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Fragmentation of Broken Men and Human Rights in a Globalized World

Dr. Mizanur Rahman*

You write 'Injustice' on earth
We will write 'Revolution' in the sky.
-Amir Aziz

1. Introduction

The second half of the twentieth century witnessed a remarkable recognition of human rights as universal rights. Despite the dichotomy and in my opinion, deliberate misconstruction of the notion of human rights into positive and negative rights, there was a visible consensus among jurists and statesmen about the preeminent significance of human rights for emancipation of human beings and building an egalitarian society. Human rights in theory and practice, had assumed such a pinnacle position in international relations and domestic policy making that political scientists were tempted to dub the era as "The End of History" and the people inhabiting the globe in the 20th century as "the Last Man".[1]

The contention is acceptable only as much as it recognized the principle of 'equality of all persons' irrespective of caste, class, sex, faith, nationality. Regrettably, however, history is full of evidence that the 'equality' was applicable only in relation to and among the 'equals' and the inherent discriminations in social and political life of the individuals were never eroded by the strict implementation of the high sounding principle of 'equality'. Those who were not 'equals', i.e. the 'Broken men'[2]always resided outside the ambit of human rights protective vest. Quite interestingly, human rights jurisprudence was given such a flavor to create an illusory equality of all to conclude that the case of the Broken Men was an unfortunate incident of the past and has no relevance in an era of universal human rights culture.

This article is an attempt to break this myth and further show that not only that the Broken men had been a constant reality even during the hey days of human rights but that the twenty-first century is witnessing the unfortunate reincarnation and fragmentation of the Broken Men in such inhuman ways that the very foundations of human civilization have come under serious threat in today's globalized world. In order to do this, we need to analyze, albeit very briefly, the nature and content of

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1 Francis Fukuyama, *The End of History and the Last Man* (Free Press 1992) 418.

2 For a definition of Broken Men, see sub-heading "Human Dignity and Broken Men" in the article.

human rights, identify the Broken Men and shed light on some of the manifestations of threats to the Broken men that make the whole idea of 'equality' and 'human rights' a nullity.

2. Human Rights

Human rights are literally the rights that one has simply because of the fact that he is born as a human being, is a human being. Human rights are *equal* rights: one either is or is not a human being, and therefore has the same human rights as everyone else (or none at all). Human rights also are *inalienable* rights: one cannot stop being human, no matter how badly one behaves or how barbarously one is treated. And they are *universal* rights, in the sense that today we consider all members of the species *Homo Sapiens* "human beings" and thus holders of human rights. Similarly, human rights are indivisible in the sense that they cannot be segregated into a hierarchical order where civil and political rights are considered as primary, 'true' rights and economic, social and cultural rights are relegated to a subordinated, secondary position and subject to not immediate but progressive realization owing primarily to their 'resource-dependent' nature[3]. Indivisibility of human rights thus also refer to the intricate relationship of 'interdependence' of different types of human rights.

There have been some debates about the cultural contexts in which human rights are to be ensured bringing in the notion of cultural relativism. Today it is more than evident that 'right to culture' itself is a human right, and to that extent the rigidity and legitimacy of 'cultural relativism' is diluted.[4]

There has also been an uproar, emanating primarily from the newly independent (developing) countries gaining self-rule during the period of decolonization (from 1960 to 1980 particularly), that the highly acclaimed Universal Declaration of Human Rights, 1948 (UDHR) may be called 'universal' only with wide stretching of imagination. They contend that the overwhelming majority of the member-states of the United Nations did not and because of their non-existence could not participate in the process of the drafting of the UDHR, and this document is embodiment of ethical and moral standards of Western civilization. The ethos, aspirations and principle mores of life of the oriental peoples were never accommodated in the UDHR. Therefore, human rights jurists as well as statesmen of this hemisphere do not tire in repeating the complaint that the UDHR is basically a "Euro-centric' document

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[3] See more on nature of human rights, Mizanur Rahman, 'Why Human Rights?' in Prof. Dr. Mizanur Rahman (ed), *Human Rights: Theory, Law and Practice in Bangladesh* (New Warsi Book Corporation 2018) 7-16; See also, Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press 2013) 7-23.

