

# **Dhaka University Law Journal**

The Faculty of Law publishes Dhaka University Law Journal (The Dhaka University Studies Part-F) once a year. The journal started its journey in 1989. Initially it was published annually. Later on it appeared twice a year (June and December Issue). From 2017 it is published annually. This journal is the leading peer-reviewed academic law journal containing original contributions on contemporary and jurisprudentially important issues written by academics, researchers, judges, and practitioners. It also publishes reviews of important recent books from recognized experts.

**Published in January 2019** by the Registrar, University of Dhaka.  
© All rights reserved.

**Printed by** Trayee (A House of Quality Printing), 15 Nilkhet, Babupura  
Dhaka-1205.  
Mobile: 01710876294

## **Subscription:**

The subscription rates for individuals for a single issue are Taka 75 (domestic) and \$15 (international). Institutional subscriptions for a single issue are Taka 100 (domestic) and \$20 (international). Postal costs will be charged separately.

Manuscripts and editorial correspondence should be addressed to:

## **Editor**

Dhaka University Law Journal (The Dhaka University Studies Part-F)  
Room No. 113, Kazi Motahar Hossain Bhaban  
Faculty of Law, University of Dhaka  
Dhaka-1000, Bangladesh  
Tel: 880-2-58613724, 9661900/4348,4349  
E-mail: deanlaw@du.ac.bd



# **Dhaka University Law Journal**

(The Dhaka University Studies Part-F)

Volume 29, 2018

# **Dhaka University Law Journal**

(The Dhaka University Studies Part-F)

---

**Volume 29, 2018**

---

***Editor:***

***Professor Dr. Md. Rahmat Ullah***  
***Dean***

Faculty of Law  
University of Dhaka

***Associate Editor:***

***Professor Dr. Md. Towhidul Islam***  
Department of Law, University of Dhaka

***Editorial Board:***

***Professor Dr. Shima Zaman***  
Department of Law, University of Dhaka

***Mr. Gobinda Chandra Mandal***  
Associate Professor, Department of Law, University of Dhaka

***Dr. Rumana Islam***  
Associate Professor, Department of Law, University of Dhaka

***Dr. Arif Jamil***  
Associate Professor, Department of Law, University of Dhaka

# Contributors

**Dr. Mizanur Rahman**

Professor

Department of Law, University of Dhaka.

&

**Emraan Azad**

Lecturer, Department of Law, Bangladesh University of Professionals (BUP).

**Dr. Md. Towhidul Islam**

Professor, Department of Law, University of Dhaka

**Dr. Muhammad Ekramul Haque**

Professor, Department of Law, University of Dhaka

**Dr. Tehmina Ghafur**

Professor, Department of Population Sciences ,University of Dhaka

**Dr. Md. Towhidul Islam**

Professor, Department of Law, University of Dhaka

&

**Shirin Sultana**

Lecturer, Department of Law, University of Dhaka

**Dr. Jamila Ahmed Chowdhury**

Professor, Department of Law, University of Dhaka

&

**Aminul Islam**

Advocate, Bangladesh Supreme Court

**Syed Masud Reza**

Assistant Professor, Department of Law, University of Dhaka

**Bahreen Khan**

Assistant Professor, Department of Law & Justice, Southeast University

&

**Emdadul Haque**

Assistant Professor, Department of Law & Justice, Southeast University

**Md. Golam Mostafa Hasan**

Lecturer, Department of Law, Jagannath University

**Md. Abu Saleh**

Senior Lecturer, Department of Law, Daffodil International University

# Dhaka University Law Journal

(The Dhaka University Studies Part-F)

---

Volume 29, 2018

---

## Contents

Assessing the Efficacy of Bangladesh's Maritime Legal Regime towards Ensuring a Sustainable Blue Economy <b>Professor Dr. Mizanur Rahman</b> <b>&amp;</b> <b>Emraan Azad</b>	1
The Legal Regime of Plant Varieties and Farmers' Rights Protection in Bangladesh: Options and Challenges <b>Dr. Md. Towhidul Islam</b>	19
Economic, Social and Cultural Rights versus Civil and Political Rights: Closing the Gap between the Two and the Present International Human Rights Regime <b>Dr. Muhammad Ekramul Haque</b>	41
Rights-based Approach to Health: Critical Reflections and Contemporary Challenges <b>Dr. Tehmina Ghafur</b>	55
Nature of Land and Pre-emption Suits: Demystifying Ambiguities <b>Dr. Md. Towhidul Islam</b> <b>&amp;</b> <b>Shirin Sultana</b>	71
Divergence in NPL Recovery of Public Banks vs. Private Banks in Bangladesh: Could ADR be an Effective Tool to Improve the Parity? <b>Dr. Jamila Ahmed Chowdhury</b> <b>&amp;</b> <b>Aminul Islam</b>	87
Reflections on the Right to Nationality: Identifying the Complexities in and around <b>Syed Masud Reza</b>	105

Linking Right to Water with Freedom of Expression: Bangladesh in Context <b>Bahreen Khan</b> & <b>Emdadul Haque</b>	117
Laws on Cyber Jurisdiction in International Perspectives <b>Md. Golam Mostofa Hasan</b>	141
Bilateral Investment Treaties (BITs) Threatening in Environmental Regulation of Host States: The Case Study of Bangladesh <b>Md. Abu Saleh</b>	165

# Rules for Contributors

The Dhaka University Law Journal is interested in original contributions on contemporary or jurisprudentially important legal issues.

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

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

## References, Footnotes and Layout

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

### Journal Articles: Single Author

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

### Journal Articles: Multiple Authors

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

### Books: Single Author

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

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

### **Books: Multiple Authors**

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

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

### **Books: Edited**

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

### **Chapters in Edited Books**

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

### **Books: Corporate Author**

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

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

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

### **Theses**

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

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

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

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

### **Newspaper**

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

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

### **Internet Materials**

International Whaling Commission, *Extending the Global Whale Entanglement Response Network* (28 January 2014) <<http://iwc.int/extending-the-global-whale-en>

tanglement-response-n> accessed 9 March 2014. [Note: here the date within parentheses is the last date of update of the web page, and the date after the URL is the date of last access.]

## **Cases**

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

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

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

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

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

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

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

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

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

## **Delegated Legislation**

Family Courts Rules 1985, r 5.

Financial Institutions Regulations 1994, reg 3.

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

The abbreviation ‘Ibid’ should be used to repeat a citation in the immediately preceding footnote. Standing alone, ‘Ibid’ means strictly ‘in the very same place’ while ‘Ibid, 231’ means ‘in the same work, but this time at page 231.’ Avoid the use of ‘Latingadgets’ 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.

# Assessing the Efficacy of Bangladesh's Maritime Legal Regime towards Ensuring a Sustainable Blue Economy

Dr. Mizanur Rahman\*  
Emraan Azad\*\*

## 1. Introduction

Geographically, Bangladesh is blessed with access to the Bay of Bengal in the South, which happens to be one of the major routes for the country towards engaging in global trade and economy. Bestowed with the maritime resources from the Bay of Bengal, Bangladesh has been a centre of attraction for the economic activities for many countries. To a good extent, Bangladesh's economy is dependent upon the sea and its aquatic resources. One-fifth of the country's population directly relies upon the maritime sector and its resources for performing various economic activities, ranging from fishing, shrimp production, salt cultivation, other aquaculture, oil and gas production, and tourism.<sup>1</sup> Recently, it is estimated that "five percent of the country's GDP could be acquired by 2030 from the resources of the sea and Bangladesh could be a developed country by 2041 if the resources are properly extracted and adequately used."<sup>2</sup> The marine economy is now undoubtedly flourishing and people dependent upon the Bay of Bengal are having the opportunity of reaping maximum economic benefits out of the sea. In short, the geographic location of the Bay of Bengal has attributed a promising dynamic in the economic prosperity of the country.<sup>3</sup> Despite the presence of such economic opportunities and prospects, this kind of economic perspective carries with it the dangers and risks of environmental security concerns due to growing industrialization, marine pollution, ocean acidification, habitat destruction, illegal and unregulated fishing, climate change, etc.<sup>4</sup>

Climate change is not new but an unavoidable phenomenon. Pollution of sea waters is an imminent threat of environmental degradation. Conservation of marine resources and aquatic biodiversity is now one of the biggest challenges. Primarily, the sea-dependent-communities from the South near to the Bay of Bengal are the victims

---

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

\*\* Lecturer, Department of Law, Bangladesh University of Professionals (BUP).

1 M. Gulam Hussain et al, 'Review on Opportunities, Constraints, and Challenges of Blue Economy Development in Bangladesh' (2017) 2(1) *Journal of Fisheries and Life Sciences* 45, 47-48 <[https://researchportal.port.ac.uk/portal/files/7509060/Opportunities\\_post\\_print.pdf](https://researchportal.port.ac.uk/portal/files/7509060/Opportunities_post_print.pdf)> accessed 16 September 2018.

2 Harun ur Rashid, 'Blue economy: Are we ready for it?', *The Daily Star* (online), 14 May 2018 <<https://www.thedailystar.net/opinion/economics/blue-economy-are-we-ready-it-1575823>> accessed 23 August 2018.

3 See for details, David Brewster, 'The Rise of the Bengal Tigers: The Growing Strategic Importance of the Bay of Bengal' (2015) 9(2) *Journal of Defence Studies* 81, 82-83 <[https://idsa.in/system/files/jds/jds\\_9\\_2\\_2015\\_DavidBrewster.pdf](https://idsa.in/system/files/jds/jds_9_2_2015_DavidBrewster.pdf)> accessed 10 November 2017.

4 Md. Asraful Alam, 'Harnessing ocean resources', *The Daily Star* (online), 23 January 2018 <<http://www.thedailystar.net/opinion/harnessing-ocean-resources-1523536>> accessed 27 May 2018.

of such risks as their livelihood is very much associated with low and high tides of the sea. In the wider sense, we all live on the earth are under the threat of marine-cantered risks and hazards.<sup>5</sup>

Hence it is clear that conservation and development of maritime resources is not only an economic and development need but squarely a question of the right to a clean and healthy environment.<sup>6</sup> At this point comes the significance of governing marine resources sustainably, not only for the economic benefits of the present generation but also for those of the future generations yet to come. Such approach of maritime governance is often known as guaranteeing a sustainable blue economy where present generation *ought not* to exploit natural resources to the exclusion of future generations, rather maintain the integrity of maritime ecosystem for both today and tomorrow.

Theoretically, the idea of sustainable blue economy approach requires that “the principles and norms of the blue economy are significantly contributing towards eradication of poverty, reduction of food scarcity, mitigation, and adaptation of climate change and generation of sustainable and inclusive livelihoods of the community.”<sup>7</sup> As the fundamental principles for sustainable blue economy suggest, Bangladesh as a coastal country should sustainably optimize the benefits received from its maritime resources. For Bangladesh, an integrated and comprehensive maritime governance policy, as well as legal framework outlining sustainable blue ecology management, can bring about long-lasting progress in the lives and livelihood of the millions of people living along the coastline, in islands across Bangladesh. To see that happening, however, Bangladesh needs to manage maritime resources following the principles of sustainable blue economy which promote the community-led protection and conservation of marine biodiversity.

In the backdrop of this scenario, the present paper aims to examine the efficacy of the existing maritime legal regime of Bangladesh in ensuring the most favourable use of maritime resources. In doing so, it firstly investigates the idea of a sustainable blue economy and its standards which aim at balancing between the maximization of maritime economic benefits and the assurance of a durable maritime ecosystem.

---

<sup>5</sup> In addition, security threats like piracy and foreign invasion can hardly be overlooked. On maritime security issue, see Mohammad Rubaiyat Rahman, ‘Regional Cooperation in Maritime Security: A View from the Bay of Bengal’ (Paper presented in Annual International Studies Convention, organized by Jawaharlal Nehru University (JNU), New Delhi, India, 2013) 1-15 <[https://www.academia.edu/5484095/ Regional\\_Cooperation\\_in\\_Maritime\\_Security\\_A\\_View\\_From\\_the\\_Bay\\_of\\_Bengal?auto=download](https://www.academia.edu/5484095/Regional_Cooperation_in_Maritime_Security_A_View_From_the_Bay_of_Bengal?auto=download)> accessed 28 January 2018.

<sup>6</sup> M. Saiful Karim, ‘Implementation of Marpol Convention in Bangladesh’ (2009) 6 *Macquarie Journal of International and Comparative Environmental Law* 51 cited in: Mohammad Delawar Hosain, ‘Impacts of Oil Spills in the Sundarbans and Challenges to the Convention of Marine Ecosystem: A Legal Analysis with Special Reference to Southern Star 7 Incident and Projected Rampal Power Plant’ (2015) 15(1-2) *Bangladesh Journal of Law* 111-130.

<sup>7</sup> See Gunter Pauli, *The Blue Economy: 10 Years, 100 Innovations, 100 Million Jobs* (Mexico: Paradigm Publications, 2010).

Secondly, it scrutinizes Bangladesh's existing legal regime in light of the principles, as developed by the World Wide Fund For Nature (formerly the World Wildlife Fund – WWF), for a sustainable blue economy. Thirdly, it concludes with some recommendations for the necessary changes in the maritime legal regime towards guaranteeing a sustainable blue economy in Bangladesh. As the paper confines its discussion only within the theoretical perspectives of the legal regime, it cautiously avoids empirically analysing the challenges and prospects of governing maritime resources for Bangladesh. As a matter of hypothesis, the paper holds that legislative framework not integrating the principles of a sustainable blue economy may hinder the effective use of maritime resources for the country. The arguments made in the paper are founded upon the significance of a sustainable blue economy for a coastal country like Bangladesh which has a promising track record of economic development for the last few decades. Throughout the paper, the authors strive to understand the efficacy of maritime laws in contributing to the development of policy measures of the government towards achieving a sustainable blue economy.

## **2. Conceptualizing the Idea of Sustainable Blue Economy**

It is very difficult to suggest any standard legal regime which might be capable of maximizing maritime benefits for the people living in coastal areas. Rather, it is advocated that maritime legal regime which integrates in its whole gamut the principles of the sustainable blue economy can best facilitate the favorable use of maritime resources in coastal countries. Therefore, understanding the idea of the sustainable blue economy has been the main concern in any discussion on the governance and management of maritime resources around the world.

As it is beyond any refusal, the sea has become a new central point of attention in the discourse on economic growth and sustainable development, both nationally and internationally. Not only the world but also Bangladesh is now in many ways at the turning points of setting its economic priorities towards the sea. In this shifting phase of setting priorities, the idea of "blue economy" is now understood as "greening" of the maritime economy, and the framework by which both governments, non-government actors, especially the sea-dependent-communities can sustainably enjoy economic benefits from the sea. In common parlance, sustainable blue economy connotes the idea of striking “a better alignment between economic growth and the health of the ocean”.<sup>8</sup>

The history of the origin of this idea of “blue economy” as opposed to “green economy” is not very ancient. The concept of blue economy emerged as a buzzword or sustainable development particularly during the drafting of the post-2015 development goals, i.e. the Sustainable Development Goals (SDGs). Specifically, the SDG No. 14

---

<sup>8</sup> See The Economist Intelligence Unit's Briefing Paper for the World Ocean Summit 2015 titled *The Blue Economy: Growth, Opportunity and a Sustainable Ocean Economy* (2015) 8 <[http://www.eiuperspectives.economist.com/sites/default/files/images/Blue%20Economy\\_briefing%20paper\\_WOS2015.pdf](http://www.eiuperspectives.economist.com/sites/default/files/images/Blue%20Economy_briefing%20paper_WOS2015.pdf)> accessed 10 February 2018.

dealing with 'Life Below Water' has required "[the sustainable management and protection of] marine and coastal ecosystems from pollution, as well as address[ing] the impacts of ocean acidification."<sup>9</sup> In general, enhancing the conservation and sustainable use of ocean-based resources are one of the SDG-related ideas to mitigate some of the challenges that our oceans are now encountering.

The founder of Zero Emissions Research and Initiatives (ZERI) at the United Nations University in Tokyo, Dr. Gunter Pauli basically designed blue economy concept,<sup>10</sup> which came out of the United Nations Conference on Sustainable Development (UNCSD) held in Rio de Janeiro in 2012 (popularly known as 2012's Rio+20 Conference).<sup>11</sup> The United Nations Environment Programme (UNEP) outlines the origin of this idea in the following words,

"The Blue Economy under the UN framework took its starting point at the Rio+20 Conference on Sustainable Development and Green Economy. It emerged as a branch of the latter, with the objective to provide a better adaptation of the paradigm to coastal, sea-resource based countries, and it was therefore referred to as 'a green economy in a blue world'."<sup>12</sup>

Despite that blue economy encompasses the principles and objectives of green economy, it has evolved from being the blue facet of green economy into a paradigm of global phenomenon, specially in coastal countries, considering seas and oceans as "developing spaces" and promising a unique opportunity for sustainable development, on the condition that well-governance of marine resources is put in the right perspective. In other words, the blue economy is something more than the mere green economy for the distinction that it enshrines the idea of "sustainability" in its range of progress and development in different sectors including the economic one. Most importantly, the notion of the sustainable blue economy is a manifestation of sustainable economic development advocates for the favourable use of maritime resources in such a manner which would strike a balance between harnessing economic benefit out of maritime resources and securing maritime ecosystems not only for present generation but also for future generations.

The Paris Declaration recognizes that "marine environments represent a key pillar

<sup>9</sup> To know more about the Goal, see the UNDP's presentation on SDGs at: <<http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-14-life-below-water.html>> accessed 19 November 2018.

<sup>10</sup> Dr. Gunter Pauli has developed his idea of blue economy in *The Blue Economy: A Report to the Club of Rome* (2009) and its sequel to *The Blue Economy 2.0: 200 projects implemented, \$4 billion invested and 3 million jobs created* (New Delhi: Academic Foundation, 2015) and *From Deep Ecology to Blue Economy: 21 Principles of the New Business Model* (Mexico: Paradigm Publications, 2016).

<sup>11</sup> See supra note 7 (Gunter Pauli).

<sup>12</sup> See Plan Bleu, *Blue Economy Project: Blue economy for a healthy Mediterranean - Measuring, Monitoring and Promoting an environmentally sustainable economy in the Mediterranean region* (Scoping Study, January 2016) <[https://planbleu.org/sites/default/files/upload/files/Scoping\\_Study\\_Blue\\_Economy\\_Jan2016.pdf](https://planbleu.org/sites/default/files/upload/files/Scoping_Study_Blue_Economy_Jan2016.pdf)> accessed 18 September 2018.

for economic and social development and therefore are considered as a vital opportunity in the fight against poverty."<sup>13</sup> Not only that, maritime resources play a crucial role in food security and human health and curbing climate change.<sup>14</sup> For an example, the livelihoods of over three billion people worldwide depend upon services from maritime resources and coastal biodiversity.<sup>15</sup> Not only that, the oceans – which supply half of all our oxygen, regulate the world climate, and are habitat to thousands of species – have been our partners in efforts to combat climate change.<sup>16</sup> One statistics say that about 93 percent of all the heat people have added to the planet since the 1950s has been absorbed by the oceans.<sup>17</sup>

As referred to previously, the Rio+20 Conference on Sustainable Development underscores blue economy as "ocean economy that aims at the improvement of human well-being and social equity, significantly reducing environmental risks and ecological scarcities." The outcome document of the Conference titled the "Future We Want" highlights the ocean's contribution to growth, stating: "We stress the importance of the conservation and sustainable use of the oceans and seas and of their resources for sustainable development." As we consider the blue economy in the context of sustainable development, this should contribute to eradicating poverty as well as sustained economic growth, enhancing social inclusion, improving human welfare and creating opportunities for employment and decent work for all while maintaining the healthy functioning of the earth's ecosystem.<sup>18</sup> As discussed above, the SDG No. 14 aims to "conserve and sustainably use the oceans, seas and marine resources for sustainable development." This Goal consists of 10 targets related to pollution management, ocean acidification, control of plastic waste and overfishing.<sup>19</sup>

<sup>13</sup> See for details the Paris Declaration adopted in 2012, at the Mediterranean Action Plan (MAP)'s 17<sup>th</sup> Conference to the Barcelona Convention (COP 17) held in Paris. The Mediterranean countries and the European Union signed the Paris Declaration calling for a blue economy to be established to safeguard and promote a clean, healthy and productive Mediterranean environment.

<sup>14</sup> Bangladesh's Prime Minister Sheikh Hasina in her inaugural speech in an international conference on the blue economy, held in Dhaka in September 2014; see for details at: <<http://www.thedailystar.net/blue-economy-39799>> accessed 10 July 2018.

<sup>15</sup> Ahmed Noor Hossain, 'How we can manage our marine resources better', *The Daily Star* (online), 26 February 2017 <<http://www.thedailystar.net/environment-and-climate-action/how-we-can-manage-our-marine-resources-better-1367104>> accessed 8 September 2018.

<sup>16</sup> See UN's Feature, 'Climate change and the world's oceans' <<https://www.un.org/sustainabledevelopment/blog/2017/06/feature-climate-change-and-the-worlds-oceans/>> accessed 18 November 2018.

<sup>17</sup> John Abraham, 'Earth's oceans are warming 13% faster than thought, and accelerating', *The Guardian* (online), 10 March 2017 <<https://www.theguardian.com/environment/climate-consensus-97-per-cent/2017/mar/10/earths-oceans-are-warming-13-faster-than-thought-and-accelerating>> accessed 18 March 2018.

<sup>18</sup> See para. 56, *The Future We Want* (UNCSD, 2012) <<https://sustainabledevelopment.un.org/content/documents/733FutureWeWant.pdf>> accessed 11 March 2018.

<sup>19</sup> Mizan R Khan, 'The rising stakes for ocean governance', *The Daily Star* (online), 3 July 2017 <<http://www.thedailystar.net/opinion/environment/the-rising-stakes-ocean-governance-1427308>> accessed 12 July 2017.

In this backdrop, the notion of ‘blue economy’ has offered a new horizon for economic development of the coastal countries to utilize sea and marine resources at national and international level. In Bangladesh, the discussion on blue economy started very recently after the settlement of maritime boundary delimitation dispute with Myanmar and India. Estimates suggest around 30 million Bangladeshi directly depend on maritime economic activities like fisheries and commercial transportation. The developing countries bestowed with coastal areas and islands have remained at the forefront of this blue economy advocacy, recognizing that the oceans have a major role to play in forming humanity’s future.

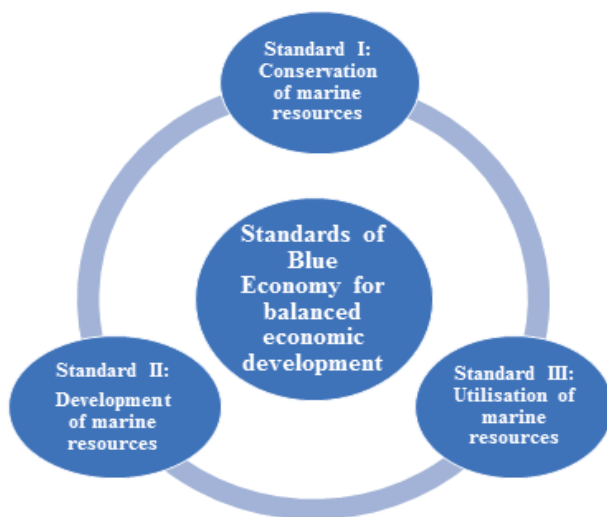


Fig.1: Standards of the Blue economy and its connection with the exploitation of maritime resources. Created by the authors.

In this respect, sustainable blue economy follows a balanced approach among conservation, development, and utilization of marine and coastal ecosystems with a view to enhancing their economic, social and environmental value for national economic development. Generating decent employment, securing productive marine economy and ensuring long-lasting healthy marine ecosystems are central focuses of sustainable blue economy in the maritime governance structure. For most of the developing countries especially for Bangladesh, adopting a policy of sustainable blue economy requires fundamental and systemic reforms in the policy-regulatory -management-governance framework(s) and identification of various maritime economic functions.

### ***The Principles for Sustainable Blue Economy***

During the past few years, the term ‘blue economy’ or ‘maritime economy’ has surged into common policy usage, all over the world. Despite increasing high-level adoption of the blue economy as a concept and as a goal of policy-making and investment, there is still no widely accepted definition of the term. The blue economy can

be understood in both strict and liberal sense. In the narrow sense, it generally refers to the use of the sea and its resources for sustainable economic development. In liberal sense, it means any economic activity in the maritime sector, whether sustainable or not. In whatever senses we define blue economy, it encompasses "oceans and seas as development spaces where spatial planning integrates conservation, sustainable use of living resources, oil and mineral wealth extraction, bio- prospecting, sustainable energy production, and marine transport."<sup>20</sup>

The World Wide Fund For Nature (formerly the World Wildlife Fund – WWF) has developed a set of “Principles for a Sustainable Blue Economy” which provides guidance on laws, institutions, and mechanisms in three ways.<sup>21</sup>

- (a) **Guidance on defining blue economy:** According to the Principles, a sustainable blue economy is a marine-based economy that:
- (i) Provides social and economic benefits for present and future generations, by contributing to food security, poverty eradication, livelihoods, income, employment, health, safety, equity, and political stability.
  - (ii) Restores, protects and maintains the diversity, productivity, resilience, core functions, and intrinsic value of marine ecosystems.
  - (iii) Bases on clean technologies, renewable energy, and circular material flow to secure economic and social stability over time, while keeping within the limits of one planet.

The Principles provide a comprehensive definition of a sustainable blue economy which suggests that the blue economy must respect ecosystem integrity and that the only source pathway to long-term prosperity is through the development of a maritime economy.

- (b) **Guidance on governance:** The Principles suggest blue economy to be governed by public and private actors and they must be inclusive, well-informed, precautionary and adaptive. This is very important as without people's participation and access to information, it is not expected that maritime area would be governed from the top. Accountability and transparency of the governance systems must be ensured through legal mechanisms. A holistic, cross-sectoral and long-term process can ensure better impacts on maritime-based economic activities. All actors in a sustainable blue economy must be innovative and proactive, without undermining the capacity of nature to support human economic activities and wellbeing.

---

<sup>20</sup> M. Khurshid Alam, *Ocean/Blue Economy for Bangladesh* 1-16<[https://mofl.portal.gov.bd/sites/default/files/files/mofl.portal.gov.bd/page/d1b6c714\\_aee6\\_499f\\_a473\\_c0081e81d7dc/Blue%20Economy.pdf](https://mofl.portal.gov.bd/sites/default/files/files/mofl.portal.gov.bd/page/d1b6c714_aee6_499f_a473_c0081e81d7dc/Blue%20Economy.pdf)> accessed 8 July 2017.

<sup>21</sup> See 'Principles for Sustainable Blue Economy' <[https://www.wwf.se/source.php/1605623/15\\_1471\\_blue\\_economy\\_6\\_pages\\_final.pdf](https://www.wwf.se/source.php/1605623/15_1471_blue_economy_6_pages_final.pdf)> accessed 17 November 2018

These Principles describe how a sustainable blue economy must be steered and managed, by the public as well as by private actors, at every scale.

(c) **Guidance on required actions:** To create a sustainable blue economy, public and private actors (including government, economic sectors, individual businesses, etc.) must set clear, measurable and internally consistent goals and targets. The actors must communicate their performances on these goals and targets. Creating a level economic and legislative playing field is needed to ensure that the blue economy has adequate incentives and rules. Both government and non-government actors must plan, manage and effectively supervise the use of marine space and resources, applying inclusive methods and the ecosystem approach. They also need to develop and apply standards, guidelines and best practices that support a sustainable blue economy.

The Principles elucidate what needs to be done, by every stakeholder, if a sustainable blue economy is to be secured. The essence of it is laid upon the recognition that maritime and land-based economies are interlinked and that many of the threats facing marine environments originate on land. Last but not least, active cooperation, sharing of information, knowledge, best practices, lessons learned, perspectives, and ideas, are needed to realize a sustainable and prosperous future for all. The core understanding of principles of the sustainable blue economy can be outlined through the following summarised tabular presentation:

**Table 1: At a Glance the Principles for a Sustainable Blue Economy**

Guidance on defining the blue economy	Guidance on governance	Guidance on required actions
(i) A clear and comprehensive definition of a sustainable blue economy  (ii) Respect towards ecosystem integrity  (iii) Emphasis on a secure pathway to long-term prosperity through the development of a circular economy	(i) The inclusion of public and private actors  (ii) Presence of an inclusive, well-informed, precautionary and adaptive actors  (iii) Accountability and transparency of the actors  (iv) Innovative, proactive holistic, cross-sectoral and long-term actors	(i) Setting and communicating clear, measurable and internally consistent goals and targets  (ii) Creating a level economic and legislative playing field with adequate incentives and rules.  (iii) Planning, managing and effectively governing the use of marine space and resources with the cooperation

Source: The World Wide Fund For Nature (formerly the World Wildlife Fund – WWF).

In the discourse of international law, it is well known that the principles discussed above are less obligatory and do not create any State responsibility. Seeing the persuasive character of these principles, one may wonder as to why we lack a comprehensive international law on the sustainable governance of maritime resources. Indeed, we have one of the far-reaching and globally influential legal regimes relating to marine environment, namely the UNCLOS 1982 – the purpose of adopting which was to establish ‘a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable utilisation of their resources, the conservation of their living resources, the study, protection and preservation of the marine environment.’<sup>22</sup> Here, the idea of ‘sustainable blue economy’ is somehow missing as the primary focus of the UNCLOS has largely been intertwined within the thinking of either protecting ocean and maritime resources or preventing and controlling marine pollution. To quote Philippe Sands et al, “the UNCLOS for the protection of the oceans and the marine resources covers large substantive areas of regulation, principally measures against pollution and for fisheries management.”<sup>23</sup> This shows the incompleteness of major international legal framework which evidently lacks the incorporation and operation of the sustainable blue economy.

Acknowledging this aspect of international environmental law's inadequacy, let us now discuss as to whether Bangladesh has been successful to integrate the principles for the sustainable blue economy in its maritime legal regime.

### **3. Understanding Bangladesh's Maritime Legal Regime in Light of the Principles for Sustainable Blue Economy**

In 2011, Bangladesh inserted Article 18A to its Constitution in order to ensure the protection and improvement of the environment and the preservation and safeguard of the natural resources, biodiversity, and wildlife for the present and future citizens.<sup>24</sup> It is evident from this constitutional provision that Bangladesh has a sacred mandate not only to manage natural resources found in lands (both plain lands and hills) but also to govern maritime resources for sustainable development of national economy. This generational development thinking for environment and nature is what we often term as "inter-generational equity".<sup>25</sup> According to Liaquat A. Siddiqui, this principle suggests that “the members of present generation hold the earth in trust for future generations and as such, they have a duty to utilize and conserve natural resources in

---

<sup>22</sup> See Preamble, the United Nations Convention on the Law of the Sea (UNCLOS) 1982.

<sup>23</sup> Philippe Sands et al, *Principles of International Environmental Law* (Cambridge University Press, 2012, 3<sup>rd</sup> ed.) 447.

<sup>24</sup> See article 18A, The Constitution of the People's Republic of Bangladesh (as amended up to 2018).

<sup>25</sup> Edith Brown Weiss is considered to be one of the advocates of this principle. See for more details, Edith Brown Weiss, *In fairness to Future Generations: International Law, Common Patrimony and Intergeneration equity* (Tokyo: United Nations University, 1989).

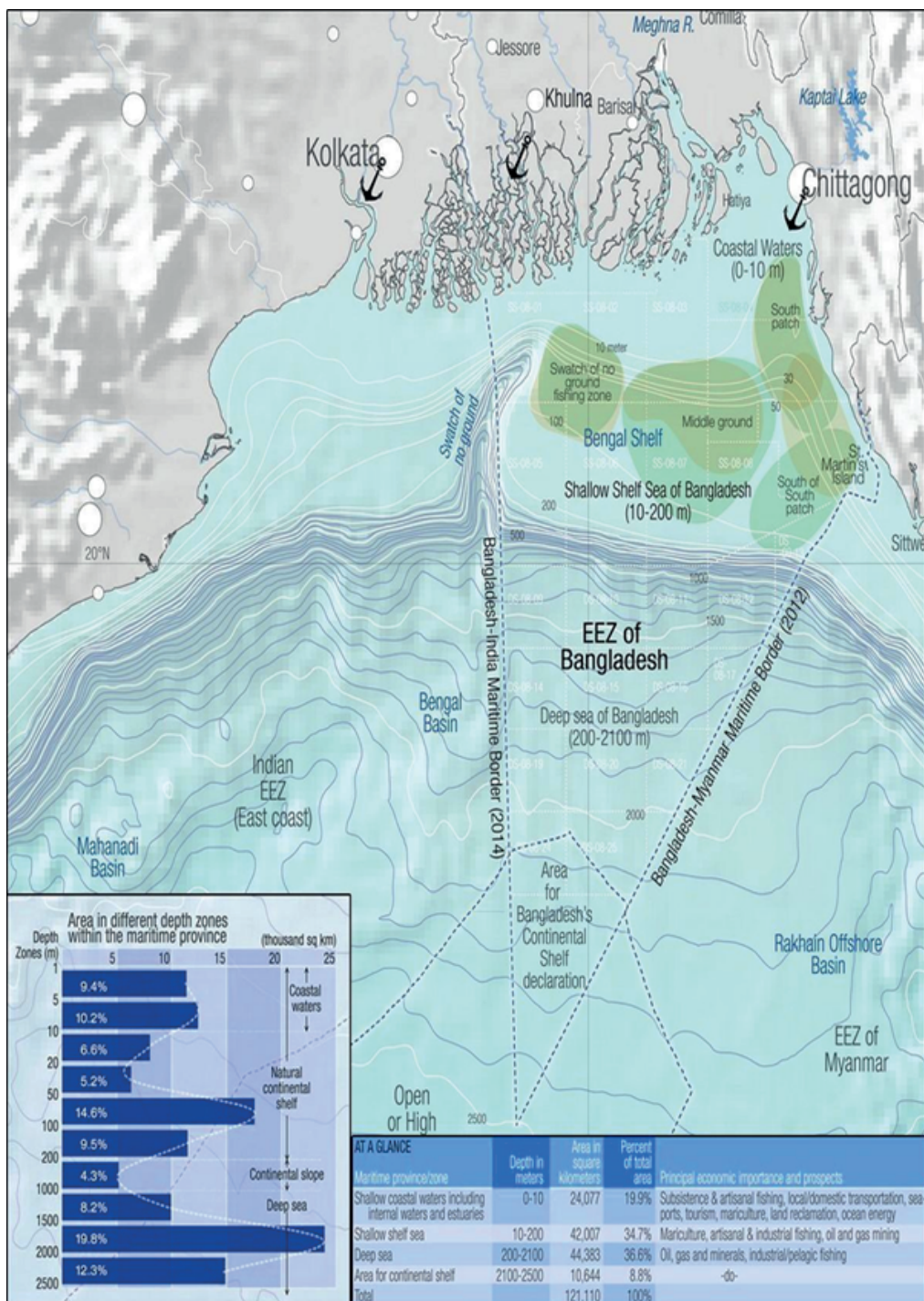


Fig.2: Maritime area of Bangladesh. Source: S.R. Chowdhury, Maritime Province of Bangladesh (Map). University of Chittagong (2014).

such a way that the rights of future generations are not compromised.”<sup>26</sup>

The idea of inter-generational equity is often explained in development discourse as “sustainable development” which means that development activities must be carried out in such a manner that it “meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>27</sup>

Much before accumulating a global consensus on international law and principles concerning sea, Bangladesh is probably the first country in South Asia to enact a nationally significant as well as internationally relevant law called the Territorial Waters and Maritime Zones Act 1974 about the determination of territorial waters, continental shelf and other maritime zones for Bangladesh. The constitutional law position is very clear in Article 143 which outlines that Bangladesh as a State has complete sovereignty upon “all lands, minerals and other things of value underlying the ocean within the territorial waters, or the ocean over the continental shelf, of Bangladesh.” Even the Parliament under Article 143(2) of the Constitution, is mandated to make laws for the determination of the boundaries of the territorial waters and the continental shelf of Bangladesh. The Act of 1974 mentioned above was basically passed by the first Parliament in compliance with the constitutional provision of Article 143(2).

Despite having such a strong legislative position, securing maritime boundary has never been an easy task for Bangladesh. Historically and geographically, Bangladesh shares maritime borders in the Bay of Bengal with two neighbouring countries, namely, Myanmar and India. For a long period of time, this geographical phenomenon demanded peaceful delimitation of maritime boundaries among these three countries. Especially, the economic prospects of the Bay region increased enormously after Myanmar and India discovered huge natural gas deposits beneath the sea. According to one report, Myanmar had once discovered 7 trillion cubic feet of hydrocarbon deposits in the region.<sup>28</sup> This was followed by India's discovery of another 100 trillion cubic feet of natural gas.<sup>29</sup> As Bangladesh has been a nation with inadequate resource base but high demand for energy, the behaviour of two neighbour countries impelled it to search for offshore energy resources. . In 2008, the government of Bangladesh took a bold step to search natural gas within its claimed territorial sea and exclusive economic zone. A total of 28 sea-blocks was then divided for that purpose. Eventually, the government leased the sea-blocks to multinational companies to deal with

<sup>26</sup> Liaquat A. Siddiqui, ‘The Legal Status of the Emerging Principles of International Environmental Law’ (1998) 9(1) *Dhaka University Law Journal (The Dhaka University Studies, Part-F)* 43, 58 <<http://journal.library.du.ac.bd/index.php?journal=DULJ&page=article&op=view&path%5B%5D=1401&path%5B%5D=1341>> accessed 22 October 2018.

<sup>27</sup> See Report of the World Commission on Environment and Development titled *Our Common Future* (popularly known as “Brundtland Report 1987”) <[http://www.exteriores.gob.es/Portal/es/PoliticaExteriorCooperacion/Desarrollosostenible/Documents/Informe%20Brundtland%20\(En%20ingl%C3%A9s\).pdf](http://www.exteriores.gob.es/Portal/es/PoliticaExteriorCooperacion/Desarrollosostenible/Documents/Informe%20Brundtland%20(En%20ingl%C3%A9s).pdf)> accessed 15 September 2017.

<sup>28</sup> See *Minerals Yearbook: Area Reports: International 2009Asia Pacific*, Vol. III (US Geological Survey, 2011) 71.

<sup>29</sup> See ‘Sea border talks start today after 28 years’, *The Daily Star* (online), 15 September 2008 <<http://www.thedailystar.net/news-detail-54877>> accessed 8 April 2018.

its growing energy needs.<sup>30</sup> But Bangladesh was subsequently compelled to suspend exploration as both India and Myanmar objected to it.<sup>31</sup> Successive discoveries and explorations of massive natural gas had made the delimitation of maritime boundary very imminent.

On 14 March 2012, the International Tribunal for the Law of the Sea (ITLOS), constituted under Annex VI of the UNCLOS 1982, resolved the dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal.<sup>32</sup> Immediately after the settlement of the maritime dispute between Bangladesh and Myanmar, an Arbitral Tribunal was constituted in 2014 under Annex VII of the UNCLOS 1982 and on 7 July of the same year, the Tribunal delimited the disputed maritime boundary of 25,602 square kilometres with India.<sup>33</sup> The decisions of the ITLOS regarding Bangladesh-Myanmar maritime boundary and the Arbitral Tribunal of the UNCLOS on India-Bangladesh maritime boundary established for Bangladesh the sovereign rights to 118,813 square kilometres of waters extending up to 12 nautical miles of territorial sea and a further exclusive economic zone of 200 nautical miles into the sea and continental shelf extending up to 354 nautical miles from the Chittagong coast.<sup>34</sup>

After the judicial settlement of delimitation of maritime boundaries with Myanmar and India, Bangladesh now bears a greater responsibility to comply with international law of the sea and progress further for a sustainable blue economy by implementing a policy of better exploiting maritime resources. To understand the extent of Bangladesh's responsibilities, let us have an idea of its present legal framework that basically defines its maritime boundaries and lacks focusing on governance of maritime resources in light of the principles of sustainable blue economy.

#### **(a) The Territorial Waters and Maritime Zones Act 1974**

In the 1970s, Bangladesh became the first South Asian country to enact maritime law to regulate its share in the Bay of Bengal. Immediately after independence, under the stewardship of Bangabandhu Sheikh Mujibur Rahman, Bangladesh Parliament passed

<sup>30</sup> Rupak Bhattacharjee, *Delimitation of Indo-Bangladesh Maritime Boundary* (Institute for Defence Studies and Analyses, 2014) <[https://idsa.in/idsacomments/DelimitationofIndo-Bangladesh\\_rbhattacharjee\\_190814](https://idsa.in/idsacomments/DelimitationofIndo-Bangladesh_rbhattacharjee_190814)> accessed 5 April 2018.

<sup>31</sup> See Srinjoy Bose, 'Energy Politics: India-Bangladesh-Myanmar Relations' (IPCS Special Report, No. 45, July 2007) 1-6 <<https://www.files.ethz.ch/isn/93326/IPCS-Special-Report-45.pdf>> accessed 8 April 2018.

<sup>32</sup> *ITLOS Judgment on Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* <[https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_16/C16\\_Judgment\\_14\\_03\\_2012\\_rev.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf)> accessed 12 October 2017.

<sup>33</sup> *Arbitral Award in the matter of Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India* <<https://www.pcacases.com/web/sendAttach/383>> accessed 12 October 2017.

<sup>34</sup> See for details, Ministry of Foreign Affairs (MoFA), *Proceedings of International Workshop on Blue Economy* (Dhaka, Bangladesh, 1-2 September 2014); and Jubaer Ahmed, 'Soumudro Baebosthanapona Somporkito Ain' [Trans. 'Maritime Management Related Laws'] in Abdullah Al Faruque and M Jashim Ali Chowdhury (eds), *New Dimensions of Law: Analysis of Selected Laws of Bangladesh* (University of Chittagong, 2017) 181.

a law officially known as the Territorial Waters and Maritime Zones Act of 1974. This Act of 1974 is the only guiding law for the maritime sector of Bangladesh. It generally defines the maritime boundaries of Bangladesh in compliance with the principles of international law of the sea. In pursuance with the law, the government declared its jurisdiction on maritime areas, including its baseline, from where the territorial waters are measured. The law allowed Bangladesh to claim its jurisdiction on five maritime areas along with internal waters. They are as follows: (a) territorial sea, (b) contiguous zone, (c) exclusive economic zone, (d) continental shelf, and (e) high seas. ,

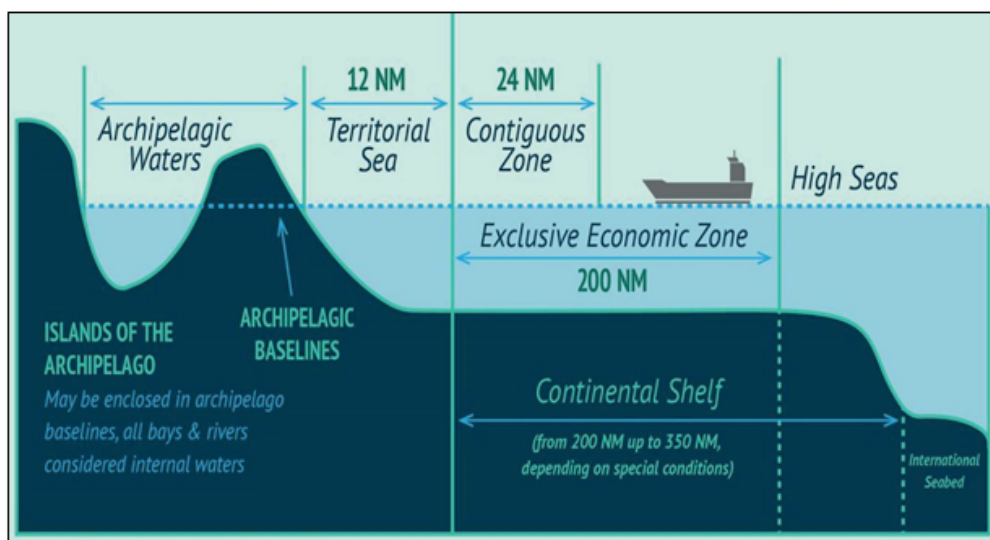


Fig.3: UNCLOS Maritime Zones. Source: UNCLOS 1982.

It is to be mentioned that this 1974 law had been adopted long before the United Nations Convention on Law of the Sea (UNCLOS) of 1982 came into existence. Bangladesh ratified the UNCLOS only in 2001.<sup>35</sup>

<sup>35</sup> It is to note that the UNCLOS of 1982 has set the limit of various maritime areas, measured from a carefully defined sea-baseline. According to this Convention, up to 12 nautical miles from the baseline (known as the territorial sea), the coastal State is free to make laws, regulate and use any resources. Beyond the 12-nautical-mile limit, there is a further 12 nautical miles from the territorial sea baseline limit, termed as the contiguous zone, in which a State can continue to enforce laws in four specific areas: customs, taxation, immigration, and pollution. Measured from the baseline, within 200 nautical miles of the exclusive economic zone, the coastal State has sovereign rights to explore, exploit and manage natural resources. In common parlance, the term 'exclusive economic zone' may include territorial sea and even continental shelf. In international law, the continental shelf is understood as the natural continuation or prolongation of the land territory to the continental margin's outer edge, or 200 nautical miles from the coastal State's baseline, whichever is greater. It may often exceed 200 nautical miles until the natural prolongation ends. According to this Convention as well as Bangladesh's 1974 law, whatever remains beyond the national jurisdictions is generally regarded to be a part of the high seas, and the sea-bed together with ocean floor are to be considered as res communis of mankind (the common heritage). See for more details, M. Habibur Rahman, *Delimitation of Maritime Boundaries* (Dhaka: Anupam Gaynbhandar, 1991); and UNCLOS website <[http:// www.un.org/depts/los/convention\\_agreements/texts/unclos/UNCLOS-TOC.htm](http://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm)> accessed 10 July 2017.

Under section 8, this Act empowers the government to take necessary measures for preventing and controlling maritime pollution and preserving the quality and balance in the maritime environment. However, as this Act was enacted in 1974 it was possible to adopt and integrate the standards of a sustainable blue economy – the idea of which originated much later in the discourse of modern development thinking.

### **(b) The Marine Fisheries Ordinance 1983**

The Ordinance was promulgated to make provisions for the management, conservation, and development of marine fisheries of Bangladesh. These rules regulate the issuance and conditions of fishing licenses for national and foreign fishing vessels, determining license conditions, allowed fishing gear, mesh size, etc. Section 26 of the Ordinance prohibits the (a) the usage of, or attempt to use of, any explosive, poison or other noxious substances for the purpose of killing, stunning, disabling or catching fish, or (b) the carriage of, or the possession or control of, any explosive, poison or other noxious substances with the intention of using such explosive, poison or other noxious substance for any of the purposes referred to in clause (a).

Though this piece of legislation focuses on management and conservation of marine fisheries, it does not have its base on the principles of sustainable blue economy. This is evident from the fact as for the reason that, the Ordinance has made section 26 inapplicable to a person who has a written authorization from the Director of Fisheries to do fishing in the name of commercial purpose. That means any person in Bangladesh, who has the authorization from the government, can perform prohibited acts endangering the marine environment. In other words, while upholding the necessity of economic exploitation of marine fisheries, this law has basically ignored the other aspect of the sustainable blue economy, i.e. avoiding harming maritime resources indiscriminately.

### **(c) The Protection and Conservation of Fish Act 1950**

This Act covers all types of aquatic species including fish, prawn, shrimp, amphibians, tortoises, turtles, crustaceans, mollusks, echinoderms and frogs at all stages in their life cycle and all types of water bodies. Under the Rules, installation of fixed nets, cage, trap, etc. has been prohibited for controlling harmful and unlawful fishing activities. It has also been made illegal to dredge and extract sand and gravel and discharge waste or any other polluting matter that disturb, alter or destroy natural habitats of fish in marine reserves.

This law is also subject to criticism on the ground that it has criminalized the activities of those people who are dependents for livelihood on maritime resources. This is also not what the principles of sustainable blue economy do suggest. While it is required, in case of the sustainable blue economy, to respect towards maritime integrity and sustainability, it is also needed to have eco-planning, managing and effective governance concerning the use of marine space and resources with the cooperation of all the coastal communities.

#### **(d) The Ports Act 1908**

Section 6(1) of this Act provides that the government may make rules, among others, (i) for regulating the manner in which oil or water mixed with oil shall be discharged in any such port and for the disposal of the same; and (ii) for the prevention of danger arising to the public health by the introduction and the spread of any infectious or contagious disease from vessels arriving at, or being in, any such port, and for the prevention of the conveyance of infection or contagion by means of any vessel sailing from any such port.

This law lacks enough focus on the security of the maritime ecosystem in general as it mainly intends to secure public health as a matter of concern. Imagining human beings devoid of resorting to the maritime ecosystem is archaic thinking – the fact of which is a prominent feature in most of the colonial laws now prevalent in Bangladesh.

#### **(e) The Coastal Zone Policy 2005**

The Ministry of Water Resources formulated the Coastal Zone Policy, which was approved by the cabinet on 17 January 2005 and was also published in the official Gazette in March 2005. The Coastal Zone Policy has been developed for all concerned ministries, agencies, the private sector, local government institutions, NGOs, and the civil society to put their efforts together for the development of the coastal zone of Bangladesh. The Coastal Zone Policy initiates a process that commits the ministries, departments, and agencies to tone and organizing their activities in the coastal zone and elaborates the basis for a firm co-ordination mechanism. But so far not much has been done for the development of the coastal zone. This policy, unfortunately, fails to address coastal pollution due to the growth of the ship breaking industry.<sup>36</sup>

#### **(f) Bangladesh Coast Guard Act 2016**

As the attack of pirates/sea wolves and illegal activities are very much common in coastal areas, the government repealed 2014's Coast Guard Act and newly made the Coast Guard Act in 2016 to combat all sorts of menace and illegality in marine areas. Through this law, a force of coast guard has been established also to keep surveillance

---

<sup>36</sup> In *Bangladesh, Environmental Lawyers Association (BELA) v. Bangladesh and Others* (2011) 16 BLC (HCD) 123, the High Court Division of the Supreme Court of Bangladesh ruled against ship breaking yards which do not hold necessary environmental clearance to operate and are immensely risky for polluting maritime ecosystem. The Court asked the government to comply with the requirements under the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal 1989. This includes the respect for Prior Informed Consent (PIC), i.e., the approval by Bangladesh of the import of ships based on the amount of toxics on board the end-of-life vessels. See for details, Shawkat Alam and Abdullah Al Faruque, 'Legal Regulation of the Ship Breaking Industry in Bangladesh: The International Regulatory Framework and Domestic Implementation Challenges' (2014) 47 *Marine Policy* 46-56; Md. M. Maruf Hossain and Mahammad Mahmudul Islam, *Ship Breaking Activities and Its Impact on the Coastal Zone of Chittagong, Bangladesh: Towards Sustainable Management* (Young Power in Social Action, 2010); and Md. Humayun Kabir, 'Coastal and marine pollution', *The Daily Star* (online), 23 April 2010 <<http://www.thedailystar.net/news-detail-135561>> accessed 12 July 2017.

over cross-boundary illegal activities including, among others, human trafficking, trafficking of living and non-living maritime resources, drugs and arms dealing, etc. However, this law also lacks in underlying the principles of sustainable blue economy mainly because it is basically a law for the establishment of coast guard to secure maritime boundary through use of martial forces. Nowhere in this Act, the standards of conservation, development, and utilization of maritime resources concerning the sustainable blue economy have been underscored, except the authority to take required measures to prevent maritime pollution by the Coast Guard Authority.

#### 4. Conclusion

Despite being a coastal State and having a huge opportunity of exploiting marine resources that are found in the Bay of Bengal, it is important to note that Bangladesh has a very few laws and policies – which reflect the principles of the sustainable blue economy for the governance of maritime area and its resources. As discussed above, the guiding law is the Territorial Waters and Maritime Zones Act of 1974 along with the Rules of 1977 which basically defines Bangladesh's maritime boundaries, without prescribing anything about conservation, development and utilization/exploitation of maritime resources. Apart from this law, other legal instruments generally focus on the regulation of marine fisheries only. Needless to say, there are other prospects and sectors of maritime resources in Bangladesh (such as oil, gas, minerals, aquaculture, mining, tourism, etc.) which are legally unaddressed as of today.<sup>37</sup> Despite that Bangladesh has a huge economic potentiality in terms of regulating marine resources, the legal regime on the issue barely gives attention for the sustainable governance of those resources at sea. Thus, striking a balance between economic growth and sustainability right of the people has become a difficult issue in maritime governance – the fact for which enabling the most favourable use of maritime resources with maximum benefit to maritime ecosystems is less seen in the maritime policy and legislative measures of the country.

After reviewing the whole maritime legal framework of Bangladesh, it can be argued that the maritime laws are largely indifferent and lack coherence in

<sup>37</sup> M. Khurshed Alam observes that the Bay of Bengal is blessed with various categories of maritime resources including marine fisheries, aquatic products, oil and gas energy, sea salt production, coastal tourism, minerals, water plantains and other water resources, while Shykh Seraj claims that we barely know exactly how much resources are there beneath the sea as no surveys have been conducted during the last three decades. See for details, *supra* note 20 (M. Khurshed Alam); and Shykh Seraj, 'Marine resources in our maritime boundary', *The Daily Star* (online), 24 July 2014 <<http://www.thedailystar.net/marine-resources-in-our-maritime-boundary-34593>> accessed 7 July 2017. On the prospects of Bangladesh's maritime resources, see also, M Shahadat Hossain et al, *Opportunities and Strategies for Ocean and River Resources Management* (Food and Agriculture Organization of the United Nations Bangladesh Country Office, Dhaka, Bangladesh, 2014); Sarkar Ali Akkas and Md. Shahidul Islam, 'Maritime Delimitation between Bangladesh and Myanmar after the ITLOS Judgment: Prospects and Concerns' (2013) 1(2) *Jagannath University Journal of Law* 1-30; and Aparup Chowdhury, *Rethinking Sustainable Coastal and Marine Tourism Development* (Bangladesh Parjatan Corporation, 25 November 2016) <[http://www.pataprodigy.org/EStaff/NTFF2016/08\\_S3AparupChowdhury.pdf](http://www.pataprodigy.org/EStaff/NTFF2016/08_S3AparupChowdhury.pdf)> accessed 12 January 2018.

underscoring the governance matter of maritime resources. Maritime governance in Bangladesh, thus, needs a comprehensive overhaul in line with the principles of a sustainable blue economy.

Despite that, its contribution in the national economy is often undervalued – at least from the perspective of the legal framework – which is evident in the articulation of laws relating to the sea and its governance lacking the strength of complying with the principles of sustainable blue economy.<sup>38</sup>

After the successful and peaceful settlement of maritime boundaries with Myanmar and India, Bangladesh now needs to pursue its unhindered economic interests in the sea by adopting a framework of integrated blue economy governance with three elements: laws, institutions, and mechanisms of the implementation. As Bangladesh has now defined sovereignty over the Bay of Bengal, it should rearrange its legal framework borrowing the established rules and norms for maritime management in compliance with the principles of sustainable blue economy. One possible step could be the formulation of Maritime Spatial Planning (MSP)<sup>39</sup> for balancing economic and environmental development in the country. In order to ensure sustainable conservation, development, and utilization of maritime resources, Bangladesh needs to develop a strategic plan after consultations with concerned stakeholders and institutions in line with the established laws and principles for the governance of ocean. For sustainable blue economy, rapid capacity building with appropriate technologies and guaranteeing adequate manpower to face the emerging challenges of ocean governance is now a must for Bangladesh. An inclusive and community-based integrated maritime management should be developed to produce a string of skilled maritime human resources. To do so, the State should also remove the scarcity of maritime education and training in the country.<sup>40</sup> Maritime laws and policies should contribute towards achieving a sustainable blue economy and consider the importance of securing maritime resources in the growing economic development fostered by the blue economy in Bangladesh.

---

<sup>38</sup> In 2004, an effort was made to make a Marine Environment Conservation Law aiming to conserve the maritime environment and prevent maritime pollution. However, this law remained as a draft bill for so long and never saw the possibility of being passed by the Parliament. For more about it see *supra* note 6 (M. Saiful Karim) 126

<sup>39</sup> As opposed to Integrated Coastal Zone Management (ICZM), MSP is considered to be an opportunity for the coastal countries through which both an integrated and holistic blue governance can be ensured by balancing priorities between growth and conservation with the participation of public-private stakeholders. See for more details, *supra* note 4 (Md. Asraful Alam).

<sup>40</sup> Except Bangabandhu Sheikh Mujibur Rahman Maritime University, Bangladesh Naval Academy, Bangladesh Marine Academy, Marine Fisheries Academy, there are very few institutions in Bangladesh which undertakes maritime education and training seriously. Very recently, Dhaka University has opened a new Department on Oceanography. Bangladesh is lagging behind in popularising maritime education and training to create qualified seafarer for possessing occupying global seafarer's job market. This sector is facing various challenges including less-standard teaching method and practical training for human and technological resources – the fact for which producing world standard seafarers from Bangladesh has become a great challenge.

