style", "imitation" or other like expressions. The discretion to declare some goods to be protected under the additional protection regime lies with the government. The government is yet to publish any such list in the Official Gazette. The government should publish a list of GI goods with worldwide notoriety like "Jamdani", "naksikantha", "hilsha" ,"Mangoes from Rajshahi" or certain "aromatic rice species". Bangladesh should reap the benefit of Doha Round negotiations by giving special protection to certain GIs in goods beyond wines and spirits.

2) Since an individual producer cannot apply for registration in individual capacity a concern remains whether a real producer, extractor or manufacturer of GI goods is divested from being a beneficiary. In the

[121] Section 10 read with rule 30 of the GI Rules 2015.

prevailing socio-economic reality of Bangladesh, the *bona fide* producers of GI goods have not always been in a position to bargain and exploit the benefit offered to them by the society. Influential traders and local vested interest groups[122] may divest them from the benefit accrued to them under the GI Act. This trend may tend the GI Act to be counterproductive since the real minds and entrepreneurs behind a GI are excluded from being benefited. This is the reason why a post-registration / post-GI mechanism should be set to monitor whether the bona fide entrepreneurs or real producers of GI goods who are the historical reservoirs of GIs are being benefited from the GI regime.

3) Rule 27 of the Draft Rules dictates the Registrar to form "consultative group" to examine the applications for GI registration. But the rule does not clearly spell out the persons who are eligible to be there in the "consultative group". The rule should be amended and re-drafted in such a way that precisely spells out at least the fields of art from where the members would be elected.

4) The GI regime of Bangladesh has made no direct reference to traditional knowledge, traditional practices and traditional goods. So a concern remains whether Traditional Knowledge and related goods could be protected in our GI regime. Traditional knowledge and related goods, e.g. certain medicinal plant varieties and traditional healing practices could be protected under the GI regime. In Switzerland, for example, agricultural goods and processed agricultural goods with traditional names can be protected as a Protected Designation of Origin (PDOs). Moreover, in the absence of a legal mechanism to protect traditional knowledge and related goods the GI Act could fill-up the legal vacuum. Pertinently, traditional goods like turmeric, "name" have already been registered under the patent regime in the US for its unique quality as a healer. India has restored those goods while Bangladesh is yet to make any law to protect them. Bangladesh may approach to recover those products after having registered them as GI under the relevant regime.

5) The Act could make some GI-HOTSPOTS i.e. by way of giving special protection of GI emanating from certain regions. For example, the GI regime of the EU (as discussed earlier) has made special protection mechanisms for GIs found in Mountains and Islands. Bangladesh could also

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[122] Within a recognized "association," traditional leaders may impose their will on members, reifying traditional hierarchies. Madhavi Sunder, 'The invention of traditional knowledge' (2007) *Law and contemporary problems* 97-124.

make special mechanisms for GIs emanating from Hilly areas and Coastal areas or GI is belonging to aboriginal people.

6) An essential prerequisite for establishing GI status in foreign countries is obtaining legal protection made available in those countries. However, it may turn out to be a daunting task to acquire legal armor in various target countries as per their respective legal frameworks. More so because, there exist significant divergences among countries with regard to the modes and the purposes of protection of GIs. Notably, TRIPS (Article 1.1) leaves it up to the Member countries to determine the appropriate method of implementing the provisions of the Agreement within their own legal framework. So Bangladesh could establish a national authority that would provide legal and technical support to local GI proprietors to get their GIs registered in the foreign countries.

7) The GI regime has made no reference to a GI Inspection structure which is required to ensure and maintain the purported quality of the GI goods.

8) As mentioned earlier, the registered proprietor of a GI in Bangladesh has to be an 'association of persons or of producers'. Such a requirement often entails creation of a new "association", thereby triggering the collective action problem upfront.[123] The registration process of a GI is, therefore, likely to involve some re-organization of the product's existing supply chain, leading to modifications in well-established commercial relations and distribution channels. This often results in new economic opportunities for some new players at the cost of some pre-existing ones, thereby creating room for conflicts.

9) Permission given to bodies other than those of the producer to register GI and thereby becoming registered proprietors allows chance of misuse. As in Bangladesh culture of law enforcement is not much strong, the real producer may be sidelined by the proprietors-they may not even know about such abuse.

10) Under European GI regime an individual and natural person could register GIs on the proof of two things a) that the person concerned is the only producer in the defined geographical area willing to submit the application and b) that the defined geographical area possesses characteristics which differ appreciably from those of neighbouring areas or the characteristics of

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[123] Kasturi Das, 'Socio-economic implications of protecting geographical indications in India' (*Centre for WTO studies*, 2009) 20.

the product differ from those produced in the neighbouring areas.[124] In Thailand an individual person, natural or legal, can apply for the protection of geographical indications.[125]

11) Branding of GI products[126] through logo and marks is an essential marketing tool to enable the product to find its niche market. The GI management regime of Bangladesh has so far taken no initiative for the branding of GI products either through sign (logo) or labeling. Given the wide geographical spectrum of some GIs in Bangladesh like *nakshi kantha*, the Government should specify a uniform logo for relevant GIs.

12) Under section 9 of the Geographical Indications Act a producer can get a GI registered and become a proprietor of the GI. The definition of "producer" also includes a person who deals in such production, exploitation, making or manufacturing of GI goods.[127] The definition of "producer" seems to be very wide which may ultimately facilitate the intermediaries and by reaping the benefits arising out of the GI registration excluding the real and bona fide producers of GI.

13) The registration procedure seems to be too cumbersome and protracted. Time consuming registration may help a GI to become generic in a hostile and competitive domestic and global business environment. So the procedure for registration should be made transparent, expedient and speedy curtailing unnecessary formalities

14) For creating a better environment to protect GIs a *sui generis* law on the protection of traditional knowledge must be enacted.

15) In India the Intellectual Property Appellate Board[128] entertains appellate jurisdiction from the proceeding of the Registrar. The Appellate Board headed by a Chairman is composed of Benches comprising two members- one technical and one judicial.[129] The Appellate Board has been designed in such a way that it predominantly comprises of personnel from a legal background. In Bangladesh in a comparable situation an appeal from the

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[124] T G Agitha, 'Traditional Knowledge and Geographical Indications' (Paper presented at Centre for WTO Studies, Indian Institute of Foreign Trade, New Delhi, 2009).

[125] *Act on Protection of Geographical Indications B.E. 2546(2003)* (Thailand).

[126] On the necessity and strategy of branding of GI Products, see, for example, Sanjeeb Agarwal and Michael J. Baron, *Emerging issues for geographical indication branding strategies* (Midwest Agribusiness Trade Research and Information Center, Iowa State University, 2005)

[127] *The Geographcal Indication of Goods (Registration and Protection) Act 2015,* s 2(3)

[128] S.83 of the Indian Trademark Act,1999.

[129] S.84 of the Indian Trademark Act,1999

proceeding of the Registrar goes to the Secretary of the Commerce Ministry who may not happen to be from a law - background. Bangladesh should also design its GI Appellate authority following the Indian model to ensure transparency, expediency and expertise. In Thailand Geographical Indications Commissions works as an appellate and expert body.[130]

16) In a *sui generis* arrangement like ours to protect GI could also protect the "poor people's knowledge"[131] of which GIs is the result. This protection of GI knowledge-base would further guard our GIs from misappropriation. Such an arrangement could bring revenue for the knowledge-holder by way of access to benefit sharing even if they are not in a position to commercialize the GI goods.[132]

17) The GI regime of Bangladesh has, to some extent failed to appreciate the realities of Bangladesh, where poor people move from rural areas to mega cities to pursue their fate. This "Diasporas" may happen due to climate change or to seek a better market in cities. "GI Form-1" of the Draft GI Rules 2014 requires "proof of origin" or "historical record" of the continuous use of goods or process. To speak alternatively, the GI Act has presupposed culture as static phenomena in terms of geography i.e. linking culture to land. Sunder[133] points out "such a restriction could stifle opportunities for some individuals as they remain within a traditional community by economic necessity not choice".

18) We have to establish that the name "jamdani" is ours and then we would be able to claim that "uppadajamdani" is a misnomer. If we once register the GI Jamdani under the additional protection scheme, we would be able to invoke a declaration from the court that "uppadajamdani" is a misnomer inasmuch it is confusing and misleading vis-à-vis the GI "Jamdani" which exclusively belongs to Bangladesh. Our argument would be based on the construction of section 22(3) of the Indian GI Act, 1999 which provides that, GIs which are endowed with additional protection are protected against use of any similar GIs accompanied by terms such as"kind", "type", "style", "imitation" or other like expressions. For example, the GI "uppada Jamdani" is composed of two words "uppada" and "jamdani"- the latter expression

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130 S.30 of the Act on Protection of Geographical Indications B.E. 2546(2003) (Thailand)

131 See generally J Michael Finger and Philip Schulereds, *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (2004).

132 The scheme of our 2013 Act predominately provides GI proprietorship to the persons who deal in GI goods in commercial scale.

133 Madhavi Sunder, 'The invention of traditional knowledge' (2007) *Law and contemporary problems* 97-124.

"Jamdani" *in toto* imitates a GI of Bangladesh with world- wide notoriety. If we construe article 22 (3) of the Indian GI Act *ejusdem generis, it* would give us a good case against "uppada jamdani".

19) We have to register them under the special protection regime under the GI Act, 2013. Then, we have to approach to get our GIs registered over the foreign jurisdiction where they are threatened.[134] Bangladesh is also required to appoint an international watch agency to monitor the usurpation the GIs of Bangladesh.

20) Bangladesh is not a party to the Lisbon Agreement on International Protection of GI which has recently been amended to provide for international registration of GIs.[135] So fighting for the cross - border protection of GIs across the world would not be cost-effective for Bangladesh

Conclusion

Offering protection to GI goods brings enormous benefits to the creators and users, whether are they in developed, developing and least developed countries. To offer protection to GI goods, there are different types of international instruments. Signing international instruments on GI binds countries like Bangladesh to follow the instrument standard for protection benefitting GI creators and users, and monitoring protection and enforcement of GI goods worldwide with nominal costs.

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[134] On the procedure as to how we can restore GIs misappropriated in the foreign jurisdiction, see, for example, Mohammad Towhidul Islam, 'Protecting Jamdani with Geographical Indications', *The Daily Star (online)* November 6, 2014 <http://www.thedailystar.net/protecting-jamdani-with-geographical-indications-48901> accessed on 7 January 2016; See also, Md. Ahsan Habib, '*Jamdani* or *Uppada Jamdani*: the GI Conundrum' (Paper presented at Fourth Global Congress on Intellectual Property Rights and Public Interest, New Delhi, 2015)

[135] WIPO, 'The Geneva Act of the Lisbon Agreement on Appellations of Origin and GIs adopted at Diplomatic Conference' (Geneva May 20, 2015) <http://www.wipo.int/pressroom/en/articles/2015/article_0009.html>

Legislation on Local Government Institutions in Bangladesh: An Appraisal

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1. Introduction

Decision-makings with regard to LGIs have largely varied according to the priorities and political commitments of the incumbent governments at different phases of the history. Therefore, the LGIs in the territory now comprising Bangladesh have failed to evolve in a consistent manner.[1] Local governments were never regarded as 'self-governments' of small areas, rather they were treated as an agent or client of central/national government. Moreover, because of their unplanned and inconsistent development, there are a lot of inconsistency in the structure, functions and jurisdiction of different LGIs. Even certain provisions regarding LGIs were inconsistent with the Constitution also. These inconsistencies create a complex relationship between different local government bodies, which in turn, results in an inefficient system of local governance. Three of the existing five basic laws on rural and urban LGIs have been promulgated very recently, 2009, namely: Local Government (Union Parishad) Act, Local Government (Paurashava) Act and Local Government (City Corporation) Act. One of the other two, which was promulgated in 1998, namely, Upazila Parishad Act, has also undergone massive amendments in 2009 and also in 2011. Besides, the Zila Parishad Act of 2000 is still in force in its entirety. In an attempt to identify above-mentioned anomalies, this article critically analyses these existing laws, including the constitutional provisions and recommends necessary reforms to bring the consistency among these basic legislation so that the government may take immediate steps to develop an effective local government system in Bangladesh.

3.1 Constitutional Base of LGIs: Critical Analysis

In Bangladesh, the encouragement for the LGIs composed of representatives of the areas concerned as a fundamental principle has been removed from Article 9 by the 15th Amendment of the Constitution. However, the spirit is still there under Article 11 in which the State shall ensure the effective participation by the people through their elected representatives in the administration at all levels. The term 'administration at all levels' creates a little confusion since there may be two categories of administration: functional administration and territorial

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[1] See for details, Kamal Siddiqui, *Local Government in Bangladesh* (The University Press Limited, 2005) 29-114.

administration.[2] Moreover, when read with the Bengali version of the term 'local government' in Article 59, it is more confusing since the term '*Sthanio Shashon*' used in the Bengali version of the Constitution is not synonymous with the term 'local government' used in the English version. The term in Bangla actually means 'local administration', which is in consonance with the term 'administration at all levels" of Article 11, but not in any way indicative of local self-government as has been envisioned in the English version of Article 59. This anomaly should be removed to provide a strong base of the local governments in the Constitution of Bangladesh.[3] This is important because as per Article 153 of the Constitution, the Bengali text shall prevail in the event of conflict between the Bengali and the English Text.

Moreover, Article 59 of the Constitution provides for local government in every administrative unit of the Republic composed of persons elected in accordance with law. The term 'administrative unit' does not in practice include unions, though it might include divisions.[4] Thus, for example, local government at the union level is not consistent with the constitutional provision, while divisions do not have any such LGIs. But throughout the history of LGIs in the territory now comprising Bangladesh, UP has remained reasonably stable, while other administrative units namely Districts or Divisions have lost their importance on many occasions in terms of local governance.[5] To make the legislation on UP in conformity with the constitutional provision, government has especially declared UP as an administrative unit.[6] Similar declaration has been made in the laws on Paurashava, and City Corporation also.[7] This was because of Article 152 of the Constitution which defines 'administrative unit' as a district or other area designated by law for the purpose of Article 59. This provision of Article 152 and the declarations of city/town/union/upazila as administrative units were completely unnecessary. In fact, it is a wrong concept to create any local government body parallel to an already existing administrative unit. Local government itself implies that it shall be an autonomous body having limited law making ability, which would provide public service, conduct development activities, and more importantly, run the

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[2] Zayeda Sharmin, Amdadul Haque and Fakhrul Islam, 'Problems of Strengthening Local Government in Bangladesh: Towards a Comprehensive Solution', (2012) 15(1) *Shahjalal University of Science and Technology Studies* 76, 81.

[3] Tofail Ahmed, *Local Government & Field Administration in the Twenty First Centuries: Some Reform Agenda (In Bengali)* (Rupantar, 2002) 25.

[4] Ibid 26.

[5] See for details, Siddiqui, above n. 1.

[6] *Local Government (Union Parishad) Act 2009*, s 8.

[7] *Local Government (Paurashava) Act 2009*, s 5 and *Local Government (City Corporation) Act 2009*, s 3[7].

administration at the local level. Therefore, it does not have any connection with the administrative unit of the national government. Rather, establishing local government parallel to administrative unit of the national government would result in double-administration and it would increase both complexities and cost.[8] Therefore, it is better to amend the Constitution instead of justifying the Union Parishad at the Union level by declaring it as an administrative unit. UP should remain as an autonomous body in full charge of the local administration at the union level. Rather government may now decide about abandoning some LGIs (such as Zila Parishad) which co-exist with administrative unit of the national government in true sense in order to avoid complexities of dual administration.

The Constitution has also empowered the parliament to promulgate laws to confer powers on the local government bodies including power to impose taxes for local purposes and to maintain funds.[9] Thus the Constitution has left the task of making local governments functional with the ordinary laws passed by the parliament. As a result, the issues like the hierarchical nature of tiers of LGIs corresponding to administrative units, central-local relationship, functions, functionaries, financing and freedom of LGIs in general hang on the balance and entirely depend on the direction given by the incumbent governments.[10] Therefore, in the absence of any specific provisions guaranteeing proper functioning of such local bodies, certain shortcomings in the existing laws governing the system of local government are evident. In this connection, Indian Constitution may be considered as an example. To give effect to the fundamental principle enshrined in Article 40 of the Indian Constitution, the 73rd amendment inserted certain basic and essential provisions on rural bodies of local self-government to remove the shortcomings of the village panchayets.[11] Similarly, the 74th amendment inserted new provisions to put the urban local government on a firmer footing.[12] Thus, these two amendments to the Indian Constitution provides a direction with a guarantee clause regarding the number of tiers, division of functions amongst central, regional and local levels, clear financing arrangement with the formation of the State Finance Commissions (SFCs) and framework for planning with mandatory District Planning Council (DPC).[13] The Constitution of Bangladesh has not mentioned anything about the election of local governments in Part VII. Therefore, the electoral rules and regulations for different tier of local government promulgated under different LG legislations do not have

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[8] Ahmed, above n 2, 26-27.
[9] *Constitution of the People's Republic of Bangladesh 1972* art. 60.
[10] Tofail Ahmed, *Decentralisation and the Local State: Political Economy of Local Government in Bangladesh (*Agamee Prakashani, 2012) 344.
[11] For details, < http://indiacode.nic.in/coiweb/amend/amend73.htm>
[12] For details, <http://indiacode.nic.in/coiweb/amend/amend74.htm >
[13] Ahmed, above n 9, 344.

any direct backing or guarantee from the Constitution. The elections of the local government therefore completely depend on the sweet will of the incumbent government. It clearly goes against the spirit of democracy.

3.2 Formation and Structure of LGIs: Critical Analysis

There are a lot of inconsistencies in the formation and structure of different types of LGIs under the current legislation. At the rural level, Union Parishad (UP) has been the most successful tier of the local government which survived all the socio-political upheavals throughout the history.[14] UP is now formed in accordance with the provisions of Local Government (Union Parishad) Act of 2009. According to section 3 of the Act, each union composed of several villages shall be divided into nine wards for the purpose of electing regular members and into three wards for the purpose of electing women members in the reserved seat. Nine UP members shall be elected from each ward, which may include regular women members also.[15] Three women members for reserved seats shall also be directly elected from the three wards.[16] Besides, the Chairman shall be directly elected by all eligible voters living within a UP and he will also be regarded as a member of the UP.[17] Thus UP, under the current legislation, is a purely elective body, which is in conformity with the Constitution. It will not be out of the place to mention here that every regular ward (not the wards for reserved seats) shall form a *Ward Shava* consisting of all the eligible voters of that ward.[18] Concerned UP member of each ward will be the Chairman of that *Shava,* which will hold minimum two meetings every year, one of which shall be known as Annual *Shava.*[19] Concerned woman member of that ward shall be the adviser of that *Shava.*[20] This provision is a good insertion in the sense that it would allow the UP to create awareness among the adult citizen within their jurisdiction as to their responsibilities and thus encourage them to cooperate in the proper functioning of the UP.