[4] Mizanur Rahman, 'Keynote paper: Stand Up for Your Rights' (University of Asia Pacific Human Rights Day Conference, Dhaka, December 2019) 3-4.

imposed on the whole of the international community through the mechanism of the membership of the United Nations.[5]

Despite non-participation of the newly- independent countries in the framing of the UDHR or subsequently, the two basic covenants of the international bill of rights, I would humbly submit that these documents enshrine and focus on the fundamental essence of human rights- 'human dignity to be precise, and this 'dignity' as a value is obviously universal though the content of 'dignity' might have a cultural component/shade and understood differently in different times, places and societies.[6]

3. 'Human Dignity'- the essence of human rights

It has been argued that notions of human dignity have underlain the political practices of most societies. It is now historically proven that in the pre-modern world, dignity was not seen as an inherent feature of all humans but as an attribute of the few. Rather than a universal principle of equality, dignity functioned as a particularistic principle of hierarchy.[7] Professor Donnelly traces three interrelated features of the Roman conception of dignity.[8] First, "dignity" was a term of hierarchical distinction, an attribute of a distinguished few (*patricians* as opposed to the *plebeians* and others) that marked them off from the vulgar masses. "*Dignitas* was the status that dignitaries had- a quality that demanded reverence from the ordinary common person."[9]

Second, "dignity" was a virtue — or the consequence or reward of virtue — in the Aristotelian sense of a learned habit or disposition that realizes human excellence. Some or even all people may have a potential for virtue, which is the proper natural end of humans. "Dignity, in Latin usage, refers especially to that aspect of virtue or excellence that makes one worthy of honour — which, as Aristotle put it, accompanies virtue as its crown."[10]

Third, "dignity" was specially connected with public appearance. "In Rome the original meaning of *dignitas* referred to an acquired social and political status, generally implying important personal achievements in the public sphere and moral integrity".[11] Although *dignitas* certainly had an inner basis, it referred particularly to

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5 ibid 4.
6 ibid 5.
7 Donnelly (n3) 121.
8 ibid 122.
9 Andrew Brennan and Y.S. Lo, 'Two Conceptions of Human Dignity: Honor and Self-Determination' in Jeff Malpes and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer 2007) 44.
10 Susan M. Shell, 'Kant on Human Dignity' in Robert P. Kraynak and Glenn Tinder (eds), *In Defense of Human Dignity: Essays for Our Times* (The University of Notre Dame Press 2003) 53.
11 Izhak Englard, 'Human Dignity: From Antiquity to Modern Israel's Constitutional Framework' (1999-2000) 21 *Cardozo Law Review* 1903, 1904.

"the outer aspect of a person's social role which evokes respect, and embodies the charisma and the esteem residing in office, rank or personality".[12]

Dignitas, in sum, was a virtue of great people, those meriting special honour or distinction. Practices of dignity involved public recognition and respect — granted by one's peers, the vulgar, society and the polity — that marked off the dignified as excellent, in the sense of excelling. *Dignitas* was "a manifestation of personal authority, majesty, greatness, magnanimity, gravity, decorum and moral qualities".[13] The "worth" to which dignity referred was a feature of the few rather than the many-let alone all.[14]

Thus, the above mentioned authorities 'hijacked' dignity of the common man and put it as a jewel in the crown of the few blessed ones. All but the blessed ones became the 'Broken Men'.