# The Legal Regime of Plant Varieties and Farmers' Rights Protection in Bangladesh: Options and Challenges

Dr. Md. Towhidul Islam\*

## 1. Introduction

Bangladesh is an agriculture-prone least developed country (LDC). Plant breeding, commercialisation and exchange of seeds, and farmers' traditional knowledge (TK) are the quintessence of its agricultural development. Involving these issues, there are several sporadic laws and a number of them are in the pipeline. Amongst the laws, the Patents and Designs Act, 1911 contains provisions for patentable inventions implicating plant varieties, seeds, and the likes, and the Trademarks Act, 2009, the Geographical Indication of Goods (Registration and Protection) Act, 2013, and the Seeds Ordinance, 1977 are treated to be merely relevant for trading of seeds. Further, these laws are not initially taken to be significant from the perspective of farmers' rights, food security, sustainable agriculture and plant genetic resources (PGRs). With the adoption of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) providing intellectual property rights (IPRs) for the plant varieties and biotechnology, the country nods to these issues as a member of the TRIPS. To respond, it has drafted a number of laws encompassing the plant varieties and farmers' rights protection, which are yet to get the final approval. Further, as a member of the Convention on Biological Diversity, 1992 (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture, 2001 (ITPGRFA), it has recently enacted the Bangladesh Biodiversity Act, 2017 which aims to ensure maximum protection for PGRs and TK and to confer the benefit sharing arrangement for their holders. However, such laws arise either of the defunct colonial rule of continuity or of the property owners' necessity or of treaty obligations. Since these laws are treaty specific, not sui generis in offering the legal protection to plant varieties, they cannot often cope with local needs and situations. As a result, farmers are restricted from their traditional use of PGRs at all levels – thus causing them to purchase IPRs protected seeds each season.<sup>1</sup> This impedes them in meeting their livelihoods and food security and brings sufferings for sustainable agriculture and PGRs.<sup>2</sup> Against this backdrop, this paper examines the perpendicular of plant variety protection (PVP) and farmers' rights in Bangladesh in terms of intellectual property, food security, and sustainable agriculture and PGRs under the laws enacted already and upcoming. The paper finally proposes some plausible suggestions to improve the existing legal regime concerning the areas of plant varieties and farmers' rights protection.

---

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

<sup>1</sup> Mohammad Towhidul Islam, *TRIPS Agreement of the WTO: Implications and Challenges for Bangladesh* (Cambridge Scholars Publishing, New Castle, 2013) 68-124.

<sup>2</sup> M T Islam, 'TRIPS Agreement and Agriculture: Implications and Challenges for Bangladesh' (2011) 8(2) *Manchester Journal of International Economic Law* 38-84.

## 2. Plant Varieties Protection

Under the TRIPS, plant varieties can be protected by patents, or by sui generis protection or by a combination of both.<sup>3</sup> In Bangladesh, plant varieties qualify to be protected by patents under the Patents and Designs Act, 1911.<sup>4</sup> However, with the proposed Plant Variety and Farmers' Rights Protection Act, 2016,<sup>5</sup> plant varieties protection can be made by PBRs.

### 2.1. Plant Varieties Protection by Patents

In Bangladesh, the provisions of the Patents and Designs Act, 1911 refer patentable invention to any manner of new manufacture, an improvement and an alleged invention.<sup>6</sup> In that sense, plants or plant varieties which are new and derived from earlier varieties can be taken as patentable since they may meet the requirements of invention being any manner of new manufacture or an improvement and an alleged invention. From the perspective of creators, this provision of the Act appears merely as the defunct colonial rule of continuity and serves the necessity of intellectual property owners in the field of plant varieties.

However, since the Paris Convention for the Protection of Industrial Property, 1883 required Members to relax owners' exclusivity on certain public interests or public purposes grounds, the Act contains certain exception clauses easing users' obligations to creators. The exceptions include government use or research exception and compulsory licensing.<sup>7</sup> The Act also provides that a patent can be cancelled on public policy or morality grounds.<sup>8</sup> Nevertheless, it does not consider that local agriculturists who mostly live from hand to mouth cannot afford the costs of creators' intellectual property rights in PGRs. Further, the Act does not require that the local people who develop and nurture plants by using their TK deserve recognition, prior informed consent and benefits for sharing their knowledge with the creators of PGRs.

### 2.2. Plant Varieties Protection by PBRs

Being called upon the urges of the local people and rights activists to act against the creators' exclusivity in plant varieties and for being sympathetic to the users of plant varieties, the country became a Member of the CBD and the ITPGRFA. As a result, the country starts taking steps in lessening the creators' exclusivity in plant varieties by preparing a draft in 2001 titled the Plant Variety and Farmers' Rights Prot-

---

<sup>3</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994 Article 27.3 (hereinafter the TRIPS Agreement).

<sup>4</sup> The Patents and Designs Act, 1911 Sections 2(8) and 2(11).

<sup>5</sup> The draft Plant Variety and Farmers' Rights Protection Act, 2016 (Ministry of Agriculture, Government of the People's Republic of Bangladesh).

<sup>6</sup> The Patents and Designs Act, 1911 Sections 2(8) and 2(11).

<sup>7</sup> Ibid. Sections 21 and 22.

<sup>8</sup> Ibid. Section 25.

ection Act, 2001. This draft witnesses several revisions and the latest draft appears as the Plant Variety and Farmers' Rights Protection Act, 2016 (the draft PVP Act). As the preamble of the draft says: '... Bangladesh, having ratified the Convention on Biological Diversity and the International Treaty on Plant Genetic Resources for Food and Agriculture, wishes to protect Farmers' Rights with regard to plant varieties and associated local knowledge'.<sup>9</sup>

The country's steps towards the plant varieties protection developed further in its association with the TRIPS agenda of plant varieties protection by way of patents, sui generis or of both. As the preamble of the draft goes on: '...Bangladesh, having ratified the Act that establishes the World Trade Organisation, wants to comply with the Agreement on Trade Related Aspects of Intellectual Property Rights'.<sup>10</sup> Finding no other form of sui generis protection for plant varieties, like other countries for which PBRs appear in the forefront after the TRIPS, the draft Act seems to follow *the International Convention for the Protection of New Varieties of Plants* 1961 as revised in 1978 and 1991 (UPOV) containing a plant breeders' rights (PBRs) style sui generis protection system and other linked issues. In fact, Bangladesh finds PBRs relatively better as an alternative to patents in the circumstances when it operates on the basis of the free sharing of knowledge in the pre-TRIPS era. Since plant breeding has made an impressive contribution to agricultural development and national food security, and bears the potential to continue to do so in the future when effectively encouraged, the draft Act is put in place. Further, because of the commercialisation of seed production and trade, as outlined in the National Seed Policy, 1993 that is to effectively carry the results of breeding and selection to farmers, the Act provides for some other guidance and support. In addition, with the purpose of protecting farmers and communities requires from the misuse of their TK and PGRs with regard to formal sector variety development, the draft Act is a sine non qua non. Moreover, to effectively achieve such purposes, the Act provides for establishing the Plant Variety and Farmers' Rights Protection Authority.

### 2.3. Objectives of the PVP Act

For the purpose of expediently providing protection for the rights of farmers and breeders with respect to plant varieties and to promote the sustainable use of plant genetic resources in the public and private domains, and finally to comply with treaty obligations and international best practices, the draft Plant Varieties and Farmers' Rights Protection Act was prepared.<sup>11</sup>

### 2.4. Definition of Breeder

The draft act defines breeder as the person who bred, or developed a plant variety in Bangladesh which was new at that time, or the person who is the employer of the aforementioned person or who has commissioned the latter's work, or the successor in

<sup>9</sup> The draft Plant Variety and Farmers' Rights Protection Act, 2016 Preamble.

<sup>10</sup> Ibid. Preamble.

<sup>11</sup> Ibid. Preamble.

title of the first or second aforementioned person, as the case may be.<sup>12</sup> However, it is not clear whether a farmer can qualify as a breeder.

## 2.5. Types of Varieties

To offer protection, the draft PVP Act allows three broad types of varieties: a new, an essentially derived variety (EDV), and an extant or a community variety meaning farmers' variety or a landrace.

**New Variety:** According to the draft Act, a variety seems to be a new variety since the Act describes variety as a plant group within a single botanical taxon of the lowest known rank, which irrespective of whether or not the conditions for the grant of a breeder's rights are fully met, can be defined by expression of the characteristics resulting from a given genotype or combination of genotypes; distinguished from any other plant group by the expression of at least one of the said characteristics; and considered as a unit with regard to its suitability for being propagated unchanged. It may include a genetic resource that has been developed by incorporating one specific gene from any cultivated or wild source or created through mutation and subsequently used in integrating the said trait of the known material of commercial use that conform with the first three criteria of this clause.<sup>13</sup>

**Essentially Derived Variety (EDV):** According section 13(4)(b), a variety shall be deemed to be essentially derived from another variety ("the initial variety") when -

- i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety;
- ii) it is clearly distinguishable from the initial variety; and
- iii) it conforms to the initial variety in the expression of the essential characteristics that result from genotype or combination of genotypes of the initial variety except for the differences, which result from the act of derivation.<sup>14</sup>

Essentially derived varieties may be obtained, for example, by selection of a natural or induced mutant, or of a somaclonal variant, or a variant individual from plants of the initial variety, back crosses, or transformation by genetic engineering.<sup>15</sup>

**Extant or Community Variety:** The Extant or a community variety means a farmers' variety or a landrace). It is the variety, or a landrace, of any plant species that is found to be cultivated for a long period and that is not protected by this Act. At the same time,

---

<sup>12</sup> Ibid. Section 2(c).

<sup>13</sup> Ibid. Section 2(t).

<sup>14</sup> Ibid. Section 13(4)(b).

<sup>15</sup> Ibid. Section 13(4)(c).

such varieties are the varieties that have become free from protection after the duration is completed or when the protection is withdrawn.<sup>16</sup>

## **2.6. Conditions of PBRs Protection**

To respond to the country's subsistence agriculture, the draft PVP Act simplifies the eligibility for PBRs protection. It provides for the UPOV criteria of novelty, consistent specific traits, stability and distinctive traits for a variety. It also provides that breeding alone is not sufficient to justify commercial privileges and the variety must have immediate, direct, and substantial benefit to the people of Bangladesh.

The Plant Variety Certificate shall be granted only where the variety is – (a) New (b) Distinct (c) Uniform (d) Stable, and (e) the subject of a denomination pursuant to the provision of this Act.<sup>17</sup>

### **(a) Novelty**

- i) The variety shall be deemed new if, on the date of filing of the application or where relevant prior to that date, seed or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for the purposes of exploitation of the variety – within the territory of Bangladesh on the date of application or earlier than one year before the filing date; or
- ii) outside the territory of Bangladesh when the application has been filed earlier than four years or, in the case of trees or of vines, earlier than six years before the filing date; and
- iii) for the first three years after protection has been extended to a genus or species of the novelty periods identified in sub-sections (a) and (b) preceding shall be doubled.<sup>18</sup>

However, novelty shall not be lost as a result of sale or disposal to others –

- i) that form part of an agreement under which a person multiplies seed of the variety concerned on behalf of the breeder or his successor in title, provided that the property of the multiplied material reverts to the breeder or his successor in title;
- ii) that form part of the fulfilment of a statutory or administrative obligation, in particular concerning tests for establishing biological security or the entry of varieties in an official catalogue of varieties admitted to trade.<sup>19</sup>

### **(b) Distinctness**

The variety shall be deemed distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge or scientific information at

---

<sup>16</sup> Ibid. Sections 2(g) and 2(x).

<sup>17</sup> Ibid. Section 9.

<sup>18</sup> Ibid. Section 9(a)(1).

<sup>19</sup> Ibid. Section 9(a)(2).

the time of filing the application. In particular, but not exclusively, the filing of an application for granting of a right or for entering an official register of varieties in any country, shall be deemed to render the other variety a matter of common knowledge from the date of the application.<sup>20</sup>

**(c) Uniformity**

The variety shall be deemed uniform if it is sufficiently uniform in its relevant characteristics, subject to the variation that may be expected from the particular features of its propagation.<sup>21</sup>

**(d) Stability**

The variety shall be deemed stable if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.<sup>22</sup>

**(e) Denomination**

The variety shall be designated by a denomination, which will be its generic designation. Once registered, the free use of the variety designation cannot be hampered during or after the expiration of the New Plant Variety Certificate.<sup>23</sup>

Further, the denomination must enable the variety to be identified. The variety designation may not consist solely of figures and not be liable to mislead or cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. It must be distinct from the designation of any existing variety, of the same plant species or of a closely related species. The Authority shall reject a denomination if it is already in use by a farming community.<sup>24</sup>

In addition, if the denomination submitted by the breeder does not satisfy the requirements of novelty, distinctiveness, uniformity and stability, the Authority shall require the breeder to propose another denomination within a prescribed period. The authority shall register the denomination at the same time as the breeder's right is granted.<sup>25</sup>

If, by reason of a prior right, the use of the denomination of a variety is forbidden to a person, the Authority shall require the breeder to submit another denomination for the variety. If after approval of the denomination, it is found that the applicant has concealed the truth by provided false information and appropriated the name of the farmers' variety, the authority shall not only nullify the denomination but also impose

---

<sup>20</sup> Ibid. Section 9(b).

<sup>21</sup> Ibid. Section 9(c).

<sup>22</sup> Ibid. Section 9(d).

<sup>23</sup> Ibid. Section 9(e)(1).

<sup>24</sup> Ibid. Section 9(e)(2).

<sup>25</sup> Ibid. Section 9(e)(3).

penalty on the applicant.<sup>26</sup>

When the Authority finds no reason for rejecting an application for the registration of variety denomination, it shall advertise such application in newspapers.<sup>27</sup> On seeing an application for the registration of the variety published, any person can file an opposition to the grant of variety protection within 60 (sixty) days from the date of the publication of an application with all valid documents of contest.<sup>28</sup>

When the variety is offered for sale or marketed within Bangladesh it shall be by the registered variety denomination during and after the expiration of the certificate. The breeder or his/her agents may offer for sale or market the variety with the association of a trademark as allowed by law, but the registered variety denomination must nevertheless be easily recognisable.<sup>29</sup>

Given the conditions laid down in the draft PVP Act, the new plant variety must conform to the criteria of novelty, distinctness, uniformity, stability, and subject to a denomination which will be its generic designation.<sup>30</sup> For an extant variety, the draft PVP Act requires only distinctness, uniformity and stability.<sup>31</sup> However, to get PVP under the draft PVP Act, an extant variety or a community variety available in Bangladesh needs to be notified in accordance with section 5 of the *Seeds Ordinance 1977* (Seeds Ordinance)<sup>32</sup> as amended in 1997 and in 2005.<sup>33</sup> This category covers a variety which has been traditionally cultivated and developed by farmers in their fields or is wild relative or land race of a variety about which the farmers possess the common knowledge. It also covers the varieties that have become free from protection after the duration expired or when the protection is withdrawn.<sup>34</sup>

The same rule is made applicable to an EDV that can be distinguished from the initial variety but retains its essential characteristics.<sup>35</sup> And if the registration is approved by the Registrar, the law allows conferral of an exclusive right over the variety, nearly identical to that of new varieties. The approach of this component of the law is to allow equal treatment and allocation of rights to each kind of plant variety (farmers' variety, extant variety, and new variety), and to all types of plant breeders

---

<sup>26</sup> Ibid. Section 9(e)(4).

<sup>27</sup> Ibid. Section 9(e)(5).

<sup>28</sup> Ibid. Section 9(e)(6).

<sup>29</sup> Ibid. Section 9(e)(7).

<sup>30</sup> Ibid. Section 9.

<sup>31</sup> Ibid, section 13.

<sup>32</sup> (ORDINANCE NO. XXXIII of 1977), published in the *Bangladesh Gazette Extraordinary*, dated the 19th July 1977.

<sup>33</sup> The draft Plant Variety and Farmers' Rights Protection Act, 2016 Sections 2(x).

<sup>34</sup> Ibid.

<sup>35</sup> Ibid. Section 13.

(from local farmers to advanced breeders). It is not yet clear whether the system of registration is too formal for farmers, whether it will be misused by parties seeking to exclude others, or whether it will cause anti-commons issues whereby too many parties independently possess the right to exclude others from utilizing the resource.<sup>36</sup>

In fact, the draft PVP Act aims to distribute benefits out of registering an EDV equitably. However, how this registering entity will be held accountable to all potential contributors in the breeding process is unclear and problematic. For example, protection of extant varieties could ironically cause an ‘anti-commons tragedy’ depriving farmers of benefits.<sup>37</sup> This could ultimately lead to disputes between different groups of farmers. Since the extant variety does not necessarily need to be novel, right-holders could hypothetically gain control over a plant variety used by a wide range of other farmers. It is assumed that communities that contribute to the development of the variety would be excluded from having to gain permission for use and require paying use fees under sections 8 and 11.

In addition, the draft PVP Act does not specify to which and to how many species PBRs need to be endowed. Perhaps it follows the TRIPS since the TRIPS’ seeming stipulation of *sui generis* PBRs protection for plant varieties does not specify to which or to how many species of plant varieties PBRs to be offered. It must, however, be noted that members of the ITPGRFA are under obligations to offer PBRs to thirty-five varieties of food crops and twenty-nine forages.<sup>38</sup> Further, Bangladesh, as a new member, must provide protection for at least fifteen plant genera or species and, after ten years, to all genera and species.<sup>39</sup>

## 2.7. Duration of the Breeder’s Rights

In dealing with the protection duration, the draft PVP Act gives two different protection durations for two broad categories. More precisely, for fruit trees, other trees and vines of perennial habit, the period of protection is 25 years and for all other varieties, the period of protection is 20 years.<sup>40</sup> The period shall be calculated from the date of initial application in Bangladesh or the priority date as defined in section 9 whichever comes first.<sup>41</sup> This categorization is random and does not depend on usefulness, local needs or on the fulfilment of local working conditions e.g. cultivation

<sup>36</sup> For example, Rajeswari Kanniah, ‘Plant Variety Protection in Indonesia, Malaysia, the Philippines and Thailand’ (2005) 8(3) *Journal of World Intellectual Property* 283.

<sup>37</sup> See Syeda Rizwana Hasan and Taslima Islam, ‘Biotechnology: Status of Law in Bangladesh’ (Briefing Paper No. 3, Bangladesh Environmental Lawyers’ Association, Dhaka, 2002).

<sup>38</sup> International Treaty on Plant Genetic Resources for Food and Agriculture, 2001 Article 11.1; Annex I.

<sup>39</sup> International Union for the Protection of New Varieties of Plants, 1991 Article 3; see also Rolf Jördens, ‘Progress of Plant Variety Protection Based on the International Convention for the Protection of New Varieties of Plants (UPOV Convention)’ (2005) 27 *World Patent Information* 232.

<sup>40</sup> The draft Plant Variety and Farmers’ Rights Protection Act, 2016 Section 17.

<sup>41</sup> Ibid.

within a certain period of time. Given the fact that the PVP is a *sui generis* form, limiting categories of varieties to two broad heads and defining the protection duration for 25 and 20 years gives straightway monopoly and to some extent longer than the TRIPS. In addition, the duration to be calculated from the date of filing the application for registration of the variety raises the possibility of creating the unnecessary monopoly if the application for registration is rejected. However, to get relief of longer monopoly, Bangladesh is privileged to choose a shorter term as is consistent for the TRIPS' patents since it is not complying with or in the process of joining the UPOV but with the TRIPS.

## 2.8. Scope of the Breeder's Rights

Under the draft PVP Act, the protection is to be accorded to a successful claim for PBRs with a New Plant Variety Certificate (NPVC). The holder of the NPVC shall have an exclusive right to commercial exploitation over harvested materials and subsequent product of the protected variety.<sup>42</sup> Subject to sections 12 and 13 of this Act, for the seed of the protected variety, authorisation of the breeder shall be required as to - production or reproduction (multiplication), conditioning of the purpose of propagation, offering for sale, selling or otherwise marketing, exporting, importing, and stocking. However, the breeder may make his or her authorisation subject to conditions and limitations, laid down in license contracts.<sup>43</sup>

Besides, the right holder shall also have an exclusive right to exploit harvested materials obtained through unauthorised use of seed of the protected variety, unless the breeder has had reasonable opportunity to exercise his rights on the seed, and in such cases on the product which has been made directly from harvested material. However, where the product is made directly by a person who has no knowledge of the rights when producing the product, this provision shall not apply.<sup>44</sup>

The provisions of section 13 shall also apply in relation to varieties that are essentially derived from a protected variety, where the protected variety is not itself an essentially derived variety; varieties which are not clearly distinguishable in accordance with section 9(b) from the protected variety; and varieties whose production requires the repeated use of the protected variety.

However, a variety that uses genes involving terminator technology shall not be protected.<sup>45</sup> Also transgenic plants/GMOs without environmental impact assessment as to harmlessness shall be refused any protection.<sup>46</sup> Further, failure to identify sources

---

<sup>42</sup> Ibid. Section 13(1) and 13(3).

<sup>43</sup> Ibid. Section 13(2).

<sup>44</sup> Ibid. Section 13(3).

<sup>45</sup> Ibid. Section 16(1).

<sup>46</sup> Ibid. Section 16(2).

and to provide benefit sharing agreement is also a ground for rejection.<sup>47</sup>

In dealing with the eligibility for applications, the draft PVP Act adds one more condition in stating that the applicant shall be eligible if s/he is national of a country that is party to an international convention or agreement on the protection of plant varieties to which Bangladesh is a party.<sup>48</sup> Foreigners are to be accorded the same rights as is granted to Bangladeshi national.<sup>49</sup> Also the draft PVP Act is more stringent in declaring applicants having headquartered in a country that has not ratified the *Convention on Biological Diversity* (CBD) as not eligible.<sup>50</sup> It is felt that such conditions of the drafts may be made a condition for eligibility rather than non-eligibility for application. The draft PVP Act also contains a common heritage provision in line with the non-binding International Undertaking on Plant Genetic Resources for Food and Agriculture (IUPGRFA) by stating that all varieties that are developed in any national public research institute including universities and national agricultural research centres shall be considered common property. However, any breeder – be in public or private research or can receive financial support from the Gene Fund in the form of direct grant or other privileges to raise additional research funds.<sup>51</sup>

In addition, the draft PVP Act limits PBRs to any variety that may lead to genetic or cultural erosion or to any variety developed by nationals or juristic persons of countries that are not a party to the CBD.<sup>52</sup>

For new plant varieties, the Bangladesh Biodiversity Act 2017 proposes a National Biodiversity Authority (NBA) with power either to give ‘citation of award’ (where no protection for personal gain or commercial privilege is sought) or ‘commercial permit’ with a contract of benefit sharing.<sup>53</sup> The Act authorises the NBA to refuse protection of a new plant variety that is potentially harmful to the environment, ecology, health and welfare of the public.<sup>54</sup> For protection of transgenic plants, a positive Environmental Impact Assessment result and bio-safety assessment is required and upon payment of compensation for hazards and damages as may be caused by its use and handling, the product must be labelled and declared appropriately.<sup>55</sup>

---

<sup>47</sup> Ibid. section 8.

<sup>48</sup> Ibid. Section 8(1)(c).

<sup>49</sup> Ibid. Section 8(1)(d).

<sup>50</sup> Ibid. Section 8(2)(b).

<sup>51</sup> Ibid. Section 22.

<sup>52</sup> Ibid, Section 8.

<sup>53</sup> The Bangladesh Biodiversity Act, 2017 Sections 8 and 10.

<sup>54</sup> Ibid, Sections 30 and 31.

<sup>55</sup> bid.

## 2.9. Exceptions to Breeder's Rights

Nothing of PBRs shall be interpreted to limit any right that farmers have as presented in section 19, among which the right to retain seed or other propagating materials of the protected variety grown for themselves in their own fields as a source of planting materials for the purpose of self-production in subsequent seasons, and the use of seed of protected varieties for non-commercial use. By regulation, the government may limit this exception to particular crops and uses.<sup>56</sup> However, the rights shall not extend to the use of protected varieties for further breeding, and for private and non-commercial use.<sup>57</sup>

## 2.10. Exhaustion of the Breeder's Rights

The PBRs as stipulated in section 12 shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of section 12(4) which has been sold or otherwise marketed by the breeder or with his/her consent in the territory of Bangladesh, or any material derived from the said material, unless such acts involve further propagation of the materials in question; or involve an export of materials of the variety, which enables the propagation of the variety into a country that does not protect varieties of the plant genus or the species to which the variety belongs, except where the exported material is for final consumption purpose.<sup>58</sup> Here, "material" means, in relation to a variety - propagating materials of any form or kind; harvested materials including entire plants and parts of plants; and any products made directly from the harvested materials.<sup>59</sup>

## 2.11. Restrictions on the Breeder's Rights

The Plant Variety and Farmers' Rights Protection Authority of Bangladesh is given the authority to restrict the use of the PBRs for reasons of public interest in the following cases:

- a) when the necessity arises for the prevention of human diseases, the preservation and conservation of the environment and biological diversity and for the maintenance of public welfare.
- b) the prevention of misuse of trade monopoly; i.e. when the seed supply of the protected variety is wilfully kept insufficient to meet the demand, thus increasing seed prices in the market, or when the variety is not made commercially available in Bangladesh within three years of the issue of the New Plant Variety Certificate.
- c) to respond to any crisis in public order.<sup>60</sup>

---

<sup>56</sup> The draft Plant Variety and Farmers' Rights Protection Act, 2016 Section 14(1).

<sup>57</sup> Ibid. Section 14(2).

<sup>58</sup> Ibid. Section 15(1).

<sup>59</sup> Ibid. Section 15(2).

<sup>60</sup> Ibid. Section 16(1).

distribution, importation and use of protected and non-protected varieties, including GMOs for the period of time specified in the Notification.<sup>61</sup>

The Authority may restrict the PBRs by issuing a compulsory license to a third party with the objective to remedy the limitation. However, compulsory license can be granted only after a reasonable effort by the parties to negotiate an agreement, with equitable remuneration to the breeder, no sooner than three years following the grant of a New Plant Variety Certificate. Further, the license will be non-exclusive and subject to termination as soon as the underlying justification ceases.<sup>62</sup>

### 3. Farmers' Rights

Farmers' rights usually include the right to preservation of traditional farming practices, the right to farmers' innovations by the selection and maintenance of seeds, the right to farmers' traditional conservation of biodiversity and the right to farmers' access to benefit sharing. However, the standards for granting and enforcing PBRs and farmers' rights differ across national jurisdictions.<sup>63</sup>

#### 3.1. Farmers' Rights under the Draft PVP Act

The draft Act defines farmer as any person, who lives in Bangladesh and cultivates crops and plants by cultivating the land himself, cultivates crops by directly supervising the cultivation of land through any other person, or conserves and preserves, or adds value to, separately or jointly with any person, any wild species or community variety, through selection and identification of their useful properties.<sup>64</sup> As to the definition of farmers' rights, the draft says that farmers' rights arise from the past, present and future contribution of farmers to conserving, improving and making available plant genetic resources. These rights involve the sharing of benefits derived from the use of these materials in breeding, and the saving, exchanging and selling of seed on a commercial basis.<sup>65</sup>

The Plant Variety and Farmers' Rights Protection Authority shall protect and promote Farmers' Rights as described in section 20 of the draft, which constitute the following:

1. The rights of farmers and their communities to protect their traditional knowledge relevant to plant genetic resources for food and agriculture.
2. The right to equitably participate in the sharing of benefits arising from the utilisation of plant genetic resources.

---

<sup>61</sup> Ibid. Section 16(2).

<sup>62</sup> Ibid. Section 16(3).

<sup>63</sup> Noah Zerbe, 'Contesting Privatization: NGOs and Farmers' Rights in the African Model Law' (2007) 7(1) *Global Environmental Politics* 97.

<sup>64</sup> The draft Plant Variety and Farmers' Rights Protection Act, 2016 Section 2(i).

<sup>65</sup> Ibid. Section 2(j).

3. The right to participate in making decisions on matters related to the conservation and sustainable use of plant genetic resources.
4. The right of farmers to seek cancellation and/or retribution, as the case may be, for appropriation by formal sector breeders of denominations traditionally in use for their varieties.
5. The right that farmers have to grow, save, use, exchange, and sell farm-saved seed of any variety except selling of seed of a protected variety for the purpose of reproduction under commercial marketing arrangements.<sup>66</sup>

Under the draft, commercial marketing arrangements include the sale or offering for sale of seed that is labelled or sealed in any form, or packed in containers with any signs of the producer or trader, or advertised for selling or marketing. The right also includes to have access to all information relevant to the exercise of their rights with respect to plant varieties.<sup>67</sup>

It appears that since agriculture is a sector of primary importance in Bangladesh, selecting PBRs in the draft PVP Act for its less monopolistic to most agriculture-prone developing and least developed countries is a smarter choice for protecting farmers' rights.

However, the draft still appears to take sides of the industry. For example, the draft PVP Act offers PBRs to the person who breeds or develops a plant variety in Bangladesh which is new at that time or to the person who is the employer of the aforementioned person or who has commissioned the latter's work, or to the successor in title of the first or second aforementioned person, as the case may be.<sup>68</sup> Further, it is not certain whether the draft PVP Act intends to offer PBRs to farmers as breeders, since the definition of farmers and farmers' rights do not have direct reference to farmers' innovations.<sup>69</sup> In addition, in the farmers' rights section, farmers' rights are taken merely to include propagating, which to some extent qualifies farmers as breeders or innovators.<sup>70</sup>

Nevertheless, the definition of farmers' rights in the draft PVP Act is taken from the ITPGRFA, which has referred to the rights arising from the past, present and future contribution of farmers to conserving, improving and making available PGRs. Such references in the Act recognise rights involved in the sharing of benefits derived from the use of these materials in breeding and the saving, exchanging and selling of seed on a commercial basis.<sup>71</sup> However, it does not directly indicate whether or not farmers have breeder status.

---

<sup>66</sup> Ibid. Section 20.

<sup>67</sup> Ibid. Section 20(5) and (6).

<sup>68</sup> Ibid. Section 2(c) & (d).

<sup>69</sup> Ibid. Section 2(i) and (j).

<sup>70</sup> Ibid. Section 20.

<sup>71</sup> Ibid. Section 2(i) and (j).

In addition, instead of giving a NPVC to farmers' varieties, the draft PVP Act offers the Citation of Award to farmer/NGO-developed varieties created through the use of public funds (development cooperation funds).<sup>72</sup> Such treatment of farmers goes against the statement in the preamble and objectives of the draft PVP Act, which says that the draft PVP Act aims at providing incentives to breeders, individually or in groups or in collaboration with farmers for better breeding of new crop varieties. Because farmers and breeders have two distinct definitions, incentive to the one shall not necessarily include the other.

The draft PVP Act also proposes that the PBRs protection shall in no way affect the rights of farmers' access to the biological and genetic resources of Bangladesh and related knowledge. The rights to collect, conserve and use plants for personal and non-commercial purposes shall not be affected under the privileges proposed under the draft PVP Act.<sup>73</sup> However, the draft PVP Act does not limit PBRs on public interests grounds or on grounds of national security concerns, maintenance of nutritional stability, prevention of monopoly or insufficient sale of the propagating material of the new plant variety, as provided by Thailand and India (countries with comparable agricultural traits) in sections 36 and 38 of the *[Thailand] Plant Varieties Protection Act 1999* (Thai Plant Variety Act),<sup>74</sup> and section 47 of the *[Indian] Protection of Plant Varieties and Farmers' Rights Act 2001* (Indian Plant Varieties Act).<sup>75</sup> While granting PBRs, the draft PVP Act also proposes more farmers' rights in consideration of the fact that 87 per cent of all seeds in Bangladesh is still saved by farmers and their indigenous varieties are the basis of the country's ecological and food security.<sup>76</sup> The draft PVP Act describes the rights of farmers to protect their TK with relevance to PGRs for food and agriculture, to equitably participate in the sharing of benefits arising from the utilisation of PGRs and to participate in making decisions on matters related to the conservation and sustainable use of PGRs.<sup>77</sup> The draft PVP Act also entitles farmers to seek cancellation and/or retribution, as the case may be, for appropriation by formal sector breeders of denominations traditionally in use for their varieties.<sup>78</sup> It proposes farmers' rights to grow, save, use, exchange, sell farm-saved seeds of any variety exc-

---

<sup>72</sup> Ibid. Section 21.

<sup>73</sup> Ibid. Sections 14 and 20.

<sup>74</sup> *[Thailand] Plant Varieties Protection Act 1999* B.E. 2542 (1999) <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=129781](http://www.wipo.int/wipolex/en/text.jsp?file_id=129781)> 10 January 2011.

<sup>75</sup> *[Indian] Protection of Plant Varieties and Farmers' Rights Act 2001* (No. 64) *Gazette of India Extraordinary* 30 October 2001 <<http://agricoop.nic.in/PPV&FR%20Act,%202001.pdf>> 10 January 2011 [Indian Plant Variety Act].

<sup>76</sup> Bangladesh Environmental Lawyers' Association, 'Laws on Access, Benefit Sharing and Prior Informed Consent' (Research Report, Bangladesh Environmental Lawyers' Association, Dhaka, 20 August, 2005) [hereinafter BELA].

<sup>77</sup> The draft Plant Variety and Farmers' Rights Protection Act, 2016 Section 20.

<sup>78</sup> Ibid.

ept the seed of a protected variety for the purpose of reproduction under commercial marketing arrangements, and to have access to all information relevant for the exercise of their rights with respect to plant varieties.<sup>79</sup>

The draft PVP Act is silent in defining farmers as breeders but it tends to offer farmers the opportunity to save, use, sow, re-sow, exchange, share, or sell their farm produce, including seeds. Such opportunity appears in clear terms under Article 39 of the Indian Plant Variety Act, as follows, 'farmers who have bred or developed a new variety can be entitled to the PBRs in the same manner as breeders'.<sup>80</sup> In addition, as part of dispensing farmers' rights in India, compensation can be claimed if a variety fails to provide the expected performance under given conditions and leads to crop failure.<sup>81</sup> However, such farmers rights are not recognised in the Patents and Designs Act or in the Seeds Ordinance, since seeds or plant varieties are patentable, prohibiting farmers from the saving, exchange and reproduction of seeds; farmers cannot get a remedy from MNCs that sell untested and hazardous seeds in the market.

### **3.2. Farmers' Rights under the Bangladesh Biodiversity Act**

The Bangladesh Biodiversity Act, 2017 also deals with some issues in relation to farmers' rights. The Act recognises the global tendency towards affirmation of IPRs over biological resources.<sup>82</sup> However, the Act ensures that the protection shall in no way affect the rights of farmers to have unencumbered access to the biological and genetic resources of Bangladesh and related knowledge.<sup>83</sup> The rights to collect, conserve and use plants for personal and non-commercial purposes shall not be affected under the privileges proposed under the Act.<sup>84</sup>

### **3.3. Farmers' Access and Benefit Sharing under the Draft PVP Act and the Bangladesh Biodiversity Act**

For famers' access to benefit sharing, there are provisions in the draft PVP Act and the Bangladesh Biodiversity Act.<sup>85</sup> For the determination of access to benefit sharing, the draft PVP Act makes it mandatory to disclose the country of origin of the material used to develop the variety.<sup>86</sup> In addition, section 19 of the draft PVP Act proposes farmers' rights to equitably participate in the sharing of benefits arising from the utilisation of PGRs. However, it does not provide details of how it will be ensured.

---

<sup>79</sup> Ibid.

<sup>80</sup> Wenqi Liu and Lingyun Gu, 'Intellectual Property Protection of Plant Varieties in Asian Developing Countries' (2008) 27(6) *Biotechnology Law Report* 525, 529.

<sup>81</sup> [Indian] *Plant Variety Act, 2001 Section 39.2*.

<sup>82</sup> The Bangladesh Biodiversity Act, 2017 Section 4 and 6.

<sup>83</sup> Ibid, Sections 33, 36 and 37.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid, Section 4, 6 and 30; the draft Plant Variety and Farmers' Rights Protection Act, 2016 Sections 11, 12 and 24.

<sup>86</sup> Ibid.

In this regard, the Bangladesh Biodiversity Act includes more details and says that the State shall ensure payment of royalties or compensations to the communities where applicable for using biological and genetic resources and related knowledge and their derivatives within the jurisdiction of the country, both in situ and ex-situ.<sup>87</sup>

#### 4. New Strategies Needed

There are many voices for and against the free-riding and misappropriation of plant varieties. In fact, agriculture-prone LDCs will not be better off without some level of free-riding that can let their traditional agricultural practices continue. However, the current international frameworks working to sustain this plan appear to be Euro-American rather than universal or ideological frameworks, because they do not fit well with the varied traditional laws, customary protocols and social norms of the diverse local communities that innovate and develop plant varieties. In the development of national and international frameworks for plant variety innovations, benefit-sharing and TK protection, policy-makers need to be aware of the diverse perspectives that surround the use and breeding of plants.<sup>88</sup> With this background in mind, a better framework in the context of Bangladesh requires (A) reasonable national regulatory systems that can be implemented with a view to ensuring that reason and larger public interest prevail, and (B) affiliation with international coalition to exert pressure to ensure that international agreements, including those concerned with trade, are made equitable.<sup>89</sup>

##### 4.1. Framing National Regulatory Systems

As part of the formation of national regulatory systems, Bangladesh is obliged to either introduce patents for new plant varieties or have an effective sui generis law to protect IPRs in agriculture by 1 July 2021.

- (I) Introducing Plant Varieties Protection by Patents with Redefining ‘Invention’, Providing ‘Origin Disclosure for the Use of PGRs’, Mandating ‘Prior Informed Consent’ and ‘Benefit Sharing’

To introduce patents for new plant varieties, the definition of the term ‘invention’ acts as a yardstick for identifying patentable products or processes. The TRIPS does not define the term ‘invention’ and leaves definition up to member countries. In practice, however, developed countries have given wide interpretations to the term in order to cover most inventions, while developing countries have provided very restrictive interpretations so that patent protection will not be extended to living organisms.<sup>90</sup>

<sup>87</sup> The Bangladesh Biodiversity Act, 2017 Sections 30 and 31.

<sup>88</sup> Daniel Robinson, ‘Sui Generis Plant Variety Protection Systems: Liability Rules and Non-UPOV Systems of Protection’ (2008) 3(10) *Journal of Intellectual Property Law & Practice* 659, 664–665.

<sup>89</sup> Islam, above n 1, 117.

<sup>90</sup> Asanka Perera, ‘TRIPS Agreement and Protection of Plant Varieties: A More Intense Scrutiny’ (2006) 18 *Sri Lanka Journal of International Law* 223, 240.

From such a standpoint, similar IPRs treaties can be investigated for a better understanding. With this end in view, the Convention on the Grant of European Patents 1973 (EPC) is a comparable treaty. However, it does not provide a statutory definition of the term 'invention'. The EPC Implementing Measures, however, emphasise that the invention must be of a technical character to the extent that it must relate to a technical field, concern a technical problem and possess technical features in terms of the matter for which invention is sought.<sup>91</sup> This interpretation is confirmed in EPC jurisprudence with the comment that an invention must have a technical character, provide a technical contribution to the art and solve a technical problem.<sup>92</sup> The same approach is taken in legal doctrine throughout the western world; such doctrine states that inventions are creations in the technical field containing a technical teaching.<sup>93</sup> Therefore, in the context of a patentable invention, knowledge is mainly considered to be technical knowledge. In agriculture to date, technical knowledge viz. biotechnology and biotechnological inventions are inventions which concern a product consisting of or containing biological material or a process by means of which biological material is produced, processed or used.<sup>94</sup>

Despite such instances and discretions, the Patents and Designs Act, 1911 in Bangladesh gives a broad and vague definition of the term 'invention' meaning any manner of new manufacture and includes an improvement and an alleged invention.<sup>95</sup> By such definition, new plants or plant varieties are patentable inventions. As Bangladesh is a least developed, agriculture-prone country, it has the option to exclude plant varieties from patentable inventions and switch to sui generis PVP.

To the present time, the draft Bangladesh Patent Act 2016 (the draft Patent Act),<sup>96</sup> the latest version of which is pending to be placed in the Parliament recently after final approval of the Cabinet, defines the term 'invention' in imprecise and large words. It means and includes any new, inventive step, and useful art, process, method or manner of manufacture, machine, apparatus or other article or substance produced by manufacture and including any new, inventive and useful improvement of any of them, and an alleged invention.<sup>97</sup> The wording 'inventive and useful improvement' is still capable of patenting all substances that exist in nature, including genes and the full range of sequence variation that occurs in the nature of any single gene with mere

<sup>91</sup> Uwe Fitzner, 'Laws and Regulations for the Protection of Biotechnological Inventions' in Jose Luis Barredo (ed), *Microbial Processes and Products* (2005) 465–494.

<sup>92</sup> Geertrui Van Overwalle, 'Patent Protection for Plants: A Comparison of American and European Approaches' (1999) 39 *IDEA: Journal of Law & Technology* 143, 585.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid. 587.

<sup>95</sup> The Patents and Designs Act, 1911 Section 2(8).

<sup>96</sup> The draft Bangladesh Patent Act, 2016 (Department of Patents, Designs and Trademarks, Ministry of Industries, Government of the People's Republic of Bangladesh 10 January 2007).

<sup>97</sup> Ibid. Section 3(13).

discovery or bio-prospecting. There is some consolation in the fact that section 4(i) of the draft Patent Act limits the scope of patent protection for products and processes by stipulating that inventions which are not patentable include any variety of animal or plant or any essentially biological process for the production of animals or plants, with the exception of a microbiological process or the product of such a process. This provision seems to follow the language of article 27.3(b) of the TRIPS virtually verbatim.

However, the TRIPS does not itself define the term ‘essentially biological processes’ or the word ‘microorganism’. This may encourage Bangladesh to opt for limiting the scope of patentability by defining the terms narrowly so that patenting of microorganisms does not become possible. For example, the Brazilian patent legislation does not allow patentability of all or part of plants and animals, except transgenic microorganisms.<sup>98</sup> According to the Brazilian legislation, transgenic microorganisms are organisms, except for all or part of plants or animals, which express, by means of direct human intervention in their genetic composition, a characteristic normally not attainable by the species under natural conditions.<sup>99</sup> This Brazilian legislation could be a guide for the draft Patents Act in Bangladesh. It could stipulate that a microorganism does not include any naturally occurring microorganisms such as bacteria, fungi, protozoa and viruses. Further, since revision of article 27.3(b) is still underway, Bangladesh has the option of completely prohibiting the patenting of life forms, including microorganisms, genes, cells, all seeds, plants and parts of plants, including those produced through processes that are not essentially biological. Further, if it retains provisions for patenting plant varieties, it can incorporate origin disclosure provisions for use of PGRs, mandate prior informed consent of communities and farmers, and ensure access and benefit sharing.

## (II) PVP (PBRs)

IPRs regimes such as PVP are established to help achieving societal goals. Policymakers in LDCs like Bangladesh should therefore view PVP as a tool to be adapted and used for achieving national agricultural development goals rather than an obligation imposed by industrialised countries. Meeting those goals requires an understanding of the circumstances of different classes of farmers, an analysis of the requirements of different types of commodities and a capacity to target IPRs regimes accordingly.<sup>100</sup> In view of such understanding, a number of strategies can be used by developing countries and LDCs like Bangladesh in order to provide plant variety protection as required by the TRIPS. However, such strategies need to provide conditions which do not threaten the countries’ interests to simultaneously comply wi-

<sup>98</sup> Jagjit Kaur Plahe, ‘The Implications of India’s Amended Patent Regime: Stripping away Food Security and Farmers’ Rights?’ (2009) 30(6) *Third World Quarterly* 1197.

<sup>99</sup> Ibid.

<sup>100</sup> Robert Tripp, Niels Louwaars and Derek Eaton, ‘Plant Variety Protection in Developing Countries: A Report from the Field’ (2007) 32 *Food Policy* 354.

th all their international obligations, especially those arising from the CBD or the ITPGRFA:

- (1) Countries such as Bangladesh can find a solution proposed in the context of the interpretative resolutions to the IUPGRFA, by recognising concurrently and equally the rights of farmers and the rights of commercial breeders.<sup>101</sup> Indeed, the TRIPS allows developing nations to construe such an option with the use of the term *sui generis*, since it gives them the discretion to determine the type and design of plant protection regime. Such a construction of the term *sui generis* enables developing countries to promote innovative plant breeding while preserving national objectives like protecting biodiversity, traditional farming, and food security.

However, the draft PVP Act that strengthens PBRs and thus expects to promote trade in Bangladesh does not define farmers as breeders. The sidelining of farmers through over-protection would affect trade and could lead to food security issues in Bangladesh. Therefore, while strengthening PBRs, the incorporation of farmers as breeders would recognise farmers' preservation of traditional farming practices, farmers' innovations by selecting and maintaining of seeds, farmers' traditional conservation of biodiversity and farmers' access to benefit sharing, thus meeting national priorities in agriculture-prone Bangladesh. This would also balance the interests of the variety of actors (especially commercial breeders and farmers) involved in agricultural trade. For example, such strategy brings harmony with the interests of commercial breeders and farmers in India and Thailand, as they start promoting the seed industry by encouraging seed trade, boosting exports and protecting seed quality.<sup>102</sup>

In order to benefit from defining farmers as breeders in Bangladesh, a review of the existing Seeds Ordinance, the Seeds Rules and the Seeds Policy<sup>103</sup> is necessary, with insertion of provisions therein to regulate the sale, import and export of seeds, as the TRIPS does not require governments to regulate seed trade. However, in making the review, the existing seeds framework needs to be harmonised with the draft PVP Act and the Bangladesh Biodiversity Act. This will stop any compromise in the rights of farmers to save, re-sow or exchange seeds, and the rights to access and benefit sharing from the registration and sale of an existing variety or a farmers' variety, or the authority to issue compulsory licensing to control price and regulate supply of seeds under public interest conditions.

<sup>101</sup> Phillipe Cullet, 'Plant Variety Protection in Africa: Towards Compliance with the TRIPS Agreement' (2001) 45(1) *Journal of African Law* 97, 117–122.

<sup>102</sup> See Srividhya Ragavan and Jamie Mayer O'shields, 'Genetic Use Restriction Technologies: Do the Potential Environmental Harms Outweigh the Economic Benefits?' (2007) 20 *Georgetown International Environmental Law Review* 97.

<sup>103</sup> 'The National Seed Policy' <<http://www.sca.gov.bd/seedpol.html>> 10 July 2010.

- (2) Bangladesh could consider giving different durations to different rights. In a situation where plant breeders' and farmers' rights are recognised as equal, it is possible to look after broader development policy goals by reducing the duration of commercial breeders' rights as much as possible and extending farmers' rights as far as possible.
- (3) The international IPRs regime normally takes the view that the claim of a variety is to be upheld unless someone contests it and the burden of proof lies entirely on the party contesting the claim.<sup>104</sup> In the case of plant varieties, this proves to be extremely problematic both at the international and domestic levels. To counter these problems, national legislation could, for instance, provide that the burden of proof should rest with the defendant.
- (4) The PVP should more generally contribute to the development of crops which do not harm the environment. It is therefore important that states include bio-safety provisions as part of their legislations. For example, the Indian Plant Variety Act includes a provision banning the registration of varieties containing genes or gene sequences involving technologies that are injurious to the life or health of human beings, plants or animals.<sup>105</sup> Since Bangladesh is proposing the plant variety legislation, it can include this in the Act.
- (5) A *sui generis* system should also contribute to sustainable agricultural management. This implies that it should promote types of agricultural management which can be sustained in the long term, which do not lead to the erosion of the genetic base and which are adapted to local climatic conditions. The incorporation of such provision in the draft PVP Act of Bangladesh is commendable in view of its climatic conditions.
- (6) Limiting PBRs through Compulsory Licensing

Limiting PBRs can act as an element to reduce and minimise food and livelihood security concerns in an LDC like Bangladesh. The limitation on PBRs can be imposed through compulsory licensing. The draft can introduce opportunities for compulsory licensing of PBRs protected products: a) where circumstances of national security concerns exist, b) where such are required for the maintenance of nutritional stability and prevention of monopoly, c) where purposes of other public interests subsist, and d) where there has been no sale of the propagating material of the new plant variety or the sale thereof is of an insufficient quantity for the needs of the people within the country or the sale thereof is overpriced.

#### (7) Access to and Benefit Sharing of PGRs

Access to and benefit sharing of PGRs are the key elements in meeting major food and livelihood security concerns in an LDC like Bangladesh. To this end, farmers sho-

---

<sup>104</sup> Cullet, above n 101, 97-122.

<sup>105</sup> [Indian] Plant Variety Act Section 29.

uld be allowed to choose from and have access to a wide range of germplasm and samples that would be best suited to their present needs. They should also have the right to use their own seeds. They should be free to improve germplasm (varieties and breeds) by using their own materials and those introduced from other sources. Farming communities should be free to sell the harvested commodity, to save seed (on non-commercial basis) for replanting and to share and exchange seeds. Farmer-to-farmer seed exchange and the sale of seed by farmers should be allowed, however a farmer should not be entitled to such rights in cases where the sale is for the purpose of reproduction under a commercial marketing arrangement. In the case of genetic resources, the country of origin should be recognised and arrangements for benefit sharing should be made accordingly. It is also beneficial to check genetic erosion, biodiversity loss and corporate control over agricultural development.

In the Bangladesh Biodiversity Act, Bangladesh also proposes to introduce the term 'access' to in situ genetic and biological resources or farmers' TK. It provides for prohibition of foreign access to their biological resources and related knowledge where this is detrimental to the integrity of their natural or cultural heritage. It also provides for uses of local varieties on charging a fee. Having provided this, the Act focuses its attention on the regulation of access by foreigners but does not have a strong framework for regulating access within the country. So there should be a broad access framework that could either prevent the PGRs from bio-piracy or removal from the country by local agents in the name of local access, or prevent privatisation by foreigners for profiteering purposes. It could also allow dissemination at the lowest possible cost to all farmers if the bio-pirated variety is of a staple food crop.<sup>106</sup>

#### **4.2. Ratchetting up International Coalition**

A sui generis plant variety protection system, as set out in the TRIPS, should not be developed in isolation. Given that plant varieties are only a subset of biological resources, all countries that are members of the WTO and the CBD should stand together and aim at drafting a single all-encompassing law which takes into account the requirements of the CBD and the TRIPS.

In the meantime, since Article 27.3(b) containing sui generis plant variety protection is still under review, Bangladesh should join African countries that are well ahead in terms of bargaining position, in order to remove PVP or to insert an amendment to this clause stating that they will continue with traditional agriculture unless they move to developing country status.<sup>107</sup>

In addition, LDCs such as Bangladesh should ensure that local politics does not result in rich, developed nations reneging on their obligation to reduce agricultural subsidies or to bind them with the TRIPS-plus treaties.

<sup>106</sup> Nirmal Sengupta, 'Traditional Knowledge and Intellectual Property Right' in Paramita Dasgupta (ed), *The WTO at the Crossroads* (2009) 100–115.

<sup>107</sup> Islam, above n 1, 124.

## 5. Conclusion

In Bangladesh, plant varieties protection, farmers' rights and other related issues did not enjoy their subsistence until the arrival of the ITPGRFA, the CBD and the TRIPS. Compliance with the obligations of treaties like the TRIPS Agreement, Paris Convention and the likes secures interests of property owners – creating monopolies for them and causing concerns by restricting free uses of plant genetic resources or by raising the prices of agricultural products in the guise of patent monopoly, and pushing farmers into dependence on engineered seeds and other agricultural inputs. However, the treaties like the ITPGRFA and the CBD and certain exceptions and flexibilities of the TRIPS Agreement and Paris Convention came up for localising the purpose of securing farmers' rights, food security, sustainable agriculture and plant genetic resources. This paper recommends that Bangladesh makes its local legislation compatible with the ITPGRFA, the CBD and the TRIPS ensuring protection of plant varieties and farmers' rights. This paper also recommends that Bangladesh stands in line with other LDCs with a view to making sure the TRIPS review favours the agricultural needs of LDCs in line with the CBD and the ITPGRFA. This will promote farmers' rights in line with fair and equitable sharing of the benefits from the utilisation of PGRs.

# **Economic, Social and Cultural Rights versus Civil and Political Rights: Closing the Gap between the Two and the Present International Human Rights Regime**

Dr. Muhammad Ekramul Haque\*

## **1. Introduction**

Historically, human rights have been divided into two major groups: civil and political (CP) rights and economic, social and cultural (ESC) rights. The rhetoric of the international human rights regime indicated that it was not meant to confer superiority upon any particular class of human rights over another. Yet it may perhaps be said that ESC rights 'are at best less important than civil and political rights.'<sup>1</sup> At worst they are not rights at all. It is submitted that an effort to giving priority to a set of human rights over the other, in terms of importance, goes against the UN rhetoric of treating all human rights as indivisible and interdependent. Interdependence is not merely symbolically important, but practically important. For example, the right of juveniles granted by article 10 of the ICCPR for separate prison facilities cannot be treated as a more important right than 'the rights to food, housing, health care, work and social security'.<sup>2</sup> In 1948, the United Nations adopted the Universal Declaration of Human Rights which contained all human rights, both CP and ESC rights, in a single document. However, in 1966, two different covenants, with two different types of state obligations, were adopted. They are: International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). It was thought that the distinction between the two sets of human rights was perpetuated by the adoption of two different covenants on human rights. However, the post 1966 developments show that the gap between two sets of human rights has been gradually diminished. The objective of this article is to show how the gap between CP and ESC rights has been diminished.

## **2. The International Covenant on Civil and Political Rights (ICCPR)**

### *2.1 Civil and Political rights recognized by the International Covenant and Civil and Political Rights:*

The civil and political rights recognized by the ICCPR are— right of self-determination (article 1), right to life (article 6), freedom from torture, inhuman & degrading treatment, and medical experimentation without consent (article 7), freedom from slavery, servitude, and forced labour (article 8), freedom from arbitrary detention, and procedural rights associated with detention (article 9), right to security of the

---

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

<sup>1</sup> Jack Donnelly, *International Human Rights in Theory and Practice* (Westview Press, Colorado, 3<sup>rd</sup> ed, 2007), 25.

<sup>2</sup> Ibid 25-26.

person (article 9), right to humane treatment in prison (article 10), no imprisonment for failure to fulfil a contract (article 11), freedom of movement (article 12), procedural rights against deportation (article 13), right to a fair trial (article 14), freedom from retrospective criminal law and the principle of legality (article 15), right to recognition as a person before the law (article 16), right to privacy (article 17), freedom of religion and belief (article 18), freedom of opinion and expression (article 19), prohibition of racial vilification (article 20), freedom of assembly (article 21), freedom of association (article 22), protection of the family (article 23), protection of the child (article 24), freedom of political participation (article 25), right of non-discrimination (article 26), rights of minorities (article 27).

## *2.2 Nature of obligation regarding civil and political rights:*

Article 2 of the ICCPR, which deals with the state obligations regarding the rights recognized therein, specified the following three major undertakings of the States Parties with regard to those rights.

Article 2(1) says:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2(2) says:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Article 2(3) says:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

Each of the above undertakings seems unconditional and is imposed irrespective of the capacity of a State Party to perform the obligations. The obligation is immediate and is not subject to any other consideration. The ICCPR did not limit obligations subject

to the socio-political conditions of the states or economic resources that might be necessary for implementing the rights. For example, the provision of a right to fair trial under Article 14 of the ICCPR involves a considerable amount of expenditure, which the state might not be able to bear at the moment of ratifying or acceding to the ICCPR. Nevertheless, the obligation in this regard is not made subject to the economic strength of a state.

### 2.3 *Enforcement mechanisms of Civil and Political rights under the ICCPR*

The ICCPR contains specific provisions regarding enforcement of those rights at both the national and international levels. At the national levels, according to Article 2(3) of the ICCPR, each State Party undertakes to ensure an effective remedy before a competent authority is available for violation of those rights. It has been also specified in Article 2(3)(c) that ‘the competent authorities shall enforce such remedies when granted’. Thus, there is an obligation of the States Parties to the ICCPR to provide a proper enforcement mechanism at the domestic level for violations of any of the rights recognized by it.

The Human Rights Committee (HRC), which is established by Article 28 of the ICCPR, is the treaty body responsible for discharging different functions under the ICCPR and its First Optional Protocol. The HRC is composed of eighteen human rights experts who serve in their personal capacity rather than as State representatives. Thus, it is an apolitical expert human rights body. Articles 28 to 34 of the Covenant contain provisions regarding formation of the HRC, election of its members and vacancies. Following are the enforcement modes which have been provided by the ICCPR and its Optional Protocol:

The States Parties to the ICCPR are obliged ‘to submit reports on the measures they have adopted which give effect to the rights recognized [therein] and on the progress made in the enjoyment of those rights.’<sup>3</sup> This is a mandatory obligation imposed by the Covenant upon all States Parties. Each State Party is bound to submit such a report whenever the HRC requests it to do so.<sup>4</sup> Each report is examined in a public dialogue between the HRC and representatives of the State Party concerned. After examining a report, the HRC makes comments in the form of Concluding Observations, ‘which are adopted by consensus, and which act as a ‘report card’ for the State under the ICCPR.’<sup>5</sup> The comments ultimately made by the HRC do not have legally binding force. However, such comments have persuasive force, and provide a path for the State to follow to advance better ICCPR compliance.