Upazila Parishad (UZP), on the other hand, is regulated by the Upazila Parishad Act of 1998. This Act, as mentioned above, has undergone major amendments in 2009 and 2011. According to section 6 of the Act, the UZP shall consist of one Chairman, two Vice-Chairmen (including one woman Vice-Chairman), Chairmen of the UPs and also of Paurashavas (if any) as members, also the women members of the reserved seats. Chairman and Vice-Chairmen shall be directly elected by the eligible voters of that upazila on the basis of adult franchise.[21] The number of the reserved seats for women members shall be one-third of the total number of UPs and

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[14] See for details, Siddiqui, above n 1.
[15] *Local Government (Union Parishad) Act 2009*, s 10.
[16] Ibid.
[17] Ibid.
[18] Ibid s. 4.
[19] Ibid s. 5.
[20] Ibid.
[21] *Upazila Parishad Act 1998*, s. 6.

Paurashavas within the jurisdiction of that upazila. The women members of the reserved seats of those UPs and Paurashavas shall elect women members for the reserved seats of the UP from among themselves.[22] Therefore, it is evident that apart from the Chairman and the Vice-Chairmen, all other members are the ex-officiao representative members from UPs and Paurashavas.

Under section 4 of the Zila Parishad Act of 2000, Zila Parishad shall consist of One Chairman and twenty members including five women members of reserved seats. Chairman and members shall be directly elected by the Mayors and Commissioners of the City Corporations (if any) and Paurashavas, Chairman of the UZP and also the Chairman and members of the UP.[23] Thus, ZP is an elective body, though Chairman and members are indirectly elected by the ex-officio representatives of other LGIs.

At the urban level, Paurashava and City Corporations are the two types of LGIs which are regulated by the Local Government (Paurashava) Act of 2009 and the Local Government (City Corporation) Act of 2009. According to section 6 of the Paurashava Act, a Paurashava may be divided into as many wards as the government may deem fit and each ward shall be represented by one Councilor. Apart from that, government will reserve one-third of the total number of wards as reserved seats for women. Paurahsava shall consist of a Mayor and a number of Councilors representing each ward of the Paurashav and also the women members of the reserved seats. Mayor shall be regarded as a Councilor of the Paurashava. Similarly, according to section 5 of the City Corporation Act, a City Corporation may be divided into as many wards as the government may deem fit and each ward shall be represented by one Councilor. Apart from that, government will reserve one-third of the total number of wards as reserved seats for women. City Corporation shall consist of a Mayor and a number of Councilors representing each ward of the City and also the women members of the reserved seats. Mayor shall be regarded as a Councilor of the Corporation.

Therefore, it is evident from the above discussion that the formation and structure of the UP, Paurashava and City Corporation are almost similar except the fact that the number of wards in case of UP is already fixed by the law. Therefore, the formation purely conforms to the concept that UP is a local government body at the rural level, and Paurashava and City Corporation, depending on the size and income of the urban area, are local government bodies at the urban level. But from the formation of the UZP, it is very clear that UZP as a local self-government at the Upazila level is not that essential. Upazila usually consists of either UPs or both UPs and Paurashavas. Therefore, another local self-government body at the Upazila level consisting of the ex-officio representatives of the UPs and Paurashavas may create confusion. As will be discussed below, this would result in overlapping of functions also. Moreover, UZP Chairman and Vice-Chairmen are elected by the voters from both UPs and Paurashavas, whereas, UZP, as a rural LGI, does not have any

[22] Ibid.
[23] *Zila Parishad Act 2000,* s. 17.

jurisdiction to serve the voters of Paurashavas. Therefore, it is quite illogical to ask the voters within a Paurashava to elect the UZP Chairman or Vice-Chairmen. However, since UZP consists of the ex-officio representatives of the UPs and the Paurashavas, it may exist as a local government coordinating body, as it was before the reorganization of Thanas in 1982.[24] If UZP is entrusted with the only task of coordinating the activities of UPs and Paurashavas with supervisory authority, it would rather contribute to the effective functioning of the local government bodies at both the rural and the urban level. Moreover, in view of rapid urban growth, this rural-urban divide might become a redundant concept in future.[25] The current trend of social transformation is rapidly progressing towards urbanization.[26] If UZP is allowed to coordinate the activities of UPs and Paurashavas, it would contribute to the effective transition of the rural areas to urban areas in the form of Paurashavas/municipalities. Those may be categorised as rural, semi-urban and fully urban municipalities depending on the scale and degree of urbanization but urbanization is the ultimate goal and reality.[27] On the other hand, the formation and structure of the ZP simply implies that it is merely increasing the tier in the rural local government structure without any compelling reason. It is not even functional at this moment in true sense, since there is no elected body to run ZP. District will always remain an important administrative unit of the government and therefore, it is not that essential to create a local government body parallel to that.

Since formation and structure of the UPs and Paurashavas/City Corporations are almost same and UZP, as a coordinating body, may be entrusted with the task of coordinating the activities of UPs and Paurashavas, all of them may be regulated by a single framework law instead of piecemeal legislation for each unit. Thus, rural-urban divide may also be eliminated in a rational way in near future.

3.3 Functions of LGIs: Critical Analysis

A long list of functions can be seen in all the LGI legislations so far enacted. According to the UP Act of 2009, the total numbers of responsibilities/activities that are conferred to UPs are 38,[28] based on the basic four themes of its function namely, administration and establishment, maintaining public order, welfare activities and economic and social development plans and their implementation.[29] Moreover, UPs are mandated to carry out any activities given by the Government from time to time.[30] Similarly, UZP also has 17 responsibilities as mentioned in the the UZP Act.[31] Similarly, Paurashava Act has entrusted the Paurashava with 64

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[24] See for details, Siddiqui, above n 1, 68-71.
[25] Ahmed, above n 9, 344.
[26] Ibid, 342.
[27] Ibid.
[28] *Local Government (Union Parishad) Act 2009*, second schedule.
[29] Ibid s. 47.
[30] Ibid second schedule.
[31] *Upazila Parishad Act 1998*, second schedule.

responsibilities/activities.[32] Similar responsibilities/activities have been mentioned for City Corporation in the City Corporation Act.[33] However, there are a lot of similarities in those responsibilities and activities. For example, all UZPs are required to formulate a five year plan and then need to divide such plan into annual development plans.[34] The same provision is applicable to all other LGIs including Union Parishads, Paurashava, and city corporations too.[35] Now, if UPs and Paurashavas prepare their five year plans, it is not clear as to what extent UZP can formulate a plan with the ex-officio representatives from UPs and Paurashavas. This provision for UZP appears to be conflicting with other two units. Similarly, both the Paurashava and UZP have the mandate to maintain and improve the public health and education. Even, UPs also have similar mandates. Therefore, there are confusion and ambiguity in terms of jurisdiction, power and roles and responsibilities of different LGIs. This issue gets further complicated when different types of LGIs share the same geographical area with almost similar mandates and responsibilities such as Zila Parishads, Upazila Parishads and Paurashavas/City Corporation.

In fact, LGIs should have standard and uniform functions without any ambiguity in terms of jurisdiction. Therefore, a standard list of uniform functions should be there for LGIs, which shall be performed by UPs at the union level and by Paurashava/City Corporation in the urban areas. However, LGI in an urban area may have a few different functions which might not be applicable for rural LGI and *vice versa.* For example, developmental activities of urban and rural LGIs may vary depending on the government grants and income. But the services package on health, education, housing, electricity, gas, telecommunication, road network, amusement etc. have to be provided to all citizens – urban, semi-urban or rural.[36] So, there must not be any conflict between the functions and jurisdictions of different LGIs. To avoid these conflicts, UZP and ZP should not have any designated list of functions as such, which often share the same geographical areas with Paurashava. Rather UZP may work as a coordinating body, as mentioned above, in avoiding conflicts between different LGIs in terms of jurisdiction, roles and responsibilities. On the other hand, the role of ZP as a local self-government appears to be artificially imposed. For example, in the list of functions for ZPs, ZP has been entrusted with the responsibility of building and maintaining bridges, culverts and public streets, which are neither maintained by the UZP, nor by the Paurashava or the government.[37] This provision is a bit illusory since it requires explanation as to why there should be such constructions which are not even maintained by the government. In other words, district as an administrative unit of the national

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[32] *Local Government (Paurashava) Act 2009*, second schedule.
[33] *Local Government (City Corporation) Act 2009*, third schedule.
[34] Ahmed, above n 9, 347.
[35] Ibid.
[36] Ibid, 342.
[37] *Zila Parishad Act 2000*, first schedule.

government will definitely take care of those responsibilities which are not within the jurisdiction of Paurashava or UZP. It is completely unnecessary to establish another local government body parallel to an administrative unit only to take care of some left over responsibilities. Therefore, the existence of ZP as a tier of the rural LGIs may be reconsidered to avoid the wastage of state resources.

Apart from 38 responsibilities/activities under the second schedule of the UP Act of 2009, UP has to play judicial role also. First of all, 54 issues have been identified as offenses under the fifth schedule of the Act. Chairman or any other authorized person may deal with these offences to compromise.[38] This again adds a number of additional activities on the list of UP responsibilities, if UPs are to address those issues/offenses. Besides, under the Village Court Act of 2006, UP plays the role of a court in trying petty cases, both civil and criminal. The Village Court consists of the UP Chairman, two UP members and two other members representing two parties to the dispute.[39] These have made the range and nature of responsibility of UPs far wider and complicated than before. Moreover, the Act of 2006 violates the Constitutional provisions of separation of judiciary from the executives in spirit. On the other hand, there is no court in Upazila at present. During the period of 1981-1991, both civil and criminal courts were installed at Thana/Upazila levels, which were less expensive and easily reachable.[40] The rural people especially poor and women were tremendously benefited from formal courts near to their doorsteps.[41] The absence of judiciary at the Upzila level has also created an imbalance among the police and executive branch at that level.

UP Act of 2009 provides as many as 21 activities of the *Ward Shava*.[42] Some of which appear to be overlapping and far too ambitious given the resource and capacity base of the *Shava*. Such roles, functions and rights of the Ward need to be synchronized with the functions of UP. Section 45 of the Act authorizes the UP to have 13 Standing Committees. In a 13 member Council, formation of 13 Standing Committees appears to be unrealistic.[43] Similarly, City Corporation Act has also provided for 14 Standing Committees,[44] and Upazila Parishad Act has provided for 17 standing committees.[45] Surprisingly, with the mandate of highest number of responsibilities/activities under the Second Schedule, Paurashava Act has provided for only five standing committees.[46] Therefore, the number in other LGIs could be

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[38] *Local Government (Union Parishad) Act 2009*, s. 90.
[39] *Village Court Act 2006*, s. 5.
[40] Ahmed, above n 9, 349.
[41] Ibid.
[42] *Local Government (Union Parishad) Act 2009*, s. 6.
[43] Salahuddin M. Aminuzzaman, 'An Analysis of Union Parishad Act, 2009', (An analysis done under the LGDP-LIC Project of the United Nations Development Programme, 2011) 25.
[44] *Local Government (Union Parishad) Act 2009*, s. 50.
[45] *Upazila Parishad Act 1998*, s. 29.
[46] *Local Government (Paurashava) Act 2009*, s. 55.

reduced to at most 5 merging the existing committees and setting appropriate terms of reference for each of the committees. A uniform framework law may serve this purpose successfully. Experiences reveal that too many standing committees have been the prime cause for non-functioning of such executive bodies and making those mere symbolic.[47]

There are inconsistencies between constitutional provisions and ground realities within which LGIs exist and function. For example, Article 59 of the Constitutions has allowed the LGIs to exercise jurisdiction over the maintenance of public order, but no provision in the existing laws empowers the LGIs as such; rather policing has always been kept outside the purview of LGIs. However, as mentioned above, in case of both rural and urban LGIs, laws have provided for a standing committee for the maintenance of public order. For maintaining public order in any unit of LG, there must be some provisions to empower the LGIs for exercising control over the law enforcing agencies. In case of UPs, government may form Village Police as and when needed and the Village Police will perform its duties and exercise its power as per the instructions of the government.[48] Apparently, there is no role of the concerned UP in the formation or in controlling the Village Police. Similarly, in case of Paurashava, government may time to time form Municipal Police (Pauro Police) for any particular Paurashava.[49] Government shall appoint a suitable officer in deputation to the Paurashava to manage the Pauro Police.[50] In this case also, Pauroshava has very little role to play in the formation or in exercising control over the Pauro Police. Besides, for maintaining public order in any unit of LG, assistance of the main law enforcing agencies in that unit is essential. If the UPs, UZPs or Municipalities does not have any control over the mainstream law enforcing agencies, it would never be possible for them to properly comply with their constitutional mandate. However, in section 113 of the Paurashava Act, mainstream police officers have been asked to assist the Paurashava, on the basis of a written request, in performing their lawful duties. Similarly, all the police officers have been asked to cooperate the Mayor or Chief Executive Officer of the City Corporation in case of any offence committed under the City Corporation Act.[51] But this has nothing to do with the maintenance of public order in general. Therefore, a uniform provision for all the LGIs is needed to empower them for maintaining public order as a constitutional mandate.

Though a long list of functions is provided for each LGI, the functionaries and funds are laying with the respective line agencies of the national government at all the

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[47] Aminuzzaman, above n 42, 25.
[48] *Local Government (Union Parishad) Act 2009*, s. 48.
[49] *Local Government (Paurashava) Act 2009*, s. 114.
[50] Ibid.
[51] *Local Government (City Corporation) Act 2009*, s. 90.

corresponding levels, i.e. union, upazila and districts.[52] The responsibilities of health, family planning, education, agriculture, fisheries, livestock, physical infrastructure – all equally appeared in the list of functions of LGIs, but the functionaries and finances are absolutely controlled by the line departments.[53] The challenging question that therefore emerges is – whether functionaries and funds will also flow towards the LGIs with the list of functions. The presence of two parallel organizations with the same or overlapping assignments create more problems than solving them.[54] As a result, two separate agencies at one particular unit are neither desirable, nor practicable. Therefore, a bold and courageous step to reform the public administration is an immediate necessity.

However, all the LGIs in addition to the national government's budgetary allocation mobilize their own resources too. Each of the LGIs has been authorized to levy taxes, rates, tolls and fees on certain items fixed by the laws. For example, Paurashava has been authorized to levy taxes, rates, tolls and fees on specified items such as taxes on annual value of buildings and lands, transfer of immovable property, erection and re-erection of buildings, import and export of goods, profession, trades and callings, births, marriages, adoption and feasts, advertisements, animals, cinema, dramatic and theatrical shows, vehicles other than motor vehicles and boats, rates on lighting, fire, conservancy, execution of any works of public utility, supply of water, cess on any of the taxes imposed by the government, school fees, fees on fairs, agricultural or industrial shows, markets, licenses, slaughtering of animals, *Jalmahals, Balumahals,* ferries and other specific services rendered by the Paurashava and also the lease money on the *haats* and *bazaars*.[55] Similarly, UZP has been authorized to levy taxes on industries and commercial organizations and cinemas (where Paurashava has not been formed), portion of taxes on dramatic and theatrical shows, taxes on street lighting, fees on fairs and shows, fees on licenses and permits for profession, trades and callings, fees on services rendered by UZP, 1% of the taxes imposed on transfer of immovable property etc.[56] It appears that many of these taxes or fees to be imposed by the UZP are very similar to those of Paurshava. In case the UZP and the Paurashava share the same geographical area, these sources of income may overlap. Therefore, as mentioned above, UZP may not have any functions of its own except coordinating the activities of UPs and Paurashavas within its jurisdiction and in that case, it will not require its own source of income except government grants. On the other hand, UP has also been authorized to levy taxes, rates, tolls or fees on very similar items (though less in number) as mentioned in the third schedule of the Paurashava Act. According to the UP Act, UP may levy taxes on annual value of buildings and lands, transfer of immovable property, profession, trades and callings, land developments,

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[52] Ahmed, above n 9, 346.
[53] Ibid.
[54] Ibid.
[55] *Local Government (Paurashava) Act 2009*, third schedule.
[56] *Upazila Parishad Act 1998*, third schedule.

advertisements, cinema, dramatic and theatrical shows, fees on licenses and permits issued by the UPs, fees on marriage registration, income fixed by the government on *Jalmahals, Balumahals, pathormohal* and also the lease money on the *haats, bazaars* and ferries.[57] It therefore appears that the sources of income for both UPs and UZPs are similar in some cases, although both of them are the tiers of the rural local government. Since UZP consists of some UPs and therefore shares the same territorial jurisdiction with those UPs, it is really difficult to identify and determine the sources individually for UZP and UP, and hence, they overlap.

On the other hand, the sources of income for both urban and rural tiers of LGIs, such as Paurashava and UPs, are almost the same in many cases, except that they vary in terms of number and jurisdictions. Considering the rapid urbanization of UPs, the number of taxable items should also increase so as to be in conformity with the Paurashava/City Corporation very soon. Besides, the income earned from taxes, rates, tolls, fees and other sources levied by UP does not correspond to the functions assigned to it.[58] This seeks to give to UPs wider sources of revenue and enhance their capacity to ensure efficient mobilization of own source of revenue. Therefore, the various sources of revenue should be divided between the two levels of government on a more rational basis, in line with the expenditure responsibilities of each level.[59]

3.4 Control of the National Government over LGIs: Critical Analysis

LGIs in the territory now comprising Bangladesh has never been free from top-down colonial approach. During British and post-partition Pakistan period, there were always some agents from the central/national government who had to play some very crucial roles with regard to the LGIs.[60] Even after the emergence of Bangladesh, government officials actually took the control of existing LGIs.[61] Since then, LGIs in Bangladesh have gone through many ups and downs and tried to achieve autonomy in different phases of its development. But unfortunately, still LGIs are not free from government control and they are not yet local self-government body in true sense. Such control takes into account the daily affairs of the LGIs. The following sub-sections will therefore discuss the Chief media of government control.

3.4.1 Removal of Chairman/Member

The government may remove the Chairman/Mayor of any LGI or any of its members from his/her office on certain grounds including misconduct, corruption, willful maladministration or misuse of powers.[62] Thus the government retained a

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[57] *Local Government (Union Parishad) Act 2009*, fourth schedule.
[58] Aminuzzaman, above n 42, 18.
[59] Ibid.
[60] See for details, Siddiqui, above n 1, 39-63.
[61] Ibid, 63.
[62] *Local Government (City Corporation) Act 2009*, s. 13; *Local Government (Pourashava) Act 2009*, s. 32; *Local Government (Union Parishad) Act 2009*, s. 34; *Upazila Parishad Act* 2009, s. 13, *Zila Parishad Act* 2000, s. 10.

control over the position of the Chairman. Whether a Chairman/Mayor or any Councilor/Member is liable for misconduct or not may often depend on the subjective satisfaction of the government. The Chairman of ZP, however, cannot be removed from his/her office unless a resolution to the effect has been passed in a special meeting by two-third of the representative members of the Parishad and that becomes approved by the government.[63] This provision, though could be unethically used by "horse trading" of members by certain political quarters,[64] was rather a better insertion to improve the traditional colonial system of the removal of the Chairman. But this much protection is not also available in case of other Mayors or Chairmen. Moreover, Chairmen (except of ZP) and Mayors may also be suspended by the government through a written order on the grounds that i) proceedings have been initiated for the removal of the Chairman or Mayor or ii) criminal proceedings have been started against him/her before any court.[65] This power is most likely to be abused by the government on the second ground if it fails to ensure that the Mayor or Chairman does not adhere to its instructions or policies. Mere beginning of a criminal proceeding does not necessarily mean that the accused person is guilty, though government has been empowered to suspend the Chairman/Mayor on that ground. Government may anytime cause to file a case before the criminal court against any Chairman or Mayor to facilitate his/her suspension for an unknown period of time.