4. Universality of Human Dignity

How valid is the claim that 'dignity' is an attribute of a few and not common to all persons? Let us see how Cicero approaches this question:

> It is essential to every inquiry about duty that we keep before our eyes how far superior man is by nature to cattle and other beasts: they have no thought except for sensual pleasure and this they are impelled by every instinct to seek; but man's mind is nurtured by study and meditation…
>
> From this we see that sensual pleasure is quite unworthy of the dignity of man [*dignam hominis*]… if we will only bear in mind the superiority and dignity of our nature [*natura excellentia et dignitas*], we shall realize how wrong it is to abandon ourselves to excess and to live in luxury and voluptuousness, and how right it is to live in thrift, self-denial, simplicity, and sobriety.[15]

Thus, Cicero does attribute dignity to humans in general. This is probably the earliest preserved usage in the classical corpus that can be comfortably translated as "human dignity." In tune with this spirit, Peter Berger claims that "dignity, as against honour, always relates to the intrinsic humanity divested of all socially imposed roles or norms. It pertains to the self as such, to the individual regardless of his position in society."[16]

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[12] Hubert Cancik, "Dignity of Man" and "Persons"' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Brill 2002) 19.
[13] See, Englard (n 11).
[14] Donnelly (n 3) 122.
[15] M. Tullius Cicero, '*De officiis'* (Walter Miller (tr), Harvard University Press 1913).
[16] Peter Burger, 'On the Obsolescence of the Concept of Honour' in Stanley Hauerwas and Alasdair MacIntyre (eds), *Revisions: Changing Perspectives in Moral Philosophy* (The University of Notre Dame Press 1983) 176.

That human dignity is a common attribute of all human beings is a theme underlying all major religious doctrines. Genesis underlines an understanding of dignity that dominated the Western/Christian world for over a millennium and continues to be a powerful presence in contemporary discussions.

> So God created man in his own image, in the image of God created He him; male and female created he them.
> And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth. (Gen. 1.27-28)

Undoubtedly, this placement — below God but above the rest of His creation — gives humans a certain dignity distinguishing them from the rest of the living world.

It is often argued and probably not without strong foundations that the particularistic elements of Hinduism's hierarchical conception of reality, which not only on its face but especially in the practice of the caste system seems deeply incompatible with human rights.[17]The Hindu tradition, however, also includes universalistic dimensions that ring it into a closer relationship with contemporary human rights ideas.

A certain universalism can be found even in the ancient texts. For example, the *Laws of Manu*, the most revered — and most conservative and "Brahminic" — of the ancient legal texts, identifies five virtues that apply to all four *varnas*: abstention from injuring others, truthfulness, abstention from anger or theft, purity, and control over the organs.

The *bhakti* or devotional tradition offers a very different kind of universalism — namely, the promise of salvation through devotion alone. For example, in the Bhagavad Gita, Krishna offers liberation through devotional discipline to members of low and high caste alike and even to women, who are largely excluded from traditional Brahminic religious practice. By downplaying caste differences at the most fundamental spiritual level, this lays a certain foundation for movement toward a social egalitarianism more compatible with modern ideas of human rights.

At the broadest cosmological level, the oneness of all reality is also a powerful support for universalism. Donnelly presents[18] (18) the following account of the *varnas* from the *Brhadaranyaka Upanishad* (1.4.11-15):

> 11. In the beginning this [universe] was Brahman — One only. Being one only, he had not the power to develop. By a supreme effort he brought forth a form of the Good, princely power [ksatra]…

[17] See more, Donnelly (n 3) 145-158.
[18] ibid 154.

12. He had no power to develop further. He brought forth the common people [vis]…
13. He had no power to develop further. He brought forth the class of serfs [Sudra]…
14. He had no power to develop further. By a supreme effort he brought forth a form of the Good - Dharma… Right and law [dharma] are the same as truth…
15. This Brahman [One divine being], then, is [at the same time] the princely power and class, the Common people, and the serfs.

The sense of a single order under one all-encompassing dharma is striking.