The HRC also issues general comments that are intended for all States Parties generally. These comments normally comprise an interpretation of an ICCPR provisi-

---

<sup>3</sup> ICCPR art 40(1).

<sup>4</sup> ICCPR art 40(1)(b).

<sup>5</sup> Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant of Civil and Political Rights: Cases, Material and Commentary* (Oxford University Press 2<sup>nd</sup> ed, 2004) 19.

on. The ‘HRC’s General Comments have proven to be a valuable jurisprudential resource.’<sup>6</sup> They facilitate implementation of the different rights by developing their normative content.

Article 41 of the ICCPR introduces an inter-state complaint mechanism for non-fulfillment of any Covenant obligation by a state, which is optional. The most important pre-condition of lodging such complaint before the HRC is that both states have recognized by declaration the competence of the HRC in regard to themselves. No such complaint has been made yet, arguably due to ‘the diplomatic and political implications of such an action; States fear retaliatory attacks on their own human rights records.’<sup>7</sup>

The First Optional Protocol to the ICCPR was created at the same time as the Covenant itself in 1966.<sup>8</sup> It created an individual complaint system, enabling ‘individuals claiming to be victims of violations of any of the rights set forth in the covenant’ to submit communications against a State Party to the Optional Protocol to the HRC for consideration. After examining a communication (so long as it is deemed to be admissible<sup>9</sup>), the HRC decides whether or not a violation has arisen, and publishes its ‘final views’ on this matter.<sup>10</sup> Such HRC decisions do not have strictly binding legal force.<sup>11</sup> However, the ICCPR is a legally binding treaty and the HRC is its ‘pre-eminent interpreter.’<sup>12</sup> The views expressed by the HRC have ‘some important characteristics of a judicial decision’, which ‘are arrived at in a judicial spirit.’<sup>13</sup> The HRC has commented:

The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.<sup>14</sup>

States are exhibiting bad faith towards their ICCPR obligations if they routinely ignore

---

<sup>6</sup> Ibid 21.

<sup>7</sup> Ibid.

<sup>8</sup> *Optional Protocol to the International Covenant on Civil and Political Rights*, Opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976) (‘*First Optional Protocol*’).

<sup>9</sup> Ibid arts 1-3, 5.

<sup>10</sup> Ibid arts 5(3) and (4).

<sup>11</sup> Scott Davidson, ‘Procedure under the Optional Protocol’ in Alex Conte, Scott Davidson and Richard Burchill, *Defining Civil and Political Rights* (Ashgate, England, 2004) 17, 28.

<sup>12</sup> Joseph, above n 5, 24.

<sup>13</sup> Human Rights Committee, *General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 94<sup>th</sup> sess, UN Doc CCPR/C/GC/33 (5 November 2008) [11] (‘*General Comment 33 of the HRC*’).

<sup>14</sup> Ibid para 13.

HRC recommendations.<sup>15</sup> If a violation is found, the HRC recommends appropriate remedies,<sup>16</sup> which may influence States Parties to change their laws and practices to bring them into harmony with the ICCPR obligations.<sup>17</sup> Unfortunately, non-compliance with the HRC decision is evident in a great number of cases.<sup>18</sup> The HRC specifically noted this concern: ‘many States parties have failed to implement the Views adopted under the Optional Protocol.’<sup>19</sup>

In summary, the ICCPR insists that States develop judicial remedies at the domestic level. As such, the States Parties to the ICCPR have undertaken the obligation to make the rights justiciable.<sup>20</sup> They are also justiciable at the international level under the First Optional Protocol. The observations, comments and views of the HRC are not judicial pronouncements in strict sense, but they have great persuasive value as they are enacted in a ‘quasi-judicial spirit.’<sup>21</sup> Thus, the rights guaranteed by the ICCPR are enforceable at both the national and international levels.

### **3. The International Covenant on Economic Social and Cultural Rights (ICESCR)**

#### *3.1 Origin and development of the ESC rights*

Historically, ESC considerations have been recognized by many religions; ‘[v]irtually all of the major religions manifest comparable concern for the poor and oppressed’.<sup>22</sup> Thus, the rights got their initial ‘strength from the injunctions expressed in different religious traditions to care for those in need and those who cannot look after themselves.’<sup>23</sup> ESC rights were also promoted by the theories of different renowned philosophers like Thomas Paine, Karl Marx and Immanuel Kant.<sup>24</sup> Apart from these philosophical forces, the concretizations of these rights by some early modern constitutions, as mentioned above, played a vital role in the development of these rights at the international level. Franklin Roosevelt’s ‘Four Freedom Address’, delivered in 1941, where he proclaimed “freedom from want” as one of four essential freedoms, is also considered to be an important step that advanced the way towards the international recognition of ESC rights.<sup>25</sup> ESC rights attained recognition at the international level with the establishment of the UN and especially the adoption of the UDHR.

<sup>15</sup> Joseph, Schultz and Castan, above n 5, 24.

<sup>16</sup> *General Comment 33 of the HRC*, UN Doc CCPR/C/GC/33, para 12.

<sup>17</sup> Joseph, Schultz and Castan, above n 5, 25.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Report of the Human Rights Committee*, (2008 vol 1), UN GAOR, 63<sup>rd</sup> sess, Supp No. 40, UN Doc A/63/40, iv.

<sup>20</sup> *ICCPR* art 2(3).

<sup>21</sup> Joseph, Schultz and Castan, above n 5.

<sup>22</sup> Henry J. Steiner et al., *International Human Rights in Context* (Oxford University Press, 3<sup>rd</sup> ed, 2008) 269.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> Asbjorn Eide, ‘Economic, Social and Cultural Rights as Human Rights’ in A. Eide et al. (eds), *Economic, Social and Cultural Rights* (Kluwer Law International, 2<sup>nd</sup> ed, 2001) 9, 15.

The UN Charter adopted in 1945 contained some significant provisions regarding ESC rights. The preamble of the Charter expressly declared the determination ‘to employ international machinery for the promotion of the economic and social advancement of all peoples.’ Article 1(3) declared that one of the purposes of the UN is ‘[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character.’ Article 13 assigned the General Assembly the duty to ‘initiate studies and make recommendations for the purpose of’ ‘promoting international cooperation in the economic, social, cultural, educational and health fields.’

Realization of ESC rights everywhere in the world obviously requires international co-operation because of the varying degrees of economic strength of the countries. The UN Charter has explicitly focused on this issue. Article 55 contains provisions regarding some basic elements of ESC rights:

The United Nations shall promote:

- (a) higher standards of living, full employment, and conditions of economic and social progress and development;
- (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation.

Moreover, Article 57 made provisions regarding the Specialized Agencies, working in the field of ESC rights, to work with the UN:

The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.

The Economic and Social Council (ECOSOC), which is composed of 54 members of the UN elected by the General Assembly,<sup>26</sup> is a principal political organ of the UN,<sup>27</sup> which was established by the UN Charter.<sup>28</sup> The UN Charter assigned different duties regarding ESC rights to the ECOSOC. For example, Article 62(1) of the Charter empowered the ECOSOC to discharge duties regarding the ESC rights:

The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned.

---

<sup>26</sup> *United Nations Charter* art 61.

<sup>27</sup> Paul Sieghart, *The International Law of Human Rights* (Clarendon Press, 1983) 423.

<sup>28</sup> *United Nations Charter* chapter X.

Therefore, the UN Charter created an elaborate institutional arrangement regarding ESC rights. The great significance of these rights is apparent in their orientation at different places of the Charter. It is submitted that the UN Charter is the first of its kind—both at national and international levels—to put such great emphasis on the rights of ESC nature.

‘It is true that the eighteenth-century declarations for the most part ignore the social and economic rights.’<sup>29</sup> Finally, the UDHR, a twentieth century document, by clearly incorporating a set of ESC rights, ‘corrected the eighteenth-century oversight.’<sup>30</sup>

However, it seems that ESC rights did not receive equal status of CP rights even with the adoption of the UDHR. The fact that the UDHR listed the ESC rights, with the exception of the right to property, at the end of the declaration might lead to the assumption that they have been accorded secondary importance in comparison with the CP rights which were inserted earlier.<sup>31</sup> Articles 3 and 22 of the UDHR indicate that the assumption is not totally unfounded. All CP rights in the UDHR ‘open with an unqualified “every”,’<sup>32</sup> while Article 22 described ESC rights to be the entitlements of every one ‘as a member of society’. Again, Article 3 of the UDHR introduced CP rights without any qualifications, while, according to Article 22, ‘the exercise of the social and economic rights is said to be dependent on “the organization and resources of each state”.’<sup>33</sup> This approach of the UDHR led to the following question: ‘[i]f the rights are of equal status, then why are there qualifications in Article 22 which are not present in Article 3?’<sup>34</sup>

Subsequent to the UDHR, the ICCPR and ICESCR tried to confirm the equal status of both sets of rights by introducing the rights in a similar way. All rights have been described—according to the preamble of the two Covenants—as coming from the same source of ‘inherent dignity of the human person’. The preamble of the ICCPR says that ‘the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.’ Similarly, the ICESCR in its preamble declares that ‘the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.’ Furthermore, unlike the UDHR, the ICESCR has

<sup>29</sup> Johannes Morsink, ‘The Philosophy of the Universal Declaration’ (1984) 6 *Human Rights Quarterly* 309, 326.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid 331.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

indirectly imposes an obligation on the ‘wealthy’ states to render economic and technical cooperation and assistance to the states that require it for the full realization of the ICESCR rights.<sup>37</sup>

Another important feature of the ICESCR obligation is the target of the achievement of the full realization of the Covenant rights ‘progressively’. This aspect of progressive realization renders the ICESCR obligation significantly different to that in its sister Covenant. The ICCPR obligation is immediate. The distinct ICESCR obligation reflects the traditional view that ESC rights are not capable of immediate realization.

### 3.4 *Enforcement of ESC rights under the ICESCR*

ESC rights were thought to be incapable of enforcement unlike CP rights. Part IV of the ICESCR provided only a supervisory mechanism to monitor and assist the realization of ESC rights by the domestic state authorities. Article 16 of the Covenant introduced a reporting system, which says that every State Party was required to submit a report describing the measures which it has adopted in accordance with the ICESCR and mentioning the level of progress it made regarding the observance of the ICESCR rights.<sup>38</sup> Unlike the ICCPR, the ICESCR does not have a provision requiring a State to provide a remedy for violation of the rights at the national level, nor did it create an international remedy. The reporting process was the only mechanism created in relation with the Covenant rights. The ICESCR, unlike the ICCPR, did not create any treaty body to supervise implementation of the Covenant rights. The reports were to be submitted to the Secretary-General of the UN, which transmitted then to ECOSOC, a political organ of the UN, for consideration.<sup>39</sup> Relevant parts of the report are transmitted to relevant specialized agencies.<sup>40</sup> No other “enforcement” system was created by the ICESCR other than the reporting system.

## 4. Classification of human rights: an analysis

The ICESCR was certainly created as the weaker Covenant. It contains progressive obligations rather than immediate obligations; the latter are stronger. The ICESCR does not create any treaty body unlike the ICCPR, so for many years it lacked a dedicated monitoring body to develop its norms. Finally, there was no mechanism providing for the enforcement of ESC rights in justiciable individual complaints, unlike

<sup>37</sup> Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (HART, 2009) 74-84. The duty of cooperation is explicitly mentioned in the *Declaration on the Right to Development*, GA Res A/RES/41/128, UN GAOR, 41<sup>st</sup> sess, 97<sup>th</sup> plen mtg, Agenda Item 101, UN Doc A/RES/41/128 (4 December, 1986) and Committee on Economic, Social and Cultural Rights, *General Comment 15: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 29<sup>th</sup> sess, Agenda Item 3, UN Doc E/C.12/2002/11 (20 January 2003) para 38 (‘General Comment 15 of the CESCR’).

<sup>38</sup> ICESCR art 16(1).

<sup>39</sup> ICESCR art 16(2) (a).

<sup>40</sup> ICESCR art 16(2) (b).

under Optional Protocol to the ICCPR, which has again stunted the development of its norms.

It is submitted that due to extreme ideological conflict between the two superpowers during the Cold War, the nature of different human rights could not be objectively assessed. Instead, that assessment was more influenced by the political motivations of the influential power bloc at that time. An-Naim commented that—

[t]he relegation of ESCR to a lower class of human rights goes back to the division of the human rights proclaimed by the UDHR into two groups during a particularly ‘hot’ phase of the Cold War in the early 1950s. That clearly ideological and political classification of human rights was initially expressed in the adoption of two separate Covenants, with different formulations and implementation mechanisms for each set of rights.<sup>41</sup>

It is argued by Bossuyt that, in contrast to CP rights, the contents of ESC rights are variable according to the economic status of the states.<sup>42</sup> He argued that the contents of CP rights are invariable, ‘as minimum rights cannot vary from one country to another.’<sup>43</sup> In response, it is submitted that the core of certain ESC rights does not vary. For example, the right to food includes the right not to be hungry, the right to shelter means that a person will not be totally shelter less, and the right to clothing to mean that a person will have a minimum amount of clothing that is required for maintaining human dignity in a society. In contrast, CP rights can vary according to the conditions within a state. For example, numerous rights can be limited for reasons of ‘public order’ or ‘public morals’; the public order situation varies from state to state, while public morals are clearly different in different states.

The classical view regarding the nature of different types of human rights is that CP rights are ‘negative rights’, while ESC rights are ‘positive rights’.<sup>44</sup> Bossuyt<sup>45</sup> has argued that CP rights require ‘negative’ actions that involve forbearance of the state to encroach on the rights of the people. On the other hand, ESC rights require ‘positive actions’ to be taken by the state. On the basis of this differing nature of the corresponding duties of the state, it is often argued that the categorisation of human rights into the above two Covenants, along with their differing obligations, is justified.

<sup>41</sup> Abdullahi A. An-Na'im, ‘To Affirm the Full Human Rights Standing of Economic, Social & Cultural Rights’ in Yash Ghai & Jill Cottrell, (eds), *Economic, Social & Cultural Rights in Practice* (Interights, 2004) 7, 12.

<sup>42</sup> Bossuyt, ‘L ‘interdiction de la discrimination dans le droit international des droits de l’homme,’ (1976) 173-217, cited in G. J. H. van Hoof, ‘The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views’ in P. Alston & K. Tomasveski (eds), *The Right to Food* (Martinus Nijhoff, 1984) 97, 103.

<sup>43</sup> Ibid.

<sup>44</sup> Donnelly, *International Human Rights in Theory and Practice*, above n 1, 30-31.

<sup>45</sup> Bossuyt, above 42, 113.

Yet the fact is that both sets of rights are simultaneously positive and negative. For example, apart from incurring positive obligations, the duty of a state to abstain from ‘forced eviction’ is a negative aspect of the right to shelter and housing, an ESC right. Again, ‘[t]here are well known examples of civil and political rights which in fact demand active intervention on the part of the State, such as the right to a fair trial.’<sup>46</sup> As noted above, the state must take many positive steps to establish a fair and expert judicial system in order to provide for due process rights. Article 2(1) of the ICCPR itself includes both positive and negative duties of the state regarding CP rights. The duty ‘to respect’ ICCPR rights denotes the negative obligation, requiring states to refrain from acts that adversely affect the exercise of any of these rights by individuals. The duty ‘to ensure’ means that States Parties are bound to take positive measures that are required for the enjoyment of these rights by the individuals. Thus, this provision clearly establishes negative and positive ICCPR obligations. In fact, both types of obligations are given equal emphasis in Article 2(1).

Donnelly has rightly observed that—

[a]ll human rights, however, require both positive action and restraint by the state if they are to be effectively implemented. Some rights, of course, are relatively positive. Others are relatively negative. But this distinction does not correspond to the division between civil and political rights and economic and social rights.<sup>47</sup>

Thus, the division between the two sets of human rights on the basis of the alleged positive-negative divide is based on simplistic and flawed distinctions and is consequently inappropriate.

A related belief is that the implementation of CP rights is ‘free’, while the implementation of ESC rights involves huge cost.<sup>48</sup> Bossuyt has argued that, in contrast to CP rights, ESC rights involve ‘a financial effort on the part of the State.’<sup>49</sup> Again, I respond that there are a number of CP rights, such as the right to a fair trial and the establishment of electoral machinery in accordance with the right to vote, which involve considerable state expenditure. On the other hand, an exercise of the right to form a trade union, an ESC rights recognized by the ICESCR, does not require expenditure.

Moreover, enforcement of ESC rights does not necessarily mean that the state will mitigate all financial needs of the people from the state fund. Rather, it primarily implies that the state will create an environment congenial to achieve the rights and will be responsible for management of all types of resources in a way so as to ensure that every one can fulfil his needs. Mostly, individuals will mitigate their needs with their own earnings, and the state has to facilitate opportunities that enable the people to

---

<sup>46</sup> van Hoof, above n 42, 113.

<sup>47</sup> Donnelly, *International Human Rights in Theory and Practice*, above n 1, 26.

<sup>48</sup> Eide, ‘Economic, Social and Cultural Rights as Human Rights’, above n 25, 10.

<sup>49</sup> van Hoof, above n 42, 103.

earn their livelihood, and refrain from actions which undermine those opportunities. It will be the last resort, in limited cases, where the state has to mitigate the personal financial needs of people from the state fund. For example, Eide has stated that—

[s]tates must, at the primary level, respect the resources owned by the individual, her or his freedom to find a job of preference and the freedom to take the necessary actions and use the necessary resources—alone or in association with others—to satisfy his or her own needs. ... State obligations consist, at a secondary level, of, for example, the protection of the freedom of action and the use of resources against other, more assertive or aggressive subjects—more powerful economic interests, protection against fraud, against unethical behaviour in trade and contractual relations, against the marketing and dumping of hazardous or dangerous products.<sup>50</sup>

After taking steps at these two stages by the state, if some individuals fail to mitigate their needs, Eide commented, then '[a]t the tertiary level, the state has the obligations to fulfil the rights of everyone under economic, social and cultural rights, by way of facilitation or direct provision.'<sup>51</sup> Even at this tertiary level of obligation, the state is not always required to provide the means directly. For example, Article 11(2) lays down that 'the state shall take measures to improve measures of production, conservation and distribution of food by making full use of technical and scientific knowledge and by developing or reforming agrarian systems.'<sup>52</sup> After facilitating such things, the state, if required, then will have to provide directly to some special groups of persons, like unemployed, ill or disadvantaged or elderly people or victims of certain disasters. Since the ICESCR was adopted in 1966, many steps have been taken at the international level to improve the level of protection of ESC rights, which eventually helped diminishing the gap between the two sets of human rights.

## 5. Developments regarding the ICESCR since 1966

In order to discharge its duties under the ICESCR, ECOSOC created a 'Working Group',<sup>53</sup> which was composed of government representatives. However, consideration of the states reports by the Working Group was not satisfactory for the following reasons.<sup>54</sup> There was no standard developed for evaluating the reports, the examination of report and other activities of the group were politicized, the attendance of members was irregular due to other concurrent meetings, there was a lack of continuity due to frequent changes in membership, and the members had political or diplomatic experience but lacked technical expertise.<sup>55</sup>

<sup>50</sup> Eide, 'Economic, Social and Cultural Rights as Human Rights', above n 25, 24.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> ECOSOC Decision 1978/10, 3 May 1978.

<sup>54</sup> International Commission of Jurists, 'Commentaries: Implementation of the International Covenant on Economic, Social and Cultural Rights: ECOSOC Working Group' (1981) 27 *The Review*, 26, 28-9.

<sup>55</sup> Ibid. Also see Kitty Arambulo, *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Right* (INTERSENTIA - HART, 1999) 29-30.

In 1985, the ECOSOC created the ‘Committee on Economic, Social and Cultural Rights’ (CESCR) to substitute the ‘Working Group’.<sup>56</sup> The CESCR is composed of 18 independent human rights experts. The members of the CESCR, unlike of the earlier Working Group, work in their personal capacity. Legally speaking, the CESCR is not responsible for monitoring the implementation of the ICESCR directly. The ICESCR imposes the obligation of supervising ICESCR implementation through the reporting system on ECOSOC and the CESCR officially assists ECOSOC to perform its duties. However, in practice, the CESCR has taken primary responsibility for monitoring and supervising implementation of the ICESCR. The CESCR effectively mirrors the HRC, the monitoring body under the ICCPR, though its duties are different. For example, it does not yet receive individual complaints, unlike the HRC, as no individual complaints system has yet come into force.

An obstacle in the way of implementation of the obligations under the ICESCR is ‘the slow process in clarifying the content of these rights [ESC rights] and their corresponding obligations.’<sup>57</sup> In that regard, the most remarkable role that the CESCR has played is its adoption of numerous general comments which have developed a substantial normative foundation for ESC rights. The General Comments have clarified many ICESCR rights and the processes required for their implementation.

The formulation of the Limburg Principles on the Implementation of the ICESCR Rights, adopted by a group of human rights experts in 1986, was a milestone development in the field of the ESC rights. Though the ‘Limburg Principles’ were not adopted by the UN, they were subsequently recognised as an official UN document.<sup>58</sup> The Limburg Principles clarified the nature and scope of the States Parties obligations under the ICESCR. The interpretative principles inserted in the Limburg Principles made it clear that the States Parties have to begin taking steps immediately for the full realization of the ICESCR rights.<sup>59</sup> According to the ‘Principles’, the States Parties to the Covenant are under an obligation to provide judicial remedies in appropriate cases.<sup>60</sup>

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights,<sup>61</sup>

<sup>56</sup> *Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, ESC Res 1985/17, UN ESCOR, 22<sup>nd</sup> mtg, UN Doc E/RES/1985/17 (28 May 1985).

<sup>57</sup> Eide, ‘Economic, Social and Cultural Rights as Human Rights’, above n 25, 9.

<sup>58</sup> UN Commission on Human Rights, *Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles")*, UN ESCOR, 43<sup>rd</sup> sess, Agenda items 8 and 18, UN Doc. E/CN.4/1987/17 (8 January 1987) April 2017 <<http://www.unhcr.org/refworld/docid/48abd5790.htm>> accessed 22 May 2017.

<sup>59</sup> *Ibid* Principle 16.

<sup>60</sup> *Ibid* Principle 19.

<sup>61</sup> ‘The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’ (1998) 20 *Human Rights Quarterly*, 691.

adopted by a group of human rights experts in 1997 on the occasion of the tenth anniversary of the Limburg Principles, was another document that paved the way towards proper implementation of the ICESCR. The experts wanted ‘to elaborate on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights’<sup>61</sup> and appropriate responses and remedies’ and they believed that the guidelines ‘reflect the evolution of international law since 1986.’<sup>62</sup> The Limburg Principles elaborated state obligations under the ICESCR, while the Maastricht Guidelines specially focused on identifying violations of ESC rights and suggesting possible remedies.

The most profound recent event in the field of the ESC rights is the adoption of the Optional Protocol to the ICESCR.<sup>63</sup> The UN General Assembly unanimously adopted the Optional Protocol to the ICESCR on 10 December 2008, the day of the 60<sup>th</sup> anniversary of the UDHR. The Optional Protocol, which has come into force on 05 May 2013,<sup>64</sup> has created scope for lodging individual complaints for violation of the Covenant’s rights against States Parties to the Optional Protocol. ESC rights have developed significantly since the adoption of the ICESCR in 1966. So too have States’ duties with regard to those rights.

## 6. Conclusion

It is worth mentioning here that a recent phenomenon at the international level has been the incorporation of both CP rights and ESC rights in the same convention in a similar way. The Convention on the Rights of the Child, 1989 (CRC) is one such example where the two sets of rights have been incorporated in an integrated manner. Similarly, the Convention on the Rights of Persons with Disabilities, 2006 also contains all categories of human rights in a single document, as its Article 1 says that the purpose of the Convention ‘is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities.’ Thus it appears that the traditional contention, which claimed that the two sets of rights are by nature so different that they cannot be incorporated in the same convention with the same implementation mechanism, has lost credibility.

Since the adoption of the ICESCR in 1966, some major developments have taken place in the field of enforcement of the ESC rights, such as the formation and functioning of the CESCR, the developments of contents of the ESC rights through the General Comments, the Limburg Principles and the Maastricht Guidelines, and the adoption of the Optional Protocol to the ICESCR. These developments reflect the realization that the initial divide between the two sets of human rights was simplistic. The developments diminish the alleged differences between the two sets of human rights closing the gap between the ICCPR and ICESCR.

---

<sup>62</sup> Ibid.

<sup>63</sup> *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, GA Res 63/117, UN GAOR, 63<sup>rd</sup> sess, 66<sup>th</sup> plen mtg, Agenda Item 58, UN Doc A/RES/63/117 (10 December 2008) opened for signature 24 September 2009 (not yet in force).

<sup>64</sup> (April 2017) <<https://www.escr-net.org/op-icescr>> (last accessed on 22 May 2018).

# Rights-based Approach to Health: Critical Reflections and Contemporary Challenges

Dr. Tehmina Ghafur\*

## 1. Introduction

Human rights got wider global attention as an aftermath of World War II which was marked with horrifying abuses of human beings *en masse* and in all forms.<sup>1</sup> It was at the same time that development assistance constituted an important dimension of international relations wherein development assistance was used as one of the important tools for building alliance with the developing countries.<sup>2</sup> However, at that period there was hardly any link between human rights and development assistance. The development and the human rights were two parallel domains, the former dominated by economists and the later by legal experts and activists.<sup>3</sup> Nevertheless, the anti-colonial struggles in the 1950s and 1960s and the movement for a New International Economic Order in the late 1960s, 1970s and early 1980s led by the Third World countries had eventually contributed in the declaration on the Right to Development in 1986.<sup>4</sup> The movement for right to development paved the way for the Third World's struggle against the rich countries' exclusive focus on political and civil rights and for the international redistribution of resources.<sup>5</sup> The declaration on the Right to Development in 1986 by the United Nations (UN) General Assembly and the World Conference on Human Rights in Vienna in 1993 have explicitly linked democracy, human rights and sustainable development.<sup>6</sup> Since then conceptual linking

---

\* Professor, Department of Population Sciences, University of Dhaka

1 Kumanan Rasanathan, Johanna Norenhag, and Nicole Valentine, "Realizing Human Rights-based Approaches for Action on the Social Determinants of Health", (2010) 12 (2) *Health and Human Rights*, 49 52; Benjamin Mason Meier, and et al "Rights-Based Approaches to Public Health Systems" in Elvira Beracocha *et al* (eds.), *Rights-Based Approaches to Public Health*, (Springer Publishing Company, New York, 2010), 21.

2 Peter Uvin, "From the Right to Development to the Rights-Based Approach: How 'Human Rights' Entered Development", (2007) 17 (4/5) *Development in Practice*, 597.

3 UNDP, *Human Development Report: Human Rights and Human Development*, (New York, 2000) 2.

4 Andrea Cornwall and Celestine Nyamu-Musembi, "Putting the 'Right-based Approach' to Development into Perspective" (2004) 25 (8) *Third Quarterly*, 1415-1437; Peter Uvin, P., "From the Right to Development to the Rights-Based Approach: How 'Human Rights' Entered Development", (2007) 17 (4/5) *Development in Practice*, 597; Benjamin Mason Meier, and et al "Rights-Based Approaches to Public Health Systems" in Elvira Beracocha *et al* (eds.), *Rights-Based Approaches to Public Health*, (Springer Publishing Company, New York, 2010), 21.

5 See, above note 2, 598.

6 Morten Broberg and Hans-Otto Sano, "Strengths and Weaknesses in a Human Rights-Based Approach to International Development: An analysis of a rights-based approach to development assistance based on practical experiences", (2017) 22(5) *The International Journal of Human Rights*, 3.

of these areas were ventured by UN bodies, i.e., United Nations Development Program (UNDP) and United Nations International Children's Emergency Fund (UNICEF). It is in this context, rights-based approaches (RBAs) to health have gained currency in the development field since early 1990s.<sup>7</sup> Gradually, it has been embraced at large by those engaged in development field as a framework to understand aspects of inequalities, exclusion, and marginalization and thereby focus on who are disadvantaged, excluded and ignored.<sup>8</sup>

Since the creation of the UN, health has been a major theme of human rights. Health is recognized as a fundamental right in numerous international instruments, including the Universal Declaration of Human Rights (UDHR). However, Human Immune Deficiency Virus (HIV)/ Acquired Immune Deficiency Syndrome (AIDS) epidemic in the 1980s has been instrumental in clarifying the ways health and human rights are connected. Evidences of people living with HIV/AIDS fleeing away from HIV/AIDS prevention and care programmes due to various forms of discriminations had contributed into such endeavours.<sup>9</sup> It was during that time under the leadership of Jonathan Mann when he had directed the Global Programs on AIDs at World Health Organisation (WHO) that the first initiative to link public health strategy with human rights took place.<sup>10</sup> Further, a series of international conferences held by the UN in the early 1990s gave a strong base to health rights obligating the states to realize its citizens' health rights. Kofi Anan's regime in the UN as the UN Secretary General, played a crucial role in drawing world attention to RBA and boosting human rights at the global level. Kofi Anan made a breakthrough in the history of human rights by his seminal call in 1997 for the integration and mainstreaming of human rights in all of UN's work and reorientation of UN's mission to reflect upon realization of human rights as the ultimate goal of the UN.<sup>11</sup>

<sup>7</sup> Ibid, 3; Peter Uvin, P., "From the Right to Development to the Rights-Based Approach: How 'Human Rights' Entered Development", (2007) 17 (4/5) *Development in Practice*, 597; Pan, H., *Conceptualizing Human Rights Application to Health Work: A Typology of Rights-Based Approaches to Health*, (Research Paper, Bachelor of Arts in Legal Studies, The University of California at Berkeley, 2013) 6.

<sup>8</sup> Sofia Gruskin, "Rights-Based Approaches to Health: Something for Everyone", (2006) 9 (2) *Health and Human Rights* 5, 5.

<sup>9</sup> Jonathan Mann and Daniel Tarantola, "Responding to HIV/AIDS: A Historical Perspective" (1998) 2 (4) *Health and Human Rights*, 8; Sofia Gruskin, "Rights-Based Approaches to Health: Something for Everyone", (2006) 9 (2) *Health and Human Rights*, 5, 5.

<sup>10</sup> Lisa Forman, "Making the Case for Human Rights in Global Health Education, Research and Policy", (2011) 102 (3), 207; See generally, Sofia Gruskin, Edward Mills and Daniel Tarantola, "History, Principles, and Practice of Health and Human Rights" (2007) 370 *The Lancet*, 449-455.

<sup>11</sup> Sofia Gruskin, Edward Mills and Daniel Tarantola, "History, Principles, and Practice of Health and Human Rights" (2007) 370 *The Lancet*, 449, 450; Celestine Nyamu-Musembi and Andrea Cornwall, *What is the "rights-based approach" all about?* Perspectives from International Development Agencies, (Working Paper 234, Institute of Development Studies, 2004), 15.

Since then this approach got wider acceptance in the health sector because it encompasses both delivery of health services as well as improving the underlying conditions or determinants of health. Applying rights framework has an appeal because it aims to address root causes of poor health lying within and beyond health system. While this approach has been embraced at large by health sector policies and programs for its outward moral appeal, the diversity in its operationalization within the respective stakeholders and the complications in its applications are also enormous.<sup>12</sup> This has led to the perception that as long as there is a lack of the appropriate precision in the usage of the term, there will always be possibilities that the stakeholder organizations will repackage what they have always done under the rubric of RBAs.<sup>13</sup>

In this context, this paper intends to unravel the definitional diversities of RBAs held by the stakeholders at different levels and the range of practices arising therefrom having implications for their implementation and outcome in health sector planning, policies and programs. The paper also draws on the complications arising out of the application of some aspects of rights-based principles and the interpretations on RBAs in relation to the right to health with a view to contribute to improved understanding of the issues, practices, and implementation. The paper is built on the most acknowledged works done on the rights-based approaches in last two decades.

## 2. Legacy of RBAs and its Emergence in the Health Sector

The historically significant events that contributed to the landscaping of the right to health include: the 1945 Charter of the United Nations; the 1948 UDHR; the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR); the 1978 Declaration of Alma-Ata; and General Comment 14 of the ICESCR.<sup>14</sup> The most lau-

<sup>12</sup> See, Rebeka Thomas and *et al*, "Assessing the Impact of a Human Rights-Based Approach across a Spectrum of Change for Women's, Children's, and Adolescents' Health", (2015) 17(2), *Health and Human Rights Journal*, 11-20; Sofia Gruskin, "Rights-Based Approaches to Health: Something for Everyone", (2006) 9 (2) *Health and Human Rights* 5, 6; Morten Broberg and Hans-Otto Sano, "Strengths and Weaknesses in a Human Rights-Based Approach to International Development: An analysis of a rights-based approach to development assistance based on practical experiences", (2017) 22(5) *The International Journal of Human Rights*, 3; Paul Hunt, "Interpreting the International Rights to Health in a Human Rights-Based Approach to Health", (2016) 18(2) *Health and Human Rights Journal*, 110; Huling Pan, *Conceptualizing Human Rights Application to Health Work: A Typology of Rights-Based Approaches to Health*, (Research Paper, Bachelor of Arts in Legal Studies, The University of California at Berkeley, 2013), 6-8.

<sup>13</sup> Celestine Nyamu-Musembi and Andrea Cornwall, *What is the "rights-based approach" all about? Perspectives from International Development Agencies*, (Working Paper 234, Institute of Development Studies, 2004) 12; Peter Uvin, P., "From the Right to Development to the Rights-Based Approach: How 'Human Rights' Entered Development", (2007) 17 (4/5) *Development in Practice*, 597, 599

<sup>14</sup> Benjamin Mason Meier, and *et al* "Rights-Based Approaches to Public Health Systems" in Elvira Beracochea *et al* (eds.), *Rights-Based Approaches to Public Health*, (Springer Publishing Company, New York, 2010), 20; Benjamin Mason Meier, "Global Health Governance and the Contentious Politics of Human Rights: Mainstreaming the Rights to Health for Public Health Advancement", (2010) 46 (1) *Stanford Journal of International Law*, 1, 2.

dable works among the right to health developments include the General Recommendation 24 of the Committee on the Elimination of Discrimination Against Women (1999), General Comments No. 14 (2000) and No. 22 (2016) of the Committee on Economic, Social and Cultural Rights, and General Comment No. 15 of the Committee on the Rights of Child (2015). The reports of UN Special Rapporteurs on the right to health i.e., Paul Hunt (2002-2008), and Dainius Puras (2014- to date) also contributed greatly in the right to health developments.<sup>15</sup>

The international right to health originated in the UN in 1946. It was, however, not subject to academic discourse until three decades past its commencement.<sup>16</sup> The taking of office of Director-General, WHO, by Halfdan Mahler, in 1973, marks the campaign for advancing primary health care as an issue of social justice. It was in this period when the importance of underlying determinants of health was brought into focus towards achieving social equality rather than too much reliance on health technologies alone.<sup>17</sup> The Hague Academy of International Law in collaboration with the United Nations University took a pioneering venture through organizing a Workshop on the Right to Health in July 1978 to facilitate academic exercise and exploration by the eminent scholars, and policy makers in the field. Therein, WHO glossed up its human rights testimonials.<sup>18</sup> The workshop renewed the consensus on the underlying determinants of health within the right to health and WHO's constitutional authority to elaborate state obligations for health.<sup>19</sup> The proceedings of it got published as *The Right to Health as a Human Right* in 1979.<sup>20</sup> The Declaration of Alma Ata in 1978, was the culmination of the renewed consensus.<sup>21</sup> The Declaration of Alma-Ata in 1978 'grounded in the concepts of justice' brought revolutionary changes in the health domain providing a right-based vision that is duly reflective of public health.<sup>22</sup> Thereafter, until 1993-94, a few conferences and academic publications examined the right to health and made its way to academic and policy agendas.<sup>23</sup>

---

<sup>15</sup> Paul Hunt, "Interpreting the International Rights to Health in a Human Rights-Based Approach to Health", (2016) 18(2) *Health and Human Rights Journal*, 114.

<sup>16</sup> Ibid, 112.

<sup>17</sup> For details, see, Benjamin Mason Meier, "Global Health Governance and the Contentious Politics of Human Rights: Mainstreaming the Rights to Health for Public Health Advancement", (2010) 46 (1) *Stanford Journal of International Law*, 1, 30-43; Gunilla Backman and et al, "Health Systems and the Rights to Health: An Assessment of 194 Countries", (2008) 372 *The Lancet*, 2047-2085.

<sup>18</sup> Benjamin Mason Meier, "Global Health Governance and the Contentious Politics of Human Rights: Mainstreaming the Rights to Health for Public Health Advancement", (2010) 46 (1) *Stanford Journal of International Law*, 1, 40.

<sup>19</sup> Ibid.

<sup>20</sup> See above note 15, 112.

<sup>21</sup> See above note 18, 40

<sup>22</sup> Ibid

<sup>23</sup> See above note 15, 114.

However, this focus on right to health shifted to human rights-based approach to health from 1993-1994 onwards. This change in shift got reinforced in the context of HIV/AIDS.<sup>24</sup> The International Guidelines on HIV/AIDS and Human Rights, drafted in 1996, refer to a “human rights approach” and “rights-based response” and on the basis of it OHCHR and UNAIDS published the International Guidelines on HIV/AIDS and Human Rights in 1998 as a tool for States in designing, coordinating, and implementing effective national HIV/AIDS policies and strategies. By the turn of the century, there has been a significant increase in the academic exercise on both human rights-based approaches and right to health.<sup>25</sup> However, only a small number of these academic works focused on the right to health and most of the monographs based themselves on phrases like ‘human rights framework(s)’, ‘rights-based approaches’, ‘health rights’, and ‘human rights’.<sup>26</sup> This increase in academic works has been accompanied with significant developments in health and human rights in the UN. In addition to the growing scholarly literature since 1999–2000, there have been significant health and human rights developments in the UN. There is considerable crossover between the literature and UN developments.<sup>27</sup>

While the Declaration of Alma-Ata, in 1978, has played a historic role in affirming the right to health and augmenting the understanding and practice of the right to health, the adoption of the General Comment 14 by the UN Committee on Economic, Social, and Cultural Rights, in collaboration with WHO and many others, in 2000 has augmented its exercise.<sup>28</sup> However, the adoption of the General Comment 14 produced an overriding understanding of the right to health that has been the most forceful in the use and exercise of the right to health.<sup>29</sup> In it the influence of Alma-Ata is loud and clear. Despite the fact that The General Comment 14 is not complete and perfect, it offers a way to make the right to health more operational and improved on the basis of practical experience. The common language provided by it created a platform for policy makers and those who are in programmes to deal with it in an easier way.<sup>30</sup> The General Comment 14 goes beyond health care service provision and includes underlying determinants of health i.e., access to safe and portable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy

---

<sup>24</sup> See above note 15, 113.

<sup>25</sup> See above note 15, 113.

<sup>26</sup> Ibid.

<sup>27</sup> See above note 15, 114.

<sup>28</sup> See above note 8, 6; See above note 18, 39-43; Gunilla Backman and et al, “Health Systems and the Rights to Health: An Assessment of 194 Countries”, (2008) 372 *The Lancet*, 2047, 2048.

<sup>29</sup> Gunilla Backman and et al, “Health Systems and the Rights to Health: An Assessment of 194 Countries”, (2008) 372 *The Lancet*, 2047, 2048.

<sup>30</sup> Ibid, 2048-49.

occupational and environmental conditions, and access to health-related education and information (United Nations, 2000).<sup>31</sup>

### 3. Basic Tenets of the RBAs

Despite the fact that the RBAs suffer from ambiguity, they have a number of universally agreed characteristics. The most basic to RBAs is the obligation to fulfill the rights of the rights holders by the duty-bearers at different levels.<sup>32</sup> Thus, the RBAs to development are based on a framework of rights and obligations. It functions for strengthening the capacities of rights-holders to enable them to make their rightful claims, and of duty bearers to duly discharge their obligations ([www.who.int/hhr/news/hrba\\_info\\_sheet.pdf](http://www.who.int/hhr/news/hrba_info_sheet.pdf)). The obligations of the duty bearers towards the rights-holders fall into three main categories, i.e., to respect, to protect, and to fulfill. Thus, a right involves an obligation on the part of the duty bearers to respect, promote, protect, and fulfill it. The duty bearers include a range of categories like the state, policymakers, health care providers, health programme managers, funders, international bodies etc. In this approach international assistance contributes to the realization of the entitlements of the rights holders by extending necessary financial or technical support to the national level duty bearers.<sup>33</sup>

The RBAs start out with active and engaged rights holders. Therefore, human agency is crucial to RBAs.<sup>34</sup> The concept of active and engaged rights holders is ingrained in the concept of empowerment. Without having the capacity to choose or act upon, the rights holders cannot be made active agents. Therefore, activism and advocacy are crucial for RBAs as they enable the right-bearers to engage in action.<sup>35</sup>

The RBAs are concerned with both outcomes and the process that is in this approach the end result does not justify the means to achieve the end results. Therefore, central to RBAs is the integration of human rights principles, i.e., participation, non-discrimination, and accountability at all stages of health planning and programming process. Thus, it includes freedoms, i.e., the right to be free from discrimination and involuntary medical treatment, and entitlements, such as the right to

<sup>31</sup> See, UNDP, *Human Development Report: Human Rights and Human Development*, (New York, 2000).

<sup>32</sup> Andrea Cornwall and Celestine Nyamu-Musembi, "Putting the 'Right-based Approach' to Development into Perspective" (2004) 25 (8) *Third Quarterly*, 1415, 1417.

<sup>33</sup> Ibid.

<sup>34</sup> Laslie London, "What is A Human Rights-Based Approach to Health and Does it Matter?" (2008) 10(1), *Health and Human Rights*, 65, 68.

<sup>35</sup> Kumanan Rasanathan, Johanna Norenhag, and Nicole Valentine, "Realizing Human Rights-based Approaches for Action on the Social Determinants of Health", (2010) 12 (2) *Health and Human Rights*, 49, 55; Andrea Cornwall and Celestine Nyamu-Musembi, "Putting the 'Right-based Approach' to Development into Perspective" (2004) 25 (8) *Third Quarterly*, 1415, 1418; Huling Pan, *Conceptualizing Human Rights Application to Health Work: A Typology of Rights-Based Approaches to Health*, (Research Paper, Bachelor of Arts in Legal Studies, The University of California at Berkeley, 2013), 9-14.

essential primary health care. Disadvantaged people and population are of particular concern to this approach.<sup>36</sup> The issues of discrimination, equality, equity, and vulnerability are of central concern to the RBAs. RBAs require context specific identification of vulnerable populations and the issues of discrimination, equality, equity. This requires the generation of disaggregated data by sex, race, religion, ethnicity, language etc.

#### 4. The Operationalization of RBAs in health

One of the major challenges of the rights-based approaches to health is to operationalize the legalistic treaty provisions so as to put them into practice. Treaty bodies' General Comments are produced with a view to bridging between short, legalistic treaty provisions and their practices. The Rapporteurs' thematic and mission reports also attempt to serve this purpose. However, they too are very often considered to be insufficient to operationalize RBAs in the context of a wide range of health issues. In this context, the UN, to facilitate development of a unified understanding and implementation of RBAs, framed the 'Common Understanding on a Human Rights-Based Approach to Development Cooperation' in 2003 for guiding all phases of programming of all UN agencies.<sup>37</sup> Its main aim has been to ensure that UN agencies, funds, and programmes apply a consistent HRBA (Human Rights-Based Approach) to common programming processes at global, regional, and at the country levels. However, the Common Understanding on RBA initiated by the UN could least serve its intended purpose, i.e., producing uniformity in understanding and practice. Its general nature made it difficult to operationalize it. As a result, different UN bodies have taken their own paths in line with their mandate to operationalize it. The UN bodies, bilateral and multilateral donors (i.e., the United States Agency for International Development, the United Kingdom's Department for International Development, the European Union, the Swedish International Development Assistance, German Technical Cooperation Agency) as well as international non-government, not-for-profit organisations i.e., CARE, Oxfam, Save the Children) prepare their guidelines for practicing RBA specific to their contexts and there from arises the issue of diversity in its operationalization.<sup>38</sup>

The rights-based approaches to programming for the UNICEF, comprehends that the end goal of all its supported programmes and activities is the realization of the rights of children and women, as it has been laid down in the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimina

<sup>36</sup> Huling Pan, *Conceptualizing Human Rights Application to Health Work: A Typology of Rights-Based Approaches to Health*, (Research Paper, Bachelor of Arts in Legal Studies, The University of California at Berkeley, 2013), 9-14.

<sup>37</sup> United Nations, *The Human Rights-based Approach to Development Cooperation Towards a Common Understanding among the UN Agencies* ('Common Understanding'), [http://www.undp.org/governance/docs/HR\\_Guides\\_CommonUnderstanding.pdf](http://www.undp.org/governance/docs/HR_Guides_CommonUnderstanding.pdf), accessed 8 July 2018.

<sup>38</sup> See above note 15, 6.

tion against Women (CEDAW) respectively. Human rights and child rights principles, i.e., universality, non-discrimination, the best interests of the child, the right to survival and development, the indivisibility and interdependence of human rights, accountability and respect for the voice of the child guide the organization's work in all sectors. It also emphasises on child and youth participation, inclusion of marginalized children. The United Nations Population Fund (UNFPA) builds its RBA particularly on the basis of the Programme of Action of the International Conference on Population and Development in 1994 which marked the historic paradigm shift in the population field from demographic targets aimed at population control towards individual's human rights and dignity and universal access to sexual and reproductive health and rights.<sup>39</sup> The World Health Organization (WHO) constitutes its RBA centering on right to health, human rights principles of participation and inclusion, equality and non-discrimination and accountability and the four elements of General Comment 14, availability, accessibility, acceptability and quality (AAAQ) of goods and services. Similar diversity has been observed in the conceptualizations of RBAs by the other bilateral foreign aid and International non-governmental organizations working in the health field.<sup>40</sup>

The chief concern here is whether this process of diversified operationalization is making ways to evade its core contents, values, and principles. Academic examination into such diversified guidelines has provided evidence for such concern.<sup>41</sup> Ambiguity in defining RBAs, variations in the use of terminologies relating to it, and having little or no connection with its operational aspects have been the most commonplace. Detailed exercise on how RBA is to be put into programming and implementation process has been rarely existent.<sup>42</sup>

Some attempts are being made by experts to provide frameworks of RBAs so as to salvage its operationalization from losing its fundamental contents, values, and principles. The most cited and recognized work in this regard is the framework provided by Sofia Gruskin and her colleagues.<sup>43</sup> As the framework articulated by the authors themselves draws on a minimalistic approach towards application of a rights-based approach to health. It is primarily designed to assess institutional articulations of RBAs through highlighting important considerations to be made in programme planning and implementation, i.e., founding on international human rights laws; application of human rights principles (participation, non-discrimination, availability, acceptability, and quality of services, transparency, and accountability);

<sup>39</sup> Sofia Gruskin, Dian O Bogecho and Laura Ferguson, 'Rights-based approaches' to Health Policies and Programs: Articulations, Ambiguities, and Assessment, (2010) 3(2) *Journal of Public Health Policy*, 134.

<sup>40</sup> Ibid, 134-38.

<sup>41</sup> See above note 15, 110; See above note 39, 138; Celestine Nyamu-Musembi and Andrea Cornwall, *What is the "rights-based approach" all about? Perspectives from International Development Agencies*, (Working Paper 234, Institute of Development Studies, 2004) 2.

<sup>42</sup> See above note 39, 138.

<sup>43</sup> See above note 39, 129-145.

right based process of implementation; and multisectoral response to health issues.<sup>44</sup> Paul Hunt, former UN Special Rapporteur on the right to health, made an important observation about this framework that besides the four elements of General Comment No. 14 of the Committee on Economic, Social and Cultural Rights' i.e., AAAQ, the other elements included in it, although very crucial elements of human rights, but are not distinctive to the right to health rather they apply to a wide range of human rights. Therefore, three more elements distinctive to right to health are suggested by Paul Hunt, to be included in the framework in this regard, i.e., progressive realization, maximum available resources, and international assistance and cooperation.<sup>45</sup>

## 5. The Centrality of Right to Health in RBAs

While there is no denying fact that the genesis of the RBAs to health is the right to health, the RBAs are broader in scope than the right to health. It is also widely recognized that there are some advantages of adopting the broader RBAs over right to health alone since it has the potential of taking a comprehensive approach to address the health issues.<sup>46</sup> However, the concern about this issue is that while doing so there is a possibility of downplaying the centrality of the right to health in the RBAs.<sup>47</sup> The right to the highest attainable standard of health is central to a rights-based health system. The right to the highest attainable standard of health connotes medical care, access to safe drinking water, adequate sanitation, education, health related information and other underlying determinants of health. Therefore, RBAs have to go much more beyond improving specific health outcomes and work towards transforming the underlying conditions that drive distributions of disease, and deprivations of rights.

Playing down the right to health within the RBAs is considered to have serious implications for both the right to health and the RBAs to health for it has distinctive features over other human rights. It is claimed that RBAs that only implicitly includes the right to health surely lacks credibility and legitimacy.<sup>48</sup> In most part of the world health policy, programs, and interventions are implemented over a period of time.<sup>49</sup> In addition, they are cost intensive and hence, low and middle income countries need overseas development assistance for implementation of these policies, programs and interventions. Consequently, the right to health also comprises progressive realization, maximum available resources, and international assistance.<sup>50</sup> These attributes of the right to health hold the conceptual and operational potential for making indispensable contributions to health interventions in a sustainable manner.<sup>51</sup>

---

<sup>44</sup> See above note 39, 138

<sup>45</sup> See above note 15, 115.

<sup>46</sup> See above note 15, 110.

<sup>47</sup> Ibid.

<sup>48</sup> See above note 15, 111

<sup>49</sup> See above note 29, 2048; See above note 15, 116.

<sup>50</sup> See above note 15, 115.

<sup>51</sup> See above note 15, 111, and 116-117.

Other human rights, i.e., the right to life, privacy, and the prohibition against torture and inhuman and degrading treatment are also part of RBAs to health but they do not have distinctive features, i.e., AAAQ, progressive realization, maximum available resources, and international assistance and cooperation.<sup>52</sup> The contribution of the right to health in the RBAs can be reaped only if these distinctive features of the right to health are explicitly recognized and consistently applied across the board.<sup>53</sup> On the contrary, if the right to health is not duly placed within the RBAs it will continue to remain as a rhetoric. However, such evidence of explicit recognition and consistent application of the right to health by the RBAs to health is clearly deficient.<sup>54</sup>

## 6. Progressive Realization of the Right to Health

The highest attainable standard of health has been enshrined in the international law as a genuine commitment and not as rhetoric and therefore, it has been put forth as a subject of progressive realization and resource availability.<sup>55</sup> While it implies that a country has to make steady progress towards fulfilling the health rights of its citizenry, it in no way means that a government has the freedom to choose any course of action it wishes to take provided they reflect some degree of progression.<sup>56</sup> On the contrary, the right to health brings in the aspects that are featured with the obligation of fulfillment with immediate effect, i.e., non-discrimination and a national health plan founded on encompassing public and private sector delineating indicators and benchmarks to monitor the progressive realization of health rights. The plans have to be prepared on the basis of evidence generated by health research. A situational analysis with disaggregated data should vanguard the health planning process. On the essential features of the health plan the General Comment 14 mentioned: clear objectives (and how these are to be achieved), timeframes, effective coordination mechanisms, reporting procedures, a detailed budget, financing arrangements (national and international), assessment arrangements, indicators and benchmarks to measure achievement, and one or more accountability devices. One of the most crucial tasks in this endeavor is to come up with comprehensive measures of progressive realization i.e., setting the indicators and benchmarks against which progressive realization will be judged and this process should take place at the national and international levels involving individual countries, international organizations, the UN Committee on Economic, Social, and Cultural Rights, and others. While most countries have set indicators and benchmarks for their respective health sectors, they do not generally cover elements that are important from a human rights perspective like appropriate disaggregation of data.<sup>57</sup> The need for dis-

---

<sup>52</sup> See above note 15, 116-117.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> See above note 29, 2048

<sup>56</sup> See above note 29, 2052.

<sup>57</sup> Ibid.

aggregated data to identify marginalized groups and monitor their progress towards equal access cannot be made secondary.<sup>58</sup> This issue is further detailed out in the following section.

It being a matter of progressive realization, prioritizing health needs and budgetary allocation is a must. Therefore, a fair, transparent, participatory, and inclusive process for prioritizing competing health needs has to evolve that takes into account explicit pro poor criteria.<sup>59</sup> The core obligations identified in General Comment 14, must receive the utmost attention in the process of prioritization, by all countries irrespective of their stage of development. Putting the right to health at the center of rights-based approach involves the distinguishing of the human rights that are subject to progressive realization from those that are not and setting more demanding obligations on high-income countries than the low-income countries and at the same time identifying core obligations that are uniformly applicable to all countries.

In international human rights law, developed countries are entrusted with important responsibilities towards the realisation of the right to health in developing countries.<sup>60</sup> General Comment 14 confirms that the human-rights responsibility of international assistance and cooperation in health extends to countries' actions as members of international organisations. High-income countries have an additional responsibility to provide required international assistance and cooperation in health in low-income countries particularly to fulfil their core obligations. Furthermore, human rights framework requires mechanisms to promote justice at all levels, local, global, micro and macro. For example the issue of ensuring access to anti-retroviral for poor people living with HIV cannot be dealt without redressing global inequalities in trade and intellectual property regimes. In such instances, global inequalities are the underlying determinants of health. In such situations, national policies and programmes are constrained to fulfill their obligations despite having national commitment.<sup>61</sup> For example, it is under the pressure of the non-government organisations and mass media that the pharmaceutical companies were forced to lower the price of antiretroviral drugs in low-income countries in 2000.<sup>62</sup>

## 7. Accountability in RBAs to Health

For the right to the highest attainable standard of health being tied to legal entitlements and obligations, effective mechanisms of monitoring and accountability are a *sine qua*

<sup>58</sup> Kumanan Rasanathan, Johanna Norenhag, and Nicole Valentine, "Realizing Human Rights-based Approaches for Action on the Social Determinants of Health", (2010) 12 (2) *Health and Human Rights*, 49, 54.

<sup>59</sup> See above note 29, 2052;

<sup>60</sup> See above note 29, 2053; See above note 58, 49-59.

<sup>61</sup> Laslie London, "What is A Human Rights-Based Approach to Health and Does it Matter?" (2008) 10(1), *Health and Human Rights*, 65, 72.

<sup>62</sup> Sofia Gruskin, Edward Mills and Danial Tarantola, "History, Principles, and Practice of Health and Human Rights" (2007) 370 *The Lancet*, 449, 451; Lisa Forman, "Making the Case for Human Rights in Global Health Education, Research and Policy", (2011) 102 (3), 207, 208.

*non* for fulfilling the obligation. In other words, accountability is ingrained within the very concepts of duty bearers and rights holders upon which the rights-based approach is founded. It falls within the legal obligations of the States to take due courses of actions towards realization of the right to the highest attainable standard of health.<sup>63</sup>

Accountability is typically perceived as a process or means of verification if health funds were spent as they should have been.<sup>64</sup> In fact, it denotes and entails much more beyond than only scrutinizing if health funds were spent accordingly. It is mainly concerned with and focused on if the right to the highest attainable standard of health is being progressively realized, with the inclusion of disadvantaged individuals, communities, and populations.<sup>65</sup> In many cases, certain health services while available in a country, are not always accessible to many of those who need them. Such as access to essential medicine in a particular country context has many dimensions and they all constitute an indispensable part of the right to health. These dimensions among others include: accessibility of medicines in remote rural areas and in urban centers having implications for the design of medicine supply systems; affordability of medicines for all, particularly, those who are economically poor, having implications for funding and pricing systems; detailed and correct information on medicines to patients and health workers.<sup>66</sup> Further, a national medicine policy must be founded on the fundamental human-rights principles of non-discrimination and equality and therefore must be designed in a way to ensure access for disadvantaged population. The design of the health system should take into account that equal treatment of all will not suffice for ensuring equal access and hence, a state must take proactive measures in favour of disadvantaged people. This process of detailed account on accessibility necessitates availability of disaggregated data to identify disadvantaged and marginalized groups and measure their progress towards equal access.<sup>67</sup>

Again on the issue of progressive realization question arises with regard to what should be accounted for progressive realization. Health outcomes are generally taken to be the key indicators as a reference for progress made at the national levels and international levels.<sup>68</sup> Whether these indicators are sufficient for measuring rights-based approach to health remains a big question.<sup>69</sup> Where health outcomes are formulated as

<sup>63</sup> Alicia Ely Yamin, "Beyond Compassion: the Central Role of Accountability in Applying a Human Rights Framework to Health" (2008) 10 (2), 1-20

<sup>64</sup> Helen Potts, *Accountability and the Right to the Highest Attainable Standard of Health*, (Human Rights Centre, University of Essex, 2008) 7.