On the other hand, provision is there for all the LGIs except ZP to fetch a motion of no-confidence on the Mayor/Chairman, Councilor/Member or even the Parishad (in case of UP) upon specific allegation.[66] However, such a motion cannot be fetched within first six months of the formation of any LGI. In case of Paurashava or City Corporation, such a motion may be fetched on the Mayor or Councilor for violating the provisions of the concerned Act or for gross misconduct or physical or mental incapacity and such a motion must be accepted by the two-third majority of the members present in the voting. To be noted, half of the elected members of the Paurashava or the Corporation as the case may be, will constitute the quorum. Therefore, such a motion actually may be accepted by two-third of the half of the total elected members. In comparison to other two tiers of rural LGIs, this provision for no-confidence motion to remove the Mayor or Councilors is relatively soft. A motion of no-confidence against the Chairman or any member of the UZP may be fetched on the similar grounds as stated above; however, such a motion must be accepted by the four-fifth majority of the total members of the Parishad. In case of UP, such a motion may be fetched though on any specific allegation, but the motion

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[63] *Zila Parishad Act 2000*, s. 10.

[64] Aminuzzaman, above n 42, 23.

[65] *Local Government (City Corporation) Act 2009*, s. 12; *Local Government (Pourashava) Act 2009*, s. 31; *Local Government (Union Parishad) Act 2009*, s. 34; *Upazila Parishad Act 2009*, s. 13B.

[66] *Local Government (City Corporation) Act 2009*, s. 14; *Local Government (Pourashava) Act 2009*, s. 38; *Local Government (Union Parishad) Act 2009*, s. 39; *Upazila Parishad Act 2009*, s. 13A.

must be accepted by nine members of the Parishad, where nine members actually constitute the quorum in a 13 member Parishad.[67] Moreover, in case of UZP and UP, such a motion shall require the approval of the government. Thus, the provisions for no-confidence motion differ in different LGIs. If all the LGIs are to be elected body as per the Constitution, there should be similar provisions for the removal of their members. Additionally, provision for government approval in case of UZP and UP again shows the intention of the national government to keep each and every step of the LGIs within its grip. Therefore, this undemocratic provision should also be reconsidered.

3.4.2 Review/Cancellation of Resolution/Decision and Activities of LGIs

According to section 44(4), the UPs are to furnish to the UNO and the DC a copy of the proceedings of their meetings and resolutions passed therein. Similarly, other LGIs shall have to send the proceedings of their meetings to the Government within fourteen days for review.[68] In case of UP and City Corporation,[69] the government on its own initiative or on the application of any Chairman/Mayor or Councilor/Member, may cancel or suspend the resolution passed or decision made, if in its opinion, such resolution of decision was not made in accordance with the law, or is in conflict with any other existing law, or threatens the life, health, public order or communal harmony or against the policy decision of the government. On the other hand, in case of ZP, UZP and Paurashava,[70] there are provisions for direct control over the activities of those LGIs. If in the opinion of the government anything done or intended to be done by or on behalf of those LGIs is not in conformity with the law and in any way goes against the public interest, then government can pass any orders to quash the proceedings, to suspend the execution of any resolutions passed or any order made, prohibit the doing of anything proposed to be done or require those LGIs to take specific action. Thus it appears that, in case of ZP, UZP and Paurashava, government can not only cancel the resolution or the decision, it may prohibit the doing of any act or instruct them to

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[67] This provision requiring nice members to accept a motion of no-confidence is a bit ambiguous, if read with section 29(4). Section 29(4) considers an UP properly constituted, if three-fourth of the total members takes oath resulting the total number of members in 10. In case any member does not take oath for any reason within thirty days of the Gazette Notification under section 28 (2), and the election is not held within 90 days under section 36 due to any calamities, the UP will remain a valid Parishad with 10 members as long as the election is not held. So, if any motion of no-confidence is fetched against any member in any meeting after six months, 7 members may constitute the quorum as per the provision of section 39(8). Then, the question arises, how can a '7 members' meeting' may accept a motion of no-confidence with the votes of 9 members.

[68] *Local Government (City Corporation) Act 2009*, s. 57; *Local Government (Pourashava) Act 2009*, s. 69; *Zila Parishad Act 2000*, s. 32; *Upazila Parishad Act 2009*, s. 32.

[69] *Local Government (City Corporation) Act 2009*, s. 107 and *Local Government (Union Parishad) Act 2009*, s. 75.

[70] *Local Government (Pourashava) Act 2009*, s. 86; *Zila Parishad Act 2000*, s. 58; *Upazila Parishad Act 2009*, s. 51.

take specific action. Thus, government actually has the full control over the decision-making of the LGIs. Because of such control, LGIs will never be able to grow as autonomous self-government body. This control should be reduced to the most possible extent. Moreover, the use of different types of languages in different Acts as to the review of the activities of the LGIs gives rise to confusion and creates a conflicting scenario.

3.4.3 Institutional Control

LGIs are staffed by two types of officials: those directly employed for those bodies and those from deputation from government officials.[71] As the officials on deputation belong to the administration cadre of the government, they are recruited and controlled by the government. On the other hand, in some cases government shall recruit directly for the LGIs and in other cases, LGIs shall have the authority to recruit its staff as per the rules made by the government. For example, Chief Executive Officer or Secretary of the LGIs shall always be appointed by the government. The government generally prescribes the number of officials and employees that an LGI can engage, sanctions new posts and prescribe all the rules and regulations as to their qualifications and appointments. Even the village police shall exercise such powers and discharge such duties as are specified by the government (section 48 of the UP Act).[72] Thus, government always maintains some degree of institutional control over the LGIs. The government officials on deputation often do not want to adhere to the instructions of the elected representatives. This often results in unhealthy administration in the LGIs and dissatisfaction among the elected representatives.

UP work closely with the Upazila Administration and it is also an integral part of the Upazila Parishad. However neither the UP Act, nor the UZP Act in any section refers or outlines the nature of relationship and institutional interface between UP and UZP. No such provision is there in Paurashava Act also, where Paurashavas may share same geographical areas with UZPs. However, all the LGI Acts provide that such inter-institutional relationship shall be fixed and maintained by the government through 'standing orders' issued time to time.[73] This temporary way of dealing with the inter-institutional relationship often results in inter-institutional disputes. In that case, government plays the role of the adjudicator, and thus once again extends its control over the LGIs.[74] Single framework legislation for all the

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[71] *Local Government (City Corporation) Act 2009, ss. 62-69; Local Government (Pourashava) Act 2009, ss. 72-78; Local Government (Union Parishad) Act 2009, ss. 62-64; Upazila Parishad Act 2009, ss. 33-34, Zila Parishad Act 2000, ss. 39-41.*

[72] *Local Government (Union Parishad) Act 2009, s. 48.*

[73] *Local Government (City Corporation) Act 2009, s. 109; Local Government (Pourashava) Act 2009, s. 119; Local Government (Union Parishad) Act 2009, s. 95; Upazila Parishad Act 2009, s. 62, Zila Parishad Act 2000, s. 72.*

[74] *For eample, Local Government (Pourashava) Act 2009, s. 107; Local Government (Union Parishad) Act 2009, s.* 88; Upazila Parishad Act 2009, s. 55, Zila Parishad Act 2000, s. 64.

LGIs may be able to remove this lacuna and may contribute towards making LGIs at different tier mutually complementary.

3.4.4 Financial Control

In the field of finance, government supervision and control is as stringent and comprehensive as it is with regard to day to day administration.[75] The government in the first instance regulates the income of these institutions.[76] Acts prescribe in detail the sources of income, powers of taxation, nature of available grants-in-aid and the loans that may be raised. The government further regulates the scale and the limit of the taxes that the LGIs may be allowed to impose.[77] For example, in case of City Corporation, government may time to time instruct the corporation to impose any tax which it is supposed to impose, or to increase or reduce any already imposed tax, to release any individual or any property from taxation.[78] However, the main area where government control is very significant is the grants-in-aid. As regards these grants, it is somewhat difficult to specify their scope and scale in detail.[79] Actually, there is no clear budgetary formula for allocation of resources for LGIs.[80] The LGIs receive development and revenue grants from central exchequer, which is nominal, compared to the public expenditure incurred at the same level through separate government agencies. The public expenditure and grant vary from year to year at each level and it is mostly an uncertain terrain for LGIs to fathom.[81] Sometimes lobbying, personal connection, and a network of irregular means play a vital role in getting an enhanced amount of grant and different project support.[82] Thus, government exercises a considerable degree of control over these institutions by increasing or decreasing their quantum or by making their release subject to the fulfillment of certain conditions. These are very important and effective weapons since a delay in the release of or a cut in, certain grants-in-aid would cause hardships to these institutions.[83]

3.4.5 Control over the Election

It is very much evident from the provisions of different LGI laws that government has full control over the elections of LGIs. Election Commission (EC) has been empowered to promulgate Rules to determine the modes of election, the dates of

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[75] Siddiqui, above n 1, 276.
[76] Id.
[77] Id.
[78] See, *Local Government (City Corporation) Act 2009*, s. 85.
[79] Siddiqui, above n 1, 277.
[80] Ahmed, above n 9, 347.
[81] Ibid..
[82] Ibid.
[83] Siddiqui, above n 1, 277.

election and also for settling the disputes after the election except for ZP.[84] Under section 20 of the ZP Act, Government is supposed to make such rules for ZP. As mentioned above, EC does not have any Constitutional backing for these activities and the government may time to time change any provision of any Acts to regulate even the Election Commission's authority of making rules. Especially, the date of election is usually fixed by the government, though Election Rules states that the date will be fixed by the EC.[85] Actually, the information as to the exact date of first meeting of the newly constituted LGI remains with the government, which is very crucial to determine the tenure of the LGI and consequently, new election also. So, normally EC has to depend on the government for declaring the date of election.

The general intent of the electoral provisions in LGI laws is to provide transparent and easy approach to build a stronger and more transparent local government electoral system. The mandate of the Election Commission to oversee and conduct the UP elections will create an independent, central point of coordination for these elections. Therefore, Election Commission should be empowered in true sense to conduct such election without resorting to the government for any reason whatsoever. Free and fair as well as timely elections at the local level can be ensured only if the Election Commission is empowered to hold such elections independently without any interference from the government.

3.4.6 Supersession and Dissolution

The extreme control which the government may exercise over the LGIs is to dissolve a local government body as a whole. ZP and UZP may be dissolved by the government on the following grounds: that the LGI is unable to discharge, or persistently fails in discharging its duties, or is unable to administer its affairs or met its financial obligations or generally acts in a manner contrary to public interest, or otherwise exceeds or abuses its power.[86] In case of City Corporation, there is an additional ground for such dissolution, that is, if the Corporation fails to collect seventy five percent of its imposed annual tax, rates, tolls, fees and other charges, without any reasonable ground.[87] An elected UP may be so dissolved if it fails to submit its budget for the next year within the fixed deadline, if 75% of the total members resign or if 75% of the total members are removed for their disqualification, or if it misuses its power or is unable to discharge, or persistently fails in discharging its duties.[88] However, Paurashava may also be dissolved on the same grounds like UP, but there is an additional ground which states that, if the Paurashava fails to collect seventy five percent of its imposed annual tax, rates, tolls,

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[84] *Local Government (City Corporation) Act 2009*, s. 35; *Local Government (Pourashava) Act 2009*, s. 21; *Local Government (Union Parishad) Act 2009*, s. 20; *Upazila Parishad Act 2009*, s. 20.

[85] City Corporation Rules, r10

[86] *Zila Parishad Act 2009*, s. 61 and *Upazila Parishad Act 2009*, s. 53.

[87] *Local Government (City Corporation) Act 2009*, s. 108.

[88] *Local Government (Union Parishad) Act 2009*, s. 77.

fees and other charges, without any reasonable ground, it may also be dissolved.[89] Even if such control is necessary, the abovementioned grounds should be streamlined to create an equal standing of the LGIs at both the rural and urban level.

3.4.7 Miscellaneous

Government control over the LGIs through the placement of civil servants is not a new phenomenon. It started a long ago and still continues. However, a new phenomenon in the system of local government in Bangladesh is the advisory role of the MPs on certain LGIs. According to section 30 of the ZP Act, MPs of any particular district shall be the Advisor to that ZP and they shall be able to give advice to the ZP in performing their duties. Similarly, section 25 of the UZP Act also provides that MPs of that particular locality shall be the Advisor to that UP and his advice shall be mandatory for the UZP. This sort of political control ultimately curtails the autonomy of the LGIs and often makes them subordinate to the party in power.

The above control mechanisms are clearly against the spirit of providing more freedom and authority to local government as part of the on-going reform process towards promoting decentralization. Many countries in the world are providing more fiscal and administrative autonomy to local governments. Even developing countries like Kenya, Tanzania, Uganda and our neighbouring Nepal and India are also reducing control of central government over local government.[90] So, a reform of the existing 'Principal-Agent' relationship between the national and the local government is an urgent necessity to create a platform for truly autonomous local self-government.

Conclusion

The concept and practice of state, government and governance have constantly been changing phase and face both with the change of time. LGIs in the territory now comprising Bangladesh have undergone many experiments since British period.[91] Although some experiments intended to decentralize or devolve authority to the local government, they failed to sustain due to lack of political commitment. Therefore, a principle-agent relationship still prevails between national and local government bodies. Besides, sporadic nature of experiments by different party in powers did not allow the LGIs to evolve in a harmonious way. With the change of the governments, policy on local government also kept changing. Thus, local government bodies have not been given a chance to act as a continuing working organization. In the absence of any definite set of policies, concepts such as 'local self-government' and 'devolution of authority' are hardly applicable to our local

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[89] *Local Government (Pourashava) Act 2009*, s. 49.
[90] Aminuzzaman, above n 42, 21.
[91] See for details, Siddiqui, above n 1, 39-63.

bodies yet.[92] LGIs in Bangladesh, even after having a tradition and practice of hundreds of years, still is not regarded and respected fully as effective, functional and credible service delivery mechanism. Mere existence and stereotype continuity does not ensure its rationale and relevance. Therefore, Justice Mustafa Kamal accepted in the case of *Kudrat-E-Elahi Panir and Others v Bangladesh,*[93] that within the framework of Articles 59 and 60 of the Constitution, Parliament retained the power of continually re-organizing, re-structuring and re-modeling the local government institutions in the light of experiences gained to meet the changing needs of changing times. Accordingly, the nation is now faced with the challenge of transforming these LGI units into effective, functional and accountable democratic institutions.[94]

As already mentioned above, each individual unit of LGI is governed by a separate set of legislation and hence, it is difficult to keep consistency and ensure coordination between and amongst them. In accordance with the recommendations stated above, a uniform and single framework legislation may shape the structure, function and other basic requirements such as election, tenures, discipline, staffing, financing, jurisdiction etc. under common principle for all the LGI units currently existing in different streams. The law itself will create adequate autonomy and 'room for manoeuvre' for each unit within its own jurisdiction. The individual units will prepare their own rules and bye-laws to administer their individual services. Therefore, the article strongly recommends for the adoption of a framework law to govern both the rural and the urban LGIs in Bangladesh.

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[92] Ibid, 289.
[93] [44 DLR (AD) 319].
[94] Ahmed, above n 9, 324-326.

Linking Human Rights in the WTO—Realities and Challenges

Dr. Shima Zaman*

1. Introduction

The debate to link human rights in the WTO, though not a new issue, is yet to be examined. The main concerns in this debate are whether: the WTO is a proper forum to address human rights; the inclusion of human rights within the WTO can undermine the very objectives of free trade; trade will impair the human rights of the citizens of the WTO members; and the linkage will curtail the authority of countries to formulate regulations to protect the human rights of their citizens. A close analysis of the WTO proceedings and covered agreements reveal that from their preambles to dispute settlement process, human rights issues have been raised and addressed both overtly and covertly. In fact, the WTO never intended to exclude human rights issues from its procedure.

There is also debate over whether human rights issues are raised to promote the human rights of all or to promote trade only. The question of integrating human rights in the WTO stems from the fact that countries have human rights obligations concurrent with their commitments in the area of international trade. Rising poverty, economic inequalities, and the depletion of finite and natural resources have challenged the traditional development paradigm and shifted the focus to the need to integrate globalisation with the goal of sustainable[1] development.

This article examines this nexus in various WTO agreements and argues that human rights concerns are built into the WTO process, as the WTO members increasingly seek to reconcile their trade and human rights objectives. At times they have made it clear that they view particular human right as a policy priority, and in many instances they have struggled to find common ground between human rights and trade objectives. Trade policymakers have introduced human rights concerns in trade policy reviews and negotiated waivers of WTO obligations to protect human rights. With a discussion on the gradual accession of human rights concern in the WTO, this article analyses the human rights obligation of the WTO members, the north-south tension over the trade-human right integration issue, and WTO principles to address human rights concerns within the WTO.

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[1] Sustainability refers to 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs': WCED, *Our Common Future* (1987) 43.

2. Human Right Obligations under the WTO

The issue of integrating human rights in the WTO arises from the human rights implications of the WTO agreements and the language of the WTO preamble. The preamble commits the members to an open trading system that would contribute to the objectives of raising living standards, ensuring full employment and a large and steadily growing volume of real income and effective demand. Although these objectives are not framed with a view to the WTO assuming a primary role as an international development agency to protect and promote human right agenda, they are nonetheless typical human rights objectives closely connected with development and economic issues. The emphasis on these issues makes it clear that trade liberalisation is not limited in trade activities but must aim to ensure these human rights for all.

The preamble also refers to 'sustainable development' as a goal of the WTO.It says:

> 'The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised'.[2]

There is a trend towards defining the process of development as human development, as a comprehensive, people-centred economic, social, cultural and political process through which all the human rights and fundamental freedoms of all individuals and entire populations can be realised.[3] Thus, sustainable development includes human rights and can only be achieved through the integration and realisation of basic human rights.