Islam presents a more comprehensive picture of the oneness of all human beings and corresponding dignity of the human soul as a representative of the Creator. The Quran proclaims, "And indeed We have honoured the Children of Adam, and We have carried them on land and sea, and have provided them with At-Tayyibat (lawful good things), and have preferred them to many of those whom We have created with a marked preferment." [Sura 17:70]

The common good is for the common people. Says the Quran: "Allah, it is He Who has subjected to you the sea, that ships may sail through it by His Command, and that you may seek of His Bounty, and that you may be thankful.

And has subjected to you all that is in the heavens and all that is in the earth; it is all as a favour and kindness from Him. Verily, in it are signs for a people who think deeply." [Sura 45:12.13]

Almost in a repetitive tone, and to further emphasize the oneness of the human creation, the Quran elsewhere states: "And He has subjected to you the night and the day, and the sun and the moon; and the stars are subjected by His Command. Surely, in this are proofs for a people who understand.

And whatsoever He has created for you on the earth of varying colours [and qualities from vegetation and fruits (botanical life) and from animals (zoological life)]. Verily, in this is a sign for a people who remember.

And He it is Who has subjected the sea (to you), that you eat thereof fresh tender meat (i.e. fish), and that you bring forth out of it ornaments to wear. And you see the ships ploughing through it, that you may seek (thus) of His Bounty (by transporting the goods from place to place) and that you may be grateful." [Sura16:12-14]

As if manifesting the principle of non-discrimination with regard to enjoyment of all the fruits of creation by all and sundry, the Quran proclaims' " He it is Who created for you all that is on earth…" [Sura2:29]

If religions are for human beings and if religious practices have over time transformed into social practices, traditions and defined ways of life, the above mentioned discussion is sufficient testimony to the fact that human dignity as an

inherent human quality is universal. Universality of human dignity can also be defined as a core characteristic of human rights. That was in fact the case till the arrival/emergence of the Broken Men.

5. Human Dignity and Broken Men

Since dignity is an inherent attribute, all living creatures born as humans are entitled to it on an equal measure. Such was the matter of things till the time the primitive class-less society based on the principle of 'equality of all' broke apart giving birth to antagonistic classes. Writes Engels:

> Since the exploitation of one class by another is the basis of civilization, its whole development moves in a continuous contradiction. Every advance in production is at the same time a retrogression in the condition of the oppressed class, that is, of the great majority. What is a boon for the one is necessarily a bane for the other; each new emancipation of one class always means a new oppression of another class. The most striking proof of this is furnished by the introduction of machinery, the effects of which are well known today. And while among barbarians… hardly any distinction could be made between rights and duties, civilization makes the difference and antithesis between these two plain even to the dullest mind by assigning to one class pretty nearly all the rights, and to the other class pretty nearly all the duties.[19]

In other words, the majority people became broken- thrown out of the hitherto existing equilibrium in the society and composed a new class, the exploited. Their dignity was shattered, trampled and initially they were reduced to the status of chattels with a human soul! This is the picture we have of the slaves from the annals of history. Thus, the history of 'civilization' began with a crushing blow to the principle of universality of human dignity by denying the same to the vast majority of the people. So the advent of civilization corresponds to the emergence of 'Broken Men'. Elsewhere, Engels noted with absolute clarity that "with the dissolution of these primeval communities society begins to be differentiated into separate and finally antagonistic classes." [20]

A reputed philosopher of the XXth century, Rene Mercic stressed the importance of human dignity as the point of convergence of certain contextual elements which sustain the structure of every order of positive law.[21] The three thousand or so cultures that have been observed reveal certain points of remarkable uniformity regarding the common nature of man and human dignity, as well as the dignity of

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[19] Friedrich Engels, 'Origin of Family, Private Property and State' in Karl Marx and Friedrich Engels (eds), *Selected Works* (Progress Publishers 1975) 582.

[20] See, Friedrich Engels, 'Engels' Note to the English Edition of 1888 of the Manifesto of the Communist Party' in Karl Marx and Friedrich Engels (eds), *Selected Works* (Vol 1, Progress Publishers 1977) 109.