<sup>65</sup> Ibid.

<sup>66</sup> See above note 29, 2049.

<sup>67</sup> Ibid.

<sup>68</sup> Sofia Gruskin, Edward Mills and Danial Tarantola, "History, Principles, and Practice of Health and Human Rights" (2007) 370 *The Lancet*, 449, 452.

<sup>69</sup> For details see Rebeka Thomas and *et al*, "Assessing the Impact of a Human Rights-Based Approach across a Spectrum of Change for Women's, Children's, and Adolescents' Health", (2015) 17(2), *Health and Human Rights Journal*, 11-20,

the key indicators for progress made, other important dimensions and levels at which human rights framework may have an important impact on are left unaccounted for. The rights-based framework needs to identify and measure the contributions made by it at different levels, i.e., the individual levels, structural levels, and also programme levels. This process of identification and measures of progress encompassing diversified aspects at multi-levels beyond the health outcomes is as important as the health outcome indicators as reference of progress, because looking at the changes that are brought in across a spectrum allows us to establish a stronger link between specific interventions, their outputs and impact.<sup>70</sup> Relevant to this discussion is the WHO's current list of Core Global Health Indicators. This list of indicators, despite having a number of indicators consistent with RBAs like the availability of health services, medicines, and personnel, unfortunately overlooks out the determinants of health, i.e., the key aspects of RBAs. The list does not have any indicator to measure contributions made by communities, enabling laws and policies, education, gender- or culture-appropriate programs, and efforts to overcome socioeconomic barriers.<sup>71</sup> The multidisciplinary, multi-country series of studies *Success Factors for Women's and Children's Health* revealed how the investments made beyond the health sector like education, women's participation, the environment, governance, poverty, etc. as well as the strategies adopted for community mobilization, participation, and accountability have contributed to fifty percent reduction of child mortality in the low and middle income countries.<sup>72</sup>

There are a number of contested issues on accountability mechanisms that poses serious challenges for RBAs to health. In the RBAs, States Parties are designated as the primary duty bearers. However, outside of the State, there are ranges of stakeholders who are not clearly linked in the accountability mechanism.<sup>73</sup> Despite the fact that RBAs are very much central to international cooperation and assistance, the locus of the international bodies and donors in the accountability loop is not clear. The role of the funding agencies is not made clear in terms of ensuring that the fund is used in a manner that fulfils citizens' rights.<sup>74</sup> Further, this has been raised as a major problem on the issue of accountability by the experts.<sup>75</sup> Even within the state machinery the responsibility of individual health professional or staff are not well explained in terms

<sup>70</sup> Kumanan Rasanathan, Johanna Norenthag, and Nicole Valentine, "Realizing Human Rights-based Approaches for Action on the Social Determinants of Health", (2010) 12 (2) *Health and Human Rights*, 49, 55.

<sup>71</sup> See above note 69, 14.

<sup>72</sup> For details see, Shyama Kuruvilla and *et al.*, "Success Factors for Reducing Maternal and Child mortality," (2014) 92(4) *Bulletin of the World Health Organization*, 533-544.

<sup>73</sup> See above note 32, 1417;

<sup>74</sup> See above note 32, 1433.

<sup>75</sup> Celestine Nyamu-Musembi and Andrea Cornwall, *What is the "rights-based approach" all about? Perspectives from International Development Agencies*, (Working Paper 234, Institute of Development Studies, 2004) 12; See above note 32, 1417; See above note 61, 72;

of realising health rights and it is particularly, when health professionals or staff are faced with the situations wherein the interests of their patients conflict with the interests of the third parties. The Frontline-line health workers are frequently caught in situations whereby they are simply unable to provide the services claimed by the right-bearers due to systemic factors.<sup>76</sup>

Despite the fact that non-state parties have been ever expanding and playing a critical role in the various spheres of health sector, i.e., service provision, biomedical research, health insurance, health management, pharmaceutical industry, health management etc., their accountability is grossly ill-defined and disconnected. In most of the developing countries regulatory mechanisms for private sectors are grossly inadequate and scantily enforced and hence, poses a big challenge in the realization of the right to health.<sup>77</sup> It is beyond any dispute that accountability in rights-based framework extends to all stakeholders i.e., public and private sectors and all international bodies working in the health sector.<sup>78</sup>

A human rights based approach requires strong accountability mechanisms with a range of implications, i.e., redress, remedial action, and guarantees of non-repetition.<sup>79</sup> It calls for diversified and multipronged strategy, including multiple forms of review and oversight, including administrative, political, legal, and international accountability and should involve multilevel stakeholders within and beyond the health sector. Interventions like, the mobile health courts or quasi-judicial and non-judicial bodies, complaints mechanisms within the health system, national human rights institutions, and professional standards associations should evolve and be tested.<sup>80</sup>

## 8. Conclusion

While application of the legal language and standards of human rights to health policy and programmes for a rights-based approach to health has opened the door for addressing health inequalities for dispensing social justice, it has also been confronted with a wide range of challenges. There has been continual debates over whether a strategy, intervention, and policy ultimately upholds human rights. Hence, ideas and ways of integrating human rights into health policies, programmes, and systems have been evolving and is still far from reaching an agreed form and method. Despite the ongoing efforts towards achieving a standard procedure to be established, the rights-based analysis for health system development has not been getting due attention at the policy making levels in most of countries. However, it is recognized across the board that respect, protection, and fulfillment of human rights is crucial for the

<sup>76</sup> See above note 61, 69; See above note 63, 3.

<sup>77</sup> See above note 29, 2053; See above note 68, 370, See above note 61, 70

<sup>78</sup> See above note 29, 2053; See above note 32, 1417.

<sup>79</sup> For details see, Alicia Ely Yamin, "Beyond Compassion: the Central Role of Accountability in Applying a Human Rights Framework to Health" (2008) 10 (2), 1-20

<sup>80</sup> See above note 79.

improvement of health status of individuals and populations.

The right to the highest attainable standard of health is key to establish an equitable health system. Therefore, the right to health should be clearly positioned at the centre of rights-based approaches to health and be interpreted in accordance with public international, and international human rights, law. The concepts of progressive realization, resource availability, and international assistance and cooperation, as well as AAAQ - need careful discussion, interpretation, and application and therefore, requires constant academic exercises.

Since RBAs are mandated to promote a participatory development process, it cannot do without the empowerment of people. All the stakeholders are to be involved as active agents in the entire policy process. Therefore, it needs to start with the participatory policy process. There must exist mechanisms to ensure public participation as well as meaningful agency on the part of those most affected by policies at different levels. Creating appropriate indicators for analyzing health system from a rights-based approach and monitoring and measuring progress towards progressive realization of health rights is one of the key contemporary challenges. More exhaustive works are needed to reflect on the necessities of a rights-based health system and to critically assess the measures and indicators applied for right based health system throughout the programme cycles. Similarly, multipronged strategies for ensuring accountability encompassing range of duty bearers and right holders are to be developed for, applied at various stages of programme planning and implementation and tested. RBAs to be able to release their transformative potentials, are not to be applied or practiced like technical formulas.

This study by laying down the contemporary thoughts and debates on conceptualizations and applications of RBAs reveals the complexities and challenges in the process. The study urges the necessity of collective efforts at multiple levels with shared views and experiences for resolving such challenges. Arbitrary conceptualisations and applications of RBAs by organisations working in the field of health may not do justice to what is actually deemed by it. Similarly, what is presumed by health policy making bodies at the state levels by RBAs could be far from enough to serve the purpose of RBAs in health. Sensitive issues like accountability mechanisms are less likely to be evolved only by state machineries particularly wherein they themselves are to be held accountable. Further, even if there are well-articulated RBAs at the policy levels, it is critical to examine if the rights principles are appropriately taken into account and are systematically implemented.

# Nature of Land and Pre-emption Suits: Demystifying Ambiguities

Dr. Md. Towhidul Islam\*  
Shirin Sultana\*\*

## 1. Introduction

The right of pre-emption entitles a right holder to get preferentially a land sold to a third party by paying a price equal to that other settled or paid by the latter. In our country, besides Muslim Law there are two key statutes, namely, the State Acquisition and Tenancy Act 1950 (SAT Act)<sup>1</sup> and the Non-Agricultural Tenancy Act 1949 (NAT Act)<sup>2</sup> containing the right of pre-emption for agricultural and non-agricultural land respectively.<sup>3</sup>

Section 96 of the SAT Act<sup>4</sup> deals with pre-emption of agricultural land. This section went through certain amendments affecting particularly right holders and the homestead land. Under the original section, when agricultural land of any holding was transferred, any co-sharer tenant of that holding or tenant having land contiguous to the land transferred could claim pre-emption. However, this provision was amended in 2006 with material changes which ultimately limited the scope of pre-emption. Under this new section, pre-emption can now be claimed only by a co-sharer tenant in the holding by inheritance within two months of the notice of transfer or from the date of the knowledge of the transfer but not after three years when the land of that holding is sold out.

On the other hand, section 24 of the NAT Act<sup>5</sup> deals with pre-emption of non-agricultural land. This section has not been changed yet. Under this section, when any non-agricultural land held by a non-agricultural tenant is transferred, any co-sharer tenant of such land may claim pre-emption within four months of the notice of transfer or from the date of the knowledge of the transfer.

When there arises a claim for pre-emption as regards an agricultural land, a case usually called a miscellaneous case must be recorded under the SAT Act by filing an application and for a non- agricultural land, a miscellaneous case has to be filed under

---

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

\*\* Lecturer, Department of Law, University of Dhaka.

<sup>1</sup> State Acquisition and Tenancy Act 1950 (East Bengal Act No. XXVIII of 1951) (amended in 2006). The full text is available at <[www.bdlaws.minlaw.gov.bd](http://www.bdlaws.minlaw.gov.bd)> 10 December 2018.

<sup>2</sup> Non Agricultural Tenancy Act 1949 (East Bengal Act No. XXIII of 1949). The full text is available at <[www.bdlaws.minlaw.gov.bd](http://www.bdlaws.minlaw.gov.bd)> 10 December 2018.

<sup>3</sup> Mohammad Towhidul Islam, *Land Law: Text, Cases & Materials* (Dhaka,<sup>2nd</sup> ed, 2018) 220.

<sup>4</sup> State Acquisition and Tenancy Act 1950, s 96.

<sup>5</sup> Non-Agricultural Tenancy Act 1949, s 24.

the NAT Act.<sup>6</sup> This sounds quite simple but in practice complications may come up with misunderstanding the nature of land since it may be an agricultural or non-agricultural land. This improper identification of the nature of land may lead to a litigation under a wrong statute and cause the application be disallowed. However, this matter was different before the amendment of section 96 of the SAT Act.<sup>7</sup> Under the previous provision, any co-sharer tenant of that holding or tenant having land contiguous to the land transferred could claim pre-emption within four months from the date of the service of the notice or from the date of the knowledge of the transfer and there was no specific maximum time bar.

Further, before 2006, the provisions of the SAT Act and the NAT Act were almost similar except a difference on the amount of compensation. So, in a pre-emption case, there was a chance of conversion which allowed transposing a pre-emption application filed under one statute into an application under another statute at a later stage. As a result, while deciding a case if the Court found that the pre-emption case was otherwise permissible despite the mis-description or mis-quotation of the provisions of law or non-insertion of correct provisions of law, the Court could give remedy.<sup>8</sup> Further, the amendment of an application was possible at any stage before pronouncing the judgment.<sup>9</sup> A number of decisions made by our Apex Court on this point support the conversion and amendment of applications.<sup>10</sup> It is to be noted that all of these decisions were given before the 2006 amendment of section 96. Therefore, a case regarding agricultural land filed under the NAT Act could be converted into one under the SAT Act and the vice versa. However, after the amendment in 2006, certain basic differences between the provisions of these two statutes arise including restricting the mode of transfer only to sale, entitling only the co-sharer tenant of holding by inheritance and excluding homestead land from pre-emption.<sup>11</sup>

<sup>6</sup> In the case of pre-emption under statutory laws (SAT Act and NAT Act), the proceeding is called a miscellaneous case and it starts with an application and under Muslim Law, the proceeding is called a pre-emption suit which starts with a plaint. See Islam, above n 3, 213 & 225.

<sup>7</sup> Section 96 of the Act No. XXVIII of 1951 is substituted with a new section 96 by section 2 of the State Acquisition and Tenancy (Amendment) Act 2006 (Act No. XXXIV of 2006).

<sup>8</sup> Mohammad Hamidul Haque, *Trial of Civil Suits and Criminal Cases*, (Dhaka, 2010) 174-176.

<sup>9</sup> Ibid.

<sup>10</sup> *Rokeya Begum v Md. Nurul Absar* (2004) 24 BLD (AD) 295, 303; *Jadav Chandra Mali v Abdul Khaleque* (1975) 27 DLR (AD) 114; *Abdus Sobhan Sheikh v Kazi Moulana Jahedullah* (2000) 5 MLR (HC) 140, 145; *Ramchandra Saha v Malay Baran Kundu* (2004) 24 BLD (HCD) 280, 283.

<sup>11</sup> Now under the SAT Act, pre-emption is allowed only for one type of transfer i.e. sale whereas under the NAT Act, the word is still transfer in general rather than any specific mode of transfer; only the co-sharer tenants by inheritance can apply for pre-emption under SAT Act whereas any co-sharer tenant of the land transferred can apply under NAT Act; application has to be made within two months from the date of knowledge or from getting the notice and no case will be maintainable after three years from the date of registration of sale deed under the SAT Act whereas application under the NAT Act has to be made within four months from date of knowledge or from getting the notice of transfer and there is no final limitation time; compensation at the rate of 25% and interest at the rate of 8% have to be deposited with application under SAT Act, failing which application shall be dismissed whereas under NAT Act, compensation at the rate of 5% and interest at the rate of six and quarter per centum have to be paid.

Due to these basic differences, conversion of applications between these two statutes becomes impracticable now-a-days.<sup>12</sup> Further, there appears almost no scope to allow such conversion even by taking any lenient construction of these provisions of law. In the absence of any opportunity to convert an application, it is important to file an application under the correct provisions of law.<sup>13</sup> And for such doing, one needs to have a clear idea regarding the nature of land. However, there are no definite criteria for determining the nature of land whether it being an agricultural or non-agricultural land. Sometimes it is decided on the basis of the location of the land, sometimes on the basis of the purpose for which the land is used and sometimes on the basis of the tenancy within which the land comprises. As such, ambiguities always turn up with regard to determining the nature of the land. Problems also come up in cases of ascertaining the nature of land when the land is described in a transfer deed in a particular manner. Again confusion arises regarding the nature of land while deciding with reference to the concept of ‘co-sharership in holding’ and ‘co-sharership in land’.

So, before claiming pre-emption under statutory laws, a clear understanding about the nature of land from all aspects is a basic requirement. Therefore, the objective of the article is to clarify all these issues required for filing a pre-emption case under the SAT and the NAT Act in the light of statutory laws and judgments given by our Apex Court.

## **2. Determining the Nature of Land: Agricultural and Non-agricultural**

Though the SAT Act mainly deals with agricultural land, nowhere in the Act, was the term ‘agricultural land’ defined. On the other hand, the NAT Act dealing with non-agricultural land defines ‘non-agricultural land’ as land used and leased out for purposes unconnected with agriculture or horticulture or cultivation and manufacture of tea.<sup>14</sup> From this definition of non-agricultural land, an inference of ‘agricultural land’ can be made as land which are connected with agriculture or horticulture.<sup>15</sup> But this definition leading to a simple identification of agricultural and non-agricultural land is not enough for all practical situations. As for example, can a land situated in municipal area used for agricultural purposes be termed as agricultural land? Or what would be the character of land which is used both for agricultural and non-agricultural purposes? All these questions need to be addressed.

In *Mst Lutfun Nahar* case,<sup>16</sup> it has been opined by the Court that the purpose of settlement and the document creating the settlement are the determining factors as to whether the land is agricultural or non-agricultural. Even if contradiction is seen between the record-of-rights and the document creating the settlement regarding the

---

<sup>12</sup> Haque, above n 8.

<sup>13</sup> Ibid.

<sup>14</sup> Non-Agricultural Tenancy Act, s 2(4)

<sup>15</sup> Islam, above n 3, 7.

<sup>16</sup> *Mst Lutfun Nahar v Syeeda Hashmat Ara Begum* (1969) 21 DLR (HC) 633, 637.

nature of land, the document creating the settlement will prevail.<sup>17</sup> This view is also supported by decisions given in a number of cases<sup>18</sup> where the nature of land mentioned in the patta deed/lease deed given by the landlord got prevalence over all other considerations.

In a later case, *Abdul Khaleque*<sup>19</sup>, the Appellate Division observed that the nature of land is referable to two things: firstly, the purpose for which tenancy was created or settlement was made and secondly, the location of the land. The Court held:

The character of the land is always referable to the purpose for which settlement was made. If the settlement was made for a purpose unconnected with the agriculture in that case the land even if used for the purpose connected with the agriculture would remain as non-agricultural land. It may also be mentioned that the purpose of the land may also be referable to its location or situation i.e. if it is within the Municipal area in that case the land would assume the character of non-agricultural land even if the said land was for the purpose connected with agriculture.<sup>20</sup>

This decision was also confirmed in the case of *Abdul Majid Pramanik*<sup>21</sup>. Regarding the land of municipal area, similar decision was also taken in two earlier cases, namely, *Abdul Khaleque* and *Rokeya Begum*<sup>22</sup>.

So, it is now a settled principle that the land situated in the municipal area (paurashava) i.e. land within urban area is considered as non-agricultural land irrespective of the purpose of settlement or actual use. The moment any upazila or area within union parishad is declared as paurashava under the Local Government (Paurashava) Act 2009<sup>23</sup> by the Ministry of Local Government, Rural Development and Cooperatives of the People's Republic of Bangladesh through official gazette, the land situated thereby becomes non-agricultural. Accordingly, pre-emption for such land must be claimed under the NAT Act. The reason for considering the land of urban area as non-agricultural is described in the afore-mentioned case of *Abdul Khaleque*<sup>24</sup> where the Court observed:

Since the land within the Municipality or in the urban area ultimately will be used for residential purpose in such situation an application seeking pre-emption

---

<sup>17</sup> Ibid.

<sup>18</sup> *Abdul Khaleque v Abdul Noor* (2006) 11 MLR (AD) 175, 178 & (2009) 17 BLT (AD) 75, 77; *Abdul Majid Pramanik v Md Sohrab Ali* (2011) 4 XP (AD) 117, 120.

<sup>19</sup> *Abdul Khaleque v Abdul Noor* (2006) 11 MLR (AD) 175, 178 & (2009) 17 BLT (AD) 75, 77.

<sup>20</sup> Ibid.

<sup>21</sup> *Abdul Majid Pramanik v Md Sohrab Ali* (2011) 4 XP (AD) 117, 120.

<sup>22</sup> *Abdul Khaleque v Jadav Chandra Mali* (1968) 20 DLR (HC) 562, 564 and *Rokeya Begum v Md. Nurul Absar* (2004) 24 BLD (AD) 295, 298.

<sup>23</sup> Local Government (Paurashava) Act 2009 (Act No. 58 of 2009) s 3(1).

<sup>24</sup> *Abdul Khaleque v Abdul Noor* (2006) 11 MLR (AD) 175, 178 & (2009) 17 BLT (AD) 75, 77.

ption in respect of the said land under section 24 of the Non-Agricultural Tenancy Act would be very much maintainable. We are of the view that the character of the land which are within the urban area or municipal area is determined keeping in view the purpose for which such land is likely to be used.

This stand of defining land on the basis of location has got some statutory recognition as well. Both the Agricultural Khas Lands Management and Settlement Policy, 1997 and the Non-Agricultural Khas Lands Management and Settlement Policy, 1995 defined ‘agricultural khas land’ and ‘non-agricultural khas land’ respectively. The term ‘non-agricultural khas land’ has been defined as land cultivable or uncultivable situated in the metropolitan areas, municipality areas, upazila headquarters and uncultivable lands situated outside the aforementioned areas<sup>25</sup> and ‘agricultural khas land’ has been defined as land other than those defined as non-agricultural khas land as per the Non-Agricultural Khas Lands Management and Settlement Policy 1995 i.e. cultivable khas lands situated outside the metropolitan areas, municipal areas and upazila headquarters.<sup>26</sup> Though these definitions deal exclusively with khas lands i.e. land which are in possession of the government,<sup>27</sup> the guiding principle for defining agricultural and non-agricultural land in general in accordance with their location can be inferred from these definitions.<sup>28</sup>

Apart from the urban area, there remains land in the rural area. In the rural area, there may be different types of land such as land used for agriculture or horticulture, land within hat/bazar, land used for the homestead purpose and land used for the business purpose etc. Now the questions are – will all these land of the rural area be considered as agricultural land in the same line as land of the urban area are considered non-agricultural? By which laws will pre-emption of these land be governed?

In a number of cases including *Abdul Khaleque*<sup>29</sup>, it is decided that in the case of a rural area, the character of land is always attributed to the nature of tenancy to which the land belongs. It is not dependent on the actual use of the land. If the tenancy is created or settlement is given for agriculture or horticulture purpose, such land will always be considered as agricultural land, otherwise they are not.

Now the consequent question is – when is a tenancy created? Before passing the SAT Act, the tenancy was created between the landlord (*zamindar*) and the tenant through settlement by patta deed or lease deed. And the nature of tenancy – whether it

<sup>25</sup> Non-Agricultural Khas Lands Management and Settlement Policy 1995, policy no. 2(Ka).

<sup>26</sup> Agricultural Khas Lands Management and Settlement Policy 1997, policy no. 9.

<sup>27</sup> For details regarding ‘khas land’, see Islam, above n 3, 363.

<sup>28</sup> Ibid, 8.

<sup>29</sup> *Abdul Khaleque v Abdul Noor and others* (2006) 11 MLR (AD) 175, 178 & (2009) 17 BLT (AD) 75, 77; *Muslim Halder (Md) v Sree Manik Lal Samaddar* (1998) 50 DLR (AD) 175; *Amir Hossain v Jatindra Chandra Das* 2 BSCD 171.

is for agriculture or not could be easily understood from the perusal of the deed of settlement or the lease deed. In the absence of the settlement deed or the lease deed, the record-of-rights i.e. CS khatian<sup>30</sup> prepared under the Bengal Tenancy Act, 1885<sup>31</sup> can be perused to understand the nature of tenancy. After the abolition of the *zamindari* system by the SAT Act, tenants become the owners of land under the government requiring to pay rents (land revenue) to the government regularly. In that case, tenancy can be said to have been created between the government and the owner of land.<sup>32</sup> And the record-of-rights – SA khatian<sup>33</sup>, RS khatian<sup>34</sup> and BS khatian<sup>35</sup> prepared or revised under the SAT Act can be said to be the proof of such tenancy.

In case of agricultural land, such land may have various names such as ‘Khanda’, ‘Chara’, ‘Chashi-Bhiti’, ‘Nama’ etc. Pre-emption for such land will lie under the SAT Act. In the case of land of hat or bazar known as ‘Chandina’ land, the SAT Act defines ‘hat’ or ‘bazar’ as:

[A]ny place where persons assemble daily or on particular days in a week primarily for the purposes of buying or selling agricultural or horticultural produce, livestock, poultry, hides, skins, meat, fish, eggs, milk, milk products, or any other articles of food or drink or other necessities of life, and includes all shops of such articles or manufactured articles within such place.<sup>36</sup>

Regarding the nature of land within hat or bazar, the Court held in the case of *Abdul Mannaf (Md)*<sup>37</sup>: Lands included within the periphery of a hat or Bazar is usually known as “Chandina” land. “Chandina” or Bazar lands are non-agricultural lands and, as such, the same is outside the scope of section 96 of the State Acquisition and Tenancy Act 1950.

<sup>30</sup> CS Khatian (Cadastral Survey Khatian) is prepared by conducting cadastral survey under section 101 of the Bengal Tenancy Act 1885 and section 117 of the Sylhet Tenancy Act 1936 covering the time from 1888 to 1963. For details see, Islam, above n 3, 76.

<sup>31</sup> Bengal Tenancy Act (Act No. VIII of 1885).

<sup>32</sup> Md Abdul Alim, ‘Land Management in Bangladesh with Reference to Khas Land: Need for Reform’ (2009) 14 *Drake Journal of Agricultural Law* 245, 247.

<sup>33</sup> SA Khatian (State Acquisition Khatian) is prepared by conducting State Acquisition survey under section 17 of the State Acquisition and Tenancy Act 1950 after the acquisition of rent receiving interest of the zamindars. It commenced from 1954 and ended in 1965. For details see, Islam, above n 3, 77.

<sup>34</sup> RS Khatian (Revisional Survey Khatian) is prepared under section 144 of the State Acquisition and Tenancy Act 1950 by conducting revisional survey after SA Record- of- Rights. It started from 1965 when SA Khatian ended and continued up to 1997. For details see, Islam, above n 3, 78.

<sup>35</sup> BS Khatian (Bangladesh Survey Khatian) is being prepared under section 144 of the State Acquisition and Tenancy Act 1950 which started since 1985 in some areas of Bangladesh. For details see, Islam, above n 3, 78-79.

<sup>36</sup> State Acquisition and Tenancy Act 1950, s 2(12).

<sup>37</sup> *Abdul Mannaf (Md) v Md Sohrab Ali Akand* (2006) 58 DLR (HCD) 242, 243.

Although the land within the periphery of a hat or bazar is identified as non-agricultural land, such land cannot be pre-emptible under any statute. The land within the hat or bazar is owned by the government. Such land cannot be private owned. Even no private person is allowed to establish any hat or bazar as per the Hats and Bazars (Establishment and Acquisition) Ordinance, 1959<sup>38</sup>. For establishing a hat or bazar, the government has to make declaration in this behalf. The procedure of declaring any such land as hat or bazar is dealt with under the aforesaid law.

Another category of land within the rural area is the homestead land. The SAT Act defines ‘homestead’<sup>39</sup> as:

[A] dwelling house with the land under it, together with any courtyard, garden, tank, place of worship and private burial or cremation ground attached and appertaining to such dwelling house, and includes any out-buildings used for the purpose of enjoying the dwelling house or for purpose connected with agriculture or horticulture and such lands within well defined limits, whether vacant or not, as are treated to be appertaining thereto.

From the plain reading of this definition itself, it appears that the homestead land is in the nature of non-agricultural land. The same conclusion was drawn by the Court in the case of *Mst Lutfun Nahar*<sup>40</sup>.

On the question of pre-emption of such land, it can be argued that pre-emption would lie under the NAT Act as the homestead land is considered as non-agricultural. In reference to homestead land situated in rural area, the High Court Division came to such a finding in the case of *Md Korban Ali Khan*<sup>41</sup>. The Court held:

A non-agricultural land situated in a rural area is pre-emptible under section 24 of the Non-Agricultural Tenancy Act. On a consideration of section 24 of the Non-Agricultural Tenancy Act it is found that pre-emption under section 24 of Non-Agricultural Tenancy Act is not confined to the land situated within the municipal area. A non-agricultural land situated in a rural area is also pre-emptible under section 24 of the Non-Agricultural Tenancy Act.

However in the case, *Fazlu Mia (Md)*<sup>42</sup>, the Appellate Division held that ‘the law is well settled that homestead of the raiyat outside municipality is pre-emptible under section 96 of the Act’.

In the case of *Abdus Salam Mia*<sup>43</sup>, the High Court Division reached to the same conclusion as that of *Fazlu Mia (Md)* case and the Appellate Division concurred with

<sup>38</sup> Hats and Bazars (Establishment and Acquisition) Ordinance 1959 (East Pakistan Ordinance No. XIX of 1959).

<sup>39</sup> State Acquisition and Tenancy Act 1950, s 2(14).

<sup>40</sup> *Mst Lutfun Nahar v Syedda Hashmat Ara Begum* (1969) 21 DLR (HC) 633, 637.

<sup>41</sup> *Md Korban Ali Khan v Asalat Khan* (2001) 6 MLR (HCD) 28, 31.

<sup>42</sup> *Fazlu Mia (Md) v Asabur Rahman* (2005) 10 BLC (AD) 10, 12.

<sup>43</sup> *Abdus Salam Mia v Sontosh Kumar Majumder* (2003) 8 BLC (AD) 147, 148.

the findings given by the High Court Division. Again this issue was elaborately addressed in the case of *Abdul Khaleque*<sup>44</sup> where a pre-emption case was filed under section 24 of the NAT Act on the ground that the land so transferred to the pre-emptee is homestead with adjuncts connected with agriculture. The prayer for pre-emption was contested mainly on the ground that the case was not maintainable since the land is not non-agricultural and as such pre-emption was required to be filed under the SAT Act. When the case came before the Appellate Division, it held:

The homestead and the adjuncts thereto of an agricultural raiyat in the rural area are hardly be considered non-agricultural land in the absence of establishing that the said land was taken settlement for non-agricultural purpose. The homestead of an agricultural raiyat is included within the agricultural holding.

In the latest case on this point, *Abdul Majid Pramanik*<sup>45</sup>, the Appellate Division came to the same conclusion. The Court held:

In a petition claiming pre-emption in respect of non-agricultural land situated in rural area the court is required to see whether the tenancy was created for agricultural or non-agricultural purpose. If the settlement of non-agricultural land was made for purposes connected with the agriculture then it would remain as agricultural land. ....there is no evidence on record to show that the tenancy was created for non-agricultural purpose. The case land is admittedly situated in rural area. The homestead of the agriculture raiyat is included within the agricultural holding and therefore, the institution of the case for pre-emption under section 24 of the Non-Agricultural Tenancy Act is misconceived one.

Here, in the case of *Abdul Majid Pramanik*<sup>46</sup> the Appellate Division did not overrule the finding of the High Court Division arrived at in *Md Korban Ali Khan*<sup>47</sup> though mentioned about it. This indicates that the stand taken in that case is also not opposed by the Appellate Division. If any land situated in rural area can be considered as non-agricultural by being contained in a non-agricultural tenancy, pre-emption under the NAT Act can lie.

So, from the above-mentioned decisions of the Apex Court, it is seen that the tenancy is always the determining factor for deciding the nature of land in the rural area. Only on the basis of existence of homestead land in the rural area, it cannot be said that such homestead land is non-agricultural. When the homestead land stands in a non-agricultural tenancy, such homestead land will be considered as non-agricultural

---

<sup>44</sup> *Abdul Khaleque v Abdul Noor* (2006) 11 MLR (AD) 175, 178 & (2009) 17 BLT (AD) 75, 77.

<sup>45</sup> Ibid.

<sup>46</sup> *Md Korban Ali Khan v Asalat Khan* (2001) 6 MLR (HCD) 28, 31.

<sup>47</sup> *Abdul Majid Pramanik v Md Sohrab Ali* (2011) 4 XP (AD) 117, 119, 120.

and the pre-emption will lie under the NAT Act. On the other hand, when the homestead land stands in an agricultural tenancy, such homestead land will be considered as agricultural and the pre-emption will lie under the SAT Act. The same would be the situation in the case of land used for business purpose in the rural area. The nature of tenancy in which such land stands is the determining factor.

It is worth mentioning here that in sub-section 16 of section 96 of State Acquisition and Tenancy Act (sub-section 16 added in 2006), it is stated that '[n]othing in this section shall be deemed to apply to homestead land'. Now what will be the implication for this sub-section? Though the case of *Abdul Majid Pramanik*<sup>48</sup> was decided in 2010 regarding pre-emption of homestead land situated in the rural area, nothing was said regarding this sub-section. If the implication for section 96(16) is considered having regard to the provisions of another statute i.e. Land Reforms Ordinance, 1984,<sup>49</sup> then it can be concluded that homestead land within rural area might not be pre-emptible. Because as per the Land Reforms Ordinance, 1984,<sup>50</sup> any land used as a homestead by its owner in the rural area has been kept exempted from all legal processes, including seizure, distress, attachment or sale by any officer, court or any other authority. Hence, a pre-emption proceeding falls within the realm of the term 'legal process' and as such homestead land might not be pre-emptible.<sup>51</sup>

The nature of land can also change from agricultural to non-agricultural through a process called conversion. This conversion is undertaken by the land administration authority (collector) of a district. Previously a tenant or landlord could apply for conversion under sections 2(4) and 72 of the Non-Agricultural Tenancy Act 1949 on payment of required fees, the collector could make the conversion. But chapter X containing section 72 has been omitted by section 22 of the East Bengal Non-Agricultural Tenancy (Amendment) Ordinance, 1967.<sup>52</sup> All these restrictions came due to the unscrupulous use of agricultural land for non-agricultural purposes by people and thereby changing the nature of land from agricultural to non-agricultural.<sup>53</sup> The National Land Use Policy, 2001<sup>54</sup> also provides guideline for conservation of agricultural land by prohibiting the use of agricultural land for non-agricultural purposes<sup>55</sup>. In line with this, a new legislation has been proposed in 2016 named 'The

---

<sup>48</sup> Above n 45.

<sup>49</sup> Land Reforms Ordinance 1984 (Ordinance No. X of 1984).

<sup>50</sup> Ibid, s 6.

<sup>51</sup> This position finds support from a decision of the High Court Division in 21 BLD 244. For details see, Islam, above n 3, 229.

<sup>52</sup> (East Pakistan Ordinance No. IX of 1967)

<sup>53</sup> Md Abdul Quasem, 'Conversion of Agricultural Land to Non-agricultural Uses in Bangladesh: Extent and Determinants' (2011) 34(1) *Bangladesh Development Studies* 59-85.

<sup>54</sup> National Land Use Policy was adopted in 2001 by the Ministry of Land, Government of Bangladesh.

<sup>55</sup> National Land Use Policy 2001, policy no. 7.2.

Conservation of Agricultural Land and Land Use Bill 2016’ which also offers provision prohibiting conversion of agricultural land into a non-agricultural one without prior permission of the proper authority, violation of which will be dealt with penal sanctions.<sup>56</sup> Now under the existing laws, the land administration authority can make a conversion of their own or on an application if they find that any agricultural land is being used for non-agricultural purpose and then assess new rent (now called land development tax) for that land accordingly.<sup>57</sup>

### 3. Understanding the Nature of Land with Reference to Transfer Deed

In the case of determining the nature of land, a difficult situation may arise when the transfer deed describes a land in a different way. The facts of the case of *Ramchandra Saha*<sup>58</sup> and *Abdul Mannaf (Md)*<sup>59</sup> can be illustrative of the situation. In the former case,<sup>60</sup> the pre-emptor after getting a notice under section 89 filed a miscellaneous case under section 96 of the SAT Act as in the kabala – the sale deed, the case land was described as an agricultural land. But the pre-emptee purchaser contested the case claiming that the disputed plot is a part of a hat and the same is not agricultural land, so the case under section 96 was not maintainable. In this case the High Court Division held that ‘[n]ature and character of the case land as described in the recital and schedule of the impugned kabala governs the provisions of law attracting the right of pre-emption.’<sup>61</sup>

In the latter case i.e. *Abdul Mannaf (Md)*<sup>62</sup>, the pre-emptor filed a miscellaneous case under section 96 of the SAT Act as in the kabala – the sale deed the case land was described as ‘kanda’ meaning agricultural land. But the pre-emptee purchaser contested the case by stating that the disputed land is a ‘Chandina’ meaning part of bazaar and non-agricultural land, so the case under section 96 was not maintainable. In this case, the High Court Division held that ‘[w]hen the pre-emptee himself purchased the land under pre-emption as “Kanda” land, in absence of any pertinent proof, he has no scope to take the plea in the pre-emption case that the land is “Chandina”.’<sup>63</sup>

Now, in the first case, the description in the transfer deed was considered as the sole determining factor to decide the nature of land transferred. But the decision in the later case differs from the earlier one on two points, firstly, in the later case it is opined that if the nature of land transferred cannot be proved in any other way, description

---

<sup>56</sup> Islam, above n 3,414-415.

<sup>57</sup> State Acquisition and Tenancy Act 1950, s 144(4A) (b) (II), 98A (3), 107(3) and Land Management Manual 1990, para 28.

<sup>58</sup> *Ramchandra Saha v Malay Baran Kundu* (2004) 24 BLD (HCD) 280, 281, 282.

<sup>59</sup> *Abdul Mannaf (Md) v MdSohrab Ali Akand* (2006) 58 DLR (HCD) 242.

<sup>60</sup> Above n 57

<sup>61</sup> Ibid.

<sup>62</sup> Above n 59.

<sup>63</sup> Ibid

given in the deed can be considered to determine the nature and secondly, such recourse has to be taken to estop the pre-emptee purchaser from overturning his earlier position regarding the nature of land. So, where the nature of land is pertinently of a specific type by definite proof (agricultural or non-agricultural), mere recital in the deed cannot change the character of the land so as to attract the provisions of law. In the case of *Adam Ali Bepari*<sup>64</sup>, in deciding the nature of land, the Court relied upon the entry made in the record of rights (khatians) over the recital in the deed. In another case, namely, *Forman Ali Howlader*<sup>65</sup> the Court held:

Mere recital in the deed describing the character of the land under pre-emption as agricultural one does not also change the character of the land against the entry in CS khatians recording the disputed land as “Bhiti” which evidently indicates that the purpose for which the lease was taken was not agricultural one.

Therefore, it can be concluded that the description of the land given in the transfer deed cannot be taken resort of in identifying the nature of land except in very exceptional circumstances for pre-emption purpose. In general, the nature of land would be determined in the ways as has been discussed in the previous part of this article.

#### **4. Understanding the Nature of Land with Reference to ‘Co-sharership in Land’ and ‘Co-sharership in Holding’**

Apart from the identification of land as being agricultural or non-agricultural, for exercising the right of pre-emption under statutory laws – the SAT Act and the NAT Act, the nature of land has to be understood from the perspective of ‘Co-sharership in Land’ and ‘Co-sharership in Holding’. Because under the SAT Act, the pre-emptor has to be a co-sharer tenant in the holding to which the disputed land belongs. On the other hand, under the NAT Act, the pre-emptor has to be a *co-sharer tenant in the land* transferred.

For ‘Co-sharership in Holding’, section 96(1) of the SAT Act states that ‘if a portion or share of a holding of a raiyat is sold to a person who is not a co-sharer tenant in the holding, one or more co-sharer tenants of the holding may.....apply to the court for the said portion or share to be sold to himself or themselves.’

For ‘Co-sharership in Land’, section 24(1) of the NAT Act states that ‘if a portion or share of the non-agricultural land held by a non-agricultural tenant is transferred, one or more co-sharer tenants of such land may.....apply to the court for the said portion or share to be transferred to himself or themselves, as the case may be.

Further, for understanding ‘Co-sharership in Land’ and ‘Co-sharership in holding’ the terms ‘land’ and ‘holding’ require to be explained. Section 2(16) of the SAT Act

<sup>64</sup> *Adam Ali Bepari v Abdur Rahman Dewan* (1991) 43 DLR (HCD) 510, 511.

<sup>65</sup> *Forman Ali Howlader v Helaluddin Pashari* (1968) 20 DLR (HCD) 1197.

defines land as land which is cultivated, uncultivated or covered with water at any time of the year, and includes benefits to arise out of land, houses or buildings and also things attached to the earth, or permanently fastened to anything attached to the earth'. Whereas, 'holding' is defined in section 2(13) of the same Act as 'a parcel or parcels of lands or an undivided share thereof, held by a raiyat or an under-raiyat and forming the subject of a separate tenancy.

The meaning of the land is easily understandable whereas formation of a tenancy is the prime consideration for being a holding. When a khatian is opened with a specific amount of rent in the name of a person or some persons having share of land, a holding comes into being. A holding may comprise a number of shares or a single share of land. As for example, Mr. X has land in two separate SA khatiyans – khatain no. 12 & khatian no. 13 where Khatain no. 12 consists of 20 decimals of land in one plot, plot no. 5 and khatain no. 13 consists of 50 decimals of land in three plots, plot no. 6, 7 & 8. Here there exists two holdings, one in SA khatain no. 12 and another in SA khatian no. 13 forming two separate tenancies.

As mentioned earlier, co-sharership in holding to which the transferred land belongs is necessary for accrual of pre-emption right under section 96 of the SAT Act whereas *co-sharership in land* transferred is necessary under section 24 of the NAT Act. If a plain reading of these provisions is made, it seems that 'co-sharership in land' means joint possession in a specific land and '*co-sharership in holding*' means joint ownership of land recorded in a holding which forms a separate tenancy. As for example, Mr. X dies leaving behind three sons A, B & C and land of 60 decimals in one holding (RS khatian no. 520) consisting of three plots (1-3). As per the law of inheritance, each of three sons has got 20 decimals where A took plot no. 1; B took plot no. 2 and C took plot no. 3. Here, A, B & C are co-sharers of the same holding though their plots are different. Again among the three brothers, it is supposed that A died leaving behind two sons M and N. As per the law of inheritance, each of M and N would get 10 decimals from plot no. 1. Here, apart from co-sharership in the holding of khatian no. 520, M & N have the co-sharership in the land of plot no. 1.

Regarding the issue of 'land' and 'holding' dispute arises as to whether the expressions 'holding' appearing in section 96 of State Acquisition and Tenancy Act and '*land*' appearing in section 24 of the NAT Act bear the same meaning or not. This point first came up for consideration in the case of *Manindra Chandra Ghose*<sup>66</sup> with reference to section 26F of the Bengal Tenancy Act, 1885 (similar to section 96 of the SAT Act). In this case Sekandar Ali J sitting singly took the view that the expression 'non-agricultural land' as appeared in section 24 is equivalent to the word 'holding' as used in section 26F the Bengal Tenancy Act, 1885. The question again arose in the case of *Brindaban Chandra Choudhury*<sup>67</sup> where a Division Bench of the then Dacca High

<sup>66</sup> *Manindra Chandra Ghose v M Mujibul Islam* (1960) 12 DLR (HC) 785.

<sup>67</sup> *Brindaban Chandra Choudhury v Mosammat Rezia Begum* (1965) 17 DLR (HC) 77.

Court consisting of K M Hassan J and Sekandar Ali J differed on this question. K M Hassan J on examining the definitions of ‘*non-agricultural tenant*’, ‘*non-agricultural land*’ and ‘*holding*’ observed that ‘from the aforesaid definitions it does not appear that ‘non-agricultural land’ defined bears the definition of ‘holding’ in the Bengal Tenancy Act’. He further observed:

It is clear that the Legislature has maintained a distinction between non-agricultural land and holding with a purpose; it may be to limit the number of applicants by making it available only to the co-sharers of the land and not of the tenancy, so that distribution amongst all the co-sharers of the tenancy may not make the land unfit for the purpose for which it was taken.

Whereas, Sekandar Ali J supported his earlier position of *Manindra* case. As the two judges differed, the matter was referred to a third judge, Murshed J who supported the view of Sekandar Ali J. Amongst others, two prime arguments put forward by these two judges are (a) the expression ‘*tenant*’ appearing in section 24 of necessity presupposes a tenancy and the tenancy covers the entire land comprising such tenancy or holding. So, the tenancy and the entire land must be viewed as a unit and (b) it is obvious from the phraseology of section 24 of the NAT Act that a right of pre-emption similar to that conferred by section 26F of the Bengal Tenancy Act, 1885 was intended to be given to co-sharer tenants under the said section 24.

After the enactment of the SAT Act<sup>68</sup> again the question came up for consideration before the Appellate Division of the Supreme Court of Bangladesh in the case of *S M Basiruddin*.<sup>69</sup> In this case Ruhul Islam J by making a detailed discussion of the previous rulings, agreed with the view expressed by Hassan J in *Brindaban*<sup>70</sup> case. He gave an elaborated argument in support of his position<sup>71</sup>. He observed as follows:

In my opinion the Legislature consciously used the expression ‘non-agricultural land’ in sub-section (1) instead of using the expression ‘tenancy’ or ‘holding’ as used in section 26F of the Bengal Tenancy Act or section 96 of the State Acquisition and Tenancy Act. The Legislature does not use a word or expression in the statute unnecessarily. The legislature being fully conscious about the object of the legislation, knew it better which particular word or expression would serve the purpose of the legislation.....it appears that the Legislature has maintained a distinction between the expression ‘non-agricultural land’ and ‘holding’ with a purpose, which may be to limit the number of applicants by making it available only to the co-sharers of the land and not to the co-sharers in the tenancy, so that the distribution among all the co-sharers may not make the land unfit for the purpose for which it was taken.

---

<sup>68</sup> (Act No. XXVIII of 1951)

<sup>69</sup> *S M Basiruddin v Zahurul Islam Chowdhury* (1983) 35 DLR (AD) 230.

<sup>70</sup> Above n 67

<sup>71</sup> Above n 69, 256-258.

In this case,<sup>72</sup> F K M A Munim CJ, Badrul Haider Chowdhury J and A T M Masud J agreed with Ruhul Islam J, and Shahabuddin Ahmed J declined to make any comment on this point.

This issue was subsequently raised in a series of cases<sup>73</sup> where the Court came to the same finding as was arrived at by Ruhul Islam J in *Basiruddin*<sup>74</sup> case. In *Aminullah (Md)*<sup>75</sup>, the Court gave an elaborated observation as follows:

In a case of pre-emption filed under section 24 of the Non- Agricultural Tenancy Act if a co-sharer tenant owns a portion of land in any plot, he is to be treated as co-sharer in the entire plot even if the land of that plot is recorded in more than one khatian. Therefore, in the event of transfer of a portion of land of that plot appertaining to another khatian a co-sharer tenant can file a pre-emption case under section 24 of the Non- Agricultural Tenancy Act notwithstanding the fact that he does not have any interest in the khatian. The words ‘one or more co-sharer tenants of such land’ occurring in section 24 of the Non Agricultural Tenancy Act means a co-sharer in the plot not the holding as mentioned in section 96 of the State Acquisition and Tenancy Act.<sup>76</sup>

The latest case on this issue is *Asad Ali (Md)*<sup>77</sup> which was decided in May, 2014. Here the Court held:

It is evident that section 24 of the Non-Agricultural Tenancy Act does not say about the right of pre-emption of co-sharers of a holding but it says about the right of pre-emption of the sharers of the land. “Land” means land. ‘Land’ does not mean ‘holding’ or ‘tenancy’.....Section 24 of the Non-Agricultural Tenancy Act has given the right of pre-emption to the co-sharer tenants of the non-agricultural land while section 96 of the State Acquisition and Tenancy Act has given the right of pre-emption to the co-sharer tenants of the holding. To seek pre-emption under section 24 of the Non-Agricultural Tenancy Act the petitioner does not require to be co-sharer of the holding, but he requires to be co-sharer of the land.

With this issue, the next question is – how long does a person remain co-sharer in land and co-sharer in holding? It is now a settled principle that in the case of ‘*co-sharership in land*’, co-sharership is lost in two ways, firstly, upon separation of jama i.e. opening of new khatain and secondly, upon partition of the land by metes and

---

<sup>72</sup> Ibid, 230

<sup>73</sup> *Syed Sad Ali v Bidhan Chandra Dev* (2000) 52 DLR (HCD) 609, 611; *Md Shafiuddin Chowdhury v Md Abdul Karim* (2001) 9 BLT (AD) 220, 222; *Rokeya Begum v Md Nurul Absar* (2004) 24 BLD (AD) 296, 301; *Aminullah (Md) v Serajl Huq* (2013) 65 DLR (AD) 82, 84.

<sup>74</sup> Above n 69.

<sup>75</sup> *Aminullah (Md) v Serajl Huq* (2013) 65 DLR (AD) 82, 84.

<sup>76</sup> Ibid.

<sup>77</sup> *Asad Ali (Md) v Golam Sarwar* (2014) 66 DLR (AD) 315, 319.

bounds either through a partition deed or through a final decree in a partition suit even if the original holding/tenancy remains intact. These propositions were established with reference to the concept of ‘non-agricultural land’ occurring in section 24 of the NAT Act in the case of *Md Shafiuddin Chowdhury*<sup>78</sup>, *Alfazuddin Ahmed*<sup>79</sup>, *Aktaruzzaman alias Shahin*<sup>80</sup> and *Asad Ali (Md)*.<sup>81</sup>

In the case of ‘co-sharership in holding’, co-sharership is lost when the jama (holding) is split up in accordance with the provisions of section 117(1) of the SAT Act and a new khatian is opened. Passing of the final decree in a partition suit does not ipso facto end co-sharership in holding. If on the basis of that decree, jama is separated or revised later then the co-sharership shall cease. These principles were established with reference to the concept of ‘holding’ occurring in section 96 of the SAT Act in the case of *Rokeya Begum*<sup>82</sup> and *Jainul Abedin Master*<sup>83</sup>.

## 5. Concluding Remarks

The propensity of filing application under statutory laws especially the SAT Act and the NAT Act is rampant. By filling pre-emption case, a claimant can get remedy only when the application is filed under proper statutory laws. This is a must after the major amendments brought in the SAT Act in 2006. And bringing an application under proper statutory laws depends on correct identification of the nature of land. But difficulties always arise in practice when determining the nature of land is in question. These difficulties are highlighted in numerous cases of our lower and higher judiciary. In such a backdrop, this article tries to clarify these difficulties by expounding the facts of a number of cases. Thereafter, possible way outs have been suggested by identifying the nature of land from different aspects. The nature of land has been clarified by determining the land as agricultural and non-agricultural from the perspectives of statutory laws, rules, land related policies and decisions of our Apex Court. Then, the nature of land has been illuminated from the viewpoint of transfer deeds against which pre-emption has been claimed by examining the decisions given by the Apex Court in a series of cases. Lastly, by analyzing the statutory laws and decisions of the Apex Court, the nature of land has also been elucidated from the viewpoints of co-sharership in land and co-sharership in holding denoted under the statutory laws.

---

<sup>78</sup> *Md Shafiuddin Chowdhury v Md Abdul Karim* (2001) 9 BLT (AD) 220, 222 & (2000) 52 DLR (AD) 41.

<sup>79</sup> *Alfazuddin Ahmed v Abdur Rahman* (2003) 55 DLR (AD) 108, 113.

<sup>80</sup> *Aktaruzzaman alias Shahin v Abdur Rashid Khan* (2010) 62 DLR (AD) 250, 254.

<sup>81</sup> Above n 77.

<sup>82</sup> *Rokeya Begum v Md. Nurul Absar* (2004) 24 BLD (AD) 295, 300-301.

<sup>83</sup> *Jainul Abedin Master v Haji Salamullah Khan* (2008) 13 MLR (AD) 143, 145.

# **Divergence in NPL Recovery of Public Banks vs. Private Banks in Bangladesh: Could ADR be an Effective Tool to Improve the Parity?**

Dr. Jamila Ahmed Chowdhury\*  
Aminul Islam\*\*

## **1. Introduction**

History of economic development suggests that banking and financial expansions of world economies are directly connected. The growth of the banking sector is followed by the economic development of countries, as in the case of the United States of America, or economic development follows the expansion of the banking sector, as in the case of the United Kingdom and many other countries throughout Europe<sup>1</sup>. Following the first pattern, the banking sector in Bangladesh has been expanding rapidly in response to the rapid economic growth in the country. The financial deepening of the banking sector in Bangladesh gathered momentum, at the onset of the financial reforms that started in the 1990s. Over the last several decades, the financial condition of the banking sector in Bangladesh has been improving, because the economic development of the country is linked with the loan portfolio of commercial banks<sup>2</sup>. Over the last decade, except for one or two years, the economy of Bangladesh has attained a stable growth rate of more than six percent per annum<sup>3</sup>. However, if commercial banks extend easy credit at the time of economic expansion without undertaking rigorous credit checks, the high growth of credit may increase the amount of Non-Performing Loan or bad debt in the future<sup>4</sup>. If a loan becomes overdue for 90 days or more, it is usually classified as a Non-Performing Loan (NPL)<sup>5</sup>. The Financial Soundness Indicators (FSIs) of the IMF define a loan as non-performing *‘when payments of interest and/or principal are past due by 90 days or more, or interest payments equal to 90 days or more have been capitalized, refinanced, or delayed by agreement, or payments are less than 90 days overdue, but there are other good*

---

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

\*\* Advocate, Supreme Court of Bangladesh

1 Ramani M Debnath, *Banks and Legal Environment* (Nabajuga Prokashani, 2009) 41.

2 Roland Beck, Petr Jakubik and Anamaria Piloitu, ‘Non-Performing loans What matters in addition to the economic cycle?’ (Working Paper No1515, European Central Bank, 2013) 4.

3 The World Bank, *GDP Growth annual % (2016)* <<http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=BD>> accessed 15 January 2017.

4 Raphael A Espinoza and Anantha K Prasad, ‘Nonperforming Loans in the GCC Banking System and their Macroeconomic Effects’ (Working Paper No 10/224, International Monetary Fund, 2010) 3.

5 Katia D’Hulster, Valeria Salamao-Garcia and Raquel Letelier, ‘Loan classification and provisioning: Current practices in 26 ECA countries’, (Working paper No92831, World Bank Group, 2014) 10.

reasons”<sup>6</sup>. Increased NPL not only impairs the financial condition of a country, it also affects the global economic state due to globalization<sup>7</sup>. In other words, the level of NPL is negatively related to the efficiency of banks and hinders economic growth and stability<sup>8</sup>. Hence, the control of both the quality and quantity of loans supplied to the market always remains a priority for the government.

Even though the problem of NPL exists all over the world, the extent of the problem is much more acute in Bangladesh, compared with other developing and developed countries. Furthermore, the trend of NPLs in Bangladesh is increasing. It is relevant if we note the status of NPL performance in different countries in Table-1, *it is clear that the trend of NPLs in Bangladesh shows they are on the increase from 6.1 (in 2011) to 10.03 (in 2012) compared with other Asian countries.*

**Table-1: Status of NPL performance in different countries<sup>9</sup>**

Country	2010	2011	2012
India	2.5	2.3	3.0
<b>Bangladesh</b>	<b>7.3</b>	<b><u>6.1</u></b>	<b><u>10.03</u></b>
Malaysia	3.4	2.7	2.2
China	1.1	1.0	0.9
Indonesia	2.5	2.1	2.1
Japan	2.5	2.4	1.87
USA	4.9	4.1	3.9

Source: Mohiuddin Siddique, Mohammad T Islam and Shahdin Ullah (2013)

The International Monetary Fund (IMF) has expressed grave concern over the recent rise in NPL in the banking sector in Bangladesh and wanted to know about the actions; the government had taken in realizing loans issued by different state-owned banks. In this respect, Bangladesh Bank’s Deputy Governor, Abu Hena Mohammed Raji Hasan said, “*We are very much operational in conducting an inclusive diagnostic*

<sup>6</sup> Adriaan M Bloem and Russel Freeman, ‘The Treatment of Nonperforming Loans’ (Paper presented at Eighteenth Meeting of the IMF Committee on Balance of Payments Statistics, International Monetary Fund, Washington DC, 27 June – 01 July 2005) 8.

<sup>7</sup> Dayong Zhang, Jing Cai, David G Dickinson and Ali M Kutun, ‘Non-Performing Loans, Moral Hazard and Regulation of the Chinese Commercial Banking System’ (2016) 63 *Journal of Banking & Finance* 48, 57.

<sup>8</sup> Mohommd A Karim, Sok-Gee Chan and Sallahudin Hassan, ‘Bank Efficiency and Non – Performing Loans: Evidence from Malaysia and Singapore’ (2010) (2) *Paraguay Economic Papers* 118, 130.

<sup>9</sup> Mohiuddin Siddique, Mohammad T Islam and Shahdin Ullah, ‘Non-legal Measures for Loan Recovery in the Banking Sector of Bangladesh’ (Research Monograph No 13, Bangladesh Institute of Bank Management, Dhaka, 2013) 6.

*examination of Sonali, Janata, Agrani and Rupali banks.*"<sup>10</sup>

It is also apparent from Table -2 that, the NPL ratio for the entire banking sector in Bangladesh has been increasing over the years and reaching 10.1 percent by the end of June 2016, from only 7.3 percent in 2010. Although loans issued by different types of banks are following this general NPL trend, the high NPL ratio in State-owned Commercial Banks (SCBs) has already reached a peak.

**Table-2: NPL ratio (percent of overdue to total loan) by types of banks**

Bank Types	2010	2011	2012	2013	2014	2015	End of June 2016
SCBs	15.7	11.3	23.9	19.8	22.2	21.5	25.7
PCBs	3.2	2.9	4.6	4.5	5.0	4.9	5.4
FCBs	3.0	3.0	3.5	5.5	7.3	7.8	8.3
DFIs	24.2	24.6	26.8	26.8	32.8	23.2	26.1
<b>Total</b>	<b>7.3</b>	<b>6.1</b>	<b>10.0</b>	<b>8.9</b>	<b>9.7</b>	<b>8.8</b>	<b>10.1</b>

Source: Annual Report: 2015-2016 of Bangladesh Bank, p.32

SCBs also represent a breeding ground for the NPL culture in Bangladesh that started with the directive loan granted to government enterprises that were suffering from increasing losses after independence. However, as Table-2 illustrates, the increasing backlog is more persistent for SCBs compared with other private commercial banks.