The implication of this sustainable development goal of the WTO is that in case of ambiguity of a WTO provision, it can be interpreted by taking into account human rights principles or social clauses. The preamble also obliges members to protect and preserve the environment. In fact the preamble has incorporated the human right to food, health, education, work, environment, and development since all are related to standards of living. The preambular statement of the WTO objectives may raise doubt in one's perception about whether the WTO is only about trade liberalisation without regard for environmental degradation, global poverty and human rights issues. The Appellate Body (AB) in the Shrimp-Turtle case has elaborated the legal significance of the WTO preamble on the WTO objectives and stated:

> The language to the Preamble to the WTO Agreement demonstrate a recognition by the WTO negotiators that the optimal use of the world's

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[2] *The Declaration on the Right to Development*, UN Doc A/RES/41/128 (4 December 1986) art 1/1.

[3] For the conceptual evolution of the human development paradigm, see G Cornia, R Jolly, F Stewart, *Adjustment with a Human Face* (1986) II–III; UNDP, *The Human Development Report: Human Rights and Human Development* (2000).

> resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intention of the negotiators of the WTO, we believe it must add colour, texture and shading to our interpretation of the Agreement annexed to the WTO Agreement, in this case, the GATT 1994. We have already observed that Article XX (g) of GATT is appropriately read with the perspective embodied in the above preamble.[4]

This language has been reflected in the preamble of many of the WTO agreements. The AoA (Agreement on Agriculture) preamble stresses that reform commitments need to be made in a manner equitable to all members and with due regard for non-trade concerns, such as food security, environmental protection, differential treatment for developing countries and the possible adverse effects of reform on LDCs (Least Developing Countries) and net food-importing countries.[5] It also requires developed countries, in implementing their commitments on market access, to take into consideration the particular needs and conditions of developing countries.[6] It emphasises the question of food security, which is connected to the human right to food. This agreement also shows concern for protection of the environment. The preamble to the Agreement on the Application of Sanitary and Phytosanitary measures (SPS)[7] emphasises the need to improve human and animal health and the phytosanitary

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[4] Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO DocWT/DS58/AB/R, AB-1998-4 (1998); Panel Report, WTO Doc WT/DS58/R (1998) (the Shrimp–Turtle Case).

[5] The AoA, [6]:Noting that commitments under the reform programme should be made in an equitable way among all Members, having regard to non-trade concerns, including food security and the need to protect the environment; having regard to the agreement that special and differential treatment for developing countries is an integral element of the negotiations, and taking into account the possible negative effects of the implementation of the reform programme on least-developed and net food-importing developing countries.

[6] The AoA [5]:Having agreed that in implementing their commitments on market access, developed country Members would take fully into account the particular needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members, including the fullest liberalization of trade in tropical agricultural products as agreed at the Mid-Term Review, and for products of particular importance to the diversification of production from the growing of illicit narcotic crops.

[7] Preamble to the SPS:[T]hat no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade; *Desiring* to improve the human health, animal health and phytosanitary situation in all Members; *Noting* that sanitary and phytosanitary measures are often applied on the basis of bilateral agreements or protocols; *Desiring* the establishment of a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and

situation in all member countries. It recognises the right of each country to adopt or enforce measures necessary to protect human, animal or plant life or health provided that these measures are not applied as a means of arbitrary or unjustifiable discrimination or deceptively as hidden barriers of international trade.[8] In fact, it elaborates the provisions of GATT Article XX(b), which exempts measures necessary to protect human, animal or plant life or health.

Though the SPS was mainly drafted with a focus on food safety and veterinary concerns, the WTO Panel in *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* (hereinafter, the EC-Biotech case)[9] 2006 gave a broad interpretation to the scope of the SPS agreement and emphasised that the SPS could cover certain damages to the environment as well.[10]Article 1 of Annex A reflects the objectives set in the preamble. It defines measures as measures to protect human or animal life or health from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs, or from additives, contaminants, toxins or disease-causing organisms in foods, beverages or foodstuffs, or to prevent or limit other damage within the territory from the entry, establishment or spread of pests.[11]

Thus, it is evident from Annex A and the SPS preamble that the SPS aims to protect human health by ensuring market access of safe food and hazardous products. Though the SPS does not speak of the right to health specifically, its objective to ensure access to safe food is very much related to the human rights to health and to food. The human right to health is not limited to the access to essential medicines but also includes a healthy environment and prevention of diseases. The human right to food includes quality food along with the availability and accessibility of foods.

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phytosanitary measures in order to minimise their negative effects on trade; *Recognizing* the important contribution that international standards, guidelines and recommendations can make in this regard; *Desiring* to further the use of harmonised sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention, without requiring Members to change their appropriate level of protection of human, animal or plant life or health; *Recognizing* that developing country Members may encounter special difficulties in complying with the sanitary or phytosanitary measures of importing Members, and as a consequence in access to markets, and also in the formulation and application of sanitary or phytosanitary measures in their own territories, and desiring to assist them in their endeavours in this regard.

[8] The SPS Agreement, Preamble, [1].

[9] Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WTO Docs WT/DS291/R, WT/DSS292/R, WT/DS293/R (2006).

[10] Ibid, WTO Doc WT/DS291/R (2006), [7].

[11] The SPS Agreement, Annex A, art 1.

The SPS is often criticised for its impact on trade flows and risk assessment standards set by members.[12]There is also doubt over how far the SPS will be able to protect members from arbitrary or unjustifiable discrimination due to different the SPS standards or from disguised restrictions in international trade. Nevertheless, the desire to protect human health or environment indicates that the SPS can effectively address the human rights to health, food and environment if it is implemented in good faith, keeping in mind the existing disparity between members.

In addressing the problem of non-tariff barriers to trade, the Agreement on Technical Barriers to Trade (TBT)[13] seeks to encourage the development of international standards and technical regulations in a manner that does not create unnecessary obstacles to international trade. However, in doing so it recognises the right of the members to regulatory autonomy to protect its human, animal or plant life or health, the environment and its essential security interests.[14]

> The main purpose of the TBT is to eliminate every obstacle to free trade, but it also requires the countries to take measures to protect human life and health when necessary, provided such measures 'are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade'.[15]
>
> Thus, it is clear from the languages of these agreements along with the WTO preamble that the WTO never meant to exclude human rights concerns from trade arena. Rather, these preambular stipulations make it clear that in regulating trade activities, countries must take into consideration the human rights aspects so that trade does not become an obstacle to the realisation of particular human rights and vice versa.

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[12] Tsunehiro Otsuki, John S Wilson and Mirvat Sewadeh, 'Saving Two in a Billion: Quantifying the Trade Effect of European Food Safety Standards on African Exports' (2001) 26 *Food Policy* 495, 512; Spencer Henson and Rupert Loader, 'Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Requirements' (2001) 29(1) *World Development* 85, 89; Spencer Henson et al, 'How Developing Countries View the Impact of Sanitary and Phytosanitary Measures on Agricultural Exports' in Merlinda D Ingco and L Alan Winters (eds), *Agriculture and the New Trade Agenda: Creating a Global Trading Environment for Development* (2004) 359.

[13] Preamble of the TBT Agreement in Paragraph 5 expresses the desire of WTO members to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade'.

[14] Preamble of the TBT Agreement in Paragraph 6 recognises that 'no country should be prevented from taking measures necessary to ensure that quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate'.

[15] Ibid.

3. Trade and Human Rights in the WTO Debates

The debate over trade and human rights is complex, entailing multidimensional problems. It stems from the human rights impacts of the WTO. The WTO critics argue that economic liberalisation threatens the future of human rights. Susan George, in the Amnesty International Lectures on Globalizing Rights,[16] claims that if globalisation continues in its present form, 'politics will concern primarily the deadly issue of survival', and the 'bottom-line issue of human rights' will become 'who has a right to live and who does not?'[17]

Vandana Shiva argues that globalisation and free trade has hijacked the aspiration to be free.[18] Corporations are granted rights and 'absolute irresponsibility through trade laws and the livelihood of millions of people is destroyed',[19]so the human rights movement must address globalisation as the most basic and universal threat to human rights.[20] Others argue that the creation of the WTO results in 'an insidious shift in decision-making away from democratic, accountable forums' to 'distant, secretive and unaccountable international bodies, whose rules and operations are dominated by corporate interests'.[21] The WTO allows for markets to take primacy over international human rights law[22] and undermines the rights to sustainable development, health, education, knowledge, culture and labour rights.[23]

Human rights advocates claim that trade exacerbates human rights concerns by, for example, encouraging sweatshops and child labour.[24] They further argue that trade rules either complicate or prevent a government's use of economic sanctions to penalise governments that condone genocide, practice torture or commit other human rights violations.[25] They further claim the human rights treaties open the way for discriminatory measures among countries based on their human rights performance.[26]

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[16] Matthew J Gibney (ed), *Globalizing Rights* (2003).

[17] Susan George, 'Globalizing Rights?' in Gibney, Ibid 15, 23–24.

[18]Vandana Shiva, 'Food Rights: A Crooked Path' in Gibney, above n 16, 87.

[19] Ibid 91–92,100.

[20]Ibid 106–107.

[21]Lori Wallace and Michelle Sfroza, *Whose Trade Organization? Corporate Globalization and the Erosion of Democracy* (1999) 2.

[22] Marjorie Cohn, 'The World Trade Organization: Elevating Property Interests Above Human Rights' (2001) 29 *Georgia Journal of International and Comparative Law* 427.

[23] Anne-Christine Habbard and Marie Guiraud, 'The World Trade Organization and Human Rights' (FIDH Position Paper, 1999), <http://www.fidh.org/IMG/pdf/omc320A.pdf>at 14 December 2008.

[24] Berta Esperanza Hernandez-Truyol and Stephen J Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (2009) 4.

[25] Ibid.

[26] Duncan Brack, 'Multilateral Environment Agreements: An Overview' in Halina Ward and Duncun Brack (eds) *Trade, Investment and the Environment: Proceedings of the Royal Institute of International Affairs Conference* (1998) 125.

These treaties help governments to deny market access to the goods of, or to prohibit trade with countries responsible for human rights violations.[27] This directly conflicts with the non-discrimination rules of the GATT/WTO. This trade rule requires the WTO members to treat products that share similar physical characteristics and end uses alike, irrespective of whether one was produced using child labour or unsustainable forestry methods while the other was not. These contradictory approaches create obstacles for using trade to realise human rights objectives and complicate debates on linking trade and human rights under the WTO. A large number of scholars favour the view that the WTO has a basis for implementing human rights values. The proponents of linkage claim that the linkage will increase the acceptance of the WTO. The WTO must consider human rights issues as pivotal if it is to continue as a reliable organisation in improving trade.[28]Proponents complain that by distancing themselves from the responsibility for improving the human rights, the WTO rules fail to take advantage of the vast power of traders by making compliance with human rights law a condition of participation in trade's bounty.[29]Trade should not push the poor into deeper poverty; rather, it must ensure that the least well-off get a fair share of the gains of trade. The proponents suggest that there is nothing to be afraid of in linking trade with human rights. Petersmann believes that trade and human rights 'both promote peaceful coexistence, tolerance and scientific progress' and that human rights make human beings not only better citizens but also better economic actors.[30] Thus, he argues that the goal of international economic organisations should be to transform 'market freedoms' into 'fundamental rights', which, if directly enforceable by producers, investors, workers, traders and consumers through courts, can reinforce and extend the protection of basic human rights.[31]

The opponents of linkage argue that international trade institutions promote economic growth by reducing barriers to trade and that burdening these institutions with other responsibilities for promoting non-economic values confuses their mission and distorts economic efficiency.[32] Some oppose the linkage on the grounds of the marked differences between human rights and the WTO regime.[33]

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[27]Ibid.

[28]CN Krishna Naik, GV Prabhakar and G Swapna Bhargavi, *Human Rights– The Road Ahead* (2008), <http://forumonpublicpolicy.com/summer08papers/archivesummer08/naik.pdf> on 8 May 2010.

[29] Hernández-Truyol and Powell, above n24; Mark Curtis, *Trade for Life: Making Trade Work for Poor People* (Christian Aid, 2001), <http://www.sporos.org/sites/sporos.org/files/Trade_for_Life.pdf> on 21 July 2009.

[30] Ernst-Ulrich Petersmann, 'Time for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 *European Journal of International Law* 621, 626.

[31] Ibid 624.

[32] Joel R Paul, 'Do International Trade Institutions Promote Economic Growth and Development?' (2003) 44 *Virginia Journal of International Law* 285, 287.

[33] Sara Dillon, 'A Farewell to 'Linkage': International Trade Law and Global Sustainability Indicators' (2002) 55 *Rutgers Law Review* 87; Philip Alston, 'Resisting the Merger and

The arguments of human rights activists and trade communities demonstrate the various ways in which human rights concerns have entered the debate for and against the liberalisation of trade. Both sides point out that the trading system of the WTO leads to changes in the lives of individuals to the extent that it affects the exercise of their human rights, with the difference that the two sides hold opposite opinions on whether the current system has positive or negative effects on human rights.

4. Linking Human Rights and Trade Issues: North-South Tension

The trade-human rights linkage issue is closely related to the activities and implementation of the WTO agreements. The WTO agreements have had significant effects on and implications for developing countries and LDCs. Many are facing serious problems arising from the implementation of the WTO agreements, while not obtaining the expected trade benefits. Meanwhile, proposals to expand the WTO by introducing new issues and areas into its remit have raised several concerns. As for the human rights issues, very little has been done on how to bridge the widening gap between the proponents of free trade and advocates of human rights.

The deep barrier of distrust that lies between developed and developing countries is suggestive of the North-South confrontation over the New International Economic Order (NIEO) 1974.[34] As was the case during the drafting of the UN Declarations on NIEO and the Charter of Economic Rights and Duties of States 1974, there is still the belief among developing countries that developed countries are continuously trying to 'impose conditions in international economic relations which violate the sovereignty and block the development prospects of poor countries'.[35] This suspicion has never been more pronounced than in the debate over a social clause or human rights in international trade.[36] On the labour issue, developed and developing countries stand in opposite directions.

Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 *European Journal of International Law* 815. Alston stated that: Any such rights arising out of WTO agreements are not, and should not be considered to be, analogous to human rights. Their purpose is fundamentally different. Human rights are recognised for all on the basis of the inherent dignity of all persons. Trade-related rights are granted to individuals for instrumentalists reasons. Individuals are seen as objects rather that as holders of rights. They are empowered as economic agents for particular purposes and in order to promote a specific approach to economic policy but not as political actors in the full sense or not as holders of a comprehensive and balanced set of individual rights (824).

[34] Eddy Lee, 'Globalization and Labour Standards: A Review of Issues' (1997) 136(2) *International Law Review* 173, 177.

[35] Ibid.

[36] Peter Fairbrother, Chris Nyland and Rai Small, 'Union Strategies for the Globalization of Labour Rights: The Social Clause Proposal' (Working Paper, Society for the Promotion of Human Rights in the Employment SPHRE), <http://www.sphre.org/workingpapers/UnionStrategiesGlobalisation.htm>at 20 August

The proponents of integration believe that the Trans National Corporations (TNCs) are relocating from countries with higher labour standards to those with lower labour standards, and that this trend serves to depress labour standards by reducing the bargaining power of workers. The export of cheap goods from countries with low labour standards creates unfair competition in developed countries with higher labour standards. This practice encourages the local regulatory regime to make labour standards flexible, resulting in a 'race to the bottom' situation and ultimately in the deterioration of the working conditions in developed countries. They regard this situation as 'social dumping' and seek to respond by means of 'social dumping duties' in the form of, for instance, unilateral trade restrictions against countries that violate basic workers' rights.[37] On moral grounds, the proponents of the trade–labour linkage express their concern for the awful condition of workers in developing countries.[38]

Seemingly the linking of social issues to the WTO and its sanctions system of enforcement is an effective way of countering the adverse social effects of trade. However, developing countries are more concerned about the inclusion of labour standards with trade measures and argue that:

1. linking labour rights to trade is a disguised protectionism for the domestic products of developed countries;
2. developed countries exercise unilateralism in enforcing their labour standards upon developing countries by disregarding their economic and social condition; and
3. such linkage will create an impediment to the market access of the goods of developing countries.[39]

Developing countries argue that the low labour costs in their countries are a function not of the deliberate exploitation of workers but of the general low standard of living and the lower level of development, and that the low cost is a legitimate comparative

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2011; Anita Chan and Robert JS Ross, 'Racing to the Bottom: International Trade Without a Social Clause' (2003) 24(6) *Third World Quarterly* 1011–1028.

[37] Friedl Weiss, 'Internationally Recognized Labour Standards and Trade', in Friedl Weiss, Erik Denters and Paul de Waart (eds), *International Economic Law with a Human Face* (1998) 79, 90.

[38] Virginia A Leary, 'Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, US Laws)' in Jagdish Bhagwati and Robert E Hudec (eds), *Fair Trade and Harmonization: Prerequisites for Free Trade?* (1996) 2, 177, 178.

[39] Clyde Summers, 'The Battle in Seattle: Free Trade, Labor Rights, and Societal Values' (2001) 22 *Journal of International Law* 61, 62; International Confederation of Free Trade Unions (ICFTU), *Enough Exploitation is Enough: A Response to the Third World Intellectuals and NGO's Statement Against Linkage(TWIN-SAL)* (29 September 1999), <http://www.hartford-hwp.com/archives/25a/022.html>at 20 May 2011; Martin Khor, *Why GATT and the WTO Should Not Deal with Labour Standards* (Third World Network, 1994).

advantage. Accordingly, in the 1996 Singapore Declaration, they opposed the inclusion of labour standards and argued successfully that the issue belongs in the ILO.[40]The Declaration rejects 'the use of labour standards for protectionist purposes' and agrees that 'the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question'.[41]

Developing countries fear that the use of human rights for sanction or protectionism is not out of context. The US and the EU frequently include and enforce their high labour standards by imposing conditionality in the GSP, making the market access of developing countries contingent upon the fulfillment of the conditions laid by developed countries.[42] Driven by the 'moral conscience' for the child labour employed in the ready-made garments sector in Bangladesh, the US threatened the market access of Bangladeshi garments with trade boycott by introducing the Harkin Bill, resulting in the dismissal of several thousand child labourers from their jobs.[43]The absence of any viable alternative elimination of child labour may cause serious social problems with human rights implications.[44]The US trade sanction in 1993 on the import of apparels produced by child labour in Bangladesh compelled the industries to dismiss child workers who for their survival started working in non-exporting workshops and factories, or as prostitutes and street vendors.[45]

Consequently, there is some danger that the consideration of labour issues by the WTO will translate into protectionism by developed countries if trade is made conditional with unrealistically high standards. In principle, developing countries are not opposed to employing trade to further human rights, provided that the rules themselves do not amount to violations and do not have the effect of violating human rights. There must also be proper safeguards against developed countries' use of human rights issues or excuse as a protectionist tool to defend their uncompetitive industries.

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[40] The Declaration assigned the ILO as the competent body to set and deal with labour standards, and noted the continuance of the existing collaboration between the WTO and ILO Secretariats: *Singapore Ministerial Declaration*, WTO Doc WT/MIN(96)/DEC (adopted 18 December 1996), [4], <http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm>at 30 January 2009.

[41] Ibid.