[21] Christopher Gregory Weeramantry, *Equality and Freedom: Some Third World Perspectives* (Sarvodaya Publishers 1999) 132.

every individual human being as an important aspect of this common nature. Based on this finding Justice Weeramantry concludes that "dignity is a concomitant of equality and there can be no equality where this dignity is violated … what really dehumanizes man is not poverty or lack of food or clothes or money, but lack of dignity."[22]

Conception of dignity is based on the foundational principle that "all human beings, irrespective of their perceived differences, are equal and deserve equal protection of the laws", and hence, "the system of laws instituting differences among individual's social positions and creating stratified identities establish immoral basis for the differential treatment of people by the State based on social origin and other perceived variations, as so that is not valid and acceptable".[23] Professor Sangroula argues that as a holder of 'dignity' every individual is entitled to five basic rights- in his words *the First rights*, which he further names as the *Right to have Rights*.[24] These five rights are: (a) the right to inviolability of physical integrity of person under every circumstance; (b) the right to inviolability of personal autonomy of individual or personhood (worth of person); (c) the right to freedom of choice of profession, ideology, faith and way of life; (d) the right to education as the most important service from the State providing better employment and life opportunities; and (e) the right to income generation activities — participate in the economic enterprise. He further contends that "the violation or impairment of any of these rights (*read elements of dignity*-M.R.) will push the person in the state of deprivation".[25]

Unfortunately, this is what happens with the dissolution of the class-less society and its transformation into a society with classes, more importantly antagonistic classes. Those at the bottom, far from the epicenter of power, ripped off their property (under common ownership in pre-class society), found themselves as no longer the subjects but the objects of law — a mechanism hitherto non-existing but now considered indispensable to subjugate the powerless — the Broken men. Engels' observations are immensely penetrating and eye-opening:

> But this is not as it ought to be. What is good for the ruling class should be good for the whole of the society with which the ruling class identifies itself. Therefore, the more civilization advances, the more it is compelled to cover the ills it necessarily creates with the cloak of love, to embellish them, or to deny their existence; in short, to introduce conventional hypocrisy — unknown both in previous forms of society and even in the earliest stages of civilization — that culminates in the declaration: The exploiting class exploits the oppressed class solely and exclusively in the interest of the exploited class itself; and if the latter fails to appreciate this, and even

[22] ibid 132.
[23] Dr. Yubaraj Sangroula, *Right to have Rights* (Lex & Juris Publications 2018) 32.
[24] ibid.
[25] ibid 26.

> becomes rebellious, it thereby shows the basest ingratitude to its benefactors, the exploiters.[26]

Thus, for us, the oppressed class is composed of the Broken Men. While the proponent of the Broken Men theory, B.R. Ambedkar[27] confined the term to 'survivors of tribal warfare ... who floated around looking for subsistence in constant danger', we venture to expand the horizons of the Broken Men to include all oppressed classes, the marginalized peoples, the downtrodden and the have-nots who have been ripped off their dignity in one form or the other.

In Ambedkar's understanding Broken Men were part of different nomadic tribes that were defeated in battle. That is all. In this minimal description, we are also provided an essential lesson of what we are as subjects. In the primordial scene of battle, we are equal subjects. In this sense this originary battle is an egalitarian one, in the sense that in it humans fought as equals and not as a part of society based on hierarchical structure. The Broken Men all came from different tribes in different places, who in the contingencies of history, found themselves on the losing side. That is all we are: victims of a contingent unfolding of history, with no particular reason for being in the current state of subjugation we are held in. In this egalitarian battle which produces Broken Men, there is no hierarchy of merit, nor divine cycle of *karma* and *gunas*, only two warring factions fighting for survival.[28]

Marx and Engels explained these battles somewhat differently — "The history of all existing society is the history of class struggles."[29] Writing more than 170 years ago, they mentioned,