The divergence in performance between SCBs and private commercial banks can be observed all over the world. For instance, Sapienza (2004)<sup>11</sup> used micro-level data to compare the public and private sector banks in Italy. As Sapienza noted, public sector banks lend at lower interest rates, with a bias towards more deprived areas, compared to private banks. Furthermore, he also observed that some of the lendings that have taken place at public sector banks might have been politically motivated. Khwaja and Mian (2004) also compared public and private sector banks in Pakistan<sup>12</sup>. They found that government-owned banks (i.e., public banks) are more likely than private banks to lend to firms whose directors or executives have political affiliations and are less likely to

<sup>10</sup> Nazmul Ahsan, 'IMF worried over growth of NPL in banking sector', *The Daily Financial Express* (online), 27 November 2012<<http://print.thefinancialexpress-bd.com/old/index.php>> accessed 23 March 2017. It is pertinent to note that the Nationalized Commercial Banks (NCBs) include four banks, namely: *Sonali, Janata, Agrani and Rupali Banks*.

<sup>11</sup> Paola Sapienza, 'The Effects of Government Ownership on Bank Lending' (2004) 72 *Journal of Financial Economics* 357, 384.

<sup>12</sup> Asim I Khwaja and Atif Mian, *Do lenders favor politically connected firms? Rent provision in an emerging financial market*<<http://www.hks.harvard.edu/fs/akhwaja/>> accessed 6 March 2017.

collect these loans on a timely basis. Similarly, Cole (2006) demonstrated that nationalized banks in India are subject to substantial government confinement, so these banks provide more loans in election years, and the goal of these loans is to appeal to voters.<sup>13</sup>

Since non-performing loans (NPLs) affect the performance of banks regarding liquidity and profitability,<sup>14</sup> any increase in NPL will adversely affect the GDP. Liquidity declines as a part of the loanable fund is locked into non-performing loans and therefore, is not available for further lending, so profitability declines since a part of the profit are used to make provisions for non-performing loans<sup>15</sup>. Hence, the recovery of NPLs requires particular attention in Bangladesh so that the financial growth of Bangladesh is not impaired and NPLs do not affect the stability of the financial sector.

Despite the existence of a high level of NPL in the banking sector in Bangladesh and its adverse consequences to the economy, not all banks can be held equally liable for this situation. The screening of documentary data reveals that while most of the NPL is accumulated in SCBs, other private banks can maintain their NPLs at a minimum acceptable level. This paper, therefore, investigates the status of NPLs of the largest SCB (i.e., Sonali Bank Ltd.)<sup>16</sup> in performing a lower level of NPL recovery and another major private commercial bank (i.e., Dhaka Bank Ltd.) that is achieving a higher level of NPL recovery in Bangladesh. If we consider these two banks as representative of their respective sectors, the primary objective of this paper is to draw some significant inferences regarding how private commercial banks are performing better than their public counterparts, while utilizing the Alternative Dispute Resolution (ADR) mechanism to recover NPLs

## 2. Methodology of the study

**2.1 Operationalizing the terms NPL and ADR:** There is no single definition of ADR and NPL that can be used universally to define the loan default and recovery process in different societies. For instance, while NPL always refers to bad loans that are behind in terms of repaying the interest or principal, the extent of delay after which a loan

<sup>13</sup> Shawn S Cole, 'Fixing Market Failures or Fixing Elections? Agricultural Credit in India' (Working paper No09-001, India 2008) 15.

<sup>14</sup> Kanu Clementina and Hamilton O Isu, 'The Rising Incidence of Non-Performing Loans and the Nexus of Economic Performance in Nigeria: An Investigation' (2014) 2(5) *European Journal of Accounting Auditing and Finance Research* 87, 96.

<sup>15</sup> Nadège Jassaud and Kenneth Kang, 'A Strategy for Developing a Market for Nonperforming Loans in Italy' (Working Paper No 15/24, International Monetary Fund, 2015) 9.

<sup>16</sup> The four Nationalized Commercial Banks (NCBs) (i.e. *Sonali, Janata, Agrani and Rupali banks*) have a total of 3599 branches throughout Bangladesh. Amongst them, only Sonali Bank comprises of 1205 branches and considered as the largest public commercial bank and nationalized commercial bank in Bangladesh. See more on *Bangladesh Bank annual report 2015-16 and websites of respective banks*.

would be considered as irregular or non-performing, or would be written-off as a bad loan varies regarding banking practices in different countries. The rate of recovery for bank credit also depends on the loan default culture of an economy. This demand-side phenomena (that mostly affects borrowers) of loan default in an economy depends on a different set of variables including legal provisions, religious restrictions, political culture and social practices.

**2.2 Non-Performing Loan (NPL):** When a borrower does not pay interest along with principal amount as per terms and conditions, then he is called '*Rin Khelapi*' (loan defaulter) and the loan is classified as '*Ku Rin*' (bad debt). As per Section 5 (cc) of *Bank Company Act 1991*, 'defaulting debtor' means any person or institution served with advance, loan granted in favour of him or an institution involving interest or any portion thereof, or any interest which has been overdue for six months in accordance with the definition of Bangladesh Bank<sup>17</sup>. Further, it is said that loan or loans which are going to be in loan losses such loans will not be paid by the borrower and shall be considered as NPL<sup>18</sup>. In the case of *Md. Abul Kashem Vs. Major General Mahmudul Hasan (Rtd.) & others*<sup>19</sup> it has been held that the appellant was a bank loan defaulter on the date of submission of his nomination paper. The appellant became a bank loan defaulter as his company defaulted in paying the loan of the bank. So, his liability is not independent of the responsibility of the company. Accordingly, he was disqualified from being elected as per clause (n) of the proviso to Article 12(1) of the RPO.

As the objective of this paper is to explore a phenomenon of NPL in Bangladesh, the following loan provisioning definition of Bangladesh Bank is used in this study to define NPL.

According to Bangladesh Bank policy, all commercial banks need to set up required provisions for their NPLs. As specified by Circular No. 14 of Banking Regulation & Policy Department (BRPD), Bangladesh Bank, there are three different types of NPLs each of which has different provisioning requirements. If any loan becomes overdue by three to six months, then it is considered as 'sub-standard' for which banks are required a 20 percent provision. Loans that remain overdue from six to nine months are classified as 'doubtful' and require a 50 provision from lender banks. Any overdue that exceeds nine months should be considered at 'bad loan,' and a 100 percent loan loss provision should be maintained by respective banks<sup>20</sup>.

<sup>17</sup> Qazi M Rahman, All about Non-Performing Loan: The Bangladesh Scenario, Views & Opinion, *The Financial Express*, 15 November 2012.

<sup>18</sup> Bangladesh Bank, *Prudential Regulations for Banks* (Selected issues, 2014) 17.

<sup>19</sup> *Md. Abul Kashem Vs. Major General Mahmudul Hasan (Rtd.) & others* (2012) 17 MLR (AD) 273, 287.

<sup>20</sup> Bangladesh Bank, 'Master Circular: Loan Classification and Provisioning' (BRPD Circular No 14, Banking Regulation & Policy Department, 2012) 1-10.

**2.3 Alternative Dispute Resolution (ADR):** Practice of ADR to settle cases out-of-court is pre-historic in this Indian sub-continent<sup>21</sup>. However, the extensive practice of ADR in the court process was popularized through the reformed ADR movement in the family courts of Bangladesh in 2000<sup>22</sup>. Family courts have a provision for conducting mandatory in-court ADR only by judges. In contrast, later amendments in various other laws of Bangladesh including the *Code of Civil Procedure (CPC) (Amendment) Act 2012*, *Labor Act 2006*, *Money Loan Courts (Amendment) Act 2010* and more<sup>23</sup> have included ADR in both in-court and out-of-court settings, where parties may resolve a dispute among themselves outside the court and inform the court later about their settlement. Further, variations are also present in the choice of ADR techniques, and third-party facilitators, as articulated in different laws of Bangladesh.

For instance, the *Labor Act 2006* suggested a sequential practice of negotiation, conciliation and arbitration to resolve labor disputes by a neutral third party outside the labor court, and even before the court proceedings<sup>24</sup>, while through several amendments, CPC incorporated the provisions of both mediation and arbitration to settle civil cases at the pre-trial stage and appellate stage<sup>25</sup>. In contrast, the *Money Loan Courts Act (MLCA) 2003* (Amended in 2010) – the law most relevant to this study – has incorporated only mediation to settle NPL disputes other than trial<sup>26</sup>. According to section 6(1) of MLCA, provisions of CPC are also applicable to MLCA, unless any of them contradict with provisions of MLCA. Unlike CPC, mediation in MLCA cannot be conducted by judges, rather by third-party mediators mutually agreed by parties, with or without a presence of their lawyers<sup>27</sup>. As discussed later in this paper, a large part of NPL for private banks are recovered through out-of-court ADR conducted even before the filing of a case. Hence, ADR in this article means both in-court and out-of-court ADR conducted by a mutually agreed third party outside the court.

<sup>21</sup> Jamila A Chowdhury, *Gender Power and Mediation: Evaluative mediation to challenge the power of social discourses* (Cambridge Scholars Publishing, 2012) 30. See more, Kamal Siddiqui, *Local Government in Bangladesh* (The University Press Limited, 2005) 30.

<sup>22</sup> Jamila A Chowdhury, *ADR Theories and Practices: A Glimpse on Access to Justice and ADR in Bangladesh* (London College of Legal Studies North, 2013) 66. Though the notion of ADR was introduced through sec. 10 and sec. 13 of the Family Court Ordinance 1985, these provisions were rarely practiced in courts before the reformed ADR movement in 2000.

<sup>23</sup> *The Value Added Tax Act 1991*, s 41A-K; *the Customs Act 1969*, s 192 A-K; *the Income Tax Ordinance, 1984*, s 152F-S; *the EPZ Trade Union and Industrial Relation Act 2004*, s 47-54; *the EPZ Trade Welfare Society and Labour Industrial Relation Act 2010*, s 39-46.; *the Conciliation of Disputes (Municipal Areas) Act 2004*; *the Village Courts Act 2006*; *the Children Act 2013*, s 37.

<sup>24</sup> *Bangladesh Labour Act 2006*, s 210.

<sup>25</sup> *The Code of Civil Procedure (Amendment) Act 2012*, s. 89A-E.

<sup>26</sup> *Money Loan Courts Act 2003*, s 22.

<sup>27</sup> *Money Loan Courts Act 2003*, s 22(2).

**2.4 Sources of data and methods of data collection:** Data has been collected from several secondary sources, including Special Assets Management Division of Dhaka Bank Ltd., and Loan Recovery and Classification Division of Sonali Bank Ltd., journal of different financial institutions, annual reports of Bangladesh Bank, annual reports of Sonali Bank Ltd. and Dhaka Bank Ltd, etc. Apart from these published sources, unpublished data on in-court filing and recovery of NPLs has been collected from court registers of *Artha Rin Adalat, Dhaka*. Further, a questionnaire survey was conducted amongst the bank officials in both Sonali Bank Ltd. and Dhaka Bank Ltd. They were also interviewed about their perceptions of the reason for lower NPLs recovery through the court process.

**2.5 Time preference:** The study relates to the period covering the years 2010 to 2015. These 5-years have been selected to understand both current status and the recent change to identify the public-private differences in NPLs recovery in Bangladesh.

### 3. Exploring mechanisms for NPL recovery: Bangladesh perspective

As NPLs hinder stability and growth of economies,<sup>28</sup> and especially NPLs of SCBs continue to remain high<sup>29</sup>, Bangladesh Bank promotes and monitors the practice of different regulatory and legal mechanisms on NPLs to reduce the extent of NPLs all over the banking sector, especially for the SCBs.

**3.1 In-house NPL recovery mechanism:** Public banks and private banks have been following specific laws, regulations, and policies for recovering loans from defaulter clients (i.e., borrowers) under their in-house mechanism for NPL recovery. These steps are as follows:

- (i) The first step in recovering NPL for a bank is to classify the loan as irregular loans or non-performing loans. Different rates of provisioning are maintained depending on the nature of NPLs. Banks follow Bangladesh Bank's circular in formulating their NPL provisioning.
- (ii) Besides loan provisioning, banks also undertake moral persuasion to defaulter borrowers and sometimes offer them interest forfeiture or various restructuring to provide them a better chance to repay. At this stage, banks do a kind of out-of-court settlement (i.e., Out-of-court settlement through negotiation) to recover such loans.
- (iii) When all of these mechanisms fail, banks must take legal measures through a court-connected mechanism by filing a case to recover NPLs.

<sup>28</sup> Mohammad A Karim, Sok-Gee Chan and Sallahudin Hassan, 'Bank Efficiency and Non – Performing Loans: Evidence from Malaysia and Singapore' (2010) (2) *Paraguay Economic Papers* 120.

<sup>29</sup> GOB, *Sixth Five Year Plan FY2011-FY2015: Accelerating Growth and Reducing Poverty (Part-1, Strategic Directions and Policy Framework)* (General Economics Division, Planning Commission, Ministry of Planning, Government the people's republic of Bangladesh, 2015) 58, 59.

**3.2 Court-connected NPLs recovery mechanism:** *The Money Loan Courts Act 2003 (Artha Rin Adalat Ain)* is a unique law for the recovery of NPLs from the defaulter clients of different financial institutions. Section 2(b) of *the Artha Rin Adalat Ain (ARAA)* states that, a court established as *Artha Rin Adalat* under section 4 of the ARAA or any joint district judge court competent *under* this Act to deal with overdue loan granted by any financial institution registered *under Bangladesh Bank Order 1972, Bangladesh Banks (Nationalization) Order 1972, Banking Companies Act 1991* and few other specialized banks (e.g. *Bangladesh Krishi Bank*) and non-bank financial institution (e.g. *Bangladesh House Building Finance Corporation*) can also be recovered under ARAA 2003.

The institutions who can file cases under the *Artha Rin Adalat Ain 2003* is also specified in section 2(a) of the said law. In the case of *Uttara Bank Vs. Ali and Co. and another*<sup>30</sup>, it was observed that only the financial institution can institute the suit in the Court of *Artha Rin Adalat* for recovery of loan and the counter-claim of the defendants is not entertained.

**Table-3: Number of case filing and resolution in *Artha Rin Adalat Ain* in 2013**

Cases outstanding at the beginning	2130	26.22%
New cases filed	5995	73.78%
Total cases for disposal	8125	100.0%
Cases disposed of through contested trial	202	2.49%
Cases disposed of through - <i>ex parte</i>	818	10.07%
Cases disposed of through dismissal	82	1.01%
Cases disposed of through mediation	4	00.05%
Cases resolved through <i>solenama</i> or withdrawal	236	02.90%
Cases outstanding at the end	6783	83.48%
Increased backlog	5979	218.45%

Source: *Artha Rin Courts, Dhaka* dated 20.10.2014

From an analysis of case filings and resolution statistics from *Artha Rin Adalat*, it indicates that among all of the cases filed in *Artha Rin Adalat* in 2013, only 0.05 percent were resolved through a court-connected ADR<sup>31</sup> (i.e., mediation) under section

<sup>30</sup> *Uttara Bank Vs. Ali and Co. and another*(2003) 55 DLR (HCD) 156.

<sup>31</sup> ADR is a set of non-adversarial dispute resolution process that endeavors to resolve dispute through active involvement of parties in to the dispute resolution process. There are four primary forms of ADR namely: (a) negotiation (b) conciliation (c) mediation and (d) arbitration.

22 of ARAA 2003, while cases determined through a contested trial were less than 2.5 per cent. Only around 3 percent of cases were withdrawn or compromised through *solenama* <sup>32</sup>. Hence, even if we assume that all cases withdrawn by banks were by mutual consent with NPL clients, not more than 3 percent of the total ARA cases can be expected to be resolved through court-connected ADR (i.e., mediation). A further analysis of the data indicates that almost all of the withdrawals were made by private banks, while the cases for public banks were either continued with a trial or disposed of as *ex-parte*, where clients refrain from paying the decree money for most of the cases, until decree *jari* cases (i.e., execution suits) are filed by the creditor banks to settle the NPLs in-court.

In contrast to these statistics on court-connected NPL recovery through ADR by public banks, there is a good instance of private banks recovering their NPLs. Thus, the next step involves collecting empirical data on NPLs recovery from both public and private banks to identify the hidden factor(s) that might have caused such a difference. As mentioned, *Sonali Bank and Dhaka Bank* have been chosen to represent public banks and private banks respectively for this purpose.

#### **4.1 Comparison between Public banks vs. Private banks: Positioning Sonali Bank Ltd. and Dhaka Bank Ltd. in the financial context of Bangladesh**

The financial sector of Bangladesh consists of Bangladesh Bank as the Central Bank, and 56<sup>33</sup> other schedule banks under its control. Of these 56<sup>33</sup> banks, six are Public Commercial Banks (PCBs) or State-owned Commercial Banks (SCBs)<sup>34</sup>, two government-owned specialized banks, 39 domestic private banks, and nine other foreign banks. Besides this, 33 non-bank financial institutions and four non-scheduled banks are also operating in the market<sup>35</sup>. The financial system also embraces 77 insurance companies, two stock exchanges, and few co-operative banks.

In Bangladesh, Sonali Bank Ltd. is the largest among SCBs, while Dhaka Bank Ltd. is one of the leading domestic private commercial banks. Hence, the objective of this paper is to take a micro-perspective and analyze divergence of NPL figures of these two banks, to facilitate a comparison between a private bank and public bank relating to recovery of NPLs. Such analysis will inform us about best practices on NPLs recovery by Dhaka Bank Ltd. that need to be replicated by other SCBs struggling with their burgeoning NPLs. As mentioned and justified earlier, Sonali Bank Ltd. and

<sup>32</sup> A *solenama* is a popular legal terminology in Bangladesh and commonly known as compromise decree. It is highly used in civil courts to denote a decree on a mutual agreement by the parties in resolving a dispute. After filing a case in a court, it is submitted by the parties when they resolve the dispute mutually.

<sup>33</sup> Bangladesh Bank, *Bank & Financial Institutions* (2014) <<http://www.bangladesh-bank.org/fnansys/bankfi.php>> accessed 12 January 2016.

<sup>34</sup> Amongst these SCBs, four banks are NCBs: *Sonali bank, Janata Bank, Agrani Bank and Rupali Bank*.

<sup>35</sup> Bangladesh Bank, *Annual Report 2015-16* (2016) 228-260.

Dhaka Bank Ltd. are chosen in this paper to make such comparison from their respective fields.

This paper aims to assist readers firstly, to know the present status of the NPLs for Sonali Bank Ltd. and Dhaka Bank Ltd. It further enables readers to compare the recovery of NPLs between Sonali Bank Ltd. and Dhaka Bank Ltd., with an objective to draw inferences and reasons for better NPLs recovery of Dhaka Bank Ltd., in comparison with Sonali Bank Ltd. The findings generated through this paper, therefore, can be generalized for other private and public commercial banks in Bangladesh, under appropriate future research.

#### **4.2. Sonali Bank Limited: A perspective on NPL recovery of the largest public bank in Bangladesh**

The Sonali Bank Limited (SBL), as mentioned earlier, is the largest state-owned commercial bank in Bangladesh<sup>36</sup>. It was originated from National Bank of Pakistan, Bank of Bahwarpur and Premier bank through the *Nationalization Order 1972* (President Ordinance No.26 of 1972)<sup>37</sup>. After that, it was registered as a limited company on June 03, 2007 under the Registrar of Joint Stock companies and obtained a license from Bangladesh Bank on June 05, 2007. Later, Sonali Bank started its operation as a company on November 15, 2007, under the vender agreement between the government of the People Republic of Bangladesh and Sonali Bank Limited<sup>38</sup>. “*The Bank has 1207 branches including two overseas branches at Kolkata and Siliguri, India. It also has a 100 per cent ownership subsidiaries, namely Sonali Exchange Co. Inc. (SECI) the USA, and Sonali Investment Limited, Dhaka. Besides, it also has two associates, namely Sonali Bank (UK), Ltd. and Sonali Polaries FT Ltd.*”<sup>39</sup> The largest commercial bank in Bangladesh – Sonali Bank Limited’s motto for customers is: ‘*Your Trusted Partner in Innovative Banking*,’ with an authorized capital and paid-up capital of Tk.60,000.00 million and Tk.38,300.00 million respectively<sup>40</sup>. The paid-up capital was Tk.9,000.00million as on 31 December 2011 and has been raised to Tk.38,300.00 million as on December 31, 2015<sup>41</sup> and the total equity of the bank stand at Tk.58,452.30 million as on December 31, 2015<sup>42</sup>.

<sup>36</sup> As NPL may arise in all different types of Banks like Nationalized Commercial Banks, Private Commercial Banks, or Foreign Commercial Banks, one may wonder why NPL of NCBs are considered in this research. It comprises a significant portion of the total banking sector in Bangladesh both in terms of number of branches (Total 1205 branches in comparison with 6 SCBs of 3703 branches) and volume of loan grant. As shown in the table below in terms of total number of branches NCBs composed around 40 percent of the total Banking sector in Bangladesh.

<sup>37</sup> Sonali Bank Limited, *Overview of the Bank* (1 January 2019) <<http://www.sonalibank.com.bd/#>> accessed 10 January 2019.

<sup>38</sup> Bangladesh Bank, *Annual Report 2007-08* (2008) 50.

<sup>39</sup> Sonali Bank Limited, *Annual report* (2015) 227.

<sup>40</sup> Ibid, 18.

<sup>41</sup> Ibid, 26.

<sup>42</sup> Ibid, 75, 77.

**4.3 Present NPL status of Sonali Bank Limited (SBL):** It appears from Table-4 that the total deposit of SBL was Tk.778,043.00 million, total advances were Tk.337,554.00 million and NPL was Tk.86,437.00 million in 2014. After that, in 2015 despite an improvement in the collection of total deposits and providence of total advance, the rate of NPL recovery declined by 0.34 percent. This decline in the recovery rate of NPL in 2015 created an extra burden on its less than 5 per cent rate of NPL recovery in 2014.

**Table - 4: NPL status of SBL( in million)**

Particular	2014	2015	Increased/ Decreased	Change %
Total Deposit	778043.00	866012.00	87969.00	11.31%
Total Advances	337554.00	346346.00	8792.00	2.60%
Total NPL	86437.00	86849.00	413.00	0.48%
Required provisions	42910.00	55442.00	-12532.00	-22.60%
% of classified	25.61%	25.08%	-0.01	-2.07%
Total Recovery	3687.00	3414.00	-73	-7.40%
% NPL recovered	4.27%	3.93%	-0.34	-0.34%

Source: Annual Report: 2015, Sonali Bank Limited.

Further, it appears from the above Table that recovery was Tk.3,687.00 million in 2014, whereas recovery was Tk.3,414.00 in 2015 that indicates that recovery rate is decreasing and NPL status of Sonali Bank Ltd. is increasing year by year.

#### **4.4 Dhaka Bank Limited (DBL): A private bank showing much better performance in NPL recovery**

Dhaka Bank Limited (DBL) is a banking company, registered under the *Companies Act, 1994* and incorporated under the *Banking Companies Act 1991*. The Bank commenced its operation on July 05, 1995<sup>43</sup>. The motto of Dhaka Bank Limited for its customers is: ‘*Excellence in Banking*’ and is a highly capitalized 2<sup>nd</sup> generation bank with an authorized capital and paid-up capital of Tk.10,000.00 million and Tk.6,254 million respectively<sup>44</sup>. The paid-up capital was Tk.3,590 million as on 31 December 2011 and has been raised to Tk.6,254 million as on December 31, 2015, and the total equity of the bank stands at Tk.13,389 million as on December 31, 2015.

In case of a single borrower, the bank cannot finance more than 35 per cent of the bank’s total capital, subject to the condition that, the maximum outstanding against fund based financing facilities (funded facilities), do not exceed 15 percent of the total capital. In case of the export sector, single borrower exposure limit shall be 50 percent of banks total capital, while funded facilities shall not exceed 15 percent of the total capital<sup>45</sup>. Dhaka Bank Limited fixes its lending caps limits every year for ensuring that

<sup>43</sup> Dhaka Bank Limited, *Annual Report* (2015) 5.

<sup>44</sup> Ibid, 46.

<sup>45</sup> Ibid, 17.

the bank's credits are adequately diversified. Product wise lending caps are set 40 percent for term loans, 50 percent for continuous loans and 10 percent for demand loans. In case of less/ excess funding in one type of facility, the same will be adjusted with a different kind of facility<sup>46</sup>

**4.5 Present NPL status of Dhaka Bank Limited (DBL):** It appears from Table-5 that the total deposit and total advances of DBL were Tk.124,854.00 million and Tk.103,132.00 million respectively, along with an NPL of Tk.5,657.00 million in 2014. Thereafter, in 2015 both the amount of deposit and total advances increased with a corresponding increase in the rate of NPL recovery from 73.5 per cent to more than 90 per-cent.

**Table -5: NPL status of DBL(in millions)**

Particular <sup>47</sup>	2014	2015	Increased	Change %
Total Deposit	124854.00	139068.00	14214.00	11
Total Advances	103132.00	117840.00	14708.00	14
Total NPL	5657.00	5491.00	-166.00	(3)
Required provisions	2120.00	1903.00	217.00	(10)
% of classified	5.49%	4.66%	-0.83%	(15)
Total Recovery	4158.34 <sup>48</sup>	4976.77 <sup>49</sup>	818.43	19.68%
% NPL recovered	73.50%	90.64%	.171	17.1%

Source: Annual Report -2015, Dhaka Bank Limited.

In this way, in 2015 deposit increased by 11 per cent, advances increased by 14 percent and NPL decreased by 3 percent than 2014. Furthermore, it also appears that NPL of DBL in 2014 was 5.49 percent; thereafter in 2015 NPL was 4.66 per cent that indicates that DBL has been decreasing its NPL.

A quick comparison of NPL recovery between SBL and DBL indicates that the issue of higher NPLs and its lower recovery is not an issue equally applicable for all different banks in Bangladesh. For instance, DBL has attained a more than 90 per cent recovery of its NPLs in 2015, while SBL is struggling with a recovery rate even below 5 per cent of its total outstanding NPLs. Empirical data was collected through a questionnaire survey and interviews of bank officials of SBL and DBL, to further explore this issue by identifying the reasons of such divergence.

<sup>46</sup> Ibid, 18.

<sup>47</sup> Ibid, 195.

<sup>48</sup> Dhaka Bank Limited, unpublished in-house document, collected on 8February 2017.

<sup>49</sup> Ibid.

**5. Reasons for increasing rate of NPLs in Bangladesh: Bankers’ perspective**

To finding out the reasons for the divergence of NPLs in public and private banking sectors in general, and Sonali Bank Ltd and Dhaka Bank Ltd, a survey was conducted amongst the bankers of the respective banks. Participation of bank officers of these two banks (i.e., Sonali Bank Ltd. and Dhaka Bank Ltd.) was ensured. A structured questionnaire has been made consistent with the subject matter of the study. However, considering the time, resources and other administrative constraints, sampling has been done among 30 respondents from two Banks situated in Dhaka.

As mentioned by the bankers, the banking sectors have been facing critical problems due to increasing amount of NPLs. 76.59 percent respondents pointed out that the clients mostly sought for interest waivers during NPL recovery and 84.91 percent respondents held banks liable for mismanagement. However, 59.94 per cent respondents opined that higher interest rate dramatically affects loan repayment rates.

Further, more than 75 per cent respondents asserted that prevailing interest rate affects the demand for credit, and political instability like *hartals* and blockades may affect the recovery rate as such political instability is also liable for business loss and consequent increase in NPLs. Furthermore, almost 70 percent respondents opined that the clients are not interested to repay bank dues after getting a loan and as such the clients become a defaulter. More than 50 percent respondents opined that existing law enforcement is not sufficient for recovery of the bank dues and as such the clients think that if they do not repay the loan, banks cannot recover the loan through enforcement of laws against the defaulters. However, almost 67 percent respondents affirmed that as the legal proceedings against the defaulters are very lengthy, clients are not interested in repaying banks’ dues — they think that as the proceeding for recovery through litigation is a lengthy process, they can escape from their liabilities. Reasons for increasing NPL are given below in Figure-1

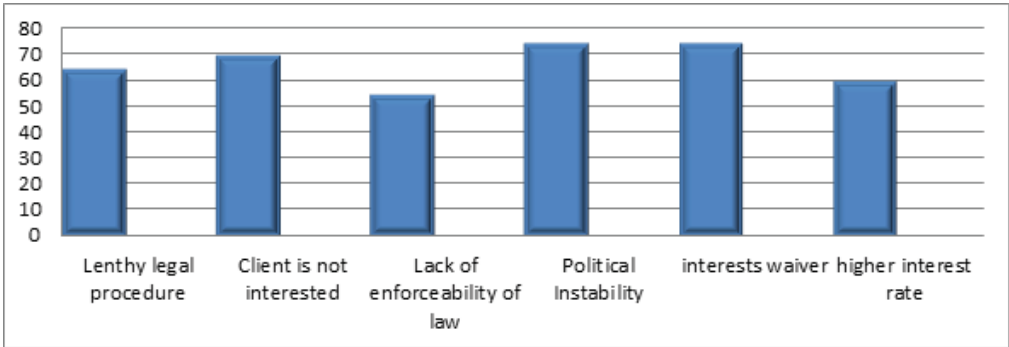


Fig. 1: Reasons for increasing NPLs: Bankers’ perspective

Analyzed data also reveals that unfair lending competition among the banks is also liable for increasing NPLs. Due to intense competition for quick lending, sometimes banks do not carefully consider the portfolio of borrowers before providing

a loan, which increases the proportion of precarious borrowers and an increased rate of default. Further, very few respondents stated that banker's corruptions are also liable for increasing NPLs in the banking sectors.

## **6. Better NPLs recovery by Dhaka Bank through ADR: Why does Sonali Bank lag behind?**

ADR has already been proven to be an efficient mechanism for NPLs recovery in many countries of the world. For instance, by following out-of-court debt settlement process, Thailand has reduced its volume of NPLs from 2700 billion Baht or 47.70 per cent of the total loan amount in 1999 to around 641 billion Baht or only 12.74 per cent in 2003<sup>50</sup>. Similarly, as observed by Ogada, after its 1997-98 financial crises, Indonesia managed to settle 70 percent of its US\$30 billion debt within the next five years (1998-2003) through ADR (i.e., mediation)<sup>51</sup>. In a World Bank study, similar advantages of out-of-court effort through ADR to recover NPLs were also observed by Garrido (2012)<sup>52</sup>.

NPL has been increasing day by day and creating a problematic situation for the banks as NPL does not generate any income for the banks<sup>53</sup>. As mentioned earlier, in order to recover the NPLs, Money Loan Courts Act (*Artha Rin Adalat Ain*) 2003 has been enacted in Bangladesh<sup>54</sup>. Though the *Artha Rin Adalat Ain* 2003 is a special law for recovery of NPLs of financial institutions, it follows the rules of the Code of Civil Procedure (CPC) 1908<sup>55</sup>. Due to existing loopholes of the CPC<sup>56</sup> (e.g., as to serving summon, the time-limit for case disposal, etc.), defaulting parties usually take the opportunity to make delay in resolving cases. By the amendment of ARAA in 2010, use of 'mandatory' ADR in the form of 'mediation' has been suggested to resolve money loan disputes (sec 22). However, section 22 of the *Artha Rin Adalat Ain* 2003 does not empower presiding judges for conducting mediation and in most of the cases lawyers act as mediators that caused lengthy procedure of the mediation. It is often claimed that defaulter clients take court-connected mediation as a tool to avoid resolving the dispute, and a way for consuming time due to the existing loopholes in the provision of ARAA. In fact, the defendant seeks for a time from the court for delaying the *Artha Rin* case.

<sup>50</sup> TumnongDasri, 'A Successful Effort in Management of Corporate Debt Restructuring in Thailand: Lessons Learnt' (Occasional Paper No 39, The South East Asian Central Banks Research and Training Centre, Kuala Lumpur, 2004) 31.

<sup>51</sup> CedaOgada, 'Out-of-court Corporate Debt Restructuring: The Jakarta Initiative Task Force' (2012) 4 *Current Developments in Monetary and Fiscal Law* 767, 775.

<sup>52</sup> Jose M Garrido, *Out-of-court Debt Restructuring* (The World Bank, 2012).

<sup>53</sup> International Finance Corporation (IFC), *Distressed Asset Transfer Handbook: General Guidelines for the Purchase and Sale of Distressed Assets in the Financial Sector* (2012)8.

<sup>54</sup> *Artha Rin Adalat Ain* 2003, preamble.

<sup>55</sup> *Ibid*, s 5(2).

<sup>56</sup> Lutfur R Chowdhury, *A text Book on Bankers' Advances* (3<sup>rd</sup>ed, 2012) 772.

As shown in Table 5, Dhaka Bank has been successfully recovering more than 90 percent of their NPLs, and the rate increased from 2014 to 2015. On the other hand, in 2015 Sonali Bank could recover only less than 4 percent of its NPL, and the rate of NPL recovery even declined by 0.34 percent from 2014 to 2015. However, detail of ARA cases of Sonali Bank and Dhaka Bank collected from *Artha Rin Adalat, Dhaka* in 2013 indicates that no case either of Sonali Bank or Dhaka Bank were resolved through solenama or withdrawal of cases. Further, none was resolved through court-connected mediation under section 22 of the *Artha Rin Adalat*. Hence, the performance of court-connected ADR (i.e., mediation) in recovering NPLs is not at all satisfactory for both public and private banks in Bangladesh. Nevertheless, the out-of-court NPLs recovery performance of Dhaka Bank through ADR (i.e., negotiation and persuasion by the bank officials and clients) remain impressive – this was possible through Dhaka bank’s initiative to resolve NPL disputes through their continuous out-of-court settlement efforts even after filing cases.

As mentioned, NPLs are firstly dealt with by every respective bank through their internal credit recovery mechanism. However, NPL cases are filed in *Artha Rin Courts* if lending banks fail to recover NPLs and then take recourse to institute a formal recovery process through litigation. ADR in *Artha Rin Courts* is not any isolated process; rather it is a connecting process with in-house recovery mechanisms and recovery processes through litigation if mediation does not succeed.

Bank officials interviewed from Dhaka Bank stated that Dhaka Bank undertakes continuous effort to resolve NPL cases even before going to court and in some cases even after filing the case in the *Artha Rin Courts*<sup>57</sup>. On the contrary, as to Sonali Bank, only in a few of the cases is the situation internally, prior to filing the case in the court. Once cases are filed in the court, only in a limited number of cases, resolution can be attained through an out-of-court ADR settlement, and most of the cases remain unresolved

**Table-6: Causes of less effectiveness of court-connected Artha Rin ADR (under section 22 of ARAA)**

Causes of less effective ADR under ARAA	No. of respondents	Percentage
Lack of genuine interest of clients to repay	20	66.67%
Delay in court proceedings	17	56.67%
Political instability and interference	2	06.67%
Poor credit management	8	26.67%

<sup>57</sup> A less than 3% withdrawal of cases through *solenma* [Table 3] however, indicates that most of the successful resolutions of NPL disputes for private banks come through ADR conducted before the filing of an NPL case under MLCA.

for an extended time under litigation. Bank officials interviewed from Sonali Bank and Dhaka Bank identified several factors for which court-connected ADR (i.e., mediation under section 22) is not effective in the *Artha Rin Courts*.

As demonstrated in Table-6, the primary reason identified by bank officials as an obstacle to be effective as to *Artha Rin* ADR is the lack of genuine interest on the part of clients to repay, and hence there is a delay in the court proceedings. These two factors are much correlated with a lack of interest by the parties. In fact, these two factors reinforce each other. For instance, if clients find a high backlog in the courts exists, they may feel discouraged to resolve their cases quickly through a court-connected ADR. Hence the delay in the court system allows them to delay the repayment of their loans.

**Table-7: Necessity to amend ARA for better NPLs recovery through court-connected ADR**

Need for amendment to ARA	No of respondents	Percentage
Very important	02	06.67%
Important	26	86.66%
Not important	02	06.67%

Since NPL clients seem to exploit the delay in the court process under the existing provisions of the ARAA, as shown in Table 7, more than 90 percent of the respondents (i.e. bankers) opined that an amendment to the ARAA is either important or very important to improve the effectiveness of the *Artha Rin* ADR (i.e., mediation under section 22). Some of the significant amendments suggested by bank officials are to increase the authority of the mediators in persuading the parties to agree on a settlement. As non-judge mediators and especially lawyers, are currently conducting *Artha Rin* ADR under section 22, the parties can easily ignore his/her suggestion to agree on a quick settlement. In a related vein, unlike *Artha Rin Courts*, scholars suggest that the higher authority of the judge-mediators in the family courts of Bangladesh is a key to attain a successful mediation in the family courts through ADR within a short period.

## 7. Further consideration

Based on the results obtained through an analysis of the documented data from the court registers, the annual reports of respective banks and the empirical data from bank officials in Dhaka Bank and Sonali Bank, a few points surfaced that can be carried out to enhance the effectiveness of ADR in recovering NPLs as follows:

- Firstly, the banks may try to resolve their cases through an out-of-court ADR (e.g., by negotiation and so forth) even before filing the cases. Because, once a case is filed, clients can utilize the existing loopholes in the legal provisions which will consequently allow them to delay in the courts.

- Secondly, even at the time, the cases are filed in the *Artha Rin Courts*, the effectiveness of the court-connected ADR may be enhanced by appointing judges as mediators or by arranging a settlement conference before commencing to the trial.
- Finally, since clients always seek an interest rate waiver that creates a significant point of negotiation between the banks and the clients, bank officials attending the mediation should have some authority to waive or lower the interest rate by a reasonable rate to accelerate the court-connected ADR settlement of NPL disputes.

## 8. Conclusion

Since remarkable examples are available in our banking sector with regard to keeping the rate of NPLs low, in the absence of relevant micro-level studies, this study is designed to draw inferences from Dhaka Bank Ltd – a bank representing private commercial banks, that can be used to extract lessons for the purpose of improving the NPL recovery of SCBs in general, and the Sonali bank, in particular. While this is a comparative study based on only two banks, the study reveals a significant difference between the practice of NPL recovery between the banks in public sector and those in the private sector that represent a lower performance and a higher performance as to recovery of NPLs in their respective sectors. Dhaka Bank Ltd. managed to recover most of their NPLs with settlements made through an out-of-court ADR settlement and the bank also withdrew cases as well. On the contrary, Sonali Bank Ltd. proceeded with a lengthy trial process and took a little step for an out-of-court ADR settlement once the case was filed in a court. Although this limited study is not enough to make any final remark or generalization, nevertheless this paper has drawn some major inferences regarding the way private commercial banks are performing better than their public counterparts, while utilizing the ADR mechanism to recover NPLs. While Sonali Bank – the largest SCBs in Bangladesh, is struggling to recover NPLs both by the court-connected ADR as well as the out-of-court ADR, Dhaka Bank Ltd., by the efficient use of the out-of-court ADR through its ‘Special Assets Management Division’, the bank is successfully managing NPLs to a level so there are fewer non-performing loans compared with industry average. Even though the political influence is still a significant factor that causes loan default and consequent NPLs, adopting an effective mechanism of ADR (both in-court and out-of-court settings) can enhance the strength of banks as to the recovery of NPLs. Since the banking sector is one of the growing industries in Bangladesh – that has the most potential to help business grow, this study and similar studies in the future will assist policy makers and enable them to have a profound insight in terms of recovering NPLs so that the country can meet a booming economy with a sound financial sector in the near future.

# Reflections on the Right to Nationality: Identifying the Complexities in and around

Syed Masud Reza\*

## 1. Introduction

It can be arguably and sensibly submitted that nationality connects a people with its mother state. It provides citizenship to a people and thus legally binds the state and its subjects pertinently in a duty-right paradigm, as prescribed by the human rights narratives. Clearly, this indicates the imperative prerequisite for many claims of rights is, to have or, to satisfy, nationality. To put simply, no nationality means (almost) no rights. Right to nationality, therefore was held to be the “right to have rights.”<sup>1</sup> Though, international law declares nationality as a right, the political projects of States<sup>2</sup> signal that it is preferred by them more as a matter of polemics than law.

Thus, nationality is legal connection between the subject and the State and it may also be assumed as a political statement between the two. As an idea, it supplies the thematic premise for a number of modern human rights charters, in the sense that the States are legally bound to ensure those rights of their nationals. This also implies, divesting nationality equals to denial of rights. The decision of a State to terminate the identity of a people (i.e. nationality) is often political following legal consequences and vice versa, but, in every case, the end results (endless sorrows and miseries) it offers to the stateless peoples remain same. What reinforces the problem is that, despite several mentions of the right to nationality, any political decision to disempower a particular group by stripping of their right remains a recurrent phenomenon. This requires an analytical examination of the vernacular of the right in order to assess their efficacy to provide solutions to different situations. Being a *domaine reserve*, the interplay and link of nationality with local politics is fairly possible. This creates a space for political spearheads to decide and regulate nationality by avoiding legal obligation. The situation is fairly portraying a longstanding struggle between international (legal) norms versus nationalist political projects. This paper suggests as a consequence of the *non sequitur* nationality, which is a (if not *the*) basic idea to provide legitimacy to any human rights claim, itself is standing on a vulnerable premise.

The political version of understanding is problematic as it clothes nationality with political polemics and thus it provides a State, a space in which ‘nationality’ remain more as grant or, outcome of issues that deal with legitimacy. In this way, nationality (of minorities) in domestic spheres of some States, is often more a question to be fixed by political legitimacy than legal determinacy. It is assumed that domestic laws are more

---

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

<sup>1</sup> *Trop v Dulles*, (1958) 356 US 86.

<sup>2</sup> As may be deduced from the language of relevant international treaties.

likely to uphold local political sentiments than international legal requirements. Besides, the soft approach as maintained by most of the human rights norms allow an unguarded and open space for the States to remain inert on issues they feel perilous. Hence, this leaves 'nationality' in a vulnerable position, as a State may at any moment declare a people as 'non-nationals' if the latter fails to satisfy any grave question involving political legitimacy among its nationals. Such statelessness is evident in the history of modern world; the situation fundamentally unsettles the premise (i.e. nationality) to claim human rights from a mother state.

On the basis of the above mentioned observation, the aim of this article is threefold: a. to analyze the language (texts and contents) of some key international human rights instruments regarding nationality in order to test their comprehensibility, efficacy and logicity, b. to examine how the normative indeterminacy of international law impacts the right to nationality and, c. to estimate how the politics on and of right to nationality interplays putting the State at the centre and thus produces or, likely to produce frustrations for the right and the people who lose it.

This article evaluates right to nationality as a recognized norm in international human rights law. In doing so, it diagnoses the generic terms in which the norm is expressed (through relevant international instruments). The domestic dimensions of the right are mostly excluded as they are varied among jurisdictions and estimating the sources of legality of the right (i.e. the international conventions) and their normative strength suffice for the present purpose. Thus, the article is fairly a thematic projection of possibilities that the norm covers under its literal grandeur.

## 2. Contents and Discontents of the Right to Nationality

It may be assumed that nationality is more a point of concern in the international theatre as may be deduced from various international conventions acceding and incorporating this as a human right. Nationality being a part of *domaine reserve*, is generally considered an issue of State's domestic jurisdiction.<sup>3</sup> To interpret nationality, hence, it becomes necessary to see the domestic laws and statements of a particular state. In international plane, however, States recognize this right in a number of human rights conventions. Their recognition signals quite clearly the existence of the right to nationality. However, any practicable or, context specific interpretation of the right seemingly appears problematic and an unworthy exercise. This is because, the right is phrased (as agreed and directed by the States) mostly in vague and imprecise terms which is frequently rendered pointless in practice.<sup>4</sup>

<sup>3</sup> There is general opinion in international law that nationality as a matter essentially falls in the hands of States. See Article 1 of Convention on Certain Questions Relating to the Conflict of Nationality Law, 1930 (or, 1930 Hague Convention). This was also reiterated by ILC Special Rapporteur Manley Hudson, "in principle question of nationality fall within the domestic jurisdiction of each state." See- ILC yearbook 1952/II, 3,7.

<sup>4</sup> Monika Ganczer, 'The Right to Nationality as a Human Right' 15 <[http://real.mtak.hu/24919/1/9789462365032\\_hfdst02.pdf](http://real.mtak.hu/24919/1/9789462365032_hfdst02.pdf)> accessed 17 October 2018.

So, for obvious reasons, any context specific interpretation of right to nationality is more likely to produce asymmetrical and often contradictory results. It thus makes the right divergently interpretable and favors a State that wants to be benefited from such indeterminacy.

So the fact remains that the right to nationality exists in texts, but its contents and meanings are still disputed. If the right was created to end statelessness, then perhaps its present narration lacks the quality suitable to check the situation. Further, it can be imagined, as the States guided the language of international treaties regarding nationality, which is as pointed: vague and imprecise, in domestic spheres they are more likely to remain equally inert or, at least selective to endorse nationality as an (inclusive) legal right. Therefore, it is submitted that nationality in these domestic tiers is more an issue to be politically settled than legally decided.

It may be also suggested that explaining nationality without necessary political arguments (emanating largely from local politics), is most likely to provide an incomplete hypothesis and by the same token impracticable. This might have relevance with the fact that States are more prone to identify the right as a part of their domestic political discourse, rather than an idea determined by international jurisprudence. The presentation of nationality as part of political narrative of a state may have several apologetic bases. Firstly, (so-called) modern nation-state, which represents the majority idea, has been over-concerned for several decades to retain sovereignty and territorial integrity. With this political agenda, a State is more willing to dress itself (through its internal laws<sup>5</sup> and external statements) as representing one nation and therefore, it subscribes one nationality, which is essentially of (or, represents) the majority people. This apparently (if not exhaustibly) consolidates the political integrity of the State. Secondly, nationality provides a general legal identity to all groups of peoples living under the same jurisdiction that in effect brings (through legitimate means and acceptable arguments) a commonality and also may be (in some cases) a degree of affinity among diverse ethnic and minority groups. This also feeds the common aim of modern States: to protect sovereignty, ensure territorial integrity and thus to avoid separatism. Thirdly, as a logical parallel of previous points, State can divest a particular group, (usually minority, or, a politically recognized 'other') from their nationality, if that group threatens or, likely to threaten, or, the State, or, its majority people consider that group as a threat to the integrity or, sovereignty of the State. It is rational to assume that such actions may have political legitimacy from the majority people (as a State essentially represents the majority group).

Glancing on these interlinked and intricate dynamics of the right to nationality, it may be imagined that its realization especially at the domestic planes, is rather a challenging issue. This also suggests that any particular minority group living in any

<sup>5</sup> A resemblance of this tendency is Article 6 (2) of the Constitution of Bangladesh, which reads, 'The people of Bangladesh shall be known as Bangalees as a nation and citizens of Bangladesh shall be known as Bangladeshis'

State may at any point of time is likely to be subjected to divestment of nationality. This action may be invalid from international human rights laws' viewpoint, but, it may be legal under municipal laws and have full political legitimacy from domestic perspective. Factually, this situation creates an un-amenable paradox that entails the right to serve more as an empty jargon in the human rights polemics.

### 3. Analyzing the Pretext and Texts of the Right

At this point, the vernacular of the right shall be analyzed in order to examine their logicity and relevance to serve proper for any context. The right has its mention in the non-binding pioneer, Universal Declaration of Human Rights (UDHR) of 1948. In this regard it is mentionable that a member of the Human Rights Commission that had been charged in 1945 with the drafting of the Declaration, Rene Cassin (1887-1976) who was a French legal scholar and Nobel Prize laureate, presented a formulation containing the right to a nationality and ending statelessness.<sup>6</sup> Understandably, the formulation was influenced by the massive disasters caused by the WWII to humanity which included instances of ending nationality and thus beginning statelessness. So, the proposition to make nationality a right was accepted by the commission although, ending statelessness could not receive any consensus.

Cassin's proposition was later updated and more rationalized by a joint proposition made by the UK and India. Both the States brought an alteration to the already submitted phrase, where the positive obligation of States, as mentioned in words: 'Everyone has the right to nationality' was replaced by a negative obligation: 'No one shall be arbitrarily deprived of his nationality';<sup>7</sup> though in the final version both of these patterns were incorporated. This seemingly brings a balance in the narration of the right. One developing issue in particular, which was neither proposed nor incorporated in the discussion that is 'right to change of nationality.' This was later suggested by the representative of Uruguay that the declaration should contain the right to change of nationality.<sup>8</sup> The suggestion was incorporated in the final variant of the right, as it had a growing significance.

Therefore in its final version the right stands on following vernacular:

#### Article 15

**1.** Everyone has the right to a nationality.

**2.** No one shall be arbitrarily deprived of his nationality nor, denied the right to change his nationality."

<sup>6</sup> Commission on Human Rights, Drafting Committee on an International Bill of Human Rights, First session, Report of the Drafting Committee to the Commission on Human Rights, E/CN.4/21, 1 July 1947, 61.

<sup>7</sup> Proposed Amendments to the Draft Declaration on Human Rights, Commission on Human Rights, 3<sup>rd</sup> Session, E/CN.4/99, 24 May 1948, 4.

<sup>8</sup> Stated by Roberto Fontaina; See- Commission on Human Rights, Summery Record of the Fifty-Ninth Meeting, E/CN.4/SR.59, 10 June 1948. 6-7.

This Article with all its fair intentions may seem apt for the purpose. It contains: a. the right to a nationality, b. the right to *change* nationality and, c. the prohibition on *arbitrary deprivation* of these rights.<sup>9</sup> Nonetheless, its asymmetries unravel against any word by word analysis. ‘Everyone’ in the first part gives the right a general and inclusive character. In any plain reading it also implies that the right is universal, which includes all stateless persons, *per se*. But, in the second clause “No one shall be arbitrarily deprived of his nationality”- creates tension, as it provides a space for the state to legally (not arbitrarily) deprive anyone from nationality. If thus nationality remains voidable legally, this is likely to contribute more to statelessness than to end it. It is noteworthy that the term ‘arbitrary’ is left undefined in the formulation and it remains unclear, which State has the burden to grant nationality.<sup>10</sup>

Further, the right to *change* nationality is also problematic; because the word change clearly means replacing an old nationality with a new one, which requires at least two conceding States. Fairly, the language suggests that old state of nationality has an obligation to withdraw the nationality (may be upon request from a person) and subsequently a new state of nationality has another obligation to grant him the same. In any given situation, it is likely that the old State is present and conceding, so the first half of the right is realizable; but, as the Article in its clauses is completely silent about the particular state obliged grant new nationality, it is difficult to conclude on which State the burden lies and why?

It can be further imagined that change in nationality as a right is likely to become an entrapment if anyone leaves a nationality, but fails to acquire a new one. On the point of ‘arbitrary’, the absence of any category or, qualifier before or, after the word makes it imprecise, unclear and thus interpretable, principally (if not only) by State. So, it is seemingly impracticable to assume that State will interpret ‘arbitrary’ against its own interest. Conversely, domestic legal means used to terminate nationality may be reused to cover and defend any arbitrariness inbuilt.

Moreover, the major premise that contains this right, the UDHR itself despite its authoritative and guiding role, has always been considered as a non-binding instrument.<sup>11</sup> Absence of binding effect makes the UDHR more cosmetic than substantive, especially when translated into practice. Its value, except the norms that later elevated as customary international law, may be signified as more ethical than legal. Thus it seems the right to nationality in its host charter stays more as a rubric or, a nomenclature than a right with settled and concrete substance. This thematic trend to mention a right in vague, uncertain and incomplete terms has been a centre-stage for long, especially in international treaties. The later mention of this right as diagnosed hereinafter shall depict the situation.

---

<sup>9</sup> See Ganczer, above n 3, 18.

<sup>10</sup> Ibid

<sup>11</sup> See, Ian Brownlie and Guy S. Goodwill, Basic Documents on Human Rights, 2006, 23.

In 1961 a more specific international agreement on statelessness the Convention on Reduction of Statelessness was adopted by the UN General Assembly. But, it does not contain the right to nationality as such. In Article 8 para 1 the convention says: “A Contracting State shall not deprive a person of his nationality if such derivation would render him stateless.” Article 9 stipulates in more general terms, including groups: “A Contracting State may not deprive any person or, group of persons of their nationality on racial, ethnic, religious or, political grounds.” Such general prohibition would make this convention a useful tool at least to end statelessness but, inclusion of a number exceptions in these prohibitions [like, as per Para 3(a)(i) of Article 8, if a person disregarding the clear prohibition of a contracting state, render services to, or, continue to receive emoluments from another State, and as per Para 3(a)(ii), his conducts are seriously prejudicial to the vital interest of the State] weakens the protection. In all these cases, as the Contracting State becomes the sole authoritative interpreter, it is likely that arguments for and from the State shall decide the results.

A central instrument of human rights discourse is the International Convention on Civil and Political Rights, 1966, which has binding effect and a growing jurisprudence, on the other hand, does not mention a right to nationality in the stated sense. It has in Article 24, para 3 mentioned that:

“Every Child has the right to *acquire a nationality*”

The convention language fairly shows the States commitment to every child to *acquire* nationality. It however, says nothing on the protection of right to nationality. If nationality of a child is lost under any condition, the right’s language in this particular framing offers no protection seemingly. Also, using the term slightly differently i.e. ‘the right to acquire’ before ‘a nationality’ as mentioned in the sentence (instead of plain ‘right to nationality’) provides another maneuvering tool in the hands of States. This bears the clear possibility to be interpreted as the right to nationality has to be *acquired* by every child and a State (the role of which is implied but made obvious here) may play a discretionary role in this regard. Also, the use of article ‘a’ before nationality suggests that only one nationality can be acquired (if at all possible) as a right. If the child is a member of asylum seeker family or, refugee, who is unwilling (for all practical reasons) to return to the State of origin and wants a second nationality, s/he is restricted from doing so, as s/he already has one nationality. So, this right, in practice may become conditional and difficult to realize.

Further, the simple sentence provides no answer to several important questions, like: which State is obliged in particular under this mandate to provide nationality to a child? Is it the State of birth of the child, or, the state of origin of the Child’s parents? Here this provision maintains symmetry with the UDHR mandate. But, the point of divergence is it does not cover a right to change nationality, as mentioned in the UDHR.

#### 4. Normative Uncertainty and It's Plausible Impact on the Right

The normative contents of right to nationality, as mentioned above are still emerging; it thereby leaves a space for uncertainty and divergent interpretations. Broadly, the international texts of the right bear several similitude, which may be regarded as the extent of consents of States, on terms and conditions of this right. Except the 1961 convention on Reduction of Statelessness,<sup>14</sup> the major human rights instruments did not recognize the principal causes that frequently stimulate deprivation of nationality of individuals and larger ethnic, political, religious and social groups. This Convention (of 1961) has another exception that it recognizes nationality, apart from individual right, as a group right.<sup>15</sup> In most other conventions as shown before, the right is framed as an individual right, imposing positive or, negative obligations. It is true that such language (individuation of rights) is useful, especially in cases of stateless persons, migrant workers, asylum seekers and even for refugees, when their number is small and manageable. But, if a particular ethnic group (with a large number of people) is refused to grant nationality or, their nationality is revoked, such situation demands a collective right to nationality which is, except the exception of 1961 convention, almost absent.

Nationality, though in nature a legal connection between a state and its citizens, it is closely connected to local political parlance. If it is politically legitimate, or, generally expected among nationals of a State to remove nationality of a particular person or, group then, stripping nationality of the group<sup>16</sup> is less likely to produce any disharmony. Bypassing such plausibility, which has factual relevance, means building a castle in the air. It has been shown that most of the legal texts incorporated this right purely from legal perspective (more specifically as a State vis-à-vis subject paradigm). This showcasing in fact hides a lot than it reveals. If causes that create deprivation of nationality and statelessness are not addressed with due magnitude and gravity, it is more likely that despite all possible antidotes, both shall continue to exist.

Nationality, like other rights has been incorporated in a number of international legal instruments. This generalization can be marked as its appeal to the international community. But, including same right in a number of international treaties has some other drawbacks. It is already shown that right to nationality in each of the treaties has differing vernacular. Most of the treaties do not have a judicial body to contribute to the development of a sound jurisprudence. This empty space has always been filled by the States. But, as norm contains internal asymmetries, in any given situation which interpretation of a treaty shall prevail becomes a very contentious question. Such fragmentation, is obvious to unsettle the purpose of a norm and thus right to nationality

---

<sup>14</sup> See Article 9 of the Convention for details.

<sup>15</sup> Ibid.

<sup>16</sup> The 1982 Citizenship Law of Myanmar divested nationality of the Rohingyas. It is widely known that such actions were never protested by the mainstream peoples of Myanmar. This also suggests that the action of Myanmar government has political legitimacy among the mainstream peoples.

(even with its ambivalent presence) becomes an apple of discord if becomes the substance of any interpretative exercise.

The right has also been subjected to regional<sup>17</sup> and domestic<sup>18</sup> legal frameworks. As these later arrangements are more close to the context than the international mandates, it is likely that regional and domestic legal frameworks, being *lex specialis* supersedes the international standards. This bypassing may create alarming situation if in content and substance, they contradict the vision of right to nationality as tool to end statelessness. This will be exemplified in the later point.