[42] Under the US' GSP programme, the President may not designate a country as a GSP recipient if it 'has not taken or is not taking steps to afford internationally recognised workers' rights to workers in the country'. See *Trade Act of 1974*, 19 USC § 502 (b) (7) (1980). This ground of exclusion was added to the *Trade Act of 1974* by the *Generalised System of Preferences Renewal Act of 1994*, enacted as Title V of the *Trade and Tariff Act of 1984*, Pub. L. No. 98, 573.

[43] Michael E Nielsen, 'The Politics of Corporate Responsibility and Child Labour in the Bangladeshi Garment Industry' (2005) 81(3) *International Affairs* 559.

[44] M Rafiqul Islam, *International Trade Law of the WTO* (2006) 544.

[45] K Addo, 'The Correlation Between Labour Standards and International Trade' (2002) 36(2) *Journal of World Trade* 299.

5. Accession to the WTO and Human Rights issue

The WTO Article XII deals with the rules governing accession. It states that any country or separate customs territory having full autonomy in the conduct of its external commercial relations may accede on terms agreed between it and the WTO.[46] It does not stipulate any criteria for membership, which signals 'perhaps the most problematic legal aspect of the accession processes'.[47] This process is often criticised for its ambiguity regarding the absence of guidance as to 'terms to be agreed' and the procedure to be followed for negotiation. Since the WTO is an intergovernmental organisation, the members negotiate with the applicant and fix the terms and conditions of accession.[48]

The accession is a result of negotiations between the applicant and the Working Party (WP) consisting of the members, and this process does not prevent members calling for unique preconditions for particular prospective members. This open-handed process has both advantages and disadvantages. Negatively, developed countries may consider them as '*carte blanche* to impose unreasonable conditions (often known as 'WTO-plus' conditions) on acceding countries'[49] Affirmatively, this process can be a possible way for integrating human rights concerns in the WTO.

There is a trend towards addressing some issues that can facilitate human rights implementation over time. A study[50] of all the accessions from January 2003 to April 2007 reveals that during this period the WP did not use accession deliberations to push new applicants to change their human rights practices and attitudes. However, they pressed for broad changes—for example, adequate protection for individuals or businesses (Cambodia), improvements in rule of law (Saudi Arabia, Nepal and Macedonia) and adherence to international labour standards (Vietnam).[51] In case of

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[46] Art XII of the WTO: 'Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations or for other matters provided for in this Agreement and the Multilateral Trade Agreement may accede to this Agreement, on terms to be agreed between it and the WTO'.

[47] Celine Charveriat and Mary Kirkbride, *Cambodia's Accession to the WTO: How the Law of the Jungle is Applied to One of the World's Poorest Countries* (Briefing Note, Oxfam International, 2003).

[48] Ratnakar Adhikari, 'Birth Defects of WTO Accession' (27 March 2002) *The Kathmandu Post*, cited in Ratankar Adhikari and Navin Dahal, *LDCs Accession to the WTO: Learning from the Cases of Nepal, Cambodia and Vanuatu, From Cancun to Sao Paulo: The Role of Civil Society in the International Trading System*, CUTS Twenty Years of Social Changes No. 0412.

[49] Ibid.

[50] Aaronson and Zimmerman, *Trade Imbalance The struggle to Weigh Human Rights Concerns in Trade Policymaking* (2007) 17. To ascertain whether the existing WTO members expressed concern about the acceding country's human rights practices, Aaronson has examined all of the accessions from January 2003 to April 2007.

[51] Ibid. Although the labour issues were not mentioned in the Report of the Working Party on Vietnam's accession, in a report prepared for World Bank, the Vietnamese Government admitted that it was under pressure to implement ILO Conventions.

China, the WP attached stringent conditions and showed concern about labour rights and conditions in China's export processing zones (EPZs).Though ultimately the accession document did not address labour laws expressly, the members recognised that the failure to enforce human rights issues could distort trade. Expressing concerns about human rights issues in the accession process can be a signal that some of the WTO members would be willing to use this opportunity to obtain the acceding countries' commitment to improve and enforce human rights situation within their countries.

However, in the absence of any particular criteria, this open-handed provision may lead to a violation of social and economic human rights. This results from the fact that any WTO member can join the WP in the accession process and put conditions of its own. Thus, an acceding country has to satisfy the demands of each member that joined the WP established for accession.[52] According to the Commonwealth Secretariat, acceding countries commit to greater liberalisation in trade in services than incumbents.[53]In 2007, Tonga had to commit to greater liberalisation in the trade in services than required in acceding to the WTO, and it became fully bound by the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) as of 1 January 2008.[54] This means that Tonga became bound for full implementation though all developing countries had benefited from longer timelines to facilitate implementation in the original Marrakesh Agreement. This is a denial of natural justice and due process in that Tonga was discriminated against compared with other WTO developing country members.

The GATS and TRIPS are very important for developing countries and LDCs in terms of the rights to health, work, water, food and education. Therefore, it is essential to formulate clear guidelines for the WTO accession. Most acceding countries and most of those yet to accede are developing countries and LDCs with poor social and economic infrastructures. The General Council adopted new guidelines at the end of 2002 to facilitate and accelerate the WTO membership of LDCs, which was reiterated in the 2005 Hong Kong Ministerial Declaration.[55] The guidelines state that:

- WTO members shall exercise restraint in seeking concessions and commitments on trade in goods and services from acceding LDCs;

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[52]Jane Kelsey, 'World Trade and Small Nations in the South Pacific Region' (2004–2005) 14 *Kansas Journal of Law and Public Policy* 248, 265.

[53] Roman Grynberg, Victor Ognivtsev and Mohammed A Razzaque, 'Paying the Price for Joining the WTO'(2002) 39, cited in the Commission on Human Rights, *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Report of the Special Rapporteur*; Paul Hunt, *Mission to the World Trade Organization*, WTO Doc E/CN.4/2004/49/Add.1 (1 March 2004) [68].

[54]Kelsey, above n 52.

[55]*Accession of Least-Developed Countries*, WTO Doc WT/L/508 (Decision of 10 December 2002).

- acceding LDCs shall offer access through reasonable concessions and commitments on trade in goods and services commensurate with their individual development, financial and trade needs;
- Special and Differential Treatment shall be applicable to all acceding LDCs;
- transitional periods shall be granted in accession negotiations to enable acceding LDCs to effectively implement commitments and obligations; and
- transitional periods/arrangements shall be accompanied by Action Plans for compliance with WTO rules.

There are doubts over how effectively this decision has changed the accession process.[56] There is a continued need for clear and objective rules and disciplines for accession negotiations. It is also necessary that accession terms reflect the LDCs' levels of development and their ability to implement their obligations.[57] The Ministerial Declaration of December 2011, in reaffirming these LDC accession guidelines, asked the Sub-committee on LDCs to develop recommendations to strengthen, streamline and operationalise the 2002 guidelines.[58] This conference emphasised benchmarks in the area of goods and services, taking into account the level of commitments undertaken by the LDCs.[59] The 2011 decision further emphasises transparency in the LDCs accession negotiation by complementing bilateral market access negotiations with multilateral frameworks.[60]

6. WTO Principles of 'Non-Application' and Human Rights

The WTO members can also use the 'non-application' principle under Article XXXV to deny WTO benefits to a potential member as long as they do so before the WTO Ministerial Council approves the member's accession application.[61] The WTO Article XIII also mentions non-application.[62]

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[56] Sarah Joseph, Blame it on the WTO: A Human Right Critique (2010) 158; The United Nations Conference on Trade and Development, The Least Developed Countries Report 2004. Part One: Chapter: 3 Selected Recent Policy Trends: Accession of LDCs to the WTO, UNTACD/LDC/2004.

[57] Ibid.

[58] *Accession of Least-Developed Countries*, WTO Doc WT/L/846 (Decision of 17 December 2011).

[59] Ibid.

[60] Ibid.

[61] Art XXXV of the GATT 1947.

[62] WTO Agreement, Article XIII: Non-Application of Multilateral Trade Agreements between Particular Members 1. This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application. 2. Paragraph 1 may be invoked between original Members of the WTO which were contracting parties to GATT 1947 only where Article XXXV of that Agreement had been invoked earlier and was effective as between those contracting parties at the time of entry into force for them of this Agreement.

These Articles leave scope for using the process to compel the acceding country to comply with human rights standards,[63] and in practice on a few occasions, the WTO members have applied this process to implement human rights concern. For example, as of 31 December 2004, three members had invoked this Article with respect to other members. The US invoked Article XIII with respect to Romania, Mongolia, the Kyrgyz Republic, Georgia, Moldova and Armenia.[64] It has revoked its invocation with respect to the first four countries.[65] El Salvador used non-application against China on 5 November 2001, and Turkey used Article XXIII with respect to Armenia on 29 November 2001.[66]

For a temporary period, the US was probably the only country that used non-application to punish other countries for human rights violation. The US used this process to deny trade privileges to terrorist countries, and its Most Favoured Nation (MFN) treatment to Russia and some other communist countries were conditional on their adherence to the provisions of the Jackson-Vanik Amendment to the Trade Act of 1974. This US amendment requires an annual review of the Russian emigration policies in order for the US to grant MFN status to Russia and other former communist countries.[67] It is clear that the US has used this tool to enforce civil and political rights. In reality, the US used this Article to prevent the spread of communism throughout Europe and Asia in the 1940s on the grounds that these countries did not protect political rights.[68]

Importing human rights conditionality in the accession process put an obligation on the acceding countries to comply with the human rights obligations that they have undertaken under the international human rights instruments. This shows the WTO members' concern about human rights issues though it is very much limited in implementing civil and political rights. As long as human rights obligations are at issue in a globalised world, it is not always possible to maintain human rights within the countries in the absence of international cooperation. Thus, alternatively, it can be argued that if human rights conditionality can be a prerequisite for the WTO accession, the WTO members have the responsibility to make the WTO rules more human rights friendly to expedite the implementation of social, economic and cultural human rights in their countries.

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[63] Aaronson and Zimmerman, above n 50, 14.

[64] *Marrakesh Agreement Establishing the WTO*, <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_04_e.htm#articleXIII>at 10 March 2010.

[65] Ibid.

[66] Ibid.

[67] David G Tarr, 'Russian WTO Accession: What Has Been Accomplished, What Can be Expected' (World Bank Policy Research Working Paper No. 4428, 2007), <http://elibrary.worldbank.org/docserver/download/4428.pdf?expires=1315470203&id=id&accname=guest&checksum=794B56F6E35D9A36D988F7BEB948BB53>at 11 May 2010.

[68] Susan Ariel Aaronson, 'Seeping in Slowly: How Human Rights Concerns are Penetrating the WTO' (2007) 6(3) *World Trade Review* 413, 427.

7. Trade Waiver and Human Rights

The WTO provisions create some flexibility to use trade to address human rights concerns in other countries. Under the WTO Article IX, a member can request authorisation to waive, on a temporary basis, their obligations under the WTO. To this effect, three-quarters of the WTO membership must agree to the terms of the waiver. This waiver may be used to allow departure from the WTO obligations on human rights issues.[69] The waiver in the Conflict Diamond Case has set an example of protecting human rights within the trade liberalisation.[70] In response to the UN's call for a ban on trade in conflict diamonds, WTO members called for, and eventually agreed upon, a waiver under the WTO for such a ban. Until January 2007, around 48 member countries have showed their interest in a waiver regarding their trade in conflict diamonds.[71] Thus, 'it is clear from this decision that the WTO can be flexible when it comes to human security and development'.[72]
The WTO has also granted a waiver of obligation for LDCs under the TRIPS Article 66 to ensure affordable medicines for their citizens, which has direct implications for the right to health and indeed life (discussed in detail in chapter six). Members waived the obligations of LDCs with regard to pharmaceutical products until 1 January 2016.[73] Moreover, the waiver concerning the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS and Public Health has important implications for the right to health.[74]Whether trade waivers are the most effective tools is a question yet to be decided; the trend is towards employing this tool to provide incentives to developing countries to improve human rights standards within the territory.

8. Trade Policy Review and Human Rights

Trade Policy Review Mechanism (TPRM) is an integral part of the WTO. Every member is required to present, at regular intervals, its trade policy at a formal session where all members participate in an open debate on the trade policy of the presenting country. The underlying objective is to improve the members' adherence

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[69] Aaronson and Zimmerman, above n 50; Sarah Joseph, Blame it on the WTO: A Human Right Critique (2010) 107; Krista Nadakavukaren Schefer, 'Chilling the Protection of Human Rights: What the Kimberley Process Waiver Can Tell Us About the WTO's Effect on International Law' (NCCR Trade Working Paper No. 2007/03, January 2007).
[70] *Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds*, WTO Doc WT/L/518 (Decision of 15 May 2003).
[71] Aaronson and Zimmerman, above n 50, 16.
[72] Foreign Affairs and International Trade Canada, Press Release, 'Pettigrew Welcomes WTO Waiver for Kimberly Process Certification Scheme', cited in Aaronson and Zimmerman, above n 50, 43.
[73] *Least-Developed Country Members Obligations Under Article 70.9 of the TRIPS Agreement with Respect to Pharmaceutical Products, Decision of 8 July 2002*, WTO Doc WT/L/478 (7 December 2002).
[74] *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/L/540 (Decision of 30 August 2003).

to various WTO rules, disciplines and commitments.[75] The TPRM is an occasion for introspection also. The largest trading countries[76] are subject to review every two years,[77] the next 16 moderate countries are reviewed every four years and the remaining members are reviewed every six years. The WTO allows developing countries a longer period between reviews.

According to the WTO Secretariat, the Trade Policy Review (TPR) enables outsiders to understand the policies of the WTO members.[78] Alternatively, its underlying purpose is to ensure transparency in every sphere of economic and trade policy making in member countries. This transparency can guard against the adoption of policies detrimental to the welfare of domestic people. Thus, TPRM helps to ascertain if members consider human rights an important element in their policies. In fact, the TPR of developing and middle-income countries during the period from 2001 to 2009 show that they, though not frequently, discussed human rights in their governmental report and also in providing feedback on other members' trade performance.

The trade policy of Georgia (2009)[79] acknowledged a relationship between economic growth, the rule of law, equality before law and human rights. The report stressed that Georgia had taken several initiatives to deal with the problem of unemployment. In order to legalise labour relations and facilitate job creation, a new labour code was enacted in 2006, which is in compliance with ILO core standards. The representative of Morocco stressed that developments in the trade policy 'are fully in line with Morocco's objectives: boosting sustainable economic growth that creates jobs and raises its citizens' living standards, within a liberal trade framework integrated into the world economy'.[80] Reaffirming the fact that the multilateral trading system and trade liberalisation is beneficial to the growth, development and well-being of the population, Morocco considered 'it urgent to ensure that these advantages are distributed equally among all countries and that efforts be made to adjust the balance rapidly in favour of developing countries'.[81]

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[75] M Rafiqul Islam, *International Trade Law of the WTO* (2006) 464.

[76] The rankings of members and their review cycles may vary due to changes in the volume of their trade in goods and services and commodity prices. For example, the accession of China and the enlargement of the EC affected the composition of the group of 16. Thus, for the purpose of review, the pre-determined rankings will be affected in a continuing process with the accession of a new member.

[77] The US, the EC, Japan and Canada belong to the largest trading countries. Since the trade policies and trade practices of these powerful countries can have a serious effect on world trade and the WTO's trading system, they are subject to frequent reviews.

[78] Donald B Keesing, *Improving Trade Policy Reviews in the World Trade Organization* (1998) 1, 12.

[79] TPR, *Georgia*, WTO Doc WT/TPR/G/224 (3 November 2009) 8.

[80] TPR, *Morocco*, WTO Doc WT/TPR/M/217 (10 August 2009) 3.

[81] Ibid 5.

In representing the TPR in 2007, the Indian representative categorically stated that:

> the eradication of poverty, the provision of basic needs for all Indians, the development of agriculture and rural areas, as well as issues related to health care, access to employable education, provision of adequate infrastructure, and effective governance are the key issues on India's action agenda.[82]

However, India vehemently opposed the US effort to make a connection between labour rights and trade through the TPR of the US in 2004. In discussing the US trade policies of 2004, India noted that the ILO, not the WTO, was competent to deal with labour issues. The Indian representative further emphasised that these reviews should not deal with non-trade issues.[83]

In its TPR, Romania stressed that it required investors to ensure that they would not violate environmental protection regulations, or affect the public order, health or morality.[84] In Bolivia's TPR, Bolivia emphasised that it had made considerable efforts to adapt to world trade rules and:

> trusted that its trading partners would appreciate what had been done, and urged the developed countries to make commitments that would lead to a substantial improvement in market access in order to enhance the economic and social welfare of their economies.[85]

The Chinese TPR stated that China had lifted hundreds of millions of people out of poverty and stressed that it would do more at home and abroad to 'lift others out of poverty' through expanding its aid and technical assistance programs and investing in rural education and infrastructural development at home and abroad.[86] China

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[82] TPR, *India*, WTO Doc WT/TPR/M/182 (9 July 2007) 2.

[83] India's position does not mean that it is not interested in complying with the ILO Convention on Labour standards. In response to the US' understanding, India drew attention to the view of the Singapore and Doha ministers, who stated that, while they were committed to the observance of an internationally recognised core labour standard, the competent body to set up and deal with labour standards was the ILO. It was clear that the WTO was not competent to deal with this matter. To legalise its standing, India recalled the mandate of the TPRM exercise and stated that it could not be a forum for open discussion of non-trade issues or issues not discussed elsewhere in the WTO. This concern of India might have a connection with the status of proposing country and the tendency of developed countries to use non-trade issues for protectionists' purpose. TPR, Minutes of Meeting, 1/14–1/16, WT/TPR/M/126, 15/3/2004; TPR, *Report by the US* (Doc WT/TPR/G/160, 3 March 2006) 24–27.

[84] TPR, *Romania,* WTO Doc WT/TPR/M/155/Add.1 (18 January 2006) 15.

[85] TPR, *Bolivia,* WTO Doc WT/TPR/M/154 (16 January 2006) 5.

[86] TPR, *People's Republic of China,* WTO Doc WT/TPR/M/161 (6 June 2006) 1–2.

further stated that environmental protection was one of the priority areas in its economic restructuring and emphasised that it would pay more attention to resource and environmental conservation in its development process.[87] The Chinese TPR provided an example of how members view and act on the relationship between trade obligations and human rights. Some members raised few concerns about human rights issues in their discussion on China's TPR. Developing and developed country members expressed concern about China's commitment to the rule of law and inadequate protections for public comment on issues such as food safety.[88]

Egypt stressed in its TPR that it had enacted new laws to protect intellectual property rights and the right of consumers and that on the social front, the most important step was a revision of the education and health sectors to raise their quality. New laws were enacted to deepen democratic political participation and strengthen the role of the civil society and the observance of human rights.[89] The Ecuador TPR noted that 'Ecuador had established specialised tribunals to defend children's and women's rights'[90] and that one of the four pillars on which oil sector policies were based was 'respecting environmental and social standards'.[91] Ecuador had undertaken various reforms of its Labour Code that had promoted greater labour mobility and favoured productive activities leading to higher employment.[92]

The in-depth study of TPRs of the countries described above shows that the member countries' willingness to change the various aspects of their legal systems to promote trade and the determination of policymakers to preserve their social compact and human rights priorities evolved together. In this process, some countries used their TPRs as a platform to tout their activism on human rights issues to send a message about their human rights priorities.