> In the earlier epochs of history, we find almost everywhere a complicated arrangement of society into various orders, a manifold gradation of social rank. In ancient Rome we have patricians, knights, plebeians, slaves; in the Middle Ages, feudal lords, vassals, guild-masters, journeymen, apprentices, serfs; in almost all of these classes, again, subordinate gradations.
>
> The modern bourgeois society that has sprouted from the ruins of feudal society has not done away with class antagonisms. It has but established new classes, new conditions of oppression, new forms of struggle in place of the old ones.
>
> Our epoch, … possesses, however this distinctive feature: it has simplified the class antagonisms. Society as a whole is more and more splitting up into two great hostile camps, into two great classes directly facing each other…[30]

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[26] Engels (n 19) 582-583.
[27] See, Bhimrao Ramji Ambedkar, *The Untouchables: Who were They and Why They Became Untouchables?* (Amrit Book Depot 1948).
[28] For an interpretation of the Ambedkarite Theory, see, Alex George and S. Anand (eds), *Beef, Brahmins and Broken Men: An Annotated Critical Selection from The Untouchables* (Navayana 2019) 351-374.
[29] Engels (n 20) 35.
[30] ibid 36.

In our opinion, these two antagonistic classes (camps, groups, blocs or however else one would designate them) are those of the rich, powerful exploiters and the poor, helpless, subordinated Broken Men.

6. Fragmentation of Broken Men

Historical materialism quite scientifically and vividly explains the emergence of Broken Men at a certain point of progressive development of human society. Our task here is not to explore the historical conditions leading to the emergence of Broken Men. It is an accepted truth that from amongst the 'equals' sprouted groups of people who no longer belonged to the 'equals' and were subordinated to the remaining 'equals' is an outcome of crude and ruthless denial of their inherent and universal right to 'dignity'. Thus, birth of Broken Men is not of recent origin, but what makes the situation of Broken Men in the contemporary world critically vulnerable is the multifaceted fragmentation of Broken Men. Quite interestingly, this fragmentation process continues to take place both at the domestic as well as at the international levels. In the next following segments of this article we will try to identify some key ingredients of the process of fragmentation of Broken Men.

The single most significant factor accountable for fragmentation of Broken Men and withering importance of human rights is the disintegration of the former Soviet Union and corresponding fall of socialism as a world order. As long as we had the bi-polar world, there existed checks and balances on the otherwise 'uncurtailed sovereign authority' of states. The world order based on two centres with two opposing ideologies and two different approaches to human rights jurisprudence as a matter of fact, crystalized basic tenets of human rights into international law of which some even attained the status of *jus cogens.* Existence of the two economic systems created an environment wherein no single category of human rights, civil, political, economic, social, cultural or otherwise could be ignored at the global level though individual states were at relative liberty to attach priority to certain category of rights. Dissolution of the Soviet Union and of socialism was a devastating blow to human rights in general and consequential negative impact on individual rights in particular.

The Uni-polar world that succeeded the fall of socialism tilted to and embraced (there being no alternative) Western form of democracy and governance with all their pitfalls. In the economic sphere, capitalism forgot about all niceties, began ignoring the call for capitalism to 'have a human face', crushed on workers' rights, and reverting back to the days of 'commodity fetishism.' Human dignity became primary casualty.

International law similarly felt the brunt of the change of epochs and attempts are abound to either impose 'new' principles of international law (guaranteeing supremacy of the West in international affairs) or re-interpret hitherto existing and

universally recognized basic principles of international law.[31] In such a scenario, Broken Men continue to remain invisible, neglected, ignored. The principles like 'sovereign equality of states' or 'territorial integrity', or principle of 'non-interference in the domestic affairs' are all but gone with the wind. Under the guise of 'War on Terror', use of illegitimate force, repugnant violation of territorial integrity of sovereign states, ' trampling of the 'right to life' of unarmed civilians have become everyday game of the big, powerful states vis-à-vis smaller and weaker in military and economic sense states. In overwhelming majority of cases, Broken Men pay the penalty of the whims and caprices of the more powerful- the wealthy exploiters.