## 5. The Politics on Nationality and Its Consequence

It is already mentioned that nationality despite its legal nature is often covered by political overtones and undertones. States in principles recognize the right to nationality as may be deduced from it generality among human rights charters. The rights themselves through their language tell a lot about the dimensions that each right is allowed to possess by States through their consents (including explanations, abstentions, amendments, additions and often statements). Thus, human rights language can be regarded as a meta-statement of the States on what rights are and what aspects of a right will be covered by the obligation of States.

A State being the sole interpreter of right to nationality and also of the relation between the State and its subjects (including non-nationals), remains the hegemonic narrator of any relevant story. It is historically evident that this narrative is able to increase and decrease legitimacy for its purpose. Hence, it is suggested that the power of individual States to make laws for its nationals must have limitations so that mandates of international law may work effectively.<sup>19</sup>

The previous analyses of the language of right to nationality show that the normative strength of the right is relatively low. The mandates of the right to nationality can be used to discard or, revoke many justifiable claims of rights, if the State concerned wills to do so. The texts that narrate the right and the way they can be interpreted, allows the State with enough space and maneuverability. Hence, the language of the right, as expressed in these conventions, intertwined plausibility and implausibility under the same rubric. This 'Yes-No' model in the same norm effectively weakens its strength.

It is mentioned that right to nationality is the base or, premise for most other human rights. This base-role makes the right more valuable than many other rights, as it contains legal bindings for a State to serve its nationals. Therefore, this right requires a higher degree of protection. Any revocation of this right, or, its absence may directly infringe some major rights like: right to life, right to vote, freedom of movement, right

<sup>17</sup> Like, the European Convention on Nationality, 1997, American Convention on Human Rights 1969 (Article 20), the African Charter on the Rights and Welfare of Child of 1990 (Article 6).

<sup>18</sup> Like the Burma Citizenship Law, 1982 of Myanmar.

<sup>19</sup> Ian Brownlie, *Principles of Public International Law*, (Oxford University Press, 7<sup>th</sup> ed, 2008) 518.

to property, equality of opportunity, freedom of association, prohibition against torture. Conversely, it can be stated that all these rights can get protected (may be progressively) if in the first place right to nationality is guaranteed.

In fact stripping of nationality of a particular people and thus making them non-nationals, allows the concerned State to negate almost every possible right of the people. Alongside as a systematic offshoot of the situation, non-nationals are more likely to face another close and even no less vicious enemy that is, the nationals (who represent the majority). A silent yet visible othering process inevitably starts from the moment a particular group is excluded from nationality. This is far excelled, especially if the State concerned is poor and nationals have, in one way or, the other to compete with the non-nationals on issues and opportunities where nationals can claim a legitimate privilege.

Also, if non-nationals stay in a State, this, by dint of their non-national status, can be regarded as illegal, if not immoral. This might increase political tensions between nationals and non-nationals, if the stay of the latter continues for a long time and the former regards them as a burden to all resources; this makes it almost obvious that local political parlance (in all plausible cases) holds the statement that non-nationals should leave the State. Thus non-nationals become a political 'other' whose fate is largely determined by political dynamics of the mainstream nationals. A blatant example of this situation may be the plight of the Rohingyas of Myanmar.<sup>20</sup> This people lost their nationality in 1982 by a *lex specialis* the Burma Citizenship Law and then onwards they have been, continuously and persistently refused all rights.<sup>21</sup>

In most factual cases, revoking nationality itself is just the beginning of crises. It is more likely to bring many other misfortunes (from bad to worst) to a person or, people. Likewise, the Rohingyas were subjected to a systematic persecution in Myanmar. A recent report of the United Nations says that, palpable persecution, expulsion, and massacres have been part of a larger plan to sequester the new generation of Rohingyas from national life, and thus bring the whole group nearer to physical displacement and cultural annihilation.<sup>22</sup>

The situation clearly suggests that for any individual or, a people the right to nationality is of utmost importance. Not only for legality of the claim of right, which the State is obliged to fulfill, but also for a greater political legitimacy and general entitlement over all services rendered by the State, nationality is a must. Its presence is

<sup>20</sup> It has been reported that since August 2017, nearly 700000 Rohingyas have fled the destruction of their homes and persecution in the Northern Rakhaine province of Myanmar for Bangladesh. For details see- <<https://www.bbc.com/news/world-asia-41566561>> accessed 19 October 2018.

<sup>21</sup> Dr. Azlan Tazuddin, 'Statelessness of the Rohingyas of Myanmar: Time for Serious International Intervention' (2018) vol 4 No: 4 *Journal of Asia Pacific Studies* 429-430.<<https://www.japss.org/upload/1.%20Tajuddin.pdf>> accessed 20 October 2018.

<sup>22</sup> Ibid, 436.

so affluent that often citizens of a State may find it difficult to perceive but, its absence it equally disturbing that a stateless person experiences in day to day affairs.

## 6. Conclusion

Any generic study of the right to nationality is likely to produce disappointments; as against its significance and importance, the degree of recognition the right receives, or, the level of protection the right itself offers appears extensively asymmetrical. This situation gets even worse, if the text of right is diagnosed with linguistic and context specific analyses. If the right was aimed to end statelessness, its design and formulation should have a clear display of that. But, the article shows that the right uses vague and undefined terms which are diversely interpretable; in some treaties, it does seem that the right has only a mention but the phrase that coined it, remains silent on inevitable constituent elements.<sup>23</sup> Thus a full-fledged right to nationality able to bring any effective change in terms of ending statelessness is seemingly absent in the international narrative.

With this adds normative uncertainty and fragmentation of legal norms in international arena. This makes it obvious that the right, in its present form, may be usable even for the States who want to violate it, or, at least limit its mandate. The other countermanding part is played by local politics as nationality has a connection with political narratives. The political parlance of within a State controls the greater legitimacy question and thus politics can guide nationality. Also, as the States in international plane decide the terms of right to nationality, the language, its silence, expression and the overall formulation represent another politics of language. Hence it is argued that, the right remains mainly in black letters, unable to provide any protection, against its revocation, or, even worse violence, that occurs as a consequence of such revocation.

---

<sup>23</sup> Like the ICCPR says in Article 24 (3) that, “Every Child has the right to *acquirea nationality*.” This is it and it just stops here. It is silent about which State is obliged to provide nationality, right to change nationality and also it speaks only for the rights of a particular group, i.e. the child. The silence of the convention on providing everyone with a right to nationality can be logically translated as an abstention from the States to generalize the right.

# Linking Right to Water with Freedom of Expression: Bangladesh in Context

Bahreen Khan\*  
Emdadul Haque\*\*

## 1. Introduction

The right to clean and safe water is undoubtedly, indispensable for survival of all human beings but it is a major concern for many parts of the world. The RTW is a derivative right<sup>1</sup> and a core HR which is a prerequisite for realizing other human rights (HRs) with the spirit of dignity.<sup>2</sup> Under the HRs jurisprudence, every State has three obligations, namely the obligations to respect, protect and fulfill basic needs including RTW for its people. The RTW contains freedom of access to safe drinking water and sanitation, prohibition of unlawful pollution of water resources; non-discrimination and no arbitrary and illegal disconnections. It also contains entitlements of access to a minimum amount of safe drinking water to sustain life and health to meet basic needs and does not entitle individuals to an unlimited amount of water even to those who are unable to afford it. Water covers about 70% of the earth surface but only 2.5% is drinkable fresh water.<sup>3</sup> According to World Health Organization (WHO), a person needs 50 to 100 litres of water daily to meet basic needs and for few health concerns.<sup>4</sup>

As per the UN Water, 2.1 billion people lack access to safely managed drinking water services.<sup>5</sup> According to a report over two billion people in the world are compelled to drink unsafe water and more than 4.5 billion people do not have safe sanitation services.<sup>6</sup> It is estimated that by 2025, about two thirds of the world's

---

\* Assistant Professor, Department of Law & Justice, Southeast University

\*\* Assistant Professor, Department of Law & Justice, Southeast University

1 Amanda Cahill, 'The Human Right to Water –A Right to Unique Status: The Legal Status and Normative Content of the Right to Water' (2005) 9(3) *The International Journal of Human Rights* 391.

2 Sharmila L. Murthy, 'The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy Over-Privatization' (2013) 31(1) *Berkeley Journal of International Law* 89 <<https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1434&context=bjil>> accessed 21 October 2018.

3 Is Water a Human Right? <[https://www.youtube.com/watch?v=CV68\\_vW46RY](https://www.youtube.com/watch?v=CV68_vW46RY)> accessed 10 November 2018.

4 UN Office of the High Commissioner for Human Rights (OHCHR), 'The Right to Water' (Fact Sheet No. 35, August 2010) 8 <<https://www.refworld.org/docid/4ca45fed2.html>> accessed 13 November 2018.

5 UN Water, 'Water, Sanitation and Hygiene' <<http://www.unwater.org/water-facts/water-sanitation-and-hygiene/>> accessed 10 November 2018.

6 World Bank, UN Department of Economic and Social Affairs, 'Making Every Drop Count: An Agenda for Water Action'- High Level Panel on Water Outcome Document (14 March 2018) <<https://reliefweb.int/report/world/making-every-drop-count-agenda-water-action-high-level-panel-water-outcome-document-14>> 11 accessed 12 November 2018.

population (roughly 5.5 billion people) could be living in areas facing moderate to severe water stress.<sup>7</sup> In rural Sub-Saharan Africa and Asia especially the South Asia, millions of people are struggling to get right to safe and clean water for personal and domestic uses.

Waterborne diseases are a major challenge to the world's population, particularly in developing countries including Bangladesh. According to WHO and UNICEF, there are 80% of all illnesses and one third of all deaths in developing countries are due to water born diseases. Water borne illnesses have two main causes namely pollution and dirt with contamination. In a separate report, the WHO estimates that 88% of all waterborne illnesses are due to poor hygiene, sanitation and an unsafe water supply.<sup>8</sup> According to World Economic Forum, nearly a million people die from water borne diseases every year and also one in every nine people lacks access to clean water mostly in rural community.<sup>9</sup> In 2010, the then UN Secretary General Ban Ki-moon said that globally more people die from unsafe water than from all forms of violence including war. In the same year the UN declared right to clean and safe water as basic HR recognizing access to water as necessary to fulfill all existing HRs. The UN called on all international communities to provide clean, safe, accessible and affordable drinking water and sanitation for all.

The dichotomy of crisis as to RTW in developing countries is a serious concern and Bangladesh is not an exception to this. Despite all the discrepancies, the calls for RTW have been grounded in notions of justice.<sup>10</sup> But the hard truth is that a great number of people throughout Bangladesh do not have access to water while access to clean and safe water is a privilege to them. According to 2018 World Bank (WB) Report, 75 million people in Bangladesh is deprived of pure drinking water while 41% of water sources contain harmful E. Coli bacteria and 82% of water supply at household level contain harmful ingredients including arsenic.<sup>11</sup>

The linkage between the RTW and the FOE is comparatively a new domain of legal development. With the advent of information and communication technology (ICT) amid internet, the culture of secrecy is into oblivion paving the way for openness in all domains of governance. The duty bearers are obliged to provide water services to

<sup>7</sup> 'U.N. chief warns of growing water scarcity', *USA Today* (online), 23 March 2013 <<https://www.usatoday.com/story/news/world/2013/03/23/un-chief-water-scarcity/2012259/>> accessed 13 November 2018.

<sup>8</sup> World Health Organization, 'Water, Sanitation and Hygiene Links to Health' (2004)<[https://www.who.int/water\\_sanitation\\_health/publications/facts2004/en/](https://www.who.int/water_sanitation_health/publications/facts2004/en/)> accessed 10 November 2018.

<sup>9</sup> Maximpact Blog, 'The World's Precious Water Supply is in Crisis' <<http://maximpactblog.com/water-supply-crisis/>> accessed 12 November 2018.

<sup>10</sup> Heiner Bielefeldt, 'Access to Water, Justice and Human Rights' in Eibe Riedel & Peter Rothen (eds), *The Human Right to Water* (BWV, Berliner Wissenschafts-Verlag, 2006) 49, 49-51.

<sup>11</sup> 'Half of Country's 'Safe' Water Supply Contaminated', *The Daily Star* (online), 12 October 2018 <<https://www.thedailystar.net/country/clean-water-and-sanitation-in-bangladesh-reduce-poverty-world-bank-1645567>>, accessed 9 November 2018.

people based on public trust doctrine (PTD)<sup>12</sup> but in many respects, they are lagging behind in terms of dissemination of information and civic engagement flouting good governance. Now-a-days the principles of the FOE are considered to be vital tools as agents of change in accessing all HRs including the RTW in all societies. Bangladesh is a party to several international legal instruments covering RTW and FOE. Moreover, the country possesses a number of national laws and policies on the RTW and FOE but implementation of these is a prime challenge. This article primarily explores the country's status on the linkage of the right to clean and safe water with the FOE covered by relevant both international and national legal instruments. It also examines how far the FOE is an effective means in ensuring RTW amid transparency, accountability, good governance and civic engagement in decision making. However, this article does not focus all statutory national laws on RTW considering the voluminous scope and time constraints for review and analysis. Among the non-reviewed legal instruments include the Embankment and Drainage Act, 1952; the Water Resources Planning Organization Act (WARPO), 1992; the National Policy for Safe Water Supply and Sanitation, 1998; the Water Resources Management Plan, 2004; the National Policy for Arsenic Mitigation, 2004; the Coastal Zone Policy, 2005; the Local Government Act, 2009; the National Commission for River Protection Act, 2013; and the Agricultural Ground Water Management Act, 2018 etc.

## 2. Methodology

This study is based on qualitative approach entailing review, analysis and observation grounded on both primary and secondary sources involving relevant national statutes, international legal instruments, case laws, books, journals articles, the United Nations (UN) documents, international reports and newspapers articles. In preparing the study a comparative approach is applied and the best practices as to RTW and FOE is reviewed.

## 3. Historical Background

The rising scarcity of water has resulted in efforts, both internationally and nationally, particularly in developing countries; to gear up human rights based approach to RTW. Historically, the RTW either explicitly or impliedly is recognized and also protected as a basic HR both in international and national legal instruments and practices but mostly in the 21st century. But the implicit recognition of the RTW<sup>13</sup> for all, especially for the vulnerable, deprived and trodden down section of people was

---

<sup>12</sup> The Public Trust Doctrine (PTD) is a globally well accepted norm or principle that the sovereign holds the trust for public use of some natural resources irrespective of private property rights. The PTD was developed by Roman Emperor Justinian and also accepted by the British and others. This doctrine is further established in international and national legal policy documents and also applied by courts of different countries.

<sup>13</sup> Anonymous Note, 'What Price for the Priceless: Implementing the Justiciability of the Right to Water' (February, 2007) 120(7), *Harvard Law Review*, 1068-1088 < <https://harvardlawreview.org/wp-content/uploads/pdfs/note.pdf>>, accessed 17 November 2018.

the fundamental failure of the 20th century development.<sup>14</sup> The concept of the FOE is also endorsed and protected as a core HR both in international, regional and national legal instruments.

The UN Conference on Human Environment (UNCHE) adopted in 1972 indirectly endorses the RTW under the right to adequate conditions of life involving environmental quality that permits dignity of life and well being. The concept of basic water requirements to meet fundamental human needs was first established at the 1977 UN Water Conference. Late agenda 21 as a non-binding action plan, adopted at the UN Conference on Environment and Development (UNCED) in 1992, confirmed this. Subsequently, a number of other plans of action have referred to safe drinking water and sanitation as a HR. The principle 4 of the Dublin Statement, 1992 ended with the provision of access to clean water and sanitation at an affordable price. The Convention on Law of the Non-navigational Uses of International Water Courses, 1997 aims to ensure the equitable utilization, development, conservation, management and protection of international water courses and the promotion of the optimal and sustainable utilization for the posterity. A Protocol on Water and Health, 1999 was adopted for the Europe under the 1992 Water Convention. In 2000, a UN resolution 54/175 endorses the right to food and clean water as fundamental human rights obliging States and international community to promote the same as moral imperative. In November 2002, the Committee on Economic, Social and Cultural Rights (ESCR) adopted General Comment no. 15 entailing the RTW as indispensable for right to life with dignity. Everyone is entitled to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses under it.<sup>15</sup> The Berlin Rules on Water Resources, 2004, superseding the Helsinki Rules 1996, accommodated all customary principles of law regarding fresh water resources. The UN Human Rights Council (UNHRC) in 2006 initiated guidelines through adoption of the resolution, 2/104<sup>16</sup> which propelled the body to issue HRs obligations to member States on safe drinking water.<sup>17</sup>

Eibe Riedel, Member of the UN Committee on ESCR, says:

“People all over the world have a human right to water as the most fundamental prerequisite for living a life in dignity. Without it, the realization of other human rights is impossible. Since water resources are limited and unevenly distributed, a clear responsibility rests on all States and other public

<sup>14</sup> Peter H. Gleick, ‘The Human Right to Water’ (1999) 1(5) *Water Policy* 487-503.

<sup>15</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), ‘The Right to Water’ (General Comment No. 15, 20 January 2003) <https://www.refworld.org/docid/4538838d11.html> accessed 15 November 2018.

<sup>16</sup> UN Sub-Commission on the Promotion and Protection of Human Rights, ‘Sub-commission guidelines on the realization of the right to drinking water and sanitation’ (Report of the Special Rapporteur El Hadji Guissé, UN document E/CN.4/Sub.2/2005/25, 2006) <[http://www2.ohchr.org/english/issues/water/docs/SUB\\_Com\\_Guisse\\_guidelines.pdf](http://www2.ohchr.org/english/issues/water/docs/SUB_Com_Guisse_guidelines.pdf)> accessed 10 November 2018.

<sup>17</sup> UN Human Rights Council, ‘Human rights and access to safe drinking water and sanitation’ (UN Resolution 7/22, 2008) <[http://ap.ohchr.org/documents/e/hrc/resolutions/a\\_hrc\\_res\\_7\\_22.pdf](http://ap.ohchr.org/documents/e/hrc/resolutions/a_hrc_res_7_22.pdf)>, accessed 10 November 2018.

or private non-state actors to secure access to safe, secure, affordable and acceptable, drinking and freshwater resources for all.”<sup>18</sup>

The UN General Assembly (UNGA) on July 28, 2010 in a resolution clearly recognized the RTW acknowledging clean, safe, affordable and accessible drinking water as crucial for the realization of all HRs. It also urged States and international organizations to provide financial resources, help capacity-building and technology transfer to help countries, in particular developing countries, to provide safe, clean, accessible and affordable drinking water and sanitation for all.<sup>19</sup>

In May 2011, the WHO urged the Member States to ensure reflection of the Millennium Development Goals (MDGs), 2000 in their national health strategies for the progressive realization of the right to water and sanitation.<sup>20</sup> On 28 September 2011, the UNHRC passed a new resolution approving the right to safe drinking water and sanitation a step further by ensuring enough financing for sustainable delivery of water and sanitation services.<sup>21</sup>

On the other hand, the idea of the FOE is indirectly supported by the British Bill of Rights Act, 1689 but the issue of FOE is expressly endorsed firstly by a statutory law in Sweden in 1766. Subsequently, the national law covering the notion of FOE for Finland was reenacted in 1951 and later the USA enacted it in 1966. After the European recognition and protection of the FOE, the idea came into the forefront of the international community. After the creation of the UN, the FOE was backed up by a soft law named the Universal Declaration of Human Rights (UDHR) in 1948. Article 19 of the UDHR is the foundation of the FOE. Consequently, nine core HRs instruments emanated from the UDHR have either implicit or explicit provisions as to the FOE. Moreover, another international Convention titled the Aarhus Convention 1998 has specifically focused on the FOE especially on environmental matters including the RTW.

#### **4. Legal Instruments on RTW**

##### **4.1 International Policy Instruments on RTW**

A wide range of international policy documents have recognized, protected and promoted the RTW with holistic as well as under rights based approach. However, the UDHR 1948 did not recognize the RTW and sanitation explicitly as there was the lack of representation of the countries whose population suffered from lack of access to

<sup>18</sup> A. Z. M. Arman Habib, ‘Access to Safe Drinking Water’ *The Daily Star* (online), 24 March 2015 <<https://www.thedailystar.net/law-our-rights/law-watch/access-safe-drinking-water-73441>> accessed 10 November 2018.

<sup>19</sup> UN General Assembly, ‘Human Right to Water and Sanitation’ (Resolution A/RES/64/292, July 2010) <[http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/64/292](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/64/292)>, accessed 17 November 2018.

<sup>20</sup> World Health Organization Document, ‘Drinking- Water, Sanitation and Health’ (64/24, 2011) <[http://apps.who.int/gb/ebwha/pdf\\_files/wha64/a64\\_r24-en.pdf](http://apps.who.int/gb/ebwha/pdf_files/wha64/a64_r24-en.pdf)> accessed 18 November 2018.

<sup>21</sup> UN General Assembly, ‘The human right to safe drinking water and sanitation’ (UN Resolution A/HRC/RES/18/1, 12 October 2011) <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/165/89/PDF/G1116589.pdf?OpenElement>> accessed 20 November 2018.

water and sanitation in the negotiating table during the process of adopting the UDHR. The UDHR under article 25 and the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 under article 11(1) provide for the HRs of all people to an adequate standard of living including food, clothing and housing. Arguably, the RTW is impliedly included by an assumption that water like air, was already freely available to all. The main treaties openly recognized the RTW includes the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979 and the Convention on the Rights of the Child (CRC), 1989 and the Convention on the Rights of Persons with Disabilities (CRPD).<sup>2006</sup>

Article 14 (2) of the CEDAW says:

“States shall take all appropriate measures to eliminate discrimination against women in rural areas to ensure, on the basis of equality of men and women that they participate in and benefit from rural development and, in particular shall ensure adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”

Article 24 of the CRC envisages that States to recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. It also says that States parties shall pursue full implementation of this right and in particular, shall take appropriate measures to combat disease and malnutrition within the framework of primary health care, through, inter alia, the provision of adequate nutritious foods and clean drinking water.

The Aarhus Convention 1998 backs the FOE as to environmental issues. The Convention consists of three pillars namely access to information (A2I) on environmental matters, public participation (PP) in environmental decision making and access to justice on environmental issues. Though, Bangladesh is not a party to this Convention but the country can follow its standardized provisions linking the FOE and right to environment including the RTW for all. In 2000, the UNGA adopted the MDGs setting eight global goals. The target 7C, under the goal 7 of the MDGs, emphasized on the access to safe drinking water for all by the year 2015.<sup>22</sup>

Article 28(2) (a) of the (CRPD), 2006 provides:

“States parties shall recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures to ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs.”

Marking the World Water Day on March in 2014, an international NGO named Article

<sup>22</sup> UN General Assembly, ‘United Nations Millennium Declaration’ (Resolution 55/2, 6-8 September 2000).

19 has developed the Free Flow Principle (FFP) with a view to recognize the right to FOE and right to water and sanitation (RWS) as rights that can be claimed and exercised by any individual, community, private and public agencies. It obliges the States to ensure exercise of people's RTW involving FOE. The FFP includes right to know, right to speak and right to be heard in the process of dissemination of information and decision making on RWS. It gives due importance on establishing an institutional framework by all countries for ensuring equality or non-discrimination and promoting inclusiveness for all in a transparent, accountable and evidence-based manner while taking any decisions at any international, regional, national or local levels.

In line with the MDGs, the UN in 2015 sets the Sustainable Developments Goals (SDGs) which are targeted to be realized by 2030.<sup>23</sup> The goal 6 of the SDGs underscores the need for ensuring availability and sustainable management of water and sanitation for all. The UN resolution on 17 December 2015 recognized right to water and right to sanitation as distinct rights derived from right to adequate standard of living.<sup>24</sup> The UN on 23 December 2016, adopted another resolution on International Decade (2018- 2028) for Action on Water for Sustainable Development.<sup>25</sup> To achieve this goal a high level panel comprising of 11 head of States and a special adviser was formed by the UN in 2016 and the panel published outcome report calling for a fundamental shift in the way the world manages water.<sup>26</sup>

Several countries have explicitly recognized the RTW in their Constitutional provisions. In African aspect, article 48, 43 and 27 of the Constitutions of the DR Congo of 2006, of Kenya 2010 and of South Africa 1996 respectively recognized the RTW. In contrast, the South Asian Constitutional attitude, except Nepal, is not progressive as to direct recognition of the RTW. Article 35(4) of the Constitution of Nepal, 2015 provides that every citizen shall have the right to access to clean drinking water and sanitation. The RTW emerged through wider interpretation of the right to life by the Supreme Court (SC) under article 21 of the Indian Constitution 1949 and article 9 of the Pakistan Constitution 1973. The SC of India in a case held that the right to water is the basic need for the survival of human beings and is part of right to life and human rights as enshrined in article 21.<sup>27</sup> In another case, the SC held that the right of access to safe drinking water is fundamental to right to life and the State is duty bound

<sup>23</sup> UN General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development' (Resolution 70/1, 25 September 2015).

<sup>24</sup> UN General Assembly, 'The human rights to safe drinking water and sanitation' (Resolution 70/169, 17 December, 2015).

<sup>25</sup> Resolution 71/222 of the 'International Decade for Action: Water for Sustainable Development 2018-2028' (Resolution A/RES/71/222, 21 December 2016) <[https://digitallibrary.un.org/record/859143/files/A\\_RES\\_71\\_222-EN.pdf](https://digitallibrary.un.org/record/859143/files/A_RES_71_222-EN.pdf)> accessed 20 November 2018.

<sup>26</sup> World Bank Press Release, '12 World Leaders Issue Clarion Call for Accelerated Action on Water, Bank' (March 14, 2018) <<http://www.worldbank.org/en/news/press-release/2018/03/14/12-world-leaders-issue-clarion-call-for-accelerated-action-on-water>> accessed 12 November 2018.

<sup>27</sup> *Narmada Bachao Andolon v Union of India* [2000] 10 SCC 664.

to provide clean drinking water to its citizens.<sup>28</sup> In a similar case in Pakistan, the SC addressed a range of issues including environmental protection and expansive interpretation of the right to life<sup>29</sup> guaranteed under article 9. The SC in another case extended the meaning of the word “life” that cannot be restricted to vegetative life or mere animal existence rather right to unpolluted water for everyone wherever he lives.<sup>30</sup>

## 4.2 National Instruments on RTW

### 4.2.1 Constitutional Provisions on RTW in Bangladesh

The Constitution of the People’s Republic of Bangladesh 1972 does not expressly acknowledge the RTW either as a fundamental right or a HR but impliedly recognize, promote and protect the same as a basic HR. Article 11 recognizes to uphold democracy and fundamental HRs with dignity. Considering the vulnerability of peasants and workers the State shall strive to emancipate the toiling masses and backward section of people from all sorts of exploitations as per article 14. Article 15 provides the recognition of five basic necessities viz. food, clothing, shelter, education and medical care for citizens and this article implicitly endorses the need of RTW as part of five basic necessities. As rural people are the worst victims of the scarcity of water and sanitation, article 16 focuses on rural development and agricultural revolution. After quite a long time later, the Constitution, through its 15<sup>th</sup> amendment, adds the provision of protection, improvement, preservation and safeguard of natural resources, wetlands, forests and wildlife, environment and biodiversity for present and future citizens in article 18A. As per article 21(1), it is the sacred duty of every citizen to abide by the Constitution and other existing laws maintaining discipline, performing public duties and protecting public property. Article 21(2) obliges every government employees to serve the people as a duty, at all times. This article is the replication of the PTD under which the duty bearers as trustees are obliged to perform their duties for the benefit of people for availing basic needs and services. Endorsing the PTD and right to life, the Kerala High Court in a case held that a company cannot be entitled to unfettered extraction of ground water that would lead to ecological imbalance.<sup>31</sup> But the entire regime of the fundamental principles of the state policy (FPSP) from articles 8 to 25 of Bangladesh Constitution provides a set of guidelines as to duties and responsibilities of the government organs in enacting new laws, enforcing and interpreting of all existing laws. Unfortunately, the provisions of the FPSP under article 8(2) are not directly rather progressively enforceable. In a case as to judicial enforceability of the FPSP, the SC held that the principles integrated in

<sup>28</sup> *A.P. Pollution Control Board II v Prof. M.V. Nayudu* [2001] 2 SCC 62.

<sup>29</sup> *Ms. Shehla Zia v WABDA, PLD* [1994] SC 693.

<sup>30</sup> *General Secretary, West Pakistan Salt Miners Labour Union v The Director, Industries and Mineral Development* [1994], Supreme Court Human Rights Case 120 of 1993 <: <http://ceej.pk/cms/docs/sc/1994/SCMR2061.pdf>> accessed 13 November 2018.

<sup>31</sup> *Perumatty Grama Panchayat v State of Kerala* [2003] High Court (Kerala, Ernakulam) Writ Petition No. 34292 of 2003, [2004] (1) KLT 731 <<http://www.elaw.org/node/1410>> accessed 13 November 2018.

the FPSP under part II is not law rather a mere collection of principles.<sup>32</sup> On the contrary, the SC in another case upheld the spirit of the FPSP as mentioned in article 8(2) and the SC directed the government to take endeavours in realizing these rights.<sup>33</sup> Article 31 guarantees equal protection of law as an inalienable right of every citizen. It is strongly against taking any action detrimental to life, liberty, body, reputation, or property of any person without the approval of law. Article 32 emphatically guarantees the right to life and personal liberty. However, the idea of right to safe and healthy environment was treated as a fundamental right through wider interpretation of right to life in a landmark public interest litigation (PIL). Even the SC in the same case held that without right to a safe and healthy environment the notion of right to life will be meaningless. The court under articles 31 and 32 of the Constitution protects right to life integrating healthy environment as a fundamental right. It encompasses within its ambit, the protection and preservation of the environment, ecological balance free from pollution of air and water, and sanitation without which life can hardly be enjoyed.<sup>34</sup> The High Court Division (HCD) of the SC in the same case accepted the argument presented by the petitioner that the constitutional right to life does extend to include right to a safe and healthy environment ensuring quality of life consistent with human dignity.<sup>35</sup>

The SC in another writ petition issued a rule to prevent unauthorized and indiscriminate extraction of ground water for industrial and commercial purposes and prevent discharge and dumping of industrial waste in agricultural lands, nearby canals.<sup>36</sup> The SC in a separate case directed various public authorities including the local government bodies to comply with the existing legal and policy framework as their legal duties to take measures providing arsenic free clean and safe water to all individuals.<sup>37</sup> In a latest PIL filed before the SC based on the WB report 2018, the SC issued a rule against several government agencies including the WASA asking why their negligence and inaction in supplying clean water will not be declared illegal. The Court also directed to form a five-member committee to test the water quality supplied by WASA.<sup>38</sup>

#### 4.2.2 Other National Laws and Policy on RTW

The legal regime of RTW in Bangladesh started comparatively later than expected period of time. Like Constitutional provisions, there is no clear recognition of the RTW

<sup>32</sup> *Kudrat-E-Elahi v Bangladesh* [1992] 44 DLR (AD) 319.

<sup>33</sup> *Dr. Mohiuddin Farooque v Bangladesh* [1997] 49 DLR (AD) 1.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Dr. Mohiuddin Farooque v Bangladesh* [1996] 48 DLR (HCD) 438.

<sup>36</sup> *Bangladesh Environmental Lawyers Association v Bangladesh and Others* [2015] Writ Petition No.440 of 2015.

<sup>37</sup> *Rabia Bhuiyan, M.P. v Ministry of Local Government and Rural Development and Others* [2007] 27 BLD (AD) 261.

<sup>38</sup> 'High Court Orders to Form 5-member Body to Examine WASA Water', *The Independent* (online), 6 November 2018 <<http://www.theindependentbd.com/post/173526>> accessed 10 November 2018.

in the existing water related laws as a HR. It is an irony of fate that despite around 200 laws on environment, none has recognized the RTW explicitly. The Environmental legislation in Bangladesh started with water pollution control to diverge pollution control and afterwards to environmental protection and conservation approach. Repealing the Water Pollution Control Ordinance, 1977 the Bangladesh Environment Conservation Act (BECA), 1995 was enacted with conservation approach. This Act implicitly recognized the RTW through adoption of protection measures under sections 4, 5, 6E, 7, 8, 9, and 12. The Department of Environment (DoE) constituted and empowered, under this Act, to carry out numbers of activities, such as declaring any area as ecologically critical area (ECA), protecting wetlands, taking steps for preserving the eco-systems, regulating excessive pollutants and issuing environmental clearance for initiating activities/projects. The noncompliance of these statutory provisions is rampant and the wetlands are degrading fast, curtailing RTW. The Water Supply and Sewerage Authority (WASA) Act, 1996 empowers undertaking specific schemes, under section 17, for the purpose of construction, development and conservation of drinking water, its collection, storage and supply within WASA's jurisdiction; and also for ensuring sanitation services. The performance of WASA, in terms of supplying drinking water at house-hold level and providing sanitation services is not found at satisfactory level which is evident from the recent WB report. Sections 5 and 6(1) of the Bangladesh Water Development Board (BWDB) Act, 2000 implicitly endorse the RTW by way of undertaking some structural and non-structural functions by the BWDB. The BWDB is responsible for development and management of water resources; to control the flow of waters of all rivers, channels and underground aquifers. Section 5 of the Open Space and Wetland Conservation Act, 2000 restricts alteration, use and transfer of any wetland as identified in government records. Changing of the nature of wetlands through indiscriminate encroachment and their illegal filling-up are serious concerns against RTW and numerous PILs have been filed challenging these unauthorized activities. The RTW is given a generous parlance in respect of right<sup>39</sup> through framing of the National Water Policy (NWP) 1999 and the Bangladesh Water Act<sup>40</sup> (BWA) 2013.

#### **4.2.2.1 National Water Policy (NWP), 1999**

The Ministry of Water Resources of Bangladesh has formulated the NWP with the aim of managing water resources of the country in a comprehensive, integrated and equitable manner for the judicious use of water resources for present and future generation. Its main objectives include development and management of water resources in an efficient and equitable manner; ensuring availability of water to all considering the special needs of poor, underprivileged, women and children;

<sup>39</sup> Md. Khalequzzamana and Zahidul Islam, 'Review of the Water Act 2013', *bdnews24.com* (online), 14 July 2013 <<http://opinion.bdnews24.com/2013/07/14/review-of-the-water-act-2013/>>accessed 10 November 2018.

<sup>40</sup> Bangladesh Water Act 2013 (Act No. 14 of 2013).

development of sustainable public and private water delivery system with necessary legal and institutional measures; bringing institutional changes through decentralization of management; capacity building in water management with economic efficiency, gender equity, social justice and environmental awareness through PP.

It emphasizes on basin-wide planning for ensuring river basin management through comprehensive planning and management of water resources by ensuring participation of project affected people undergoing mandatory social and environmental impacts. The NWP vests the ownership of water on State, on behalf of people reflecting PTD. The Government obliges to allocate water equitably, facilitate availability of safe and affordable drinking water supplies and sanitation. It focuses on the relationship of water with other sectors like, agriculture, industry, fisheries and wildlife, navigation, hydropower and recreation, environment, and for preservation of different types of wetlands. It requires resorting appropriate technology for research and information management as to water. The policy prioritizes stakeholders' participation for getting direct inputs from people at all levels ensuring accountability. Subsequently, the Bangladesh Water Act (BWA) 2013 was enacted to effectuate the NWP.

#### 4.2.2.2 The Bangladesh Water Act (BWA), 2013

The core objective of the BWA is to frame provisions for integrated development, management, extraction, supply, equitable use, promotion, protection and conservation of water resources. It lacks express recognition of the RTW as a HR creating difficulty in claiming and yielding it. Even the penultimate version of the BWA had considered access to safe water as HR but ultimately dropped while passing the enactment.<sup>41</sup>

Section 3 recognizes right to potable water and water for hygienic purpose as top priority rights. It permits customary use of water and the easement right to water in private or public land. It binds the duty bearers to protect the water resources following PTD, since peoples' RTW vest upon the State. Here, water includes: surface, ground, sea, rain and atmospheric water but it is silent on the modes of harvesting of rain water complementing ground water recharge. The BWA has no specific provision on ensuring supply of pure drinking water which is addressed by the WASA Act, 1996 and the Local Government Act, 2009.

The Act neither bars any attempt to water privatization nor has any provision on capping of water for industrial or developmental use. Since water resource is *res communis* implying to be common for entire mankind and to be protected for all.<sup>42</sup> Ab-

<sup>41</sup> Md. Khairul Islam, 'Access to safe potable water has not been termed as human rights in the Bangladesh Water Act 2013' interviewed by Shahnoor Wahid, *The Daily Star* (online), 22 March 2014. <<https://www.thedailystar.net/access-to-safe-potable-water-has-not-been-termed-as-human-rights-in-the-bangladesh-water-act-2013-16662>> accessed 13 November 2018.

<sup>42</sup> Paul A. Barresi, 'Mobilizing the Public Trust Doctrine in Support of Publicly Owned Forests as Carbon Dioxide Sinks in India and the United States', (2012) 23(39) *Colombia Journal of International Environmental Law and Policy* 41, 49.

sence of any such provision barring privatization in the BWA may increase the vulnerability of the poor, whereas the government agencies are duty bound to protect water resources for the benefit of present and future citizens as a Constitutional pledge.

Section 4 endorses the National Water Resources Council (NWRC) as the apex authority, positioning the Prime Minister as its Chairperson. It consists of around forty five members, of them only four represents non-government organizations (NGOs). The main functions of the NWRC include: setting policy for achieving the objectives of this Act; providing guidelines for coordinated water resources development; approving and ensuring the proper implementation of NWP and National Water Management Plan (NWMP), etc.; advising the government to enter into any international water related treaties or instruments with other countries or regional organizations.

A subordinate body, namely, the Executive Committee of NWRC (ECNWRC) is formed for ensuring the proper implementation of NWRC's functions. Its main functions include publishing, disseminating and evaluating the directions and recommendations of the NWRC and NWP and NWMP; notifying and advising the NWRC on water resources management; settling any inter-institutional dispute, etc. It is empowered to issue order on compliance, removal, and protection and clearance certificate; recommend the Government to declare and earmark any water source or aquifer as water stress area (WSA); fix the safe yield for ground water extraction of any area and this issue is also addressed by another law, namely the Agricultural Groundwater Management Act, 2018. The ECNRC may initiate conservation of *dighi*, pond or any other similar water bodies as sources of potable water; and can enter into any public or private land for the purpose of inspection and survey, interrogation of persons, call for or scrutinize any record or information, sample collection etc.

The Act emphasizes on public consultation and public hearing for taking any decision; on A2I regarding protection, conservation and management of water resources; and on publishing and publicizing any compliance, removal or protection order, through print and electronic media. The Act has cross references of other Acts, such as, the Water Resources Planning Organization (WARPO) Act, 1992, the BECA, 1995, the ICT Act, 2006, and the Right to Information (RTI) Act, 2009. The proper implementation of the BWA depends on the Bangladesh Water Rules (BWR), 2018.

The offences under this Act are non-cognizable and bailable which may ignite the possibility of recurrence of water crimes. The first time offender may be exonerated from the charge by the ECNWRC through compensation. The second and subsequent time offender can be penalized with a fine not exceeding taka ten thousand or an imprisonment not exceeding five years or with both. Section 36 of the BWA bars on direct access of people to the court as it requires a written complaint to be made by the Director General of the WARPO or his authorized officer, in taking cognizance of any offence.

In recent years, the wetlands are being encroached and filled up, in the name of development by influential persons and land grabbers, impacting adversely on RTW. Addressing environmental issues, a good number of PILs have been filed before the SC, and the apex court has pronounced numerous directives to conserve the wetlands for ensuring people's RTW but the proper implementation of these directives is a real challenge. Though the NWP points out the role of women in water management, the BWA and BWR say nothing about the special need of vulnerable groups, women and children in realizing their RTW. Traditionally, women and children are responsible to collect household water and shrinkage of water bodies will increase their disproportionate sufferings affecting their health and restricting their work and education opportunities.

#### **4.2.2. 3 Bangladesh Water Rules 2018**

Like the BWA, the BWR does not recognize the RTW as a HR. It is framed very recently to ensure proper implementation of the BWA. Rule 3 of the BWR specifically obliges the WARPO to undertake activities ensuring RTW for drinking and domestic purpose by fixing every person's daily water demand and limiting water availability as per the directions of ECNWRC; and to supervise, review and evaluate the works done for ensuring the RTW for all. For the violation of the compliance or protection order, rule 44 imposes compensation, up to the amount double to damage caused or five million taka, whichever is less. Though rules 49 and 52 urge to establish and preserve all documents, records and database as public documents but rule 4 impedes access to such database, if designated as "classified". Rule 6 details out the method of public hearing before taking any decision which is a positive gesture.

### **5. Legal Instruments on FOE**

#### **5.1 International Instruments on FOE**

The FOE is an internationally endorsed core HR around the world. The right to FOE is broad and covers many freedoms such as right to seek, receive and impart information that are essential to every human being. The term FOE also entails four things namely the freedom of newspapers and publication; independence of broadcast media, prohibition of all forms of censorship and freedom of assessing, obtaining, participating and circulating information without any frontiers.

Historically, the term freedom of speech as a part of the FOE was first recognized in the English Bill of Rights enacted on December 16, 1689. However, Sweden is the first country to come up with the approach of full disclosure of public information under the Freedom of the Press Act, 1766 when Finland was a territory governed by Sweden. In America five freedoms<sup>43</sup> including the freedom of speech and the freedom of press were ensured under the first amendment of its constitution in 1791. The French Declaration

<sup>43</sup> Five freedoms in the first amendment of the American Constitution includes freedom of speech, freedom of press, freedom of religion, freedom of peaceful assembly, and freedom to file petition against the government. This first amendment was the part of bill of rights comprised of first ten amendments of the American Constitution. The bill of rights or fundamental rights were enforced on December 15, 1791.

titled the Declaration of the Rights of Man and of the Citizen 1789 protects freedom of speech.

The UNGA for the first time in 1946 recognized the FOE in the name of the freedom of information as a basic HR and “the touchstone of all the freedoms of which the UN is consecrated.”<sup>44</sup> Following its own earlier footsteps, the UNGA in 1948 adopted the UDHR. Under article 19 of the UDHR, the FOE got a firm shape for everyone as to freedom of opinion and expression without interference and regardless of frontiers.<sup>45</sup> Article 5(d)(vii) and (viii) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1965 reiterated the FOE comprising of the freedom of thought, conscience, opinion and religion.

Article 19 of the International Covenant on Civil and Political Rights (ICCPR), 1966 reignited the flame of the FOE under the UDHR through any media regardless of boundaries. Articles 19(3) also provides three restrictions on the FOE, subject to provision of law and are necessary for respect of the rights of others and also for the protection of national security or of public order or of public health or morals. Article 15(3) of the ICESCR, 1966 and articles 12 and 13 of the CRC, 1989 recognize the FOE. Article 13 of both the International Convention on the Protection of All Migrant Workers and Members of their Families (ICMW), 1990 and the UN Convention on against Corruption (UNCAC), 2003 recognize the FOE. Moreover, article 10 of the European Convention on Human Rights (ECHR), 1950, article 9 of the African Charter on Human and Peoples’ Rights, 1969 and article 13 of the American Convention on Human Rights, 1981 also recognize the FOE in regional levels.

Over 80 countries in the world representing nearly five billion people have now adopted RTI laws but some of them earned reputation for successful enforcement while many failed to keep pace in term of adept implementation leaving further scope to learn from mistakes. Now, over 70 countries recognized RTI as a basic constitutional right.<sup>46</sup> In the context of South Asia, Pakistan firstly ventured the RTI Ordinance in 1997 and again in 2002 revoking the first one. But in 2005, India has turned to be the pioneer in enacting the full-fledged RTI Act and headed towards information friendly governance. Nepal enacted similar law in 2007 while Sri Lanka passed the same law in 2016 and Pakistan in 2017.

In fact, the core nine international HRs documents under the UN mechanism directly or indirectly acknowledge the FOE. Bangladesh being a ratifying member

<sup>44</sup> UN General Assembly, ‘Calling of an International Conference on Freedom of Information’ (*Resolution A/RES/59*, 14 December 1946) < [https://documents-dds-ny.un.org/doc/RESOLUTION/ GEN/NR0/033/10/IMG/NR003310.pdf?OpenElement](https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/10/IMG/NR003310.pdf?OpenElement)>, accessed 19 November 2018.

<sup>45</sup> UN General Assembly, ‘Universal Declaration of Human Rights’, (Resolution A/RES/217 III), 10 December 1948) art.19.

<sup>46</sup> Md. Asaduzzaman and Emdadul Haque, ‘Reviewing the Views: Obstacles to Good Governance’, *The Daily Star* (online), 20 January 2015 <<http://www.thedailystar.net/obstacles-to-good-governance-60753>> accessed 10 November 2018.

country of the eight international HRs instruments out of core nine documents that bears the country's testimony of respect towards global commitment of HRs.<sup>47</sup> Being obliged to comply with the bindings under these HRs instruments including the ICCPR, CEDAW, UNCRC and UNCAC, the RTI Act 2009 was enacted in Bangladesh.

## 5.2 National Instruments of FOE

The history of FOE law in the name of RTI law in South Asia including Bangladesh is of recent origin. The Bangladesh Constitution, 1972 does not have any special provision for RTI except some integrated and implicit recognition under articles 7, 11, 36 to 39 backed up by the Preamble as the guiding star.<sup>48</sup> The Preamble pledges to realize a democratic process, free from exploitation upholding the core HRs including rule of law, freedom, equality and justice for all citizens. Article 7 envisages all powers of the Republic to the people; article 11 declares the Republic as democracy promising to assure basic HRs. Articles 36 to 38 postulates the freedom of movement, assembly and association which are linked with the FOE. The indirect journey of Bangladesh towards the information based governance started with article 39 entailing freedom of thought and conscience, and of speech coupled with reasonable restrictions including the interest of state security, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. Replacing the RTI Ordinance, 2008, the RTI Act, 2009 was enacted focusing good governance, transparency, accountability through democratic and civic engagement. Accessing information is treated as a right under sections 2(g) and 4. Even, RTI as to life, arrest and release from jail is to be disseminated within 24 hours under section 9(4). However, there are 20 exceptions under section 7 vitiating the objectives in the name of state security, integrity, sovereignty, intelligence and public interest. The punishment under this Act is too low; fine not exceeding taka five thousand or six months imprisonment or both; and needs amendment to limit the restrictions on A2I and to impose higher punishment.

But the various provisions of national laws create impediments for FOE, such as articles 39(2), 43 and 108 of Bangladesh Constitution, sections 124A, 153A and 153B, 228, 292, 293, 295 and 499 of the Penal Code 1860, section 4A of the Criminal Procedure Code 1898, section 28B of the Post Office Act 1898, sections 123 and 124 of the Evidence Act 1872, rule 28(1) of the Rules of Business, 1996, rule 19 of the Government Servants (Conduct) Rules 1979, section 5(1) of the Official Secrets Act, 1923, section 57 of the ICT Act 2006, sections 8, 21, 25, 28, 29, 31, 32, 43, 53 of the Digital Security (DS) Act 2018, the National Broadcast Policy 2014 and the National Online Mass Media Policy 2017.

<sup>47</sup> Emdadul Haque, 'Rohingya Refugee Paradox: Casting an Inner Eye' (2012) 2(12) *Asian Journal of Research in Social Science & Humanities* 97-108.

<sup>48</sup> In the Constitution of the People's Republic of Bangladesh 1972, nothing is clearly mentioned with right to information but freedom of speech, press and of conscience is guaranteed under article 39. Also the power of people is recognized in article 7 of the sacred document. Article 11 enumerates human rights and democracy while articles 36 to 38 entail right to movement, assembly and association respectively.

It may be opined that before the RTI Act, the culture of secrecy was prevailing in full swim in the country.<sup>49</sup> But the positive gesture as to the FOE is that this Act under section 3(b) possesses the supremacy clause in case of its contradiction with other laws denying A2I. Therefore, people's RTI may not be barred in any way other than supported by express provisions of law. Despite all odds, the enactment of the Act sensing its far reaching value is an epoch-making incident in the history of participatory legislation in the country.

## 6. Linkage of RTW, FOE and Good Governance

The linkage between RTW and FOE, as a tool of empowerment of common people paving the way for good governance, is of recent phenomenon. But the relation between RTW and FOE is indirectly and insufficiently recognized in the national and international legal instruments linking the nexus of these two with good governance. The idea of good governance is overwhelmingly acknowledged as a vehicle for the realization of the RTW and FOE. The core components of good governance comprise transparency, accountability, civic engagement though proactive disclosure, equality, inclusiveness and diversity. The PP in water management through engaging all relevant stakeholders especially the landless, marginalized and other disadvantaged groups is of paramount importance.

Information allows people to scrutinize the actions of a government and is the basis for proper, informed debate of those actions.<sup>50</sup> Bad government needs secrecy to survive and also allows maladministration, inefficiency, wastefulness and corruption to thrive. Government power, backed by an informed citizenry, is unassailable, because through full availability of the FOE, an equitable partnership between the government and the individual is established, based upon respect for the latter's right to know.<sup>51</sup> The FOE enables citizens to seek information from duty holders and make them responsible for proactive disclosure.<sup>52</sup> John Adams terms information as knowledge putting emphasis that it is indispensable, indisputable, inalienable, infeasible divine right to all born in the world.<sup>53</sup>

The scenario of international law as to the concept of FOE is different than national legislation. International law is born with the provision of FOE. But the materialization of the dream of international law through national commitment is rhetoric for

<sup>49</sup> Official Secrets Act 1923 (Act No. XIX of 1923) which was enacted by the British Government for the Indian Sub-continent to deter free flow of information and harbouring the practice and culture of secrecy and red tap attitude of the colonial ruler.

<sup>50</sup> William R. Staples (ed), 'Encyclopedia of Privacy, Volumes 1 & 2' (Westport, Conn: Greenwood Press, 2007) 240.

<sup>51</sup> Herbert N. Foerstel, 'Freedom of Information & the Right to Know: The Origins & Applications of the Freedom of Information Act' (Westport, CT, USA: Greenwood Publishing Group, 1999) 24.

<sup>52</sup> Shaheen Anam, 'Freedom to Know: Right to Information Act and its implications for Bangladesh', *Forum* -A monthly publication of the *Daily Star*, June 2009 3(6).

<sup>53</sup> John Adams, 'A Dissertation on the Canon and Feudal Law' in Robert J. Taylor, Mary-Jo Kline, Gregg L. Lint (eds), *Papers of John Adams*, Vol. 1 & 2 (Cambridge, Mass.: Belknap Press of Harvard University, 1977) 108.

many developing countries including Bangladesh. In term of national laws, there are more provisions restricting the FOE than allowing the same. The capacity of the State in terms of economic, social and cultural development, mindset of the duty bearers and general masses are still major causes for non-enforcement of the FOE in Bangladesh. But the enactment of laws allowing FOE is an opportunity to claim and to implement this bundle of rights in the days ahead. In line with the preamble of the RTI Act, the State is obliged to ensure A2I for good governance amid transparency, accountability of public, autonomous and other bodies eradicating the corruption and other forms of maladministration. The Information Commission of Bangladesh is authorized to promote transparency and accountability of the public, autonomous, statutory and private organizations curbing corruption and establishing good governance. But the real challenge of this commission is to be capacitated itself in achieving its target.

The integration of the RTW and FOE is indirectly enshrined in section 6 (2) (b), (c), (d) and (f) of the BWDB Act, 2000. This Act underscores the compulsion of initiation of water development projects ensuring feasibility study, engagement of public and private agencies, public participation and Environment Impact Assessment (EIA). Sections 8(2) and 15(4) of the BWA provide ensuring public participation in making future NWP and national water resources plan. While issuing compliance order, removal order and safety order as to ensure the RTW and protection of water bodies under sections 12(6), 13(3) and 27(2), the duty bearers are obliged to give reasonable opportunity to the concerned persons or agencies of being heard. To scrutinize the entitlement of the RTW through the FOE, the BWA, in its several provisions including sections 38 and 44, articulates the FOE by following the ICT Act 2006 and the RTI Act 2009 for public hearing and participation. The BWA permits A2I on already executed activities of the NWRC, ECNWRC or the authorized officer, and is silent on getting information on any proposed actions; but the RTI Act permits A2I on proposed activities. The authorities may, using this plea, impart only that information which they feel safe and not to disclose other just considering as “classified”. Hence, the BWA needs amendment allowing A2I of proposed actions and specific provision on proactive disclosure to ensure FOE in yielding the fruit of good governance.

The BWA is mostly silent on ensuring good governance issues like transparency and accountability in government actions. It also lacks the consequences of any inaction, irregularity, negligence and corruption if done by these authorities that impede achieving good governance in defiance of public interest and the PTD. The BWA should consider induction of the provision of water ombudsperson to ensure good governance following similar practice in New South Wales in 1998 and Sydney in 1999 (Australian practices). The insufficient representation of civil society and local community in both the NWRC and the ECNWRC can be easily ignored through majority vote. So, it should encourage civil society, community organization and media in highlighting people’s demand and grievance on water issues.

For accessing RTW both international and national bodies are required to a collaborated and dedicated action.<sup>54</sup> A core component of good governance is accountability and that should be satisfactorily practiced by relevant duty bearers. In a case of India, the SC held that the plea of the duty bearers as to poor finance would be a poor alibi when people in misery and cried for justice<sup>55</sup> reflecting the PTD. To ensure accountability in relation with the RTW, the SC of Nepal in a case asserted that a national water supply company should be accountable for its actions or inactions and declared that on the ground of incapacity its legal obligation to provide pure drinking water on a regular basis cannot be diminished.<sup>56</sup> The laws of Bangladesh theoretically acknowledged the concept of good governance both in terms of RTW and FOE but again the implementation of those is in shambles. However, there is a wider scope of good governance in assessing the RTW integrating the FOE.

## 7. Challenges and Opportunities

The smooth integration of RTW with FOE is new threshold in the context of Bangladesh. But the landscape of socio-legal, political, economic and cultural attitudes of both the duty bearers and general masses pose enormous challenges to integrate between these two. The delicate integration of these two factors may accelerate realizing the RTW. The major challenges and opportunities in Bangladesh regarding the RTW and FOE include:

### 7.1 Challenges:

- i) Bangladesh as a deltaic country needs water for the sustenance of its deltaic feature and which is linked with the RTW. It shares 57 trans-boundary rivers with neighboring countries but being the lowest downstream country has no control over the flow that comes from upstream countries.
- ii) The country is heavily dependent on surface and ground water. Rain water harvesting is not popular in Bangladesh resulting in excessive dependence on ground water extraction. It leads to lowering of aquifer level of ground water which is a major threat for the densely populated country in the backdrop of global climate change.
- iii) The scarcity and misuse of fresh water as to quantity and quality is aggravated due to contamination or pollution from point and non-point sources.
- iv) Relevant legal instruments are remaining unenforced to a large extent posing serious threat to RTW, public health and sustenance of water ecosystem.

<sup>54</sup> María Adelaida Henao Cañas, 'The right to water: dimension and opportunities' (January-June 2010) 1(1), *Columbia, EAFIT- Journal of International Law*, 69-79 <<http://publicaciones.eafit.edu.co/index.php/ejil/article/view/381/377>> accessed 13 November 2018.

<sup>55</sup> *Municipal Council, Ratlam v. Vardhichand and Others*, AIR [1980] SC 1622.

<sup>56</sup> *Advocate Prakash Mani Sharma and Others v Nepal Water Supply Corporation and Others* [2001] Supreme Court WP2237/1990 <<http://www.elaw.org/node/1383>> English Translation by Raju Prasad Chapagai.

- v) In many cases, development projects are being carried out without proper consultation with grass root level stakeholders despite the legal obligations. As a result, the poor, marginalized and vulnerable people largely victimized.
- vi) The country is also in dearth of integrated research on water resources management which involves huge allocation of financial resource.
- vii) Prime Minister is in charge of the NWRC but her busy schedules with executive functions seldom allow her to concentrate on this body.
- viii) Though there are legal provisions allowing the FOE, the A2I is still is massive challenge to realize as the vested interest groups make procrastination in dissemination of information and sometimes intimidate the media persons and their families.
- ix) In the name of development, the housing companies, business houses and influential quarters often encroach wetlands and water bodies posing serious threat to RTW; their dubious advertisements of the projects in the print and electronic media often confuse the people due to lack of awareness as to the right.
- x) The sector is also lagging behind in relation to proactive media engagement disseminating information and engaging investigative reporting. Generally, media coverage arises in the wake of immediate necessity of observing any national or international day such as World Water Day, World Environment Day, and World Wetland Day etc.
- xi) Global climate change is another big concern for water sector in the country. Community people's water dependency may in near future face big challenge, if not prepared as to adaptation to climate change.
- xii) Lack of political will is the root of all challenges as the political commitments at the end generally turn rhetoric instead of reality provoking irregularities in water governance.