Human rights concerns also seeped into the TPRs of developed countries. The US and the EC frequently talked about their commitments to promoting labour rights internationally. In its TPR of 2007, the EC stated that one of the reasons for its expansion throughout Europe was to advance human rights and to promote 'decent work' around the world.[93] It noted that 'trade policy is . . . an important vehicle for

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[87]Ibid, 5–6.

[88]WT/TPR/M?161, Comments of the US Representatives on transparency, public comment, IPR; Comments of India on transparency especially on SPS; New Zealand, Canada, Norway on a lack of transparency on SPS, EC, Singapore on transparency.

[89] TPR, *Egypt,* WTO Doc WT/TPR/M/150 (31 August 2005) 3.

[90] TPR, *Ecuador,* WTO Doc WT/TPR/M/148) 93.

[91]Ibid, 5.

[92]Ibid.

[93]TPR, Report by the EC (Doc WT/TPT/G/177, 22 January 2007). However, not everyone agrees with these strategies. At the review of the EC in 2004, Australia noted that the effort

social and environmental objectives, alongside a range of other policy areas'.[94] In its TPR of 2009, the EC claimed that promoting coherence between trade policy and protection of the environment has long been high on its agenda.[95] It further stated that the EC and its member states have been 'in the forefront of the fight against climate change both at home and in the international arena.[96] In furtherance of their commitment, the EC developed a policy with some of the most aggressive carbon emissions reduction targets.[97]

9. Concluding Remarks

Although the WTO is primarily a trade organisation and need not transform into a human rights organisation, it must incorporate human rights perspectives to improve its credibility. The WTO regime is not an isolated or enclosed system, but one that reaches out to the whole of international public law. In this sense, the relationship between the WTO and human rights is not imaginative or artificially created, but realistically rooted in agreements and in proceedings. As it is a member-driven organisation, the responsibility lies with the members to infuse a human rights framework in the work of WTO Councils and Working Groups.

An analysis of the use of human rights issues in the WTO proceedings and principles reaffirms the fact that the WTO can play an important role in realising human rights along with its trade objectives. However, the present practice is limited to the use of human rights either for political purposes in the form of implementing civil and political rights or for restricting market access to products of developing countries in which they have a comparative advantage. Theoretically, WTO rules are designed to use trade as a means of ensuring higher living standards, but in practice it puts much emphasis on those issues that are important for trade liberalisation over the real economic, social and cultural infrastructure of developing countries and LDCs. Thus, the question of economic, social and cultural rights of developing countries and LDCs remain unaddressed in the WTO system.

The WTO rules do not prevent governments from taking measures necessary for protecting human rights, but its rules do contain provisions that pose obstacle to the exercise of these rights. These rules are designed to 'fit all sizes' in denial of the fact that there exist enormous disparity between developed and developing countries regarding economic, social, cultural and political point of views. In ensuring human

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of the EC to pursue social and environmental objectives in its regional, bilateral arrangements raises some concerns; TPR, EC (Doc WT/TPR/G/136) 10–11, [33]–[39].

[94] TPR, EC (Doc WT/TPR/M/136/Add.1, 7 June 2009).

[95] TPR, EC (Doc WT/TPR/M/214, 8 June 2009) 6–7.

[96] Ibid, 6.

[97] Ibid, 7.

rights for every individual, developing countries and LDCs need special attention and protection. The WTO rules also take this into consideration and make exceptions to general rules, but it is not always possible for developing countries to exercise those avenues. Thus, express provisions on human rights in the agreements are necessary. This article argues that if the WTO can react to address civil and political rights, it can and must pay attention to the implementation of basic human rights like the rights to food, health and work, along with other social and economic rights.

Women, Law And Resistance: A Feminist Perspective

Dr. Farmin Islam*

Introduction

Power relations in society determine how different social groups and classes of people are able to claim and achieve their rights. Law as it is cannot reach the people on its own. How human beings understand, protect and claim their rights makes a difference to their position in society. The application, implementation and execution of laws and rights are greatly affected by these factors. However, power relations between men and women as well as between different socioeconomic groups are not rigid demarcations but fluid areas of struggles subjected to change.

In patriarchal societies women do not enjoy equal status as men in any sphere of their lives. Furthermore, women belonging to economically disadvantaged classes are even less likely to enjoy their legal rights. However, women are not merely 'helpless victims' of discrimination and injustices. Although their rights are undermined by society in general and their capacity to act on their own behalf has been overlooked for long, they are not inanimate beings but active social agents. The notion of 'agency' plays a crucial role in understanding how women can and do claim their legal rights. This article explores the different ways and means through which human beings in general and women in particular 'resist' social and legal injustices. Women's claims of autonomy in whichever form it takes is the crucial first step towards achieving their legal rights.

The Concept Of Resistance

One of the focal points of my research was to listen to the 'voices' of women workers about their own situation, and thereby acknowledge their 'agency.' However, I had not conceived of that agency in terms of the notion of resistance. At the very beginning of my work this conceptualisation was brought upon me by my own respondents who did not match the mythological and ideological image of docile victims. I noticed that they used a wide variety of strategies at home in getting their own views heard or advancing their own position. Moreover, they described to me the different tactics they use at work to respond to what they described as 'dealing with boredom' or 'just having fun'.

These claims of autonomy, however small, and other findings on their knowledge and willingness to use the law made me realise that the women do resist. They know their priorities and assert themselves when they feel they should. They are neither the passive, bearers of oppression, nor do they accept unfairness without resistance,

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whatever the form it may take. Women workers are engaged in day to day struggles and resistance both at work and at home to better their lives. They are constantly looking for ways and means to cope with the overwhelming odds against them, facing these with energy and spirit as part of their constant effort to retain dignity as human beings in an environment that constantly denies them any status. Recognising that women share with men the basic attribute of resisting unfair treatment is the first step, towards rethinking Bangladeshi women. This section addresses the issue of 'resistance' as found amongst people in general, and the ways of recognising and recovering the voices of women as a 'subordinate' group.

The concept of *resistance* by subaltern groups, or those who are generally regarded as powerless has been developed by several writers, most of whom rely on the theories of Foucault, Bourdieu and Gramsci for their analysis. These theories necessarily draw upon concepts of power in social relations. Power has generally been conceptualised as the supreme factor in all social interactions, or appears as a 'mysterious phenomenon, that hovers everywhere and underlies everything'[1]. However, many new insights and concepts have developed around the notion of power relations. For example Giddens has remarked that power is implicated at all levels of social life, from the level of 'global cultures and ideologies' all the way down to the 'most mundane levels of everyday interactions'[2]. Therefore, the analysis of power is not limited to social institutions of political collectivities, but can also take a face-to-face encounter as its starting point.

Power therefore involves the skills and resources which people bring to and mobilise in the production of interaction and is implicated in the production of meaning[3]. Given the emphasis on social actors and resistance in both my study and that of the subaltern, groups which I draw upon, the notion of power deployed must take agency into account. In its most general sense power is agency and by linking power to agency, the possibility is rejected that social actors are ever completely governed by social forces. Even when they display outward compliance with the oppressive contingencies of their situations, it cannot be conclusively stated that they have been 'driven irresistibly and uncomprehendingly by mechanical pressures' beyond their control[4]. Clegg comments that the key to understanding the role of agency resides in thinking of power as a phenomenon which can be grasped only relationally[5]. What is required is a consideration of the relational field of force in which power is configured and in which one aspect of this configuration is the social relations in which agency is constituted. Power is not a thing nor is it something that people have in a proprietorial sense. They 'possess' power only so far as they are relationally constituted as doing so. To the extent that the relational conditions

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[1] Anthony Giddens, *The Constitution of Society* (Polity Press, Cambridge, 1984).
[2] Anthony Giddens, *New Rules of Sociological Method* (Hutchinson, London, 1976)
[3] Kathy Davis, *Critical Sociology and Gender Relations* (Sage Publications, London, 1991).
[4] Giddens, above n 1.
[5] Stewart R Clegg, *Frameworks of Power* (Sage Publications, London, 1989).

which constitute power are reproduced through fixing their obligatory passage points, then possession may be fixed and 'reified' in form. Clegg comments that:

> The greatest achievement of power is its reification. When power is regarded as thing like, as something solid, real and material, as something an agent has, then this represents power in its most pervasive and concrete mode. It is securely fixed in its representations. However, reified power will rarely if ever occur without resistance. To this extent power is infrequently the complete reification that it is sometimes assumed to be.[6]

Politics includes both a struggle for power and a struggle to limit, resist and escape from power. Therefore the concept of resistance builds on the above logic that power will almost certainly be resisted, and may itself be an expression of power by the subaltern against that of the dominant. Clegg further comments that:

> [A]s power always involves power over another and thus at least two agencies, episodic power will usually call forth resistance because of the power/knowledge nature of agency. Power and resistance stand in a relationship to each other. One rarely has one without the other. It might be thought that, in the absence of an overt conflict, there will be no resistance to power. This would be to confuse notion of resistance *per se* with a particularly dramatic expression of it.[7]

Resistance may therefore be expressed even in mundane ways and reflect the multidimensional ways in which power is manifested. James Scott's studies are illustrative of writing based on such conceptualisations of resistance. His work in the traditional field of social movement theory focuses on 'everyday forms of resistance' which are constantly present in the behaviours, traditions, and consciousness of the subordinate to systems of ideological and material dominance. Elsewhere Scott distinguishes between the public behaviour of subordinates towards people in authority and power and the *hidden transcript*, which is the discourse that takes place 'offstage' beyond direct observations of power holders and consists of those speeches, gestures, and practices that confirm, contradict, or inflect what appears in the public. "The hidden transcript is, the privileged site of non-hegemonic, contrapuntal, dissident, subversive discourse"[8].

Others such as the *Subaltern Studies* historians in India led by Ranajit Guha[9] are concerned with recovering the voices of those whose subjectivity and agency are generally obscured by most historical writing. They offer theoretical perspectives on the interpretation of power and subaltern subjectivity. Scott did not address the issue

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[6] Ibid.
[7] Ibid.
[8] James C Scott, *Domination and the Arts of Resistance: Hidden Transcript* (Yale University Press, New Haven and London, 1990).
[9] Ranajit Guha, *Writing on South Asian History and Society,* Oxford University Press, Delhi, 1987).

of gender and resistance separately in his work although he included women as belonging to the subordinate group. The Subaltern historians on the other hand took up this issue specifically in the fifth volume of their collected work, although Haynes and Prakash[10] treat this aspect separately in their own collection of edited articles. I will dwell upon some of the main currents in this writing before explaining my own concept of resistance.

Resistance includes a wide range of behaviour both overt and covert. However, when in overt form it often takes the form of revolution or rebellion. Historically overt resistance acquires greater attention than the covert form which exists in everyday situations. For example, those forms of struggle that are present in the behaviours and cultural practices of subordinated peoples can remain unnoticed and are unlike those of overt revolt which attract immediate attention. This theory is based on the notion that power can constantly be fractured by the struggles of the subordinate. Scott's analysis of resistance by Malay peasants is essentially based on class conflict, and he distinguishes it from overt actions such as riots and strikes:

> Important and diagnostic though these exceptional events may be, they tell us little about the most durable arena of class conflict and resistance: the vital, day-to-day struggle on the factory floor over the pace of work, over leisure, wages, autonomy, privileges, and respect. For workers operating, by definition, at a structural disadvantage and subject to repression, such forms of quotidian struggle may be the only option available. Resistance of this kind does not throw up the manifestos, demonstrations, and pitched battles that normally compel attention, but vital territory is being won and lost here too.[11]

Scott's description of these ordinary weapons of the powerless groups includes foot dragging, dissimulation, false-compliance, pilfering, feigned ignorance, and so on. These Brechtian forms of class struggle have certain features in common. They require little or no co-ordination or planning, often represent a form of individual self help and typically avoid any direct symbolic confrontation with authority or with elite norms. However, he adds a word of caution:

> It would be a grave mistake, as it is with peasant rebellions, overly to romanticise these 'weapons of the weak'. They are unlikely to do more than marginally affect the various forms of exploitation which peasants confront. Furthermore, the peasantry has no monopoly on these weapons, as anyone who has observed officials and landlords resisting and disrupting state policies which are to their disadvantage can easily attest.... On the other hand, such Brechtian (or Schweikian) modes of resistance are not trivial.[12]

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[10] Douglas Haynes and Gyan Prakash, *Contesting Power Resistance and Everyday Social Relations* (Oxford University Press, Delhi, 1991)

[11] James Scott, 'Everyday Forms of Peasant Resistance' (1986) 13 *The Journal of Peasant Studies* 5-35

[12] Ibid.

Similarly, Haynes and Prakash comment that power is constantly fractured by the struggles of the subordinate. They explain that social structure, rather than being a monolithic, autonomous entity, unchallenged except by dramatic instances of revolt, is better conceived of as a constellation of contradictory and contestatory processes. However, they also contend that episodes of resistance themselves rarely mark pure forms of escape from domination; struggle is constantly being conditioned by the structures of society and political power. Furthermore, if resistance is an everyday phenomenon then it need not always be seen as a product of extraordinary transformations in material and social conditions. It is also necessary to keep in mind that resistance need not always be a conscious act. Haynes and Prakash's definition of resistance is helpful in this regard:

> Resistance, we would argue, should be defined as those behaviours and cultural practices by subordinate groups that contest hegemonic social formations, that threaten to unravel the strategies of domination; 'consciousness' need not be essential to its constitution. Seemingly innocuous behaviours can have unintended yet profound consequences for the objectives of the dominant or the shape of the social order.[13]

Finally, they add that the struggles of the subordinate need not be dramatic or informed by conscious ideologies of opposition to seriously affect relations of domination. Apart from these descriptions of resistance found among subordinate people in general, there are studies that deal exclusively with the resistance of women. I have chosen just three examples to show the ways in which resistance can be manifested.

Lila Abu-Lughod's study of Bedouin women in Egypt is remarkable for capturing the subtle ways that women resist male domination in traditional Muslim culture. She finds various ways in which resistance is expressed, through the daily enactment of minor defiances, opposition to arranged marriages, 'sexually irreverent discourse' or making fun of men and manhood as well as through oral lyric poetry. The element of shared oppression by women and their support of each other is probably the most important feature of the types of resistance described by Abu-Lughod, particularly those which are often so subtle or hidden from general view that they can easily be missed:

> Women use secrets and silences to their advantage. They often collude to hide knowledge from men; they cover for each other in minor matters, like secret trips to healers or visits to friends and relatives; they smoke in secret and quickly put out the cigarettes when children come running to warn them that men are approaching.[14]

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[13] Douglas Haynes and Gyan Prakash, above n 10).

[14] Abu-Lughod Lila, 'The Romance of Resistance: Tracing Transformations of Power Through Bedouin Women (1990) 17 *American Ethnologist* 41-55.

Mernissi's delightful account of her childhood spent in a Moroccan harem provides further insights into how women resist the rules and regulations that a male dominated society imposes on them. She describes how the women in the harem, including her own mother, stole the keys to the cabinet radio in the men's saloon and had them copied in order to enjoy the music which they loved but were forbidden to listen to. Mernissi describes the situation with admirable humour:

> Father was sure that he and Uncle had the only two keys to the radio. However, curiously enough, the women managed to listen to Radio Cairo regularly, when the men were out Chama and mother often would be dancing away to its tunes, singing along with the Lebanese princess Asmahan 'Ahwa'(I am in love), with no men in sight.[15]

These forms of resistance indicate that power is exercised in relation to women through a range of prohibitions and restrictions which they both embrace, in their support for a system of sexual segregation, and resist, as suggested by the fact that they fiercely protect the inviolability of their separate spheres, that sphere where defiance takes place[16]. Similarly, Raheja and Gold's study of Rajasthani women in India, a region which is widely held to bear a strong patriarchal ideology, explains that resistance is inextricably embedded in women's expressive traditions. Women have their own means of demonstrating disapproval or dissatisfaction, although they may carefully hide this in speech and other gestures that do not ordinarily give them away. However, women's words, in language, songs and poetry are central to their expressions of resistance, and are commonly engaged within restrictive societies. Raheja and Gold comment:

> Ordinary women know the power of words, and they know well the experience of speaking of their grief and their resistance in sung and spoken narrative, and thus . . . poetic and ritual forms of protest can enable women to articulate a resistant stance and then to raise their voices when more practical forms of protest become possible.[17]

Women also resist their employers or other people in authority who are not within the kin group, alongside those with whom they are related. Risseeuw described the resistance of women workers in the coir industry in Sri Lanka, both at the domestic level and in work relationships. Her work traces the gradual marginalisation of working class Sri Lankan women as part of a historical process which subjected them to class and male domination. However, the women have developed various mechanisms whereby they manage to keep some control over their lives. She explains the mechanisms used in their working lives:

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[15] Fatima Mernissi, *The Harem Within* (Bantam Books, London, 1994).

[16] Abu-Lughod Lila, above n 14, 41-55.

[17] Raheja Gloria Goodwin and Ann Grodzins Gold, *Listen to the Heron's Words: Reimagining Gender and Kinship in Northern India* (University of California Press, Berkley, 1994).

> Today a woman undertakes every possible form of resistance to her trader. She prefers to be independent if she has the financial means thereto, to fool and cheat the trader if she hasn't, and finally to please him/her if she is economically exceptionally vulnerable. A young girl is taught by her (female) elders to cheat in rope quantity with the same matter-of-factness as she is taught the household chores. She is trained to realise the exploitative nature of the work-relationship, but also to deny it on the surface. An economically vulnerable woman will also teach her daughter how to appear 'loyal' and get close to the trader and his family. Knowledge of their habits; food preference etc. can all be useful to bend the quality of friendship/intimacy to her own advantage.[18]

Moreover, strategies of deceit rather than revolt reiterate in a woman's relationship with her husband and in-laws. Her margins for open revolt are more limited than those of men, making deception of superiors appear no more than common sense[19].

Apart from these examples, there is considerable evidence in history that indicates women's participation alongside men in revolutions and uprisings around the world. Although there is little history of Bengali Muslim women organising around gender issues, they were nevertheless part of wider political and nationalist struggles. In the case of Bengali women in undivided India the freedom movement against the British was of particular importance. Writers have documented the role of Indian women, and particularly those from the Bengal region in the struggle for independence[20].