## **7.2 Opportunities:**

- i) The country is blessed with huge workable manpower that can be used for initiating and implementing water conservation as well as water management activities with a sense of ownership. Since the literacy rate is scrolling up, it will be easy to motivate people in the decision making process through their active engagement.
- ii) The vision of 'Digital Bangladesh' may be utilized proactively regarding sharing of information and awaking people about their rights and needs as to water and sanitation as ICT sector is booming.
- iii) Vigilant Civil Society Organizations (CSOs) are striving to ensure RTW utilizing the tool of FOE. The PIL is also a handy vehicle to realize the RTW. Moreover,

workshops, seminars, symposiums and other awareness measures are being carried out to aware the stakeholders and common masses.

- iv) Water Charter like Citizens Charter may be formulated by the relevant government agencies for ensuring free flow of information and good governance amid transparency, accountability. For eradicating irregularities and expediting good governance in water sector, the idea of water ombudsperson may be proactively considered like Australia.
- v) Detailed study on RTW and FOE can help find the real scenario of inconsistency between these two aspects for the better realization of RTW engaging civic engagement. In addition, national legal instruments recognized the guidelines for PP, project assessment and environment impact assessment (EIA) may be accelerated, through close monitoring for effective management of water resources.
- vi) In order to realize the SDGs effectively, the government officials are coming forward in capacity building in respect of critical water issues and other cross-cutting challenges through specialized training, research and joint programmes with development partners.
- vii) Since the Prime Minister is the chairperson of the NWRC and also a member of the UN High Level Panel on Water formed for two years (2016 -2018) to achieve goal 6 of the SDGs, her commitment towards advancing urgent actions on sustainable access to RTW for the posterity can be cascaded in all present and future programmes on water management.

## **8. Findings and Recommendations**

As the research focused on the establishment of linkage between the RTW and FOE and the utility and usefulness of the FOE in realizing the RTW in Bangladesh in the light of both international and national legal instruments, it has partially successful in linking the proposition. Based on the PTD, the study has also yielded the causal link of the RTW and FOE with the motto of good governance. In essence, the findings and recommendations of the study are mentioned below:

### **8.1 Findings:**

- i) Due to lack of access to clean and safe water, water-borne and infectious diseases spread alarmingly taking away lives of a large number of people in the world including Bangladesh.
- ii) The notion of RTW is not expressly endorsed as a basic HR neither in Bangladesh Constitution nor in other domestic statutory laws. On the contrary, the idea of FOE is recognized as a basic right both under Constitution and statutory laws.
- iii) NWP, BWA and BWR are mostly silent about media engagement especially setting parametres for donor agencies as to participation, funding and supervision for amelioration of the wounds as to RTW. The BWA also bars direct access of people to the judiciary which hinders the entitlement of the RTW.

- iv) In accessing and disseminating information on water related issues, the impediments prevailing on the existing laws including the RTI Act, ICT Act and DS Act are great concerns for integrating the RTW and FOE.
- v) The NWP and the subsequent BWA followed by BWR are based on the provisions of developments, management, extraction, distribution, usage, protection and conservation. But the study reveals that the access to water is impliedly recognized as a right but in reality seems to be a privilege given by duty bearers.
- vi) Due to excessive restrictions imposed on FOE, the purpose of recognition of the FOE is largely jeopardized. However, there is an opportunity to use the FOE as a handy tool in realization of the RTW as well as promoting good governance in water issues.
- vii) Right to clean and safe water enable smooth realization of right to life. Similarly, the FOE is a vital tool to ensure the RTW which may stimulate a right to life with dignity ensuring education, health and hygiene. Ultimately, the protection of the RTW and FOE may lead to effective social and economic development of the country.
- viii) There is a lot of scope to improve the practice of good governance in water management that engages different stakeholders both at public and private sectors through introduction of Water Charter and Water Ombudsperson like Australian practices. In dealing with inaction and irregularities of the duty bearers in term of ensuring the RTW and FOE, the transparency and accountability measures are not specifically spelled out.
- ix) The capacity building of the duty bearers is in need of further advancement as to physical, technical and scientific issues of upcoming challenges for ensuring the RTW for all.
- x) Considering the urgency of water management, two authorities, namely NWRC and ECNWRC are created at policy and implementation level. Even, the Prime Minister is the head of the policy level authority to deal with water management issues; the outcome of those bodies is yet to be surfaced.
- xi) The DoE, BWDB and WASA have specific statutory responsibilities as to water resources conservation, management and development but they lag behind in discharging their responsibilities in protecting RTW through ensuring FOE.

## 8.2 Recommendations

- i) Bangladesh Constitution should include the RTW as a basic HR like South Africa, Kenya, DR Congo and Nepal. Accordingly, the duty bearers should take specific actions for the realization of the RTW in consonance with PTD.
- ii) Implement the RTI Act 2009 that requires governments and other duty bearers to proactively inform the public about issues relating to RTW and water management. The restrictions imposed on the free flow of information under the RTI Act, ICT Act and DS Act may be eased.

- iii) The RTW as recognized in the BWA and BWR may be more meaningful if the existing bars in terms of direct access to justice are lifted and the law should be amended to make offences as non-bailable.
- iv) Enabling environment may be created for all people, including civil society and HRs defenders, to participate in decision-making related to RTW without fear of discrimination or reprisals. There could be targeted measures ensuring equal and effective participation of all marginalized groups, especially women and persons with disabilities and FOE should be utilized as a mean of empowerment general masses.
- v) Since the implementation of the NWP, BWA and BWR largely depends on the WARPO, it is in dire necessity to strengthen the capacity of the body in terms of manpower, financial resources and research and development as well as technical knowhow.
- vi) In attaining the goals, particularly goal 6 of the SDGs, Bangladesh should formulate time-bound action plan and proper implementation mechanism with required budgetary allocation and through ensuring PP.
- vii) Like electricity tariff, the existing flat rate of water tariff is required to amend by introducing slab as per consumption for ensuring equity to the poor and vulnerable sections of the society.
- viii) Since Bangladesh is dependent on trans-boundary rivers, the regional cooperation including joint research is needed for the augmentation of shared water to realize RTW effectively.
- ix) The obligation of Bangladesh arising out of being party to international instruments on RTW and FOE, must be replicated in national laws and policies either by enforcing or amending the existing laws or framing new laws as a continuous process.
- x) The water sector of the country must replicate the idea of good governance involving accessibility, fairness, accountability, transparency, independence, efficiency and effectiveness by introducing water ombudsperson in the BWA.
- xi) Periodic review of relevant laws and policies on RTW and FOE need to be conducted in line with the changing needs of the people. The FFP of Article 19 may be taken into positive consideration for ensuring RTW by integration in national laws and policies.

## 9. Conclusion

Life in riverine Bangladesh is dependent on water. Water is central to the way of life and single most important source for human well-being. The RTW is an indispensable right in all over the world while the FOE is an essential means for accessing the RTW with a view to guaranteeing a dignified life. Both the RTW and FOE encounter scores of hurdles as to recognition, promotion, protection and enforcement in developing countries especially in Bangladesh. The existing international legal instruments

endorse the RTW vehemently but the national laws accept it tacitly. However, the materialization of the obligations arising from both aspects, need further attention of all stakeholders for the prompt and timely actions based on the PTD. Simultaneously, the prevailing international and national laws and policies concerning the FOE have recognized the right to know, right to speak, right to be heard and right to PP in decision making but the inherent flaws in those laws and the proper implementation of those are the major impediments. In essence, there is a dire necessity of delicately balanced integration of the RTW and the FOE in the policy documents where all the stakeholders including the government, civil society organizations, media, community organization, activists and mass people at large should play their respective roles in realization of the RTW for all amid involvement of transparency, accountability and good governance. But it is a daunting challenge to ensure sufficient amount of safe water including improvement of the standard of living, health, hygiene and sanitation for all. But, still there is a long way to go in terms of realization of RTW in a sustainable manner through integration of FOE in true sense.

# Laws on Cyber Jurisdiction in International Perspectives

Md. Golam Mostofa Hasan\*

## 1. Introduction

Cyberspace is the living but unseen world within our known real world. Cybercrimes occur in the real world through the cyberspace. This is why the nature of the cybercrimes is different from the crimes committed without involving cyberspace. In cyberspace, it is extremely difficult to contemplate where the threats are coming from. Cyberspace has changed the face of the world- the way we do things, the way we do businesses, the way we entertain above all everything that relates to our lives. At the same time, the traditional ways of committing crimes are also changing dramatically, posing tremendous challenges and threats to our conventional legal measures for combating crimes. The opportunity of hiding identity in the cyberspace; the volatile nature of digital evidences; the difficulties of tracing commission of cybercrimes; and such like circumstances put the cybercriminals at low risk of being caught and prosecuted. On the other hand, the law enforcement agencies, as well as prosecution system of the country are facing terrible difficulties to counter such crimes.

Cybercrimes often involve several states because a cybercriminal sitting in one country may cause damages in another country through using websites located in a third country. Here comes the question of jurisdiction- which country is proper forum for settling cyber disputes or prosecuting and trying cybercrimes. Therefore, the developing law of cyber jurisdiction must address whether a particular event in cyberspace is controlled by the laws of the country where the 'website' is located, or by the laws of the country where 'the internet service provider' is located, or by the laws of country where the user is located, or perhaps by all of these laws. Unfortunately, laws of determining jurisdiction in cyberspace are not univocally settled yet. Jurisdictional laws are developing across the globe, mostly through case-laws and domestic cyber laws of different countries. Till today, there is only one comprehensive treaty dealing with jurisdictional matters in cyber activities, that is, the Convention on Cyber Crimes, 2001.

Primarily, disputes relating to cyber jurisdictions are resolved by resorting to traditional international jurisdictional principles that exist in international laws. However, the courts around the world, particularly, the USA Courts have developed and applied certain distinct jurisdictional principles particularly suitable for cyber situations. As of today, there exist two groups of scholars- proposing two distinct formulas in order to deal with cyber disputes and cybercrimes. One group proposes that existing international laws and principles can be applied in cyberspace *mutatis mutandis*, whereas, the other group strongly suggests that existing laws cannot be

---

\* Lecturer, Department of Law, Jagannath University

suitable for a completely new and rapidly changing world like cyberspace and a whole new set of laws and principles are required to be developed.

## 2. Nature of Cyberspace and Jurisdictional debate

Cyberspace is a “borderless” world—a world of its own. The internet is a very different space and it has become hugely integrated in our daily lives that many issues of our political, social and economic freedoms depend on its preservation and operation.<sup>1</sup> It is a new social order, which cuts across cultures, civilizations, religions, etc. and creates a “new realm of human activity” forcing mankind to rethink the appropriateness of extending the existing rules to it.<sup>2</sup> The “border-breaching” nature of cyberspace, the substantial differences in the substantive laws of different states and the absence of any centralized enforcement mechanism in the virtual world give rise to a multiplicity of judicial forums, since the cause of action and the parties are spread across physical borders.<sup>3</sup> A specific example will better show us the complexity involved in a particular act in cyberspace. A cybercriminal residing in country A uploads a defamatory material on the website hosted in country B against the managing head who is a national of country C of an international company running its business in the country of D where it suffered loss for online defamation. Now it gets hazy or conflicting what constitutes jurisdiction and which country has jurisdiction to prosecute the alleged perpetrator of such cyber defamation: is it the country of residence of the perpetrator (Country A), or the place of the act (Country B), or the location of the effect (country C) or the nationality of the affected persons (country D)? Or all of these at once?<sup>4</sup> In such a situation, it is obvious that jurisdictional conflicts will arise. Jurisdictional conflicts are two types- positive conflict where several states claim jurisdiction at the same time and negative conflict where no state claims jurisdiction. Jurisdiction in cyberspace and cybercrimes becomes more complex and trickier in case where acts in the cyberspace that are legal in the state where they are initiated but are illegal in other states where its effects are seen. In this situation, a person unknowingly may commit a criminal act in another state and become subject to its jurisdiction with possibility to be prosecuted for an act, which he knew legal.

To assert jurisdiction over a particular act or person requires jurisdictional basis recognized by international laws. Without any legal base of jurisdiction, a state cannot

<sup>1</sup> Andrej Savin, ‘How Europe formulates internet policy’ (2015) 3 *International Political Review* 2014, <<http://policyreview.info/articles/analysis/how-europe-formulates-internet-policy>>, referred in Elizabeth Anne Kirley, ‘Reputational Privacy and the Internet: A Matter for Law?’ (2015) *PhD Dissertations* 14 <<http://digitalcommons.osgoode.yorku.ca/phd/8>> accessed 6 May 2018.

<sup>2</sup> David Johnson and David Post, ‘Law & Borders—The Rise of Law in Cyberspace’ (1996) 48 *Stanford Law Review* 1367.

<sup>3</sup> Amit Sachdeva, ‘International Jurisdiction in Cyberspace: A Comparative Perspective’ (2007) 8 *Center for Teaching, Learning and Research* 245.

<sup>4</sup> SSusan Brenner & Bert-Jaap Kooops, ‘Approaches to Cybercrime Jurisdiction’ (2004) 4 *Journal of High Technology Law* 5 <<https://ssrn.com/abstract=786507>> accessed 1 January 2018.

assert or exercise jurisdiction upon a person or an act. So, a state has to carefully rely on certain legal basis upon which it exercises jurisdiction. In an adjudication before the court, a plaintiff chooses his forum, and the defendant, in his turn, objects as to the jurisdiction of the chosen court. Any ruling on the question requires a balancing of the interests of the plaintiff, who has a right to choose his forum and the defendant, who cannot be exposed to the contingency of facing litigation in any and every court.<sup>5</sup> Therefore, given the fact that cyberspace is global phenomena without any physical border, today's state requires a coherent doctrine of jurisdiction applicable for internet transactions. As there are no concrete and specific determinant rules for internet and cyberspace, the courts of different countries are struggling to settle jurisdictional questions in various cyber situations by borrowing the traditional personal and territorial jurisdiction and other rules of jurisdictional conflicts as exist in international laws and extending them to the cyberspace.

There arises at least two broad and diametrically opposite ways in which courts of different legal systems and scholars are responding to this jurisdictional problems.<sup>6</sup> First, one group of courts and scholars find appropriate to apply the existing personal and territorial jurisdictional rules of international law *mutatis mutandis* in situations of cyberspace. The other group suggests that traditional rules of private international laws are grossly inadequate and often claims exposition of new rules to address this new situation. It claims that the virtual world of cyberspace should be subjected to a greater degree of control than the real world.<sup>7</sup>

### **3. Traditional International Laws and Principles Relating to Jurisdiction as applicable to Cyberspace and cybercrimes**

In case of dealing with extraterritorial matters, the issue of jurisdiction of a state is of foremost important for two reasons. Firstly, it has to determine a forum state, i.e. where to litigate or who is the right country to prosecute a criminal act; and, secondly, the issue of jurisdiction is the first one that the adjudicating court must face and answer in affirmative before it may proceed to adjudicate upon any other.

Jurisdiction of a state refers those powers which a state can exercise by its inherent sovereignty. State's Jurisdiction generally encompasses three aspects- jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce.<sup>8</sup> Restatement (Third) of

---

<sup>5</sup> See above n. 3.

<sup>6</sup> Vakul Sharma, *Information Technology Law and Practice* (Delhi: Universal, 2004) 262, referred in, see above n. 2.

<sup>7</sup> Golak Sahoo, 'Jurisdictional Jurisprudence and Cyberspace' (2009) 4 *Asian University Journal of Science and Technology: Physical Science and Technology* 66.

<sup>8</sup> For details, see, R. O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735-760; G.D. Triggs, *International Law: Contemporary Principles and Practices*, (2006) 344; D.J. Gerber, 'Beyond Balancing: International Law Restraints on the Reach of National Laws' (1984) 10 *Yale Journal of International Law* 189; Ian Brownlie, *Principles of Public International Law*, (Oxford University Press, 5th ed, 2002) 58.

Foreign Relations Law of the United States (1987)<sup>9</sup> provides categorical definitions of these three aspects of jurisdiction. According to this Statement, **jurisdiction to prescribe** is a sovereign entity's authority "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things by legislation, by executive act or order, by administrative rule or by determination of a court." **Jurisdiction to adjudicate** is a sovereign entity's authority "to subject persons or entities to the process of its courts or administrative tribunals" for the purpose of determining whether prescriptive law has been violated. **Jurisdiction to enforce** is a sovereign entity's authority "to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other non-judicial action. So, prescriptive jurisdiction refers to the capacity of a state to legislate in respect of persons and/or conduct, whereas, enforcement jurisdiction refers to the capacity, or otherwise, of that state to enforce compliance with those laws. Adjudicative jurisdiction refers to the ability of courts to adjudicate and resolve disputes.

Laws relating to extraterritorial jurisdictions for dealing with trans-border conducts are already in place in international domain. There are at least five jurisdictional principles in international law upon which the state generally assume jurisdiction while dealing with extraterritorial matters. These principles are generally accepted by all states and the international community as being consistent with international law.<sup>10</sup> They are-

- Principle of territoriality
- Principle of Active Nationality
- Principle of Passive nationality
- Protective Principle
- Principle of Universality

The adjudicating courts of different countries are trying to resolve jurisdiction issues of cyberspace on basis of these existing traditional jurisdictional principles, but the process of setting concrete and specific rules applicable for cyber situations only is in developing state.<sup>11</sup>

### 3.1. Principle of Territoriality

Traditionally, all three types of jurisdiction, prescriptive, adjudicative and enforcement, have been based primarily upon the concept of territory.<sup>12</sup> The concept

<sup>9</sup> The Restatement (Third) of Foreign Relations Law of the United States is a "treatise or commentary" on jurisdictional and other principles of international law and, as such, is "not a *primary* source of authority upon which, standing alone, courts may rely for propositions of customary international law. See, *United States v. Yousef*, (2003) 327 F.3d 56, 99 (2d Cir.). "Such works at most provide evidence of the practice of States, and then only in so far as they rest on factual and accurate descriptions of the past practices of states, not on projections of future trends or the advocacy of the 'better rule'. See above n. 4.

<sup>10</sup> For details, see, Malcolm Shaw, *International Law* (Cambridge University Press, 6<sup>th</sup> ed, 2008) Ch. 12.

<sup>11</sup> *Zippo Mfg. v Zippo Dot Com, Inc.*, (1957) 952 F. Supp. 1119, 1123 (W.D.Pa.) held that there is a global revolution looming on the horizon, and the development of the law in dealing with the allowable scope of personal jurisdiction based on Internet use is in its infancy.

<sup>12</sup> See above n. 4.

of territorial jurisdiction that jurisdiction is determined *by the place where the offence is committed* (emphasis added), in whole or in part naturally flows from the principle of sovereignty of a state. The basic principle of sovereignty is that a state has exclusive control or authority over any person or acts within its territorial domain and has power to deal with them by all legal and reasonable means. It includes three fundamental principles: exclusive control over the nation's territory, non-interference, and equality between States.<sup>13</sup>

The Convention on Cybercrime 2001<sup>14</sup> bases cybercrime jurisdiction on the principle of territoriality and nationality. Art 22(1)(a) of the Convention provides, "Each Party shall . . . establish jurisdiction over any offence established in accordance with Article 2 through 11 of this Convention, when the offence is committed . . . in its territory." Deciding whether or not an offence has been committed in a nation's territory is not, however, a simple undertaking when the commission of the offence involved the use of cyberspace.<sup>15</sup> With cybercrime, it is difficult to ascertain exactly where a particular act takes place. For example, in case of a particular act of cybercrime, i.e. child pornography or defamatory web contents, jurisdiction constitutes at all the locations where material is uploaded, or, where the web is hosted, or where service providers are located, or from where the material can be viewed or received.<sup>16</sup> In principle, all the countries herein may invoke jurisdiction. So, applying only territorial principle dose not solve the problem of cyberspace. It requires additional things to decide.

The case of *Yahoo, Inc. vs. LICRA*<sup>17</sup>, shows us the difficulties that remain in resolving both the prescriptive and enforcement jurisdictional issues under territorial principle in cyberspace. Two French association, namely the International League Against Racism and Anti-Semitism (LICRA) and the Union of French Students (UEJF) filed a suit against Yahoo!, the America based online content provider for hosting auctions in their website that displayed and sold Nazi memorabilia, material that is illegal to view in France but legal almost everywhere else. Yahoo! argued that

<sup>13</sup> These three principles constitutes the centrality of the concept of sovereignty derived from Westphalia and the various international relations theories (Marxism excepted), see, Stephen Krasner, *Sovereignty: Organized Hypocrisy*, (New Jersey, Princeton University Press, 1999) 44-46; Joan Fitzpatrick, 'Sovereignty, Territoriality, and the Rule of Law' (2002), 25 *Hastings International and Comparative Law Review* 304, 310; However, some authority refers that sovereignty includes only two principles: one according to which a State is "unequivocally sovereign within its territorial jurisdiction", and "the principle of non-interference", see, Seyom Brown, *International Relations in a Changing Global System: Toward a Theory of the World Polity*, (Boulder, Colorado, Westview Press, 1992) 74.

<sup>14</sup> The Council of Europe's Convention on Cybercrime 2001 is the first and only international treaty to address several categories of crimes committed via the Internet and other information networks. Its primary goal is to "pursue a common criminal policy aimed at the protection of society against cybercrime, especially by adopting appropriate legislation and fostering international co-operation.

<sup>15</sup> See above n. 4.

<sup>16</sup> See above n. 4, p. 15.

<sup>17</sup> See, *Yahoo!, Inc. v La Ligue Contre Le Racisme et L'Antisemitisme (LICRA)*, (2001) <<http://cyber.law.harvard.edu/is02/readings/yahoo-order.html>> accessed 15 March 2018.

French court did not have jurisdiction over Yahoo! However, the French court assumed jurisdiction over Yahoo, and ordered it to restrict access to such content and resolved to impose a monetary fine.<sup>18</sup> In this case, the French court assumes jurisdiction mainly because the Nazi contents of the web, which is illegal in France can be accessed and viewed in France.

Yahoo! later moved the U.S. District Court of Northern California seeking a declaration that the French court's judgment could not be enforced against Yahoo! in the United States. Yahoo! maintained that allowing enforcement of the French court's order with its restriction and prohibitions in the United States would violate the right to freedom of expression under the First Amendment of the U.S. Constitution. The Court assumed jurisdiction and held this plea valid on basis of 'effects test' doctrine (discussed later) by stating that allowing enforcement of French court order in the US would be wrongful since its primary purpose or intended effect is to deprive US resident of its constitutional rights.<sup>19</sup>

Another complex case of application of the territoriality theory is *Bavaria v. Somm*,<sup>20</sup> tried at the Amtsgericht of Munich, Germany, in 1999. As Managing Director of CompuServe Information Services GmbH, Felix Bruno Somm, a citizen from Switzerland, was charged in Germany with being responsible for the access in Germany to violent, child, and animal pornographic representations stored on the CompuServe's server placed in the USA. The court considered it had jurisdiction over Mr. Somm because, even though he was Swiss, he lived in Germany.

### 3.2. Principle of active nationality theory<sup>21</sup>

Traditionally, the two undisputed bases on which state jurisdiction is founded in international law are territoriality and nationality.<sup>22</sup> These two major jurisdictional principles also constitute the primary bases for assuming state's jurisdiction in cyberspace. The Convention on Cybercrime 2001 has extended these territoriality and nationality principles to the cyber world. After territoriality, nationality of the perpetrator is the second major constituting factor of jurisdiction in cybercrime.<sup>23</sup> Article 22 (1)(d) of the Convention on Cybercrime requires parties to establish

---

<sup>18</sup> Ibid

<sup>19</sup> *Yahoo! Inc. v La Ligue Contre Le Racisme et l'antisemitisme* (2006) (LICRA) 433 F.3d 1199 (9<sup>th</sup> Cir.).

<sup>20</sup> *People v Somm*, 8340 Ds 465 Js 173158/95 (Amtsgericht, München, Bavaria, 1999). See also, Thomas Stadler, *Der Fall Somm (CompuServe)*, <<http://www.afs-rechtsanwaelte.d-urteile/artikel06-somm-compuserve1.php>> accessed 15 March 2018.

<sup>21</sup> See generally, Christopher Blakesley, 'Jurisdictional Issues and Conflicts of Jurisdiction', in M. Cherif Bassiouni (ed), *Legal Responses to International Terrorism. U.S. Procedural Aspects*, (Dordrecht, Martinus Nijhoff Publishers, 1988) 139; Ray August, 'International Cyber-Jurisdiction: A Comparative Analysis', (2002) 39 *American Business Law Journal* 539.

<sup>22</sup> *The Wood Pulp Case*, 4 CMLR 901, 920; referred in Malcolm Shaw, *International Law* (Cambridge University Press, 6<sup>th</sup> ed, 2008) 652.

<sup>23</sup> See above n. 4, p. 24.

jurisdiction “when the offence is committed (...) by one of its nationals, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any state.” Therefore, the state can exercise its jurisdiction over any offender who is its national; it is immaterial where the offence is committed. It can assume jurisdiction over him even if he commits the cybercrime in a foreign location.

The case *United States v. Jay Cohen*<sup>24</sup> seems to be a good example of the application of active nationality theory. The World Sports Exchange, an Antigua based betting company was charged for illegal online betting and gambling in the USA. The company targeted customers in the United States, advertising its business all over America by radio, newspaper, and television. Its advertisements invited clientele to bet with the company either by toll-free telephone or through the Internet. The US District Court was unable to assert jurisdiction over the company because it was in Antigua. Its President, however, was a citizen of the USA and the court assumed jurisdiction over him on active nationality principle and sentenced him on August 2000, to a term of twenty-one months’ imprisonment. The US Second Circuit Court upheld the conviction in appeal.

### 3.3. Principle of passive nationality

According to the principle of passive nationality, jurisdiction depends on the nationality of victim. The state can exercise jurisdiction to try an individual for offences committed abroad which have affected or will affect nationals of that state.<sup>25</sup> In the field of cyber criminology, a fine example of jurisdiction assumption by application of the passive personality theory is the sentencing, on July 25, 2003, by United States District Court of Connecticut, of the Russian citizen Alexey Ivanov, who lived in Chelyabinsk, Russia, for hacking into computers in the United States,<sup>26</sup> which will be discussed hereinafter in detail. However, assuming jurisdiction under this principle may come into direct conflict with the equality and non-interference of sovereignty principle.

### 3.4. Protective Principle

This principle provides that states may exercise jurisdiction over foreign nationals who have committed an act abroad which is deemed to prejudicial to the security of the particular state concerned. This principle, however, is least used to invoke jurisdiction and there are uncertainties as to how far it extends in practice and particularly which acts are included within its ambit. So, it is a principle which can easily be abused.<sup>27</sup>

---

<sup>24</sup> (2001) 260 F.3d 68 (2d Cir.).

<sup>25</sup> See above n. 12, p. 664.

<sup>26</sup> *U.S.A. v Ivanov* (2003), 172 C.C.C. (3d) 551 (Nfld.C.A.). Another example is the sentencing – in the federal court of Manhattan, Southern District of New York, of the Kazakhstan citizen Oleg Zezev to 51 months in prison, for extortion and computer hacking charges, due to facts that occurred while he was still living in Almaty, Kazakhstan. See, U.S. Department of Justice. United States Attorney, “Kazakhstan Hacker Sentenced to Four Years Prison for breaking into Bloomberg Sysytes and Attempting Extortion”. <<http://www.usdoj.gov/criminal/cybercrime/zezevSent.htm>> accessed 15 March 2018.

<sup>27</sup> See above n. 12, p. 667

There is no example known so far in any major legal system of the world that protective principle has been used in a case of cybercrime.

### **3.5. Principle of universal jurisdiction**

Under this principle, each state has jurisdiction to try particular offences, and punish the offender irrespective of the place of the commission of the crimes and regardless of any link or effect of crimes on such state. Universal jurisdiction can be only applied in case of the most heinous and serious crimes which shakes the international conscience. Two requirements are necessary for assuming universal jurisdiction: first, the State assuming jurisdiction must have the defendant in custody, and second, the crime must be especially offensive to the international community. Generally, it is most applicable for war crimes, genocide, crimes against humanity etc. that are of international crimes. However, the first crime to be considered for universal jurisdiction was piracy, followed by slave traffic. After WW II, war crimes, crimes against humanity, certain terrorist acts, hijacking and sabotage of planes, apartheid, torture and other violations of human rights progressively became subject to universal jurisdiction.<sup>28</sup> The universal jurisdiction is not still applied in cybercrimes. It is also claimed that this principle has no application in case of cybercrimes. However, question remains what if any of such international crimes subject to universal jurisdiction is occurred through means of internet and computers in the cyberspace.

### **4. Jurisdictional Issues under the Convention on Cybercrime, 2001**

The Convention on Cybercrime is the first ever international treaty dealing with cybercrimes affecting globally. The Convention mainly seeks to address internet, and computer related crimes by securing international cooperation among member states and harmonizing national laws on cybercrimes and improving investigative techniques. It was signed in Budapest, on 23 November 2001 and came into force on 1 July 2004. The Convention has an Additional Protocol which came into force On 1 March 2006. To date, 58 countries are signatories to the convention and 54 of these, including the United States, have ratified it.<sup>29</sup> Though the convention is an endeavor of the European Union and most of the ratifying countries are European, many non-European countries have ratified the same, including the USA, Canada, Japan, Australia, South Africa, even Sri Lanka etc. Bangladesh and India is yet to ratify the Convention.

It has been discussed earlier that the Convention on Cybercrime has extended the traditional principles of jurisdiction to cyberspace. It has basically adhered to territoriality and nationality principle as basis for exercising jurisdiction over online activities.<sup>30</sup> However, the bases of jurisdiction set forth in this Art are not exclusive. Paragraph 4 of this Article permits the parties to establish, in conformity with their domestic law,

---

<sup>28</sup> See above n. 12, p. 668.

<sup>29</sup> <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures>> accessed 7 December 2017.

<sup>30</sup> See generally; Art 22 and Explanatory note to this Convention, paras 233-236.

other types of criminal jurisdiction a well.<sup>31</sup> The Convention seeks to resolve positive conflict of jurisdiction (whereas several countries claims jurisdiction) through international cooperation and consultation. It requests the state party to consult among them in order to determine a proper venue for prosecution.<sup>32</sup> In some cases, it will be most effective for the states concerned to choose a single forum for prosecution; in others, it may be best for one state to prosecute some participants, while one or more other states pursue others, either result is permitted under the Convention.<sup>33</sup> However, international cooperation and consultation is not mandatory. It also provides that, if State party is of the view that consultation may impair the investigation or proceedings, it may delay or decline consultation.<sup>34</sup> The convention basically rests on good will and trust of state for effective investigation and prosecution of cyber related offences and disputes.

## 5. Laws and Principles Applied in Courts around the Globe

### 5.1. Cases in the USA

The overwhelming complexity of cyber disputes can be comprehended by rulings of different US courts in different cases of many new and innovative facts happening in the cyberspace. The early evolutionary stage of cyberspace jurisdiction in the United States has been marked by inconsistencies and contradictory decisions.<sup>35</sup> The Courts of the U.S. primarily assumed personal jurisdiction by extending the traditional rules of territoriality and nationality to cyber conducts and cybercrimes.<sup>36</sup> However, the courts, over the time, out of increasing case laws in cyber matters have developed certain coherent principles and rules to resolve cyber jurisdictions. Now, the courts assert personal jurisdiction over a non-resident or foreign national based on ‘the doctrine of minimum contacts’<sup>37</sup>, or on ‘the effects test doctrine’<sup>38</sup>, or based on ‘sliding scale’ test, i.e. the standard that how *passively*<sup>39</sup> or *actively*<sup>40</sup> a website perform when targeting specific individuals in a certain state or territory. Through these doctrines, it has been possible to exercise jurisdiction over a person without his physical presence in the forum state.

---

<sup>31</sup> Art 22(4).

<sup>32</sup> Art 22(5).

<sup>33</sup> Explanatory note to the Convention, para 239.

<sup>34</sup> Explanatory note to the Convention, para 239.

<sup>35</sup> Denis Rice, 'Jurisdiction in cyberspace: Which law and forum apply to Securities transactions on the internet?' 21 *University of Pennsylvania Journal of International Economic Law* 615, <[https://www.law.upenn.edu/journals/jil/.../Rice21U.Pa.J.Int'lEcon.L.585\(2000\).pdf](https://www.law.upenn.edu/journals/jil/.../Rice21U.Pa.J.Int'lEcon.L.585(2000).pdf)> accessed 10 April 2017.

<sup>36</sup> For example, *Yahoo! Inc. v La Ligue Contre Le Racisme et l'antisemitisme (LICRA)* (2006) 433 F.3d 1199 (9<sup>th</sup> Cir.); *United States v Jay Cohen* (2001) 260 F.3d 68 (2d Cir.); *U.S.A. v Ivanov* (2003), 172 C.C.C. (3d) 551 (Nfld.C.A.). These cases have been discussed hereinbefore.

<sup>37</sup> *International Shoe Co. v Washington*, (1945) 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95.

<sup>38</sup> *Calder v Jones*, (1984) 465 U.S. 783, 790.

<sup>39</sup> *Zippo Mfg. Co. v Zippo Dot Com, Inc.*, (1997) 952 F. Supp. 1119 (W.D. Pa.).

<sup>40</sup> *CybersellInc v Cybersell Inc.* (1997) 130 F.3d 414 (9th Cir.).

To exercise personal jurisdiction over a non-resident or foreign national, a U.S. court must undertake a two-step inquiry.<sup>41</sup> First, the court must apply the relevant state's 'long-arm statute'<sup>42</sup> to see if it permits the exercise of personal jurisdiction. Second, the court must consider whether assertion of jurisdiction comply with the requirements of 'due process clause' of the U.S. Constitution under the Fourteenth amendment. The court can, under no circumstances, assume jurisdiction violating this constitutional limitation.

### 5.1.1. Minimum contacts standard

*International Shoe Co. v. Washington*,<sup>43</sup> a landmark decision of the United States Supreme Court first articulated 'minimum contacts' theory. It held that an out- of- state person or a corporation might be subject to the jurisdiction of a state court if it has "minimum contacts" with the State. To apply this theory, two tests must be satisfied- i) that the defendant had sufficient minimum contacts with the forum state for due process to justify assertion of jurisdiction; and ii) such assertion of jurisdiction does not offend 'traditional notions of fair play and substantial justice'.<sup>44</sup> To apply 'minimum contacts' standard the courts must be satisfied three essential conditions

- there must be some act by which the defendant *purposefully avails himself of the privilege of conducting activities with the forum state*;
- the plaintiff must show either that the defendant's contacts with the forum are continuous and systematic, or that the suit arises out of or is related to those contacts;
- the exercise of personal jurisdiction must be reasonable.<sup>45</sup>

*Asahi Metal Industry Company v. Superior Court*,<sup>46</sup> requires higher jurisdictional threshold for a foreign national (something more than minimum contacts threshold) for invoking jurisdiction of forum state. *Core-Vent Corp. v. Nobel Industries AB.*,<sup>47</sup> examines further this the higher jurisdictional threshold as applied in *Asahi Metal Industry Company v. Superior Court*,<sup>48</sup> The plaintiff, a California corporation, brought suit against the defendant, five Swedish citizens and three American citizens for

---

<sup>41</sup> See above n. 3, p.248-249.

<sup>42</sup> The name "long-arm" comes from the purpose of these statutes, which is to reach into another state and exercise jurisdiction over a nonresident defendant. See generally; C.M. Cerna, 'Hugo Princz v. Federal Republic of Germany: How far does the Long- Arm Jurisdiction of US Law reach' (1995) 8(2) *Leiden Journal of International Law* 377.

<sup>43</sup> 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95.

<sup>44</sup> See, Talat Fatima, *Cybercrimes* (Lucknow, Eastern Book Company, 1<sup>st</sup> ed, 2011) 348-352.

<sup>45</sup> (1945) 326 U.S. 310, 316; See above n. 2, p. 249; see generally; Ibid, 348-352; Julia Gladstone, 'Determining Jurisdiction in Cyberspace: The "Zippo" Test or the "Effects" Test?' (2003) *Informing Science* 145.

<sup>46</sup> (1987) 480 U.S. 102 (107 S.Ct. 1026).

<sup>47</sup> (1993) 11 F.3d 1482 (9<sup>th</sup> Cir.).

<sup>48</sup> (1987) 480 U.S. 102 (107 S.Ct. 1026).

publishing articles containing false and misleading comparisons between Core-Vent's and Nobel pharma's dental implants. The District Court for the Central District of California dismissed for lack of personal jurisdiction. The plaintiff appealed and the United States Court of Appeals, Ninth Circuit affirmed the lower court. The appellate court found that California's long-arm statute allowed courts to exercise personal jurisdiction over defendants to the extent permitted by the 'due process clause' of the United States Constitution. The court ruled that in a case like this, where the defendant has not had continuous and systematic contacts with the state in order to subject it to jurisdiction, the three-prong minimum contacts test should be applied. This test consists of (1) whether there was purposeful availment; (2) whether the claim arises out of or is related to defendant's activities; and (3) whether the exercise of jurisdiction comports with fair play and substantial justice.<sup>49</sup>

### 5.1.2. Effects test standard

In *Calder v. Jones*,<sup>50</sup> the US Supreme Court based jurisdiction on the principle that the defendant knew that his action would be injurious to the plaintiff, therefore he must be reasonably presumed to have anticipated being 'haled into court where the injury occurred'. So, if the website operator intends to cause an effect in a given forum and actually does, he arguably avails himself of the privilege of doing business here and attracts jurisdiction of the forum. This test is known as 'effects test' doctrine. The "effects" cases are of particular importance in cyberspace because any conduct in cyberspace often has effects in various jurisdictions. The application of 'effects test' principle requires that the defendant must: (i) commit an intentional act that is (ii) expressly aimed at the forum state that (iii) causes harm that the defendant knows is likely to be suffered in the forum state.<sup>51</sup>

### 5.1.3. Sliding Scale standard

Jurisdiction is also assumed on the nature and level of activity in the website. It is called 'sliding scale' test. It was first propounded in the case of *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*,<sup>52</sup> (hereinafter as *Zippo Case*). This case first articulated an overall analytical framework for assuming personal jurisdiction based on Internet activity. For this purpose, it provides a "continuum" or sliding scale for measuring websites, and divided them into three general categories: (1) active websites; (2) interactive websites permitting exchange of information with the host computer; and (3) passive websites.<sup>53</sup>

The "passive" website is analogous to an advertisement in *Time magazine*; it posts information generally available to any viewers, who have no on-site means to respond

<sup>49</sup> (1987), 480 U.S. 102 (107 S.Ct. 1026) 1485.

<sup>50</sup> (1984) 465 U.S. 783.

<sup>51</sup> See also; *Panavision Int'l, L.P. v. Toeppen*, (1996) 938 F. Supp. 616 (CD. Cal.); (1998) 141 F3d 1316 (9<sup>th</sup> Cir.).

<sup>52</sup> (1997) 952 F. Supp. 1119 (W.D. Pa.).

<sup>53</sup> The 'active website' termed in the *Zippo* case as 'integral website'. The three-category method of analysis regarding websites is not universally employed. See above n. 38, p. 618.

to the website.<sup>54</sup> The court resolved that a passive website was insufficient to establish personal jurisdiction but an active website through which a defendant conducts business with the forum residents was sufficient to establish personal jurisdiction. An active website was issued by a defendant to conduct transactions with persons in the forum state, to receive online orders, and to push messages directly to specific customers. Using the traditional analysis, a court could reasonably justify its decision to assert personal jurisdiction over a defendant who operates an active website.<sup>55</sup>

The courts exercise jurisdiction over defendants acting through active websites since this “involves the knowing and repeated transmission of computer files over the internet”. Ordinarily, jurisdiction is not exercised over those who merely supply information through passive websites, without anything more since doing otherwise would be “inconsistent with traditional personal jurisdiction case law . . .”<sup>56</sup>

The middle category, or “interactive” website, falls between passive and integral. It allows a forum state viewer to communicate information back to the website. Under *Zippo*, exercise of jurisdiction in the “interactive” context is determined by examining the level of interaction and the commercial nature of the website.<sup>57</sup> In *Zippo* case, for instance, the defendant, a Californian, operated an integral website that had contracts with 3000 Pennsylvania residents and Internet service providers; the Pennsylvania court had no difficulty finding jurisdiction over the nonresident defendant.

*Cybersell Inc v. Cybersell Inc.*<sup>58</sup> is another case involving trademark infringement where the court refused to exercise jurisdiction over the defendant because it found the website passive. The United States Court of Appeals for the Ninth Circuit rejected the notion that a defendant “purposely avails” itself of the privilege of conducting business within a jurisdiction merely because its homepage can be accessed from Arizona. In this case, the plaintiff was an Arizona corporation that advertised its commercial services over the Internet. The defendant was a Florida corporation offering webpage construction services over the Internet. The Arizona plaintiff claimed that the alleged Florida defendant, had violated the plaintiff’s trademark, ‘Cybersell’. He also claimed that Florida defendant should be subject to personal jurisdiction of the Federal court in Arizona, since the defendant online advertisements were targeted to a worldwide audience, including Arizona. In declining to assert jurisdiction, the Ninth Circuit used a *Zippo* type of analysis without specifically adopting *Zippo*.<sup>59</sup> First, the court articulated a three-part test for determining whether a district court may exercise specific jurisdiction over a nonresident defendant: (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by

---

<sup>54</sup> See above n. 38, p. 615.

<sup>55</sup> Ibid, 615.

<sup>56</sup> See generally above n. 3.

<sup>57</sup> See above n. 38, p. 616.

<sup>58</sup> (1997) 130 F.3d 414 (9<sup>th</sup> Cir.).

<sup>59</sup> See above n. 38, p. 616.

which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections; (2) the claim must be one which arises out of or results from the defendant's forum-related activities; and (3) exercise of jurisdiction must be reasonable. Applying the foregoing principles, the Ninth Circuit concluded that the Florida defendant had conducted no commercial activity over the Internet in Arizona. Posting an "essentially" passive home page on the Web using the name "Cybersell" was insufficient for personal jurisdiction. Even though anyone could access defendant's homepage and thereby learn about its services, the court held that the Florida defendant had not deliberately directed its merchandising efforts toward Arizona residents.

Non applicability of jurisdiction over passive websites is also upheld *Bensusan Restaurant Corp. v. King*.<sup>60</sup> In this case, the website in Missouri offered tickets to a local jazz club, but none had ever been ordered by any resident of New York, where a famous jazz club with the registered mark was located. The district court held that "creating a site, like placing a product into the stream of commerce, . . . without more . . . is not an act purposefully directed to the forum state." So, now, merely, that a web contents can be viewed or accessed in the forum state, does not give it jurisdiction over the defendant. In order to support personal jurisdiction in cyberspace the courts now require that defendants provide more than mere accessibility to a Web site.<sup>61</sup> For instance, *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*,<sup>62</sup> invoked personal jurisdiction to enforce an earlier issued injunction because the defendant could determine who were the US citizens and knowingly allow the citizens of the US to subscribe to the members of its website.

## 5.2. Cases in Europe

The legal framework in Europe concerning the assertion of jurisdiction in respect of cybercrimes is perhaps one of the most comprehensive.<sup>63</sup> Several instruments of the Council of Europe provide guidance on the question on jurisdiction on crimes committed using computers and internet. They are: (i) the Convention on Cyber

<sup>60</sup> (1996) 937 F. Supp. 295 (S.D.N.Y.), *aff'd* (1997) 126 F.3d 25 (2d Cir.). Only three reported cases to date have based personal jurisdiction essentially on website accessibility alone. See, *Bunn-O-Matic' Corp. v Bunn Coffee Serv., Inc.*, (1998) U.S. Dist. LEXIS 7819 (C.D. IM.) (remarking, however, that defendant was aware of impact of infringing mark on Illinois); *Telco Communications Group v An-Apple-A-Day*, (1997) 977 F. Supp. 404, 407 (E.D. Va.) (relying on *Imet* to hold that personal jurisdiction existed over defendant for defamation claim solely on basis of website that "could be accessed by a Virginia resident twenty-four hours a day"); *Inset Sys., Inc. v Instruction Set, Inc.*, (1996) 937 F. Supp. 161, 161 (D. Conn.) (finding personal jurisdiction on the basis of a toll-free number and the presence of 10,000 Connecticut users who could access the website); referred in above n. 38.

<sup>61</sup> Gabriole Zeviar-Geese, 'The State Of Law On Cyber jurisdiction And Cybercrime On The Internet', (1997-98) 1 *Gonzaga Journal of International Law* <<http://Www.Gonzagajil.Org/>> accessed 2 April 2017.

<sup>62</sup> (1996) 939 F.Supp.1032 (S.D.N.Y.).

<sup>63</sup> Cristos Velasco, 'Cybercrime Jurisdiction: Past, Present and Future' (2015) 15 *Journal of the Academy of European Law*.

Crimes, 2001 (Art 22); (ii) the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (better known as the Lanzarote Convention) (Art 25); (iii) the Council of Europe Convention on Action against Trafficking in Human Beings (Art 31); and (iv) the Council of Europe Convention on the Prevention of Terrorism (Art 14).

These instruments contain *inter alia* provisions on jurisdiction allowing national courts of Member States to assert jurisdiction over criminal offences committed: (i) on that Member State's territory; (ii) on board ships and aircraft registered under the laws of a state; (iii) by one of a state's nationals when the offence is committed outside the territorial jurisdiction of any state; as well as (iv) provisions to prosecute in the case of denial of extradition and (v) consultation mechanisms to determine and coordinate actions for prosecution and the avoidance of parallel proceedings.

In addition to the Council of Europe instruments, three Council Framework Decisions, also contain provisions on the adjudication of jurisdiction. They are-

- I. *Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings;*
- II. *Council Framework Decision 2008/913/JAA of 28 November 2008 on combating certain forms of racism and xenophobia by means of criminal law; and*
- III. *Council Framework Decision 2002/475/JAI of 13 June 2002 on combating terrorism.*

One relevant aspect of Council Framework Decision 2002/475/JAI of 13 June 2002 on combating terrorism is that it seeks to centralize criminal proceedings in a single state, an objective which is highly important in order to avoid multiple investigations and positive jurisdictional conflicts among Member States.

In addition to the Council framework Decisions, there are two European Union Directives that have recently replaced the Council Framework Decision on attacks against information systems as well as the Council Framework Decision on combating sexual abuse and child pornography. These instruments are:

- I. *Directive 2013/40/EU of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA (Article 12).*
- II. *Directive 2011/92/ of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (Article 17)*

Although these directions seek to unify the national approaches on the assertion of jurisdiction for the prosecution of cybercrime in this region of the world, the reality is that there is not yet complete uniformity among the approaches adopted by each of

the European Union Member States. National courts of European Union Member States continue to apply discretionary powers under national procedural criminal laws in order to prosecute crimes according to their own methodologies and legal traditions for cases dealing internet crimes committed using the support of information technologies.<sup>64</sup> It is also argued the EU directives is unnecessarily complex and is in desperate need of refinement.<sup>65</sup>

### 5.3. Cases in India

Only a very few cases concerning personal jurisdiction in cyberspace have been decided by the superior courts in India. Traditionally, the jurisdictional issues in civil cases are governed by the Code of Civil Procedure, 1908 (Sec 15-23) and in criminal cases, by the Code of Criminal Procedures, 1898 (Sec 177-188). The provisions of these Codes are based on traditional principles of territoriality. Under these provisions, jurisdiction is based mainly on basis of the domicile of the defendant and the location of the subject matter or the location where cause of action arises. The Indian courts are applying the provisions of these codes in cyber cases too. In addition to the Code of Criminal Procedure, sec 4 of the Indian Penal Code provides jurisdiction for extraterritorial offences, containing a specific provision relating to cyber offences committed outside India. Sec 4(3) provides that Indian court can try any person in any place without and beyond India committing offence targeting a computer resource located in India. Section 2 (I) (K) of the Information Technology Act, 2000 defines computer resources meaning computer, computer system, computer network, data, computer database or software. Therefore, the Indian Penal Code provides a wide power for Indian courts to assume jurisdiction over any foreign nationals, even not residing in India, if he commits crimes against computer resources located in India. The Extradition Act, 1962 comes into play for causing concerned foreign country to extradite him to India. The Information Technology Act, 2000 is the recent law regarding internet and computer activities and crimes in India and provides in Sec 75 the basis for determining extraterritorial jurisdictions. Therefore, the cyber jurisdiction in India is interplay of several Codes and Acts mentioned above.

Along with these statutory laws, and where the statutory laws are insufficient, the Indian courts are modifying its jurisdictional approaches in line with the modern cyber jurisdictional rules adopted by the common law courts elsewhere in the world, and it is naturally follows that appears that just as the technology is by and large a borrowed one, the law in relation to it will also inevitably be that.<sup>66</sup> There is scope and need for developing indigenous law.<sup>67</sup>

---

<sup>64</sup> Ibid.

<sup>65</sup> Dan Jerker B. Svantesson, 'The Extraterritoriality of EU Data Privacy Law- Its Theoretical Justification and Its Practical Effect on U.S. Businesses' (2014) 50 *Stanford Journal of International Law* 53.

<sup>66</sup> See generally, Justice S. Muralidhar, 'Jurisdictional Issues in Cyberspace' (2010) 6 *Indian Journal of Law and Technology* 41.

<sup>67</sup> Ibid.

The approach adopted India is similar to the “minimum contacts” approach of the United States.<sup>68</sup> The courts also adopt the three classifications of websites approaches to determine minimum contacts of the parties with Forum country.<sup>69</sup>

#### 5.4. Cases in Bangladesh

Laws regarding transnational cyber jurisdiction in Bangladesh are almost similar to those of India. The Code of Civil Procedure, 1908 (Sec 15-23), in civil cases, and in criminal cases, by the Code of Criminal Procedures, 1898 (Sec 177-188) govern jurisdiction of the court. These jurisdictional provisions are dominantly based on principle of territoriality, particularly location of acts or place of occurrence of crimes. Sec 188 of the Code of Criminal Procedure 1898 provides for nationality principle, that when a citizen of Bangladesh commits an offence at any place without and beyond the limits of Bangladesh, he may be dealt with in respect of such offence as if it had been committed at any place within Bangladesh at which he may be found. The court can also assume jurisdiction under this provision of law in case of cybercrimes.

Section 4 of the Information and Communication Technology Act 2006 (hereinafter, the ICT Act 2006) provides transnational cyber jurisdiction which widens the court's jurisdiction. It provides that the courts of Bangladesh may invoke jurisdiction over any person committing crimes outside Bangladesh if such crimes are punishable under the ICT Act 2006.<sup>70</sup> This provision appears to be unrealistic and ambiguous since it does not clarify who it refers by the term ‘any person’ - whether it refers to a Bangladeshi or a foreign national. If any person means a Bangladeshi, it invokes nationality principle which is ok. But if it is presumed that it includes any foreign national, then why Bangladesh should bother foreign national committing crimes in a foreign country. This provision of the ICT Act 2006 needs to be specific. In Sec 4(b) provides that the court of Bangladesh can try any person who commits offence outside Bangladesh using a computer, computer system, or computer network located in Bangladesh. Under this principle, Bangladesh can try even a foreign national residing in abroad committing the crimes in Bangladesh. This jurisdiction is based on location of crimes. Sec 4(c) of the ICT Act empowers the court to exercise jurisdiction over any person residing in Bangladesh commits a crime which occurs in a foreign territory.

---

<sup>68</sup> (*India TV*) *Independent News Service Pvt Ltd v India Broadcast Live LLC*, (2007) (35) P.T.C. 177 (Del.) (India); *Casio India Co. Limited v Ashita Tele Systems Pvt. Limited* (2003) (27) P.T.C. 265 (Del.) (India), however overruled by *Banyan Tree Holding (P) Limited v A. Murali Krishna Reddy*. CS(OS) 894/2008 (High Court of Delhi, 23rd November 2009); *Presteege Property Developers v Prestige Estates Projects Pvt. Ltd.* MFA 4954 & 13696/2006 (High Court of Karnataka, 2nd December 2009) (India); see also, *Sholay Media Entertainment & Anr. v Yogesh Patel*, CS(OS) 1714/2001 (High Court of Delhi, 27th January 2010) (India). See also above n. 3, p. 254.

<sup>69</sup> *Ibid*.

<sup>70</sup> *The Information and Communication Technology Act 2006*, s.4(a).

In case of conflicting or multi-jurisdictional claims, Mutual Legal Assistance in Crimes Act 2012 is a great tool for Bangladesh to assert jurisdiction and to see international cooperation through mutual consultation. This Act provides detailed procedure for inter-country cooperation in carrying out enquiries, prosecutions and trial of criminal activities. It also empowers the Bangladesh government to freeze or attach properties of criminals and their equipment used in criminal activities in line with the request of a foreign country.

### **5.5. A Comparative Analysis of Cyber Jurisdiction in order to Find out Suitable Approach for Bangladesh and Other Developing Countries**

Each legal system has responded to the question of cyber jurisdictions differently, based upon its own ideas of justice, expediency, convenience and experience, and guided by the prevalent constitutional and political order.<sup>71</sup> While some states have adhered to the requirement of territorial nexus as the basis of jurisdiction, others claim to have “adapted” and “relaxed the jurisdictional basis” to better counter the challenges posed by, and keep pace with, developments in science and technology.<sup>72</sup>

The nationality theory is most frequently applied by States applying the civil law tradition.<sup>73</sup> On the other hand, countries based on common law system tend to apply traditional territorial principles of jurisdiction, as in the UK and the USA.

The convention on cybercrime is heavily Europe centric. At the end of 2017 only 13 countries which are not member of European Union signed and ratified the convention and one country South Africa only signed the convention.<sup>74</sup> European countries follow civil law system. Bangladesh is of common law legal system which is distinguished from European civil law systems. Bangladesh may not adopt the all the jurisdictional principles prescribed in the Convention at this moment.

As a common law country, our traditional justice system is dominantly based on principles of territoriality and location of crimes. So, relating to cybercrime, Bangladesh should only assert territorial principle of jurisdiction to establish its jurisdiction. Bangladesh should follow the principles that it will only deal with the cybercrimes committed within its territory or affecting computer or computer system located in Bangladesh, irrespective the national of perpetrators.

The nationality principle is not suitable for Bangladesh to follow in present complex world in cyber situations. Moreover, investigation and prosecution of cybercrime is very expensive and delicate and requires a substantial amount of resources. Establishing jurisdiction at principles of nationality will put heavy pressure

---

<sup>71</sup> See above n. 3.

<sup>72</sup> See above n.3.

<sup>73</sup> Explanatory note to the Convention on Cybercrime, para 236, p. 4.

<sup>74</sup> <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures>> accessed 20 December 2017.

on Bangladesh, since it, at present, lacks of most modern logistic and technical infrastructure and measures.

If Bangladesh is obliged to assert nationality principle of cyber jurisdiction, then if any citizen of Bangladesh commits any cybercrime in foreign country, Bangladesh will be legally liable under international law to investigate and prosecute crimes committed by such nationals. It will give Bangladesh under huge international burden which is less practical for the country. If Bangladesh follows territorial principle, it may assert the other country within whose territory any Bangladeshi commits cybercrime to investigate and prosecute. It will save Bangladesh from broad international obligation.

Even the UK, the common law country, reserves the right not to apply Article 22 (1) (d) of the Convention of Cybercrimes which provides nationality principle of jurisdiction.<sup>75</sup> So, when a British citizen commits crime in foreign territory, the country is not under any obligation to prosecute him for his crime. Therefore, when the UK avoids other international treaty obligation of a widened trans-border jurisdiction based on nationality principle, Bangladesh should follow principles of England regarding cross border cyber jurisdiction.

In the age of cyber space, developing countries like Bangladesh are exposed to threat of exploitation of their databases, risking their national security, and sovereignty from the technologically powerful and developed countries. Therefore, Bangladesh should be very careful to enter into a framework of international jurisdictional principles. The author, upon the above mentioned discussion, opines that in regard to cyber jurisdictional principles, Bangladesh should be more reserved and should still follow the traditional territorial principles.

Following territoriality principle will give advantages to Bangladesh. When any citizen of powerful countries commits crimes in Bangladesh, Bangladesh can investigate and prosecute such foreign nationals. Not agreeing with nationality principle, the country of which the perpetrator is national cannot claim against Bangladesh to take its citizens away for prosecution. Sometimes it may be necessary that for national security, Bangladesh should prosecute such foreign national. In such a situation, Bangladesh will have the upper hand.

To determine whether a cyber event or crime actually occurred within the territory of Bangladesh or affects anyway the location of Bangladesh, the court may adopt 'the doctrine of minimum contacts', or 'the effects test doctrine', or 'sliding scale' test which has been evolved in the USA.<sup>76</sup> The minimum contacts theory and sliding scale theory are mainly helpful in resolving the disputes which are mainly in the area of

---

<sup>75</sup> Article 22 (1) Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with Articles 2 through 11 of this Convention, when the offence is committed: (d) by one of its nationals, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State. *Ibid*.

<sup>76</sup> See discussion above on point 5.1.

commercial activities, copyright or trademark infringements, or in intellectual property cases.<sup>77</sup> The effects test is mainly useful in cyber criminal matters.<sup>78</sup> India is following the same.<sup>79</sup> In this respect, the sec 4 of the ICT Act 2006 should be amended and made more elaborate and concrete.