From the *Swadeshi* movement beginning in 1905 to Gandhi's Non-cooperation, nonviolent resistance of *Satyagraha* and the Quit India Movement of 1942, Bengali women participated at various levels of organisation. Many young women in Bengal, between the ages of 16 and 30, came under the influence of the militant revolutionary movement that diverged from the non-violent methods of Gandhi. They joined physical culture clubs and patriotic societies like *Deepali Sangha* in Dhaka and *Chattri Sangha* in Calcutta, with some taking part in daring terrorist attacks on government officials and property[21]. In the freedom movement against colonial rule the Hindu Bengali women took the lead; nevertheless, their Muslim counterparts played their part in less dramatic ways[22]. The involvement of Hindu and Muslim Bengali women in anti-colonial peasant movements such as the Indigo Revolt of 1859-60, which sparked off from a small locality in Jessore in East Bengal against British planters, as well as the Tebhaga Uprising that arose in the aftermath

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[18] Carla Risseeuw, *Gender Transformation, Power and Resistance Among Women in Sri Lanka: The Fish Don't Talk About the Water* (Manohar, New Delhi, 1991).

[19] Ibid.

[20] Rozina Visram, *Women in Indian: The Struggle for Independence From British Rule,* Cambridge University Press, Cambridge, 1992).

[21] Ibid.

[22] Shahnaj Huda, *Born to be Wed: Bangladeshi Women and the Muslim Marriage Contract,* unpublished PhD Thesis, University of East London, School of Law, Essex 1996).

of the Bengal Famine are also well-known. However, the Tebhaga Uprising combined anti-feudal and anti-colonial agitations and in terms of class leadership it was a peak in the history of women's overt resistance comments on the impact of the nationalist movement on the consciousness of Bengali women:

> The first strings of political consciousness among Bengali women were articulated through the nationalist movement. Once this process began, issues of gender could not but arise in the minds of politicised women. It is not possible for feminist consciousness to transcend all the socially constructed barriers and develop radical potentialities. Nor did the women leaders of the period envisage any such possibilities....The cue for women's upliftment came initially from men. This set an explicit limit to the aspirations of women. For the more sensitive women, however, participation in the freedom movement meant a protracted struggle against two different badges of servility: colonialism and patriarchy.[23]

It is a generally held view that the movement for the 'emancipation' of Bengali women in the eighteenth century was initiated by men as part of modernizing their own world, nevertheless it was to have a mixed effect on them. Although some middle and upper class Bengali women gained a certain degree of individuality and autonomy from the introduction of formal education and other measures, there were those who resisted this imposed Westernization. Moreover, education, exposure to the outside world and foreign values had the effect of making women question the very institutions that they had so far believed to be natural. Thus women began to abhor the dual standards of sex, condemned men's polygamous practices and extra marital sexual relationships, as well as claiming equality with men. Murshid quotes Rokeya Sakhawat Hossain who pioneered the cause of education for Muslim Bengali women:

> We must have the desire to go side by side with men in this world and believe that we are not slaves. We must be ready to do anything that will make us equal to men. If we can achieve this equality by independently earning our livelihood, then we must do that....Why shouldn't we earn? Haven't we "hands? Legs? What don't we have? Can't we earn our living with the same labour that we have to expend in our households?[24]

Self-expression and questioning, which often ran counter to the hopes and expectations of those involved with introducing change, was brought to the *antahpur* with the introduction of education. The bahdromohila who participated in the reform movements and in the process of transformation in the late nineteenth century- Hindu or Muslim- constituted only a small fraction of the entire female population

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[23] Peter Custers, *Women in the Tebhaga Uprising: Rural Poor Women and Revolutionary Leadership (1946-47)* (Naya Prokash, Calcutta, 1987).

[24] Ghulam Murshid, *Reluctant Debutante: Response of Bengali Women to Modernization 1849-1905,* Sahitya Sansad, Rajshahi University, Rajshahi, 1983).

of Bengal. Nevertheless, they set the trend, created an ideal and provided a model for other women. Although these women, and others from middle and working class populations displayed some political consciousness during the post colonial years, they were marginal to the politics process. However Bangladeshi women's direct involvement in politics reached a high point in the struggle for independence against the Pakistani regime. Women became actively involved in the movement, particularly on the cultural front. Many Bengali customs, some of which were related to the women of the Eastern wing, led to the latter being regarded as, au fond, non-Muslim. Bengali Muslim middle class women were frowned upon by the Pakistani society due to •their cultural practices like singing, dancing and drama in public performances, which were seen to be evidence of Hindu influence. At times when the Pakistani state tried to impose their version of Islam on the Bengalis, women actively resisted. Singing the songs of Tagore, wearing teep or bindis35 or simply being seen in public became acts of political dissent. Women spearheaded massive demonstrations in typical Bengali attire, singing Bengali nationalist songs in what was effectively a cultural resistance to the Pakistani regime.

Given the instances of Bengali women's overt resistance, it is surprising that they continue to be regarded as passive victims. The only logical answer to this may be that there has been some kind of deliberate policy or unconscious desire to stress their weakness. When resistance does take the form of social movement, it arises in response to persistent forms of dissatisfaction, inequity or exploitation that people experience. Female participation in social movements during specific periods of unrest are not uncharacteristic behavioural practices but represent women's active involvement and responsiveness to their social conditions.

There are a multitude of ways in which women resist as subordinate groups in society. Women are active, responsible and responsive - and this is reflected even in their mundane everyday lives. Bangladeshi women have always responded to their own situations, coping with innumerable socio-economic pressures with spirit and determination. Often such responses and resistance are hidden from public view, commonly disregarded or effectively undermined, giving the impression that they are acquiescent or resigned to reality. However, this view is only partial and a deeper understanding of women proves otherwise. McCarthy confirms that:

> A reconceptualisation of women's responsiveness to life conditions as proactive rather than merely reactive, may contribute to an important revising of the stereotypical image of them as passive housewives and mothers uninvolved in. productive activity and unable to defend their own and others' interests.[25]

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[25] Florence E McCarthy, *Gender and Political Economy: Explorations of South Asian Systems,* Oxford University Press, Delhi, 1993).

Resistance And Law

Clearly there are two levels of their resistance and the articulation of rights. The first occurring in informal everyday situations where they express their own opinions of rights and wrongs and resist what they consider as unfair treatment. They exhibit covert resistance to socio-economic pressures and oppressive shop-floor atmosphere in their daily lives and even articulate rights on the basis of their own sense of justice. The second level of their encounter lies in the overt resistance through a highly strategic recourse to the legal system against discriminatory and repressive measures taken by management. Both levels are crucially linked to their own sense of justice and legality and the production of their own identities. Some women under certain situations would prefer to attain the second level, but the majority of women workers never reach it.

A key element of the second level -the strategic use of law - lies in Law's potential for being used as a site of resistance to contest power. Writers on the rights discourse have repeatedly stressed the importance of rights claims to subaltern groups including women. In many ways law and legal discourse have played a central role in struggles to improve women's status and given those movements their political and discursive character. Women's engagements with the law can thus be seen as an important site of struggle with a subversive potential. Minow comments that: "Legal language has force. It both triggers and justifies power. But precisely because language is not identical to power, people may at times use it as a brace against power". Although legal discourse has not always been favourable towards women, it contains the possibility of being used strategically. Smart comments in this respect that:

> [L]aw is not simply law.. not a set of tools which we can bend into a more favourable shape...We must, therefore, remain critical of this tendency without abandoning law as a site of struggle.. Law is productive of gender difference and identity, yet this law is not monolithic and unitary.[26]

It is essentially through this approach that their appeal to the legal system can be explained; as an attempt to grapple with the hostile environment in which they must survive. In this respect 'hegemony', and particularly 'masculine hegemony' calls for some explanation because it is particularly this power that the women workers are trying to confront. The notion of hegemonic masculinity has been explained by Connell (1987:184). He is of the opinion that, in the concept of hegemonic masculinity, 'hegemony' means a social ascendancy achieved in a play of social forces that extends beyond contests of brute power into the organisation of private life and cultural processes. Although hegemony does not refer to ascendancy based on force, ft is not entirely incompatible with it and indeed they commonly go together. The connection between hegemonic masculinity and patriarchal violence is close, though not simple. Moreover, hegemony does not mean total cultural

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[26] Carol Smart, *Law, Crime and Sexuality: Essays in Feminism* (Sage Publications, London, 1995).

dominance or the obliteration of alternatives. It means ascendancy achieved within a balance of forces or a state of play. Other patterns and groups are subordinated rather than eliminated. This pattern needs to be recognized in order to account for the everyday contestation that occurs in social life. Connell further explains that hegemonic masculinity implies "the maintenance of practices that institutions men's dominance over women".

Going back to the two levels of the encounter between law and women workers, it is clear that both levels are rooted in their sense of fairness and resistance to oppression and both are integral to the process of forming their own identities. It is also through law and the claiming of rights that women can find connections with others and discover selfhood. When considering rights assertions of women, particular, local and situational contexts must necessarily be taken into account. It is under such specific contexts that women articulate the significance of their rights, and their denials, for their political and social identities and for their thoughts and acts of resistance to hegemonic forces. Minow touches on an interpretation of rights that recognises different people's particular rights claims not only in the context of the courts but also 'apart from the state', where they may be attempting to create identities and communities. She comments that:

> Rights...are neither limited to nor co-extensive with precisely those rules formally announced and enforced by public authorities. Instead rights represent articulations - public or private, formal or informal- of claims that people use to persuade others (and themselves) about how they should be treated and about what they should be granted. I mean, then, to include within the ambit of legal discourse all efforts to claim new rights, to resist and alter official state action that fails to acknowledge such rights, and to construct communities apart from the state to nurture new conceptions of rights. Rights here encompass even those that lose, or have lost in the past, if-they continue to represent claims that muster people's hopes and articulate their continuing efforts to persuade.[27]

The above conceptualisation implies that rights are an aspect of people's daily lives and experiences. They have meanings that link people to one another and they foster mutual responsibility. This• perspective views rights as not only abstracted, universalized claims of individuals vis-a vis state formal state law but also as constituted within the diverse, concrete experiences of human beings as they go about their normal routines and interact with one another. Women daily express their reactions to the mundane denials of rights and he effects such denials have on who they are - how they define themselves. With regard to rights rights as expressions of people's lived experiences, adds that:

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[27] Martha Minow, 'Interpreting Rights: An Essay for Rober Cover' (1987) 96 *Yale Law Journal* 1860-1995.

> We become increasingly aware of the need to listen to such voices as they express the meaning of rights not only within the sphere of prosecution and courts but within the context of women's ongoing lives.[28]

By listening to the voices of women workers it is possible to understand how they articulate their rights and manage to resist oppression. Moreover, a necessary implication of such an approach is the recovery of women's voices which also helps to break down their image of helplessness. Parpart confirms that:

> [W]omen's realities can only be discovered by uncovering the voices and knowledge of the 'vulnerable', and that once that is done, this 'vulnerability' is neither so clear nor so pervasive. Attention to difference, language, and resistance provides new insight into...people's behaviour...Attention to difference and to multiple power/knowledge systems can encourage self-reliance and a belief in one's capacity to act.[29]

This notion necessarily involves a de-centered perspective of law and legal institutions; a consideration of the views of people outside these established realms, their responses to the centre and attempts to make their own worlds as best they can. Therefore, as discussed earlier, even when in traditional terms women workers may lack an awareness of their legal rights, they do in fact have a clear understanding of what they are entitled to. It needs to be recognised that when the women workers in the garments industry articulate their claims based on their own sense of justice they are reaching out towards a kind of legality. Villmoare elaborates on this issue that:

> A decentering perspective suggests that law is not what jurisprudence, in most of its incarnations, hastried to convince us it is, that there is no such thing as the law, however conceived. Law is plural and exists in. many overlapping spheres of life, some within the realm of the state, others outside it.[30]

De Sousa Santos describes this contemporary View as one of legal pluralism and conceives of:

> ... different legal spheres superimposed, interpenetrated, and mixed in our minds as much as in our actions, in occasions of qualitative leaps or sweeping crisis in our life trajectories as well as in the dull routine of eventless everyday life.[31]

Santos therefore insists on law in many areas and activities of people's lives. As an aspect of law, rights are then more than simply claims made in courts or other

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[28] Adelaide H Villmoare, 'Women, Differences, and Rights as Practices: An Interpretative Essay and a Proposal' (1991) 25 *Law and Society Review* 385.

[29] Jane E Parpart, 'Who is the Other? A Postmodern Feminist Critique of Women and Development Theory' (1993) 24 *Development and Change* 439-464.

[30] Villmoare, above n 28, 385.

[31] De Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 29 *Journal of Law and* Society 569-584.

formal institutionised arenas; they are located in a multiplicity of places. Finally, Villmoare states that:

> From the perspective of a society of decentered law, an observer can entertain the argument that rights have a role in the "eventless everyday" lives of women. Rights occupy some of those overlapping legal spaces in various combinations and with different meanings for diverse women. With an understanding that law exists in various sites, we inquire about women's everyday rights discourse as acquiescence and resistance to their surroundings.... A decentered conception of law aware of everyday life pulls us toward the peripheries and local contexts of women's lives, their articulation of rights, the resistances to their rights expectations and the meanings they have for women...[32]

In local contexts we see power struggles over law and rights and "uncover the latent or suppressed forms of legality in which more insidious and damaging forms of social and personal oppression frequently occur"[33]. Therefore there is need to look for local, daily expressions (and denials) of rights as resistance and/or acquiescence to domia'nant powers, especially because these expressions are meaningful for the people involved. Consideration of the local, and the contexts within which the local makes- sense, leads away from grand theory and universal generalisations into the study of particularities, where we tend to recognise the partiality of our understandings and the value of women's own voices. Such perspectives emphasise the situatedness of women and their rights claims[34].

Although articulations and claims- of rights- are made in women's everyday lives, these comprise the first level of their sense of legality and justice. Moreover, day to day acts of resistance, some overt and some covert, are embedded in their understanding of what constitute minimum standards at work. On the other hand direct recourse to the legal process is an overt resistance to unfair treatment and exemplifies the second level of their claim to rights and justice. The formal 'rights claim' by women in the Courts can therefore be perceived as an attempt to resist hegemony through the strategy of litigation. The litigation process provides women with 'brief saturnalias of power' when the tables are turned, when their covert acts of resistance or hidden transcripts finally break out and become public. This recourse to the law by women workers in the garments industry is essentially an overt form of resistance by individual women who have chosen litigation to resist what they perceive as unfair treatment by their employers. This strategy is most likely to be opted for by women who have managed to break numerous barriers, who may have passed several stages of covert resistance, before seeking legal solutions to their problems. However, these individual claims, also have the possibility of taking on a political dimension, by uniting women towards achieving certain common

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[32] Villmoare, above 28, 385.
[33] Santos, above n 31, 569-584.
[34] Villmoare, above n 28, 385.

goals. By claiming their rights through 'the legal process women try to regain dignity and self-esteem, particularly when such has been cruelly denied to them by their employers. For the women workers the decision to litigate is an important and crucial step towards restoring their identities, for themselves as well as for fellow• strugglers. Legal rights remain important for people who have never had rights or those who are disadvantaged. To use Fineman's words:

> Law is found in the discourses used in everyday life reflecting understandings about 'Law' Law is evident in the beliefs and assumptions we hold about the world in which we live and in the norms and values we cherish.[35]

Moreover, law as a source of power has the ability to empower those who call upon it, including the subalterns or oppressed groups. They can and do use the rights language as a mode of resistance against hegemonic power. The recourse to law by the garments women is therefore an expression of their resistance and a source of empowerment. As explained by Williams:

> In the law, rights are islands of empowerment. To be un-righted is to be disempowered, and the line between rights and no rights is most often the line between dominators and oppressors. Rights contain images of power, and manipulating those images, either visually or linguistically, is central in the making and maintenance of rights.[36]

Formal claims to legal rights, or recourse to law implies that at times "the space in the courtroom does provide the possibility for a conversation that might not otherwise be held"[37]; it provides the possibility of a story being told which under different conditions would have remained silenced, or voiced only at a covert level with little chance of being heard by a larger audience.

This article seeks to correlate between the concepts of 'resistance' and women's strategic use of law. It explores how women react to suppression of their basic needs as human beings in their daily lives as well as the ways and means by which they seek to establish their legal rights through the strategic use of law. Both are forms of 'resistance' a very basic human quality.

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[35] Martha Fineman, *Feminist Legal Scholarship and Women's Gendered Lives* (Open University Press, Buckingham, 1994) 229-246.

[36] Patricia Williams, *Feminist Legal Theory: Readings in Law and Gender,* Westview Press, Boulder, 1991).

[37] Hilary Lim, *Feminist Perspective on the Fundamental Subjects of Law* (Cavendish Publishing Limited, London, 1996).

Anticipatory Breach of Contract: Concept and Nature

Dalia Pervin *

1. Introduction

The aim of this article is to explain and examine the term anticipatory breach, its scope and provisions contained in section 39 of the Contract Act 1872 in the light of English law of Contract. Laws regarding contract are codified in Bangladesh. However, the Contract Act 1872 is not an exhaustive one. Moreover, the scope of the law may be expanded by interpretation and explanations of different sections. It is true that Bangladeshis a common law country and most of its laws are taken from England specially the Law of Contract. As a result the present English law of contract may be used as an aid to interpret certain laws regarding contract in Bangladesh. For example, section 39 of the Act, which deals with anticipatory breach of contract, may be clarified by the relevant principles of English law of contract.

The objective of writing this article is to make a general overview of the laws regarding anticipatory breach of contract. In doing so, I will show how English law of contract can be used in clarifying certain provisions regarding anticipatory breach of contract in Bangladesh.

Anticipatory breach or anticipatory repudiation[1] (renunciation, renouncement, rejection, and denial) occurs when a performance of a contract is due in a future specific date and one of the performing parties refuses or rejects to perform his or her part of the obligation before the due date of performance. To give an example, if A agrees to supply B 100 kilograms of sugar for Tk 5000 on 25th of December and on 15th of December he communicates B that he is not willing to fulfill his obligation, A is constituting an anticipatory repudiation which excuses B from performing his part of the obligation. One important thing here to remember is that, in anticipatory breach, the innocent party, (here B) does not have to prove that he was ready and willing to do his part of the performance at the date of the renunciation as per term of the contract that is in this case B does not have to prove that he was ready with money at 15th of December.

Chitty on Contract[2] has defined the term as, if, before the time arrives at which a party is bound to perform a contract and he wants to break his promise expressing not to perform it or acts in such a way that a reasonable man would think that he

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[1] See *Black's Law Dictionary* (West Group, 7th ed, 1999) 1806-7.

[2] H G Beale (ed), *Chitty on Contracts* (Sweet & Maxwell, 28th ed, 1999) vol 1, 1383 [24-021].

does not intend to fulfill his part, this constitutes an anticipatory breach. Chitty said, this situation entitles the other party to take any one of the two specific courses. These are as follows;

1. He may accept the repudiation, treat the repudiation as discharging him from his further performance and immediately sue for damages or
2. He may wait till the time for performance arrives and then sue.

He also explains that if the anticipatory breach is of continuing form and the innocent party continued to press the other party for performance, it does not preclude him from his later right of election to terminate the contract, if the party in breach continues in his decision (anticipatory breach) up to the moment of termination.

Lord Wright in Heyman[3] case said,
Perhaps the commonest application of the word 'repudiation' is to what is often called the anticipatory breach of a contract where the party by words or conduct evinces an intention no longer to be bound and the other party accepts the repudiation and rescinds the contract. In such a case, if the repudiation is wrongful and the rescission is rightful, the contract is ended by the rescission but only as far as concerns future performance. It remains alive for the awarding of damages either for previous breaches or for the breach which constitute the repudiation.

So here the promisee rescind the contract as much as the extent of the future remaining performance (In An Executory Contract)

The Contract Law 1872 of ours does not directly define anticipatory breach but explains the notion in the following ways;

Section 37 of the Contract Act imposes the liability on the party to perform the promise and if the concerned party does not perform his duty in due time then after the expiry of that time, the result would be clear breach of contract. Subsequently, in Section 39 the Act explains about the situation where the promisor before that refuses to perform or disable himself to perform the promise. Section 39 says-When a party to a contract has *refused* to perform to perform or disabled himself From performing, his promise in its *entirety*, the promise may *put an end* to the contract, unless he has signified, by words or conduct, his *acquiescence* in its continuance.

Illustrations of this Section are as follows;

(a) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance.On the sixth night A willfully absents herself from the theatre. B is at liberty to put an end to the contract.

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[3] Heyman v Darwins Ltd [1942] AC 356, 379.

(b) A, a singer enters into a contract with B, the manager of the theatre, to sing at his theatre two nights in every week during the next two months, and Bengages to pay her at the rate of 100 rupees for each night. On the sixth night A willfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it. but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

This section meant to enact the law of England and as well as our law before the Act of 1872 that where a party to a contract refuses altogether to perform or is disabled from performing his part of obligations of that contract, the other side has a right to rescind it.

Section 39 applies to executory contracts [4] where the time of performance has not yet arrived, and not to executed contracts.

Mulla[5] in his book has explained that if a party by any intimation, words or conduct, declines(refuses) to continue with the contract(in its entirety) it is repudiation, if the result is likely to deprive the innocent party of substantially the whole benefit of the contract[6].

Section 39 explains that repudiation may occur

1. If one party refuses to perform his part(renunciation) or
2. Makes it impossible for himself to perform(disables himself) or
3. Fails to perform his part of the contract that is in each of the cases to show an intention not to fulfill his part of the contract.

One important thing to remember in this section is that the refusal or renunciation[7] by the promisor to perform or disabling himself from performing the promise in its entirety. Mere failure by the promisor to perform the promise, without showing an intention to end the contract, will not result in repudiation[8]. The latter situation will be dealt by Ss 54 and 55 of the Contract Act 1872.

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[4] Consideration is called executory in a contract where there is an exchange of promise to perform acts in the future, eg a bilateral contract for the supply of goods whereby A promises to deliver goods to B at a future date and B promises to pay on delivery. If A does not deliver them, this is a breach of contract and B can sue A notwithstanding that his part of the obligation is outstanding too.
Consideration is called executed if one party makes a promise in exchange for an act by the other party, when that act is completed, it is executed consideration, e.g. in a unilateral contract where A offers Tk 500 reward for the return of her lost mobile phone, if B finds the phone and return it, B's consideration is executed.

[5] See R G Padia (ed), *Pollock and Mulla: Mulla Indian Contract And Specific Relief Acts,* (LexisNexis Butterworths, 13th ed, 2006) vol 1, 1006-7.

[6] Federal Commerce and Navigation Ltd v Molena Alpha Inc [1979] 1 All ER 367.

[7] A renunciation may occur when one party refuses to perform his obligations of the contract in some essential respect. It can also occur where one party declares that he is or will be unable to perform his obligation under the contract in some material respects.

[8] VL Narasu v PSV Iyer AIR 1953 Mad 300.

Does every breach of contract (repudiation) discharge the innocent party from performance of his part of the contract and gives the right to sue for damages?

It is to remember that discharge of liability is not necessarily coincident with the right to sue for damages. Chitty[9] has mentioned "Any breach of contract gives rise to a cause of action; not every breach discharges from liability." So a discharge may follow at the option the innocent party where the other party has repudiated the contract. As repudiation does not discharge the contract so it does not automatically terminates the obligations of the innocent party, rather it gives an option to the innocent party to consider itself as discharged. Consequently if the innocent party rescinds the contract, the primary obligations of both the parties are over, the defaulting party becomes liable for payment of compensation for the breach. If the innocent party does not want to affirm the repudiation of the contract, the contract continues till the date of original performance[10].

Anson[11] expressed that, a contract is a contract from the time it is made, and not from the time performance is due. To give an example if A contracts with B on 2nd September to deliver a car worth Tk 3,00,000, on 6th November, payment on delivery. A valid contract has been constituted but respective performances are outstanding. If A, declines to perform his part of the obligations entirely on 15th September, which is prior to the due date of performance, an anticipatory breach is constituted; it entitles B to treat the contract at an end. Though the term anticipatory breach has been used, it is in fact a breach in the **present repudiation**. The renunciation supplies the cause of action, (on 15th September, when A denied to do his part of obligation) not the future breach (due date of performance that is 6th of November). By this prior breach, it gives the promisee an option to treat the repudiation as an immediate breach, putting an end to the contract for the future and gives the right of action for damages.

So the repudiation of the contract gives the right to claim damages immediately to the promisee and he has not to wait for the due date for performance and the real breach to occur.

Hochster v De La Tour[12] is a landmark English contract law case on anticipatory breach of contract which has held that if a contract is repudiated before the date of performance, damages may be claimed immediately.
The fact of case is in April, De La Tour agreed to employ Hochster as his courier for three months from 1 June 1852, to go on a trip around the European continent. On 11 May, De La Tour wrote to say that Hochster was no longer needed. On 22 May, Hochster sued. De La Tour argued that Hochster was still under an obligation to stay

[9] Beale, above n 2, 12, 19 [25-001].
[10] Padia, above n 5, 1006-7.
[11] Jack Beatson, *Anson's Law of Contract*, (Oxford University Press, 27th ed, 1998) 541.
[12] Hochster v De La Tour [1853] 2 E&B 678.

ready and willing to perform till the day when performance was due, and therefore could commence no action before.

Lord Campbell CJ held that Hochster did not need to wait until the date of performance was due to commence the action and awarded damages.
In his judgment, he said,

> *"If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage.*
> *In the present case, of traveller and courier, from the day of hiring till the day when the employment was to begin, they were engaged to each other, and it seems to be a breach of an implied contract if either of them renounces the engagement.....*
> *The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer.*

In Universal Cargo Carriers Corpn v Citati[13] Devlin J explained the term and said that there are two forms of anticipatory breach. They are

1. Renunciation by a party of his liabilities under it and
2. Impossibility created by his own act

These two forms have a common characteristic that is essential to the concept, that is, the injured party is allowed to anticipate **an inevitable breach.** He expressed that anticipatory breach means simply that a party is in breach from the moment that his actual breach becomes inevitable. Since the reason for the rule is that a party is allowed to anticipate an inevitable event and is not obliged to wait till it happens, (re phrase) it must follow that the breach which would actually have occurred if he had waited.

Promisee's option

If the promisor to a contract repudiates the contract, the promisee (the Innocent Party), has an option and that is he may accept that repudiation and sue for damages for breach of contract, whether or not the time for performance has come or if he chooses , disregard or refuse to accept it and then the contracts remains in full effect.

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[13] Universal Cargo Carriers Corpn v Citati [1957] 2 ALL ER 70.

As anticipatory breach means that a party is in breach from the moment his actual breach becomes inevitable, the rule also applies to a situations where the performance is conditional. In Frost v Knight[14] the defendant promised to marry the plaintiff on the death of his father. While the father was still alive, the defendant announced that he does not want to fulfill the contract. The plaintiff brought a suit for damages.

It was held by the Court of Exchequer, that the promisee could treat the repudiation of the other party as wrongful putting an end to the contract and may at once bring an action for damages for breach of contract.

The effect of anticipatory breach was summed in Florrie Edridge v Rustomji Danjibhoy Sethna[15] before the Contract Act 1872, came into force:
It was said, "The promisee, if he pleases, may treat the notice of intention as inoperative, and wait the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to an his own obligations and liabilities under it , and enables the other party not only to complete the contract , if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to compete it.

On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as wrongful, put an end to the contract, and bring his action at once as on a breach of it; and in such action, he will be entitled to such damages as would have arisen from the non performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

Acquiescence, Acceptance of Repudiation and concept of Retraction: Are they Same?

The word acquiescence used in the last line of section 39 of the Contract Act. Here the situation was even the promisor has repudiated the contract on 6th night that he did not perform on 6th night and resume to sing on the 7th night and the promisee has given acquiescence to it and the contract was retreated.

When repudiation occurs the performing party to the contract is excused from having to fulfill his or her obligation. Under the English Law the repudiation can be retracted by the promising party so long as there has been no material change in the position of the performing party in the interim. *A retraction* of the repudiation restores the performer's obligation to perform the contract but if the repudiation makes it impossible to fulfill its promise, then retraction is not possible and no act of

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[14] Frost v Knight [1872] LR 7 Ex 111, 113.
[15] Florrie Edridge v Rustomji Danjibhoy sethna.

the promising party can restore the performing party's obligations under the contract.

An example would be if A promises to give B a Toyota car in exchange for B making A's portrait, but A then sells the Toyota to X before B begins painting, A constitutes an anticipatory repudiation which excuses B from performing. Once the car has been sold to X, there is no way that A can fulfill the promise to give the car to B. Retraction is not possible here.

The last part of the section 39 of the Contract Act 1872 says "...unless he has signified; by words or conduct, his acquiescence in its continuance."

Illustration "b" narrated a situation where B by signifying his acquiescence in the continuance of the contract even after A has repudiated the contract. In that case after giving consent for continuance of the performance (Here singing) B cannot now put an end to the contract. But if A was unable to perform at that time even if he wanted to perform, the contract could not be *retracted.*[16]

Effect of Breach: Right of election

The innocent party has two rights from which he has to elect one.

1. Right to affirm the contract not withstanding the breach. This course will prevent the contract from being discharged, but damages may still be recovered (affirmation). Or
2. To treat the contract as discharged and claim for damages (termination).

Affirmation

An election to affirm the contract means that all the obligations of both contracting parties remain alive[17]. As a result affirming means, awaiting performance on the contractual date set for that performance to begin.[18]

One important thing here to remember that what Lord Reid said, the general power to affirm the contract could not be exercised by a person who had no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages.[19]

The strict approach towards identification of affirmation requires clear and unequivocal evidence of an intention to continue with the contract and hence the election is frequently stated to be irrevocable.[20] Lord Ackner said:

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[16] See The Contract Act 1872 (Bangladesh) S 39, illustrations a-b.
[17] Jill Poole, Textbook on Contract Law, (Oxford University Press, 11th ed, 2012) 310.
[18] Fercometal SARL v Mediterranean Shipping Co.SA [1989].
[19] See Poole, above n 17, 311.
[20] Fercometal v Mediterranean Shipping [1989] AC 788.

There is no third choice.....to affirm the contract and yet be absolved from tendering further performance unless and until[the breaching party] gives reasonable notice that he is once again able and willing to perform.

The innocent party might have to face two risks if he affirms the repudiation;

1. If the non breaching party is itself in breach of contract, that party cannot argue, at least not unless estoppel operates, that the initial renunciation by the other party operates as an excuse for its own subsequent breach.[21]
2. Similarly, if the contract is frustrated in the period between the affirmation and the due date for performance, the frustration will discharge the contract and the non breaching party will lose the remedy of damages for the breach.[22]

In Avery v Bowden[23] The master of the ship had been told in advance of the last possible date for loading that there was no cargo available, which may have amounted to repudiation. He elected to affirm the contract, and remained in port hoping that a cargo would eventually be provided. Before the last possible date for performance of the contract, the contract was frustrated by the outbreak of the Crimean war, thus depriving the ship owners of a remedy they might have had for the failure to provide a cargo, had that repudiation been accepted as terminating the contract.

The second limitation here requires that the affirming party must be able to continue with their own performance of the contract without the cooperation of the breaching party in order to be able to claim the contract price, otherwise the affirming party will be limited to remedy in damages.[24] This restriction in White & Carter that a claimant will be limited to a remedy in damages where he is unable to perform without the cooperation of the contract- breaker, applies only where the performance which has been prevented by the breach was a precondition to the payment obligation, i.e. the performance was entire.

As it was mentioned before (page 6) the synonym affirmation has been used fro the word acquiescence used in our law which is more related to retraction than affirmation though the outcome of that word is as similar as the word affirmation

Termination

Where the innocent party elects to treat the breach as repudiary, he must communicate it to the breaching party to make the repudiation effective.[25] It is said

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[21] Ibid.
[22] Poole, above n 17, 314.
[23] Avery v Bowden [1855] E & B 714.
[24] White & Carter (councils) Ltd v McGregor [1962] AC 413.
[25] Art III of the European Draft Common Frame of Reference suggests that notice of termination should be given "within a reasonable time."

in Vitol S. A. v Norelf Ltd. (The Santa Clara)[26] that an acceptance of repudiation requires no particular form; a communication does not have to be couched in the language of acceptance. It is sufficient that communication or conduct clearly and unequivocally conveys to the repudiating party that the aggrieved party is treating the contract as at an end.

> In the Vitol case, V and N had entered into a contract on 11 February1991 for the purchase of a cargo of propane. On March 8, V sent a telex to N repudiating the contract. This was subsequently agreed to amount to an anticipatory breach which, if accepted by N, would bring the contract to an end immediately. N did not communicate with V but, on 12 March, started to try to find an alternative buyer and on 15 March, sold the cargo to X. V challenged the arbitrator's decision that these **actions** by N amounted to an acceptance of the anticipatory breach.

The House of Lords held that N's actions constituted acceptance of V's anticipatory breach.

Lord Steyn in his judgment set out three principles which apply to acceptance of a repudiatory breach (that is termination of the contract)

a. Where a party has repudiated a contract the aggrieved party has an election whether to accept the repudiation or affirm the contract

b. An act of acceptance of repudiation requires no particular form; a communication does not have to be couched in the language of acceptance. It is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiating party that the aggrieved party is treating the contract as at an end.

c. The aggrieved party need not personally, or by an agent, notify the repudiating party of his election to treat the contract as at an end. It is sufficient that the fact of the election comes to the repudiating party's attention, for example , notification by an unauthorized broker or other intermediary may be sufficient

In applying all these three principles to the case (Santa Clara), Lord Styen noted that the specific issue before the House was '*Whether non-performance of an obligation is ever as a matter of law capable of constituting acceptance.*'[27] Their Lordships answered this question in the affirmative.

Their lordships expressed that whether there is acceptance in a particular case 'all depends on the particular circumstances of the case'[28] At the conclusion it could be said that it would be a caution for a party where his possibility of acceptance would

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[26] [1996] 2 Lloyd's Rep 225, 229.
[27] Ibid.
[28] Ibid.

be by inaction, the safest course for that party who intends to accept a repudiatory breach, and therefore terminate the contract, is to do so specifically, by communicating this to the other party.[29]

Is 'acceptance' of the termination is needed for claiming damages upon an anticipatory breach?

The English rule regarding anticipatory breach is that anticipatory breach does not automatically give rise to a right of action for damages unless and until it is accepted. This 'acceptance principle' has been the subject of controversy for a long time in the academic circle.

The controversy was regarding the divergence view as to whether an anticipatory breach should be recognized as a breach of contract in itself and whether the repudiatee's right of action for damages before the time for performance should be made dependent on the election(affirmation or termination of the anticipatory breach) he makes.

In Johnstone v Milling[30]Lord Esher M.R. has explained the effect of anticipatory breach as

> *"A renunciation of a contract, or, in other words a total refusal to perform it by one party before the time for performance arrives, does not , by itself, amount to a breach of contract but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. Where one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract.....The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation."*

In explanation of the above matter in is worth mentioning that, in cases of anticipatory breach by renunciation of the contract, the cause of action is not the future breach; it is the renunciation itself.[31] In Frost v Knight it was stated that the anticipatory breach is not based on the fiction that the eventual cause of action may, in anticipation, be treated as a cause of action. So if the anticipatory breach is accepted as a discharge of the contract, it is not open to the party in breach subsequently to the tender performance within the time originally fixed.[32]

In anticipatory breach, the innocent party has **to accept** the repudiation of the other party meaning elect the termination of the contract and then sue for damages for the

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[29] See Richard Stone, *The Modern law of Contract,* (Routledge, 9th edn) 445.
[30] [1886] 16 QBD 460.
[31] The Mihalis Angelos [1971] 1 QB 164.
[32] Xenos v Danube Ry [1863] 13 CB.

present breach and not the future breach which is still not yet arrived. If we see the illustrations of section 39 the same thing has been explained in the last line of the section where the singer could not sing after the 6th night when he has repudiated the contract if the manager of the theatre had accepted his repudiation. And by accepting the repudiation the innocent party could sue the other party for damages.

One basic thing to remember in getting damages under repudiation is that until the innocent party accepts the repudiation, he can't claim damages under that breach. A famous theory called 'conditional damages claim' [33](In Avery v Bowden, the judges said that anticipatory breach would constitute a cause of action for damages only when the repudiatee accepted it. Hence the conditional damages claim proposition) explains this principle. Even before the case White & Carter[34] the English Law has established that a duty to mitigate only arose when an anticipatory breach was accepted.[35] A duty to mitigate should not arise until the loss caused by a breach of contract to the innocent party becomes certain. We have seen in the above mentioned cases that in anticipatory breach cases, the repuditee's loss of bargain will not become certain until the repudiator's future performance becomes impossible or the contract is terminated. A duty to mitigate, consequently, should not arise before an anticipatory breach accepted.

Asquith LJ in Howard v Pickford Tool Co.[36] said: "An unaccepted repudiation is a thing writ in water and of no value to anybody; it confers no legal rights of any sort or kind."

Andrew Burrows in his book[37] recognized it and said that, as it is under US law, that a duty to mitigate arises with a right of action for damages when the repudiation is communicated and the repudiatee's election either to affirm the contract or to accept the repudiation must be with that duty.

Though the Contract Act, 1872, did not include this acceptance theory explicitly, but we follow this rule in our contract law cases.

Conclusion

Section 39 of the Contract Act explains the term anticipatory breach but it does not explain how it works meaning when the repudiation happens, it does not explain that the sufferer, if he does not want to retract, he has to accept the repudiation and then only can go to the court for compensation. This acceptance theory from English law has aided our law to explain anticipatory breach in a broader aspect. This article has focused in this area by explaining our law and discussing English principle and cases regarding anticipatory breach. The article has also tried to explore our law of anticipatory breach as well as explained the English law in this regard.

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[33] [1855] 5 El & BI 714; 119 ER 647.
[34] White & Carter (councils) Ltd v Mcgregor [1962] AC, 413.
[35] Roth & Co v Taysen Townsend & Co [1895].
[36] [1951] 1 K.B. 417, 420.
[37] Andrew Burrows, *Remedies for Tort and Breach of Contract* (Oxford University Press, 3rd ed, 2004) 128.