Beyond the territorial limits of jurisdiction in cyberspace, resolving cyber disputes and prosecuting cybercrimes, mutual assistance and co-operation is the most safe and effective for Bangladesh under the Mutual Legal Assistance in Crimes Act 2012.

With facts analyzed, practices of countries shown, and examples analyzed, this article suggests for developing countries, in relation to cybercrime, still territorial principalty is effective, practical and more realistic with necessary adaptation within its justice system.

## **6. Jurisdiction relating to trans-border investigation, search, and seizure of evidences**

Enforcement jurisdiction involves the question that whose authority it is to investigate, and to conduct search and seizure, if necessary. Investigation on cybercrime most of the time crosses territories of several countries. Trans-border investigation on cybercrime are seen by many a violation of traditional principle of state's sovereignty, and as a trespass to a state's territory. Electronic documents and evidences relating to cybercrime are often fragile in nature and require immediate search, seizure and protection. Investigating authority faces serious dilemma in handling such investigation and collecting electronic evidences without affecting other state's sovereignty claims. A widespread outcry and controversies both in political and legal context arose concerning the issue of violation of state's sovereignty by trans-border search and seizure in *U.S. v. Gorshkov*<sup>80</sup> case. In this case, the FBI identified Russians Vasiliy Gorshkov and Alexey Ivanov as the hackers who had been breaking into the computer systems of U.S. businesses. In order to arrest them, the FBI created a bogus company called "Invita" located in Washington, and brought the hackers to Seattle to interview with Invita. During the fake interview, the FBI arrested them. They immediately downloaded all the necessary files form the accused's computers located in Russia as evidences without any warrant and of course without consent from Russian counterparts. The accused argued that the evidence obtained from computers located in Russia was the product of a search and seizure that (a) violated the Fourth Amendment and/or (b) violated Russian law. The district court denied the motion. It held (a) that the Fourth Amendment did not apply because it does not encompass extraterritorial searches directed at non-US citizens; and (b) even if it did apply, the agents' action was justified under the exigent circumstances exception to the Fourth Amendment's warrant requirement. The court also held that (a) the agents'

---

<sup>77</sup> See above n. 47, p. 352.

<sup>78</sup> Ibid.

<sup>79</sup> See discussion above on point 5.4.

<sup>80</sup> (2001) WL 1024026, 1 (W.D.W.A.).

actions did not violate Russian law and (b) if they did, it was no basis for suppressing evidence in a U.S. proceeding. Upset about what they regarded as the FBI's violation of Russian sovereignty, Russian authorities subsequently charged the FBI agent primarily responsible for the intrusion with hacking and asked that the agent be turned over for trial. U.S. authorities have not complied. The case suggests the necessity to have proper jurisdictional rules under which it shall be determined when trans-border search and seizure of evidences is permissible exercise of enforcement jurisdiction. Article 32 of the Convention on Cybercrime provides that trans-border searches are allowed if data are publicly available or if an authorized person in the target state has given consent. However, this rule does not solve all issues involved with cross border collection of evidences. These areas are still mostly dependent on international cooperation and state's good will. In the *Rome Labs*<sup>81</sup> case and the *Tore Tvedt*<sup>82</sup> case, problems are solved through international cooperation, in spite of legal barriers. In the *Rome Labs* case, the controlling law was that of the location where the actions in question occurred, the hacker's location. In the Tvedt case, however, the controlling law was that of the country in which the damage was said to have occurred.<sup>83</sup>

However, there is another case where law itself did not allow it, though the concerned states were willing to cooperate.<sup>84</sup>

<sup>81</sup> In the *Rome Labs* case, two hackers, calling themselves as "Datastream Cowboy" and "Kuji," whose identities were unknown penetrated into military networks of Rome Air Development Center (Rome Lab), Griffiss Air Force Base, New York. The hackers were located in the United Kingdom. US Air Force agents established a working relationship with New Scotland Yard agents and they arrested the hackers. Three years later, Richard Pryce, a.k.a. "Datastream Cowboy", a 16 year old boy was fined with £1,200 for the intrusion and Matthew Bevan, a.k.a. "Kuji", was acquitted on a different ground. See, Staff Statement. U.S. Senate. Permanent Subcommittee on Investigations, *Security in Cyberspace*, 5 June 1996, Appendix B; <[https://fas.org/irp/congress/1996\\_hr/s960605b.htm](https://fas.org/irp/congress/1996_hr/s960605b.htm)> accessed 15 April 2017.

<sup>82</sup> Tore Tvedt was the founder of the Norwegian far-right group Vigrid (an organization which professes a doctrine that mixes neo-Nazism, racial hatred and religion, claiming to worship Odin and other ancient Norse gods). He posted on his Web page racist and anti-Semitic propaganda. The web site was stored in a North American server. He was considered responsible for the contents of the Web page, even if it was stored out of Norway's jurisdiction. A Norwegian court assumed jurisdiction and sentenced him to seventy-five days in jail with forty-five days suspended, plus two years of probation. See, 'Norwegian Jailed for Web Racism', *CNN*, 23 April 2002. <<http://www.cnn.com/2002/WORLD/europe/04/23/norway.web/index.html>> accessed 29 March, 2018.

<sup>83</sup> Armando Cottim, 'Cybercrime, Cyber terrorism and Jurisdiction: An Analysis of Article 22 of the COE Convention on Cybercrime' (2010) *European Journal of Legal Studies*; <<http://hdl.handle.net/1814/1511>> accessed 2 March 2018.

<sup>84</sup> In '*I love You Prosecution*' case, a computer virus called 'I love You' was spread through an email attachment and affected millions of personal computers and systems around the world in May 2000. The virus was created and disseminated by two computer programmers from the Philippines who were traced by the Philippines authorities. Since the Philippines did not have a law to punish crimes against the creation and dissemination of viruses at that time, the authorities in that country dropped all the charges against the offenders and they were not criminally prosecuted. Then, the United States Department of Justice got involved in the investigation and tried to cooperate in the prosecution and extradition of the offenders to the United States, however such efforts were meaningless precisely because of the principle and requirement of dual criminality, which requires that extradition may be allowed only when the legislation of both countries provides for a specific sanction and punishment, which was not the case in the Philippines.

The abovementioned cases suggest that there must be proper laws and rules providing legal basis for necessary trans-border investigation and evidences collection. It is essential, therefore, to establish the circumstances and conditions under which trans-border searches and seizures are permissible. The Convention on Cybercrime does not resolve the legal concerns involved here but mostly relies on international cooperation and coordination for a successful trans-border investigation. It requires the state parties to establish appropriate domestic procedures for detecting and investigating cybercrimes. It provides for consultation mechanism to avoid multiple investigations. Again, ironically, the Convention does not make state party under legal obligation to cooperate, and gives in appropriate circumstances to decline cooperation. It is considered one of the major weaknesses of this Convention. In order to cure this deficiency, one author proposes three amendments<sup>85</sup> to the Convention. First, consultations were not to take place “where appropriate”, but that they would be established as an obligation. Second, the Convention itself be effectively considered as an extradition convention between the Parties. Third, the Convention may be amended or supplemented by additional protocol to include an internal mechanism that allows police investigators from one Party to perform their work online in another Party, through informal communications.

## 7. The Solution: Ascertaining Determinant Principles of Jurisdiction

The cyberspace merely requires a “straightforward application” of existing conflict rules;<sup>86</sup> whereas the scholars at the other extreme suggest a need for a “fundamental re-examination” of the working of jurisdiction and creation of an entirely new set of rules.<sup>87</sup>

However, there are four basic competing models for the governance of the global net-

- i. simple extension (with adjustments) of the existing rules of international jurisdiction;
- ii. a multilateral treaty based establishment of new and uniform jurisdiction rules; The UN has also been debating the need for a new global cybercrime treaty. At the recent Twelfth UN Congress on Crime Prevention and Criminal Justice, there was agreement that -cybercrime threatened economies, critical

---

<sup>85</sup> See above n. 78.

<sup>86</sup> Henry H. Perritt Jr, ‘The Internet is Changing International Law’ (1998) 73 *Chicago-Kent Law Review* 997.

<sup>87</sup> David Johnson and David Post, ‘Law and Borders—The Rise of Law in Cyberspace’ (1996) 48 *Stanford Law Review* 1367; see also; John Delacourt, ‘Recent Development: The International Impact of Internet Regulation’ (1999) 38 *Harvard International Law Review* 207; David G. Post, ‘Anarchy, State and the Internet: An Essay on Law-Making in Cyberspace’ (1995), <www.wm.edu> accessed 14 June 2007; David Post, ‘Against Cyber anarchy’ in Adam Theierer and Clyde Crews Jr (eds), *Who Rules the Net?* (2003); Joel Reidenberg, ‘Governing Networks and Rule Making in Cyberspace’ (1996) 45 *Emory Law Journal* 911; Barry Waldman, ‘A Unified Approach to Cyber- Libel: Defamation on the Internet, a Suggested Approach’ (1999) 6 *Richmond Journal of Law and Technology* 9; William Byassee, ‘Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community’ (1995) 30 *Wake Forest Law Review* 197; referred in above n.3, p. 255

infrastructure, the credibility of institutions and social and cultural well-being.<sup>88</sup>

- iii. establishment of a new international organization to propose a set of rules appropriate for cyberspace jurisdiction; and,
- iv. an optimism of emergence of individual decentralized decisions by various actors and stakeholders.<sup>89</sup>

Since cyberspace is a global phenomenon which transcends, ignores and bypasses geo-political borders, solutions likely to be appropriate must also be global, or in any case multilateral.

Therefore, the model endorsing the conclusion of a multilateral treaty based establishment of new and uniform jurisdiction rules seems most appropriate.<sup>90</sup> One of such effort is the Convention on Cybercrimes. However, the Convention does not resolve the issues of international jurisdiction comprehensively.<sup>91</sup>

## 8. Conclusion

The cases discussed hereinbefore suggest the disharmony that continues to exist among nations on questions of jurisdiction.<sup>92</sup> They also depict that variance of substantive and procedural laws regarding cyberspace as well as diverse local legal requirements of the countries make things worse in settling cyber jurisdictional conflicts. Therefore, without an underlying uniform approach to jurisdiction, the court will likely to arrive at inconsistent decisions in different cases having more or less similar facts. Jurisdictional conflicts and inconsistent judicial approach in settling disputes will certainly have huge negative impacts on development of coherent laws regarding cyberspace. Ultimately, it may lead to chaos and disorder in the cyber world which has real and direct effect on our lives in the real world. It necessitates coordinated and concerted regional or global initiative to uniform the laws regarding internet and computers. It could be done through multilateral or international binding treaties. The Conventions on the Cybercrimes 2001 is one such approach. However, it needs to be done in a more broader scale, addressing all aspects of cyberspace, computer and information technology. The appropriate approaches developed and applied by the courts can be made the foundation for such uniform approach. Bangladesh, as a developing country still should follow the territorial principles

<sup>88</sup> United Nations, *Twelfth United Nations Congress on Crime Prevention and Criminal Justice: Report of Committee II on agenda item 8 and Workshop 2*, (2010b), A/CONF.213/L.4/Add.1, United Nations, Geneva.; as discussed in Peter Sommer and Ian Brown, "Reducing Systemic Cybersecurity Risk" (January 14, 2011). Organisation for Economic Cooperation and Development Working Paper No. IFP/WKP/FGS(2011)3 <<https://ssrn.com/abstract=1743384>> accessed in 6 May 2018.

<sup>89</sup> See above n. 3, p. 255.

<sup>90</sup> See above n. 3, p. 255.

<sup>91</sup> See generally above n. 4.

<sup>92</sup> Julia Gladstone, 'Determining Jurisdiction in Cyberspace: The "Zippo" Test or the "Effects" Test?' (2003) *Informing Science* 154-155.

regarding cyberspace jurisdiction, and to adapt this traditional principle, to the suitability of cyber situations, our courts may follow the ‘minimum contacts theory’ ‘the sliding Scale theory’ or ‘the effects test’ theory applied by the US courts. In other areas, resolving disputes through mutual assistance under the Mutual Legal Assistance Act 2012 is the safest and effective course of action. The minimum contacts theory and sliding scale theory are mainly helpful in resolving the disputes which are mainly in the area of commercial activities, copyright or trademark infringements, or in intellectual property cases.<sup>93</sup> The effects test is mainly useful in cyber criminal matters.<sup>94</sup> The countries around the globe may endeavor to adopt some foundational uniform rules as basis of jurisdiction upon the Conventions, case laws and theories discussed above. In line with this development, the countries must come forward to make or modify their local laws and procedures dealing with cyber situations so that there develops a coherent and specific international legal system of cyber jurisdiction.

---

<sup>93</sup> See above n. 47, p. 352.

<sup>94</sup> Ibid.

# Bilateral Investment Treaties (BITs) Threatening Environmental Regulation of Host States: The Case Study of Bangladesh

Md. Abu Saleh\*

## 1. Setting the background and context of the study

There has always been a conflict between the sovereign right of a host State to regulate its environment and the protection of investor's right under the Bilateral Investment Treaties (BITs). In absence of any Multilateral Investment Agreements (MIAs), the conflict between investment and environment has run through a lavish number of BITs. These treaties are primarily concerned with attracting foreign investments by guaranteeing a number of substantive and procedural safeguards to foreign investors, including recourse to investor-State dispute settlement (ISDS) for the purported violation of treaty obligations.<sup>1</sup> Simultaneously, a host State has the sovereign right to take regulatory measures for the protection of its environment.<sup>2</sup> At times, States could be legally obligated to adopt different regulatory environmental measures to comply with national and international environmental law instruments.<sup>3</sup>

To give an example, like many other countries, Bangladesh in one hand, has adopted national policy to protect and preserve its environment. The constitution of Bangladesh provides: '[T]he State Shall endeavor to protect and improve the environment and to preserve and safeguard the natural resources, bio-diversity, wetlands, forests and wild life for the present and future citizens.'<sup>4</sup> The Supreme Court of Bangladesh has interpreted the right to life to include the protection and preservation of the environment.<sup>5</sup> Bangladesh has also adopted various legislations, policies and strategies

---

\* Senior Lecturer, Department of Law, Daffodil International University.

<sup>1</sup> Kenneth J. Vandeveld, 'The Political Economy of Bilateral Investment Treaty' (1998) 92 *American Journal of International Law* 621, 631.

<sup>2</sup> Catherine Titi, *The Right to Regulate in International Investment Law* (Nomos and Hart Publishing, 2014). See also, Suzanne A. Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13 *Journal of International Economic Law* 1037, 1038.

<sup>3</sup> Pushkar Anand, 'South Asian Bilateral Investment Treaties and Regulatory Autonomy to Protect Environment: Is there a Threat?' (Society of International Economic Law, Working Paper No. 2016/19, 2016) 2.

<sup>4</sup> *Constitution of the People's Republic of Bangladesh* 1972, art 18A.

<sup>5</sup> *Dr Mohiuddin Farooque v Bangladesh*, (1996) 48 DLR (HCD) 438. See also, *Bangladesh Environmental Lawyers' Association v Election Commission & Others*, (1994) 23 CLC (HCD).

in this regard.<sup>6</sup> Similarly, the country has signed and ratified many multilateral environmental agreements (MEAs).<sup>7</sup> On the other hand, Bangladesh has embraced 32 BITs of which 6 are not in force.<sup>8</sup> The country has entered into these treaties in complete absence of any concrete negotiation plan and feasible analysis. It repeatedly overestimated the benefit of attracting foreign direct investment (FDI), ignoring the risk of attracting investment claims for the environmental measures. These treaties could offer an alternative forum for foreign investors to adjudicate the legitimate regulatory environmental measures of Bangladesh before investment tribunals. Moreover, ISDS tribunals are reluctant to consider non-investment concerns of the host States, rather the tribunals generally consider the obligation of parties under the BITs only.<sup>9</sup>

<sup>6</sup> The first major law that has been promulgated for the specific purpose of protection and preservation of environment is the *Environmental Conservation Act (ECA) of 1995*, which was followed by the *Environmental Conservation Rules (ECR) of 1997*. Different policies were adopted at different times for the purpose of protecting environment at different sectors and these policies include: Forestry Policy 1994, Fisheries Policy 1998, Agriculture Policy 1999, National Water Policy 1999, Industrial Policy 1999, National Health Policy 2005, National Food Policy, Urban Transport Policy, Livestock Development Policy 1992 National Land Use Policy 2001 and National Energy Policy 2004. In 2010, the environment court was established to hear cases arising out of the *Environment Conservation Act, 1995*. For further study, see, Frahana Helal Mehtab, Md. Abu Saleh and Riad Mahmud, 'Bangladesh' in Guiguo Wang, Alan Yuk-Lun Lee and Priscilla Mei-Fun Leung (ed), *Essentials of the Laws of the Belt and Road Countries: Bangladesh, Pakistan, Sri Lanka* (Zhejiang University Press, 2017) 1, 77-89.

<sup>7</sup> Bangladesh is contracting party to the following environmental treaties: *the Convention on Biological Diversity of 1992*; *the Framework Convention on Climate Change and the Montreal Protocol on Ozone Depleting Substances of 1992*; *The Ramsar Convention on Wetlands of International Importance specially as Waterfowl Habitat of 1971*; *Convention Concerning the Protection of the World Cultural and Natural Heritage of 1975*; *Convention on the Conservation of Migratory Species of Wild Animals of 1979*, *United Nations Convention on the Law of the Sea of 1982*; and *Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal of 1993*. See also, Mohammad Nour, 'Environment and Sustainable Development in Bangladesh: A Legal Study in the Context of International Trends' (2011) 53 *International Journal of Law and Management* 89-107.

<sup>8</sup> Bangladesh Investment Development Authority (BIDA) (25 August 2018), <<http://bida.gov.bd/investment-policy-2>> accessed 3 September 2018. The treaties which are not in force: *Agreement Between the Government of the People's Republic of Bangladesh and the Government of the Democratic People's Republic Of Korea on the Promotion and Reciprocal Protection of Investments*, 21 July 1999 (not in force) (Bangladesh-DPR of Korea BIT); *Agreement between the Republic of Turkey and the People's Republic of Bangladesh Concerning the Reciprocal Promotion and Protection of Investments*, 12 April 2012 (not in force) (Bangladesh-Turkey BIT of 2012); *Agreement between the Government of United Arab Emirates and the Government of the People's Republic of Bangladesh*, 17 January 2011 (not in force) (Bangladesh-United Arab Emirates BIT); *Agreement Between the Government of the People's Republic of Bangladesh and the Government of the Islamic Republic of Pakistan on the Promotion and Protection of Investments*, 24 October 1995 (not in force) (Bangladesh-Pakistan BIT); *Agreement on the Promotion and Reciprocal Protection of Investments between the Government of the Socialist Republic of Vietnam and the Government of the People's Republic of Bangladesh*, 1 May 2005 (not in force) (Bangladesh-Viet Nam BIT); *Agreement between the Government of the People's Republic of Bangladesh and the Government of the Kingdom of Thailand for the on the Promotion and Reciprocal Protection of Investments*, 30 March 1988, (had been terminated) (Bangladesh-Thailand BIT).

<sup>9</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, Award, (2006) ICSID Case No. ARB/03/16, para 423.

This paper aims to explore the interactions between these two conflicting obligations of Bangladesh arising out of BITs and environmental legal instruments. Both international investment law and international environmental law have often been considered as *lex-specializes*,<sup>10</sup> and this can be precisely one reason why contemporary international law is characterized by fragmentation.<sup>11</sup> Therefore, it is increasingly necessary for every host State while drafting BITs to assess the investment-related litigation risk arising from the adoption of environmental measures in order to minimize such risk. Otherwise, the composition of various tribunals to hear a single claim will be highly likely in many occasions of such interface between the two thriving special areas of international law.<sup>12</sup>

Given the overlapping nature of obligations of Bangladesh under BITs and environmental instruments, this paper is an attempt to study 32 BITs of Bangladesh and to examine whether foreign investors could use these investment treaties to litigate environment related regulatory measures of Bangladesh before ISDS. The study has been necessitated by three key reasons.

First, though the growing interface between BITs and environment has attracted considerable attention in international investment law (IIL) scholarship, no such scholarship has commenced so far to address the interface from Bangladesh perspective. This study is an elementary contribution to the ever-growing body of IIL scholarship from Bangladesh standpoint, which presents the position of LDCs in general. Second, Bangladesh has already presented itself as being fully open to FDI and offering high standards of treatment to foreign entities and it has significantly liberalized its foreign direct investment policy since late 1970s.<sup>13</sup> Like many other south Asian countries, Bangladesh became aggressive in signing BITs from 1990s.<sup>14</sup> Pushkar Anand made an analysis to show how the growing number of BITs has increased FDI flow in Bangladesh during the period from 1993 to 2013.<sup>15</sup> Both the upturns of FDI flow and the number of BITs evidence that the country is becoming a favourite destination for foreign

<sup>10</sup> Jorge E Viñuales, 'Foreign Investment and the Environment in International Law: An Ambiguous Relationship' (2010) 80 *British Year Book of International Law* 244, 246.

<sup>11</sup> Anne van Aaken, 'Fragmentation of International Law: The Case of International Investment Protection' 17 *Finnish Year Book of International Law* (2008) 91.

<sup>12</sup> Tony Cole, 'The Boundaries of Most Favoured Nation Treatment in International Investment Law' (2010) 33 *Michigan Journal of International Law* 538; see also, Andrea K. Bjorklund, 'Private Rights and Public International Law: Why Competition among International Economic Tribunals is not Working' (2007) 59 *Hastings Law Journal* 246-47.

<sup>13</sup> Frahana Helal Mehtab, Md. Abu Saleh and Riad Mahmud, (above n. 6) 29-39.

<sup>14</sup> The total number of BITs before 1990 was eight and which is thirty two in 2018 with a massive increase by twenty six BITs, for details see, UNCTAD IIA database, (25 August 2018), online: Investment Policy Hub UNCTAD <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/16>> accessed 10 August 2018.

<sup>15</sup> Pushkar Anand, (above n. 3) 16. He mentioned that in the year 1993 the amount of FDI in Bangladesh was \$ 14 million with the presence of 9 BITs and the FDI flow increased into \$ 1599 million in 2013 while the total number of BITs was 30.

investment. Therefore, it is necessary for the country to undertake feasible study to examine whether these BITs accommodate adequate public policy measures to safeguard its environment. Third, there have already been several instances where foreign investors brought investment claims against host States for the exercise of environmental regulatory measures alleging that such environmental measures violate different provisions of BITs.<sup>16</sup> It has raised two valid concerns: (i) whether an attempt to protect environment is likely to contradict with the provision of fair and equitable treatment (FET), and (ii) whether the same could amount to expropriation under BITs of Bangladesh. Such ISDS claims may endanger the protection and preservation of environment. Therefore, it is necessary to examine the likelihood of litigating environmental measures under BITs and to suggest plausible ways of defending such measures, in case an ISDS claim is escalated by an investor against Bangladesh.

## 2. Environmental regulatory space in bangladeshi bits

After locating the context and necessity of the study, this part offers brief inspection of ERPs in the BITs of Bangladesh. Two such studies have already been conducted by the Organization for Economic Co-operation and Development (OECD) and Pushkar Anand. While OECD analyzed 1623 BITs of 49 countries, not including Bangladesh, considering seven categories of typology,<sup>17</sup> and Anand studied 173 BITs of south Asian counties allowing for the typology of purposes and the typology of provisions.<sup>18</sup> The present paper is a country specific study of Bangladesh to map ERPs in 32 BITs as part of the preamble, general exception, as exceptions to substantive provisions, as part of the protection of an investment commitment and also as independent provisions in these BITs.

### 2.1 ERPs as Part of the Preamble

The sovereign right of a host State to regulate environment has found its place in some of the BITs along with other objectives, such as the protection and the promotion of investment. In general, the preambular provisions are indicative of the ‘object and purpose’ of a BIT.<sup>19</sup>

<sup>16</sup> *Metalclad Corporation v United Mexican States*, Award, (2000) ICSID Case No ARB (AF)/97/1; *CDSE v Costa Rica*, Award, (2000) ICSID Case No. ARB/96/1; *Biwater Gauff Ltd v United Republic of Tanzania*, (2008) ICSID Case No ARB/05/22; *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador*, partial award on the Merits, March 30 2010, PCA Case No. 2009-23, UNCITRAL; *Grand River Enterprises Six Nations v United States of America*, Award, (2011) UNCITRAL; *Renco Group v Republic of Peru*, Partial Award on Jurisdiction, (2016) ICSID case No. UNCT/13/1; and *Infinito Gols Ltd. v Costa Rica*, Decision on Jurisdiction, (2017) ICSID Case No. ARB/14/5.

<sup>17</sup> Kathryn Gordon and Joachim Pohl, ‘Environmental Concerns in International Investment Agreements: A Survey’ (OECD Working papers on International Investment, 2011/01, OECD Publishing)

<sup>18</sup> Pushkar Anand, (above n. 3).

<sup>19</sup> Boisson DE Chazournes Laurence, ‘Environmental Protection and Investment Arbitration: Yin and Yang’ (2017) *Anuario Colombiano de Derecho Internacional* 381, < <https://archive-ouverte.unige.ch/unige:94904> > accessed 10 July 2018.

While this clause does not create any substantive obligations, nonetheless, it becomes relevant in interpreting the ordinary meaning of the treaty text in the light of ‘object and purpose’.<sup>20</sup> In addition to text, the overall context that is reflected in a treaty for the purpose of interpretation is also relevant.<sup>21</sup> Some investment tribunals have relied on preambles for the purpose of interpretations.<sup>22</sup> For instance, in *SGS v. Philippines*, the tribunal relied on the preamble of the *Philippines-Switzerland* BIT to resolve uncertainties in its interpretation so as to favour the protection of covered investment.<sup>23</sup> Though BITs are primarily focused on the protection of investments, in some instances, States expressed their willingness to consider environmental aspects along with economic development in the Preamble itself. For an example, The Bangladesh-Turkey BIT of 2012 contains the objective of protecting environment without relaxing environmental measures in its preamble.<sup>24</sup>

It states:

‘Being convinced that these objectives can be achieved without relaxing health, safety and environmental measures of general application as well as internationally recognized labor rights’.<sup>25</sup>

This is only BIT of Bangladesh that aims at protecting environment in its preamble with the goal of striking the balance between investment and environmental protection. Rest of the treaties envision of reciprocal economic development of the contracting States. To give an example, the preamble of the *Bangladesh-Malaysia* BIT provides:

‘Recognizing the need to protect investments by investors of both Contracting Parties and to stimulate the flow of investments and individual business initiatives with a view to promoting the economic prosperity of both Contracting Parties’.<sup>26</sup>

More or less similar formulations are adopted in all other 31 BITs of Bangladesh,<sup>27</sup> and hence provide very less latitude to protect the sovereign right of host State in protecting environment. However, it deserves to mention that the IISD Model

<sup>20</sup> *Vienna Convention on the Law of treaties (VCLT)* (adopted 22 may 1969, entered into force 27 January 1980) art 31 (1).

<sup>21</sup> VCLT 1969, art 31 (2).

<sup>22</sup> *Philip Morris Products SA v Oriental Republic of Uruguay*, (2010) ICSID Case No. ARB/10/7, para 169. In this case the tribunal relied on the preamble of the *Switzerland-Uruguay* BIT; see also, *Siemens AG v Argentine Republic*, Decision on Jurisdiction, (2004) ICSID Case No. ARB/02/8, para 81.

<sup>23</sup> *SGS SA v Republic of Philippines*, Decision of the Tribunal on Objections to Jurisdiction, (2004) ICSID Case No. ARB/02/6, para 116.

<sup>24</sup> *Bangladesh-Turkey* BIT of 2012.

<sup>25</sup> *Bangladesh-Turkey* BIT of 2012, para 5 of the preamble.

<sup>26</sup> *Agreement between the Government of Malaysia and the Government of the People’s Republic of Bangladesh for the on the Promotion and Protection of Investments*, 12 October 1994 (entered into force 20 August 1996), preamble (*Bangladesh-Malaysia* BIT).

<sup>27</sup> The BITs of Bangladesh can be found at UNCTAD Investment Policy Hub, <<https://investmentpolicy-hub.unctad.org/IIA/CountryBits/16>> accessed 9 December 2018.

Agreement introduces the concept of sustainable development in its preamble.<sup>28</sup> The Indian Model BIT 2016 follows the similar approach of sustainable development embedded in the preamble.<sup>29</sup>

## 2.2 *ERPs as General Exception/NPM Type Clause*

A second way in which environmental concern constitutes part of BITs of Bangladesh is general exception clause which is also known as non-precluded measure (NPM) provisions. This type of clause carves out environmental and some other regulatory measures of host States from the obligation of the entire treaty. This clause plays an important role in securing the regulatory space of host States for non-investment concerns.<sup>30</sup> Invoking such measure generally depends on three factors: first the permissible objective of protecting environment;<sup>31</sup> second the nexus requirement link between the measure and the objective to be achieved;<sup>32</sup> and third, the satisfaction of non-discrimination, reasonableness and due process requirements.<sup>33</sup> Thus the validity of any environmental measure as part of general exception clause depends on the text of BITs. To give an example of this type of clause, Article 5 of the *Bangladesh-Turkey BIT* of 2012 provides:

‘Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measures: (a) designed and applied for the protection of human, animal or plant life or health, or the environment; (b) related to the conservation of living or non-living exhaustible natural resources’.<sup>34</sup>

This provision of general exception is almost similar to the general exception of GATT Article XX.<sup>35</sup> This Article allows WTO member States to adopt measures necessary to protect human, animal and plant life,<sup>36</sup> and the measures relating to the protection of exhaustible natural resources.<sup>37</sup> WTO jurisprudence has developed some

<sup>28</sup> International Institute of Sustainable Development, IISD Model International Agreement on Investment, April 2005 < [https://www.iisd.org/pdf/2005/investment\\_model\\_int\\_agreement.pdf](https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf) > accessed 1 September 2018.

<sup>29</sup> Model Text for the Indian Bilateral Investment Treaty, 2016 (Indian Model BIT) < <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560> > accessed 1 September 2018.

<sup>30</sup> Prabhash Ranjan and Pushkar Anand, ‘How Healthy are the Investment Treaties of South Asian Countries: An Empirical Study of Public Health Provisions in South Asian Countries’ BITs and FTA Investment Chapters’ (2018) *ICSID Review* 1, 18.

<sup>31</sup> Ibid.

<sup>32</sup> Prabhash Ranjan and Pushkar Anand, ‘The 2016 Indian Model Bilateral Investment treaty: A Critical Deconstruction’ (2017) 38 *Journal of International Law Business* 1.

<sup>33</sup> Amit Kumar Sinha, ‘The ‘Necessary’ Nexus Requirement Link in General Exception Provisions of SouthAsian Bilateral Investment Treaties and Some Insight on Its Interpretative Approach in the Context of South Asia’ (2017) 5 *the Chinese Journal of Comparative Law* 129-153.

<sup>34</sup> *Bangladesh-Turkey BIT*, art 5(1).

<sup>35</sup> *General Agreement on Tariffs and Trade 1994* (GATT 1994), art XX.

<sup>36</sup> GATT 1994, art XX (B).

<sup>37</sup> GATT 1994, art XX (g).

tests to justify an environmental measure as a general exception to GATT.<sup>38</sup> However, Article 5 of *Bangladesh-Turkey* BIT does not contain an elaborate *chapeau* like Article XX of GATT.<sup>39</sup>

Bangladesh has signed only one such BIT that pertains an ERP in the form of general exception clause. Though it seems to become a trend in the BITs of many other countries.<sup>40</sup> Though exceptions are difficult to validate a regulatory measure pertaining to environment, they can still serve as one of the approaches used to incorporate environment-friendly provisions in the BITs.<sup>41</sup>

### 2.3 ERPs as Exception to Different Substantive Provisions of BITs

ERPs also exist in some BITs as exception to the provisions of national treatment (NT), most favoured nation (MFN) treatment, FET and expropriation in the main text of BITs, as third approach to protect the sovereign rights of a host States to regulate environment. This kind of exception immunises a host State from an investment claims under BITs. For instance, the Bangladesh-France BIT underlines that a measure of a host State for the protection of environment and public health purposes does not amount to less favourable under the MFN obligation of the contracting parties.<sup>42</sup> Such ERP permits a host State to take any environmental measure even if it has a discriminatory effects on foreign investors and hence such measure does not violate the non-discrimination obligation of the parties. No other BITs of Bangladesh has such qualifying MFN or NT provisions to oust environmental measures from the ambit of non-discrimination principles of BITs. However, the *Bangladesh-Turkey* BIT of 2012 allows parties to take regulatory action for public purposes, such as health and the environment. Article 6 of the treaty provides:

‘Non-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation’.<sup>43</sup>

If such conditional expropriation clause exists in BITs, the environment related measures of a host State shall be immune from the claim of an indirect expropriation.

<sup>38</sup> See generally, Md. Abu Saleh, ‘The WTO Jurisprudence and the Protection of the Environment: A New Paradigm of Progress and Reconciliation’ (2015) 4 *NALSAR Environmental Law and Practice Review (ELPR)* 93-124

<sup>39</sup> GATT 1994, art XX Chapeau.

<sup>40</sup> To give an example, art 16 of the Model Indian BIT 2016 adopted a general trend to carve environment measures out of the entire BIT.

<sup>41</sup> Wakgari Kebeta Djigsa, ‘The Adequacy of Ethiopia’s Bilateral Investment Treaties in Protecting the Environment: Race to the Bottom’ (2017) 6 *Haramaya Law Review* 67, 81.

<sup>42</sup> *Agreement between the Government of the Republic of France and the Government of the People’s Republic of Bangladesh on Promotion and Protection of Mutual Investment*, 10 September 1985 (entered into force 9 October 1986) (*Bangladesh-France* BIT), Exchange of Letter No 3.

<sup>43</sup> *Bangladesh-Turkey* BIT of 2012, art 6 (2).

## 2.4 *Independent ERPs*

Another approach in protecting the sovereign right of environmental measures is the incorporation of independent ERPs in the BITs. Article 4 of the *Bangladesh-Turkey* BIT of 2012 provides:

‘1. A Contracting Party shall not waive or otherwise derogate from its national public health and environmental policies as an encouragement or otherwise, to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of an investment of an investor of the other Contracting Party.

2. Each Contracting Party shall reserve the right to exercise all legal measures in case of loss, destruction or damages with regard to its public health or life or the environment by investments of the investors of the other Contracting Party’.<sup>44</sup>

The first part of this Article confirms the balance between non-investment and investment concerns at all stages of foreign investment.<sup>45</sup> The later part enables host States to exercise all legal measures for the protection of environment and some other objectives.<sup>46</sup> This is the only Bangladeshi BIT that contains independent ERPs.

## 2.5 *ERPs as part of the Protection of an Investment Commitment*

The *Bangladesh-UAE* BIT subjects the regulation of an investment to the compliance with national and international law of a host State. Article 3 of the treaty states:

‘Investor of a Contracting Party as far as possible shall comply with the international laws and regulations of the other Contracting Party in relation to public health and/ or environmental policies.’<sup>47</sup>

Such a provision bears the significance to immune any environmental measure of a host State, which is taken in pursuance to the obligations of any party under either national or international law. Likewise, the *Bangladesh-Denmark* BIT also obliges parties not to relax environmental regulations as part of the protection of an investment commitment.<sup>48</sup> Unlike the *Bangladesh-UAE* BIT, this treaty obliges the investors to provide adequate and effective compensation in case a host State suffers from a loss, destruction, or damages with regard to its environment by the investors.<sup>49</sup> This type of host State’s environment friendly clause could possibly give rise to the counter environmental claims as an investment claim before the investment tribunals against the investors.

<sup>44</sup> *Bangladesh-Turkey* BIT of 2012, art 4.

<sup>45</sup> *Bangladesh-Turkey* BIT of 2012, art 4(1).

<sup>46</sup> *Bangladesh-Turkey* BIT of 2012, art 4 (2).

<sup>47</sup> Agreement between The Government of The United Arab Emirates and the Government of the People's Republic of Bangladesh for the Promotion and Reciprocal Protection of Investment, 17 January 2011(not in force) art 3.2 (*Bangladesh-UAE* BIT).

<sup>48</sup> *Agreement on the Promotion and Reciprocal Protection of Investments between the Governments of the Republic of Bangladesh and the Kingdom of Denmark*, 5 November 2011 (entered into force 27 February 2013) (*Bangladesh-Denmark* BIT)

<sup>49</sup> *Bangladesh-Denmark* BIT, art 2.2.

### 3. The possibility of investment claims under bits of bangladesh for the exercise of environmental regulatory measures

After mapping ERPs in the BITs of Bangladesh, it is evident that very few of the treaties include ERPs. But these treaties give investors a direct right of action against the environmental regulatory measures of a host State, through ISDS, for the alleged violation of different provisions of BITs. This may create a havoc concerning the environmental regulation of a host State. This part explores the possibility of investment claims for the environmental measures giving rise to an award of damages under BITs of Bangladesh. More specifically, it will consider FET and Expropriation provisions of Bangladeshi BITs, since these two provisions are having greater implications for bringing environment related investment claims.

#### 3.1 Fair and Equitable Treatment (FET)

Most BITs provide for FET of foreign investments and it is the frequently invoked provision in investor-State disputes.<sup>50</sup> The study of FET has been necessitated because the majority of successful ISDS claims are for the violation of this standard of treatment.<sup>51</sup> Moreover, there is lack of precision in defining this standard.<sup>52</sup> Such uncertainty and vagueness allow for a substantial degree of subjective judgment widening the latitude for foreign investors to evade domestic laws and other regulatory measures.<sup>53</sup>

This standard obliges the host State to grant a 'fair and equitable treatment' to the investment. For example, the *Bangladesh-Thailand* BIT provides:

'Investments of investors of either Contracting Party shall all time be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in anyway impair by unreasonable or discriminatory measures, the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party'.<sup>54</sup>

Today, this concept is accepted as an autonomous standard,<sup>55</sup> while it has also been

<sup>50</sup> Rudlof Dolzer and Christoph Schreuer, *Principles of International investment Law* (Oxford University Press, 2012) 130. See generally, C Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' 2005, 6 *Journal of World Investment and Trade* 357-86; A Deil, 'The Core Standard of International Investment Protection: Fair and Equitable Treatment' (2012).

<sup>51</sup> Rudlof Dolzer and Christoph Schreuer, *Ibid*, 130.

<sup>52</sup> *CMS v Argentina*, Award, (2005) ICSID Case No. ARB/01/812, para 273.

<sup>53</sup> Wakgari Kebeta Djigsa, (above n. 40) 70. See also, United Nations Conference on Trade and Development (UNCTAD), *Investment Policy Framework for Sustainable Development*, 2015< [http://unctad.org/en/PublicationsLibrary/diaepcb2015d5\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf) > accessed 20 August 2018.

<sup>54</sup> *Bangladesh-Thailand* BIT, art 2.2. Almost similar set of articulations are found in most of the BITs of Bangladesh.

<sup>55</sup> Ioana Tudor, *The fair and Equitable Treatment Standard in International Law of foreign Investment* (Oxford University Press, 2008) 182-202.

suggested that the FET standard is merely an overarching provision which embraces the other standards of protection found in the BITs.<sup>56</sup> The investment tribunals in many occasions have examined it separately to find out whether there has been a violation of this principle.<sup>57</sup> Foreign investors may claim the violation of this standard even if they receive same treatment as of the local investors, and also when they are unable to invoke MFN clause.<sup>58</sup> Moreover, while interpreting this standard, the investment tribunals identified extensive list of principles into FET clause.<sup>59</sup> Accordingly, FET clause embraces the protection of the investor's legitimate expectations, stability and transparency, compliance with contractual obligations, due process, good faith, and freedom from coercion. The primary objective to insert such provision is to strengthen the security and trust of the foreign investors thereby maximizing the use of economic resources.<sup>60</sup>

FET standard could perhaps be more problematic for a host State's regulation of environment when this principle is interpreted to protect the legitimate expectations of the investors. The investor's legitimate expectations generally originate from the legal framework of the host State at the time when investment is made, and any other undertakings, and direct or indirect representations, made by the host State.<sup>61</sup> Thus if the law governing the investment changes affecting the interest of an investor, the investors must be compensated for the loss suffered.<sup>62</sup> Such interpretation of FET principle could preclude poorer States like Bangladesh from taking effective measures to protect environment in line with its constitutional and international obligations since the country is not financially capable enough to compensate such measures. There are several ISDS cases where the environmental measures of host States have been litigated for the alleged breach of FET provision of BITs.<sup>63</sup> In *Metalclad v. Mexico*, the cancellation of permit by Mexico owing to concerns of contamination of water resources and consequent health hazards was challenged before ICSID tribunal by the investor.<sup>64</sup> The tribunal found that such environmental measures amount to regulatory

<sup>56</sup> Rudlof Dolzer and Christoph Schreuer, (above n. 50) 133. See also, *Iemire v Ukraine*, Decision on Jurisdiction and Liability, (2010) ICSID Case No. ARB/06/18, paras 259, 385.

<sup>57</sup> *Plama v Bulgaria*, award, (2008) ICSID Case No. ARB/03/24, paras 161-63.

<sup>58</sup> Rudlof Dolzer and Christoph Schreuer, (above n. 50) 133; K Yannaca-Small, 'fair and Equitable Standard' in K Yannaca-Small (ed), *Arbitration under International Investment Agreements* (Oxford University Press, 2010) 385.

<sup>59</sup> Rudlof Dolzer and Christoph Schreuer, (above n. 50) 145.

<sup>60</sup> *Tecmed v Mexico*, Award, (2003) ICSID Case No. ARB (AF)/00/2, para 155.

<sup>61</sup> C Schreuer and U Kriebaum, 'At What Time Must Legitimate Expectations Exist?' in J Werner and A H Ali (ed), *A Liber Amicorum: Thomas Walde Law Beyond Conventional Thoughts* (CMP Publishing, 2009) 265.

<sup>62</sup> *Total v Argentina*, decision on liability (2010) ICSID Case No. ARB/04/1, para 122.

<sup>63</sup> *Metalclad v Mexico*, (above n. 16); *MTD v Chile*, Award, (2005) ICSID Case No ARB/01/7; *Chemtura v Canada*, Award, (2010) UNCITRAL.

<sup>64</sup> *Metalclad v Mexico*, (above n. 16).

taking and therefore in violation with the FET provision.<sup>65</sup> Similarly, in *Tecmed v. Mexico*, the host State was held liable for violation of the expropriation and FET provisions under the *Spain-Mexico* BIT for not renewing the license of a land-fill due to environmental concerns.<sup>66</sup> The findings of the ICSID tribunal in *MTD v. Chile* also deserves special mention. The tribunal found that the host State by entering into an investment contract in one hand, and by denying the relevant permits on the other hand, had breached the legitimate expectations of the investors and thus violated FET clause under the *Chile-Malaysia* BIT.<sup>67</sup> On the contrary in *Parkings v. Lithuania*, the tribunal stated that the legitimate expectation of an investor is protected under national law and therefore it is not protected under international investment law.<sup>68</sup>

As a host State, Bangladesh may curb the extended application of FET norm through limiting the application of this standard for the objective of environmental regulations. Otherwise, such non-qualifying FET provision could restrict the sovereign right of Bangladesh to adopt new policies for the public good. Unfortunately, no BITs of Bangladesh limits the FET provision to the environmental regulatory discretions of the host State except under the Joint Interpretative Notes (JIN) to the *Bangladesh-India* BIT, which was signed in Dhaka on October 04, 2017.<sup>69</sup> This JIN mentions:

‘The concept of “fair and equitable treatment” under Article 3(2) does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens, and does not create additional substantive rights’.<sup>70</sup>

There is considerable debate whether FET standard merely reflects international minimum standards, as contained in customary international law,<sup>71</sup> or is an autonomous standard as discussed above.<sup>72</sup> However, this note unequivocally excludes the possibility of autonomous use of FET provision under the *Bangladesh-India* BIT.

Further the note specifically excluded environmental measures beyond the scope of FET standards. The JIN states:

‘The “fair and equitable treatment” standard under Article 3(2) does not require compensation for measures designed or applied to further public policy objectives including but not limited to: a) protection or improvement of natural resources and the environment’.<sup>73</sup>

<sup>65</sup> *Metalclad v Mexico*, (above n. 16), paras 102-107.

<sup>66</sup> *Tecmed v Mexico*, (above n. 60).

<sup>67</sup> *MTD v Chile*, (above n. 63), paras 161-70.

<sup>68</sup> *Parkings v Lithuania*, Award, (2007), ICSID Case No ARB/05/8, para 344.

<sup>69</sup> Joint Interpretative Notes (JIN ) to the *Bangladesh-India* BIT, 2017 <<https://dea.gov.in/sites/default/files/Signed%20Copy%20of%20JIN.pdf>> , accessed 9 December 2018.

<sup>70</sup> Ibid, 3.

<sup>71</sup> *Occidental v Ecuador*, Award, (2004) LCIA Case No. UN3467, paras 189-190; *Azurix v Argentina*, Award, (2006) ICSID Case No. ARB/01/12; *Vivendi v Argentina*, Award, (2007) ICSID Case No. ARB/97/3.

<sup>72</sup> See, above n. 55-57.

<sup>73</sup> Ibid, 4.

Such note will definitely preserve the regulatory rights of host States in safeguarding environment and it will also control unintended interpretations by investment tribunals. The issuance of such note is likely to have robust persuasive value on the interpretation of the BIT. The question whether such note in the *India-Bangladesh* BIT would be an ‘amendment’ or ‘true interpretation’ of the treaty. JIN could be regarded as an amendment of the BIT in accordance with Articles 39 and 11 of the Vienna Convention on the Law of Treaties.<sup>74</sup> Thus JIN may have the effect of amending the BIT, if the term ‘any other means if so agreed’ under Article 11 of VCLT is interpreted to include such agreed note as an amendment.<sup>75</sup> It has been further argued that it is difficult to draw a distinctive line between amendment and true interpretation and the JIN mainly provides clarification to the original text of the treaty quite thoroughly.<sup>76</sup> Nevertheless, the tribunal in *ADF v. United States* expounded that the NAFTA Free Trade Commission’s (FTC) Notes of Interpretation are to be treated as the most authentic and authoritative and thereby binding on the parties.<sup>77</sup> But the tribunal did not address the issue of distinction between the JIN and amendment.<sup>78</sup>

This is the only example where FET provision of Bangladeshi BITs has been qualified in favour of the rights of Bangladesh to regulate environment. The rest BITs containing FET provision make the country vulnerable to the potential investment claims for the alleged violation of FET standard.

### 3.2 Expropriation

The present part studies the expropriation provision of 32 Bangladeshi BITs and finds that out of 32 BITs 29 BITs grant protection of foreign investment against both direct and indirect expropriation.<sup>79</sup> Then, this part examines whether the sovereign right of Bangladesh to regulate environment in line with national and international obligations could give rise to an investment claim of expropriation under its BITs. This part also examines whether Bangladeshi BITs contain any safeguards for the regulatory exercise of sovereign rights in protecting environment?

In general, expropriation is the most severe form of interference with property.<sup>80</sup> Such interference can be direct or indirect. Expropriation is direct when it is

<sup>74</sup> VCLT (above n. 20) art 39 states: ‘a treaty may be amended by agreement between the parties’ and art 11 states: ‘the consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.’

<sup>75</sup> *Ibid.*

<sup>76</sup> Gabrielle Kaufmann-Kohler, ‘Interpretative Powers of the Free Trade Commission and Rule of Law’ in E. Gaillard and F. Bachand (ed), *Fifteen Years of NAFTA Chapter 11 Arbitration* (Juris, 2011) 191.

<sup>77</sup> *ADF Group Inc. v United States*, Award, (2003) ICSID Case No. ARB (AF)/00/1.

<sup>78</sup> *Ibid.*

<sup>79</sup> It is interesting to note that out of 32 BITs of Bangladesh, 3 BITs do not contain expropriation provision at all and these are; *Bangladesh-German* BIT, *Bangladesh- Switzerland* BIT, and *Bangladesh-Iran* BIT.

<sup>80</sup> Rudlof Dolzer and Christoph Schreuer, (above n. 50) 98.

characterized by a forcible deprivation of the title of the property by means of administrative or legal measures of the host States.<sup>81</sup> This can take place in form of nationalization, confiscation, acquisition or requisition of an investment.<sup>82</sup> Direct or explicit expropriations are relatively rare and the negative effect of such measure has made it unwise. Accordingly, the practice of indirect expropriation has increased significantly.<sup>83</sup> Thus, in case of indirect expropriation, the investors hold title but they become unable to utilize their investment in a meaningful way.<sup>84</sup>

All the 29 BITs of Bangladesh having expropriation provision cover both direct and indirect form of expropriation. For example, the *Bangladesh-India* BIT provides:

‘Investments of investors of either Contracting party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for a public purpose in accordance with law on a non-discriminatory basis and against fair and equitable compensation’.<sup>85</sup>

It lacks language that excludes environmental regulatory measures from the ambit of expropriation. The *Bangladesh-Turkey* BIT is the only one exception to exempt such environmental measures.<sup>86</sup> Now question arises whether any attempt by Bangladesh to adopt environmental regulatory measures would constitute expropriation under its BITs. A similar kind of issue for the first time was raised before an investor-State tribunal in *Ethyl Corporation v. Canada*.<sup>87</sup> The US Corporation in the capacity of an investor in Canada, challenged a Canadian legislation entitled ‘the Manganese-based Fuel Additives Act, 1997’.<sup>88</sup> This Act banned the importation of inter-provincial sale

<sup>81</sup> *LG & E Energy Corp. v Argentina*, Decision on Liability, (2006) ICSID Case No. ARB/02/1, para. 187 and it provides for: ‘...the direct one (expropriation), understood as the forcible appropriation by the State of the tangible or intangible property of individuals by means of administrative or legislative action’.

<sup>82</sup> Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Wolters Kluwer Law and Business, 2009) 323.

<sup>83</sup> UNCTAD, *Series on Issues in International Investment Agreements, Taking of Property*, (2002) 20, which states: ‘It is not the physical invasion of property that characterizes nationalizations or expropriations that has assumed importance, but the erosion of rights associated with ownership by the State interferences. So, methods have been developed to address this issue’.

<sup>84</sup> *Rudolf Dolzer and Christoph Schreuer*; (above n. 50) 101.

<sup>85</sup> *Agreement between the Government of the Republic of India and the Government of the People’s Republic of Bangladesh for the Promotion and Protection of Investments*, 9 February 2009 (entered into force 7 July 2011) art 5 (a) (*Bangladesh-India* BIT). It is to be mentioned that all other BITs of Bangladesh contain considerably identical, if not verbatim, provisions relating to expropriation.

<sup>86</sup> *Bangladesh-Turkey* BIT of 2012.

<sup>87</sup> *Ethyl Corporation v Canada*, Award on Jurisdiction, 38 I.L.M. 708, (NAFTA Chapter 11 Arbitration Tribunal, 1998).

<sup>88</sup> *Manganese-based Fuel Additives Act, 1997* (Canada) banned the importation of inter-provincial sale of methylcyclopentadienyl manganese tricarbonyl (MMT), an octane booster, when added to gasoline enhances fuel efficiency. See also, Mary E. Footer, ‘BITs and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment’ (2009) 18 *Michigan Journal of International Law* 33, 39.

of MMT as a pollutant and harmful to human health.<sup>89</sup> The core question before the tribunal was whether the sovereign regulatory measure of a host State relating to environment, public health, and other social issues could possibly amount to indirect expropriation.<sup>90</sup> At the end, the government of Canada agreed to set aside the MMT ban and the country paid \$ 13 million, which was considered to be the cost and the investor's lost profit in Canada.<sup>91</sup> Such precedents will definitely endanger the sovereign right of a host State to adopt regulatory measures for the protection of environment.<sup>92</sup>

Likewise the ICSID tribunal in *Santa Elena v. Costa Rica* decided that environmental regulatory measure of Costa Rica constituted an indirect expropriation.<sup>93</sup> The tribunal found:

'Expropriatory environmental measures, no matter how laudable and beneficial to society as a whole, are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the State's obligation to pay compensation remains'.<sup>94</sup>

While the tribunal in *S.D. Myers v. Canada* referred the idea underlying the police powers doctrine concerning the distinction between the right to regulate and expropriation.<sup>95</sup> The tribunal found:

'The general body of precedent does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 [expropriation] of the NAFTA, although the Tribunal does not rule out that possibility... Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference. The distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs'.<sup>96</sup>

The possibility of using police powers by host States in justifying environmental regulatory measures was further articulated in *Tecmed v. Mexico*, where the tribunal noted that an investor is not entitled to any compensation for the economic loss suffered due to the exercise of sovereign rights within the framework of police powers.<sup>97</sup> Though this statement was given only as an *obiter dictum*, since the tribunal excluded in casu the application of police powers doctrine.<sup>98</sup> Still the finding of this

<sup>89</sup> Mary E. Footer, *Ibid*, 39.

<sup>90</sup> *Ethyl Corporation v Canada*, (above n. 87).

<sup>91</sup> Mary E. Footer, (above n. 88) 40.

<sup>92</sup> Muthucumaraswamy Sornarajah, *the International Law on Foreign Investment* (Cambridge University Press, 2004) 293.

<sup>93</sup> *Santa Elena v Costa Rica*, award, (2002) ICSID Case No. ARB/96/1.

<sup>94</sup> *Ibid*, para 72.

<sup>95</sup> *S.D. Myers v Canada*, Award, (2002) UNCITRAL.

<sup>96</sup> *Ibid*, paras 181-182.

<sup>97</sup> *Tecmed v Mexico*, (above n. 60), para 119.

<sup>98</sup> *Ibid*; see also, Jorge E. Viñuales, 'The Environment breaks into Investment Disputes', in M. Bungenberg, J. Griebel, S. Hobe, A., Reinisch (ed), *International Investment Law* (Hart/Nomos, 2012) 19-20.

case is worth mentioning because a clearer statement was made by the tribunal in recognizing the right of host States to regulate environment.

Such decisions of investment tribunals indicate that the use of BITs to litigate environmental measures is no more a mere speculation rather it has become the reality. This may bar the fulfillment of constitutional and international obligations of a host State to ensure the right to safe environment as part of right to life. Realizing the danger of such investment claims many developing countries in recent times recognized that an environmental measure which is non-discriminatory does not constitute expropriation.<sup>99</sup> The *Bangladesh-Turkey* BIT of 2012 (which is yet not in force) could also become a good example how Bangladesh has changed its approach in protecting environment. However, Bangladesh may follow Indian Model BIT of 2016 to safeguard its environmental regulations from the claim of expropriation.<sup>100</sup>

#### 4. Conclusions

The forgoing discussions demonstrate that the sovereign right of Bangladesh to regulate environment has been slowly eroded away through a number of BITs, which the country has entered into. While negotiating BITs, the country hardly felt the necessity to strike a good balance between its regulatory discretions in one hand and the promotion of foreign investment on the other hand. Most of the BITs are too generous to compromise the sovereign rights of public policy measures with the investor-State arbitration body.

The study finds Bangladesh in a very vulnerable situation. The country is overwhelmingly ambitious in attracting foreign investment through providing a host number of assurances under BITs. Unfortunately, in absence of any concrete negotiation plan, the country as a host State failed to accommodate its public policy objectives together with environmental concerns in its BITs. This is perhaps for the so called reason that in negotiating a bilateral treaty the country finds itself in a highly unequal position that does not produce a fair outcome. The country lacks adequate legal capacity and skill in investment treaty negotiation since it largely depends upon the professional aptitude of the contracting parties.

The analysis shows that out of 32 BITs, only 4 treaties include ERPs in the treaty and these are: *Bangladesh-Turkey* BIT of 2012; *Bangladesh-UAE* BIT of 2011; *Bangladesh-France* BIT; and *Bangladesh Denmark* BIT; and 1 treaty that is *Bangladesh-India* BIT contains JIN in favour of right to regulate environment. Though the first two of these four treaties are not in force. Yet again, there is great diversity in terms of their textual presence and implication. ERPs appear in the preamble, as

<sup>99</sup> *Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments*, 17<sup>th</sup> May of 2013, art 10.5.

<sup>100</sup> Indian Model BIT 2016, art 5.5 contains an exception to the expropriation clause where any non-discriminatory measure with the objective of protecting environment does not amount to expropriation.

general exception, as exception to MFN, NT, FET, and expropriation and as part of performance requirement and sometimes even as independent provisions. However, ERPs exist in *Bangladesh-Turkey* BIT in four different places, and so affords greater regulatory discretions to host State to take environment related measures. This treaty could be a possible model for Bangladesh in negotiating/renegotiating BITs to house environmental policy objectives. The paper presents a very critical picture that most of the BITs of Bangladesh offer an alternative venue for foreign investors to litigate environmental measures before ISA under two possible scenario: first, for the alleged violation of FET standard; and second for the claim of indirect expropriation. Thus, the paper concludes recommending Bangladesh that it should revisit its BITs and incorporate ERPs in the BITs with the objective of enjoying greater control over environmental regulatory autonomies. Such provisions will help Bangladesh shield environmental policy discretions in case an investment claim is brought by foreign investors. The Indian Model BIT of 2016 may become a good template for Bangladesh in striking a good balance between investment and non-investment concerns.