Fragmentation of Broken Men is also accelerated by the unfortunate trend of a bend toward the right in international politics and governance. It became more than evident when the self-proclaimed leader of the world, the US President Donald Trump declared from the podium of the general Assembly of the United Nations that "the future of the world belongs not to the globalists *(read human rights activists and defenders*- M.R.) but the patriots (*read ultra-nationalists, i.e. fascists*-M.R.)".[32] Such a shift in the policy of a country like the Unites States has had a catastrophic impact upon international relations: not only the state that had for long pursued human rights as a core foreign policy agenda took a sharp turn to the right but it led to resurgence of reactionary, authoritarian and dictatorial regimes at the helm of power in different countries around the globe. Interestingly, everywhere the change of guards has been taking place under the guise of 'democratic governance'. The situation has been worsening so rapidly that even the human rights defenders failed to notice exactly when the much appreciated and universally recognized conception of 'rights-based approach' was emptied of its contents and became a hollow slogan paving the path for a smooth upward ride of 'charity-based approach'. The offerors are the 'benevolent, kind-hearted', rich and elite rulers whereas the offerees are Broken Men- the poor, vulnerable, marginalized mass people whose mere existence depends on the 'charity' and 'kindness' of the ruling elites.

Radical changes in international relations are intertwined with further fragmentation of Broken Men at the domestic level. How this fragmentation works may be looked into from economic analysis of development projects in a country like Bangladesh. But let me remind the reader that in lieu of Bangladesh you are free to use the name of any country but the result will not be much different. A reputed political economist of Bangladesh, Prof. Abul Barkat writes:

> Bangladesh is a rich country but its people are not wealthy. Bangladesh is rich because (a) it is rich in land, (b) rich in water bodies, (c) rich in forests, and (d) rich in human resources — people. But the reality is that there exists huge gap in the

[31] See more, Mizanur Rahman, 'Right to Peace and Human Rights' (n3) 172-181.
[32] See, Mizanur Rahman, 'Keynote paper: Stand Up for Your Rights' (n 4) 13.

> relationship between the first three riches with the last one- people. This gap (which is also a deviation) is illustrated in that the men who till the land and produce the wealth (paddy, jute, agricultural products etc.) do not own the land; the men (fisherman) who create wealth in the water bodies (breeds and catches fish) do not own the water body; and the men who put their labour in the jungles and forests and produces wealth (creates and protects the forests) do not own that forest. This detachment is a core reason of impoverishment of the people- the producers of wealth"[33] and their further fragmentation.

As if to match this economic reality, governance at the domestic level is increasingly becoming what we may call 'democratic authoritarianism'. Today, populism has displaced nationalism-the core foundation of nation states. What is even more alarming is that populism is being fuelled by ultra-nationalism, religious fundamentalism/extremism, racial discrimination and ultimately a clash of civilizations- West versus the East, the rich North versus the poor South. Ultimate victims of all such 'excesses' are the Broken Men. A layman's inquiry into the recent events in Yemen, Syria, Afghanistan, or even 'secular' India would provide ample examples.

On the human rights sector, authoritarian regimes willing desperately to portray them as 'democratic' and 'people-friendly', are increasingly usurping the rights-based logic for effecting economic, social and cultural (ESC) rights and bringing those under their monopoly domain to show case the benevolent nature of their authority. Thus, notwithstanding the courageous move by the Himalayan country Nepal to proclaim ESC rights as fundamental rights of the citizens, vast majority of the members of the international community continue to consider ESC rights as benefits of 'charity' or 'kindness' of the ruling class. In so doing, the rulers forget that while doing charity may be an element of dignity of the bestower, charity *per se* is an element of indignity of the bestowed and therefore, not commensurate with human rights!

Authoritarian character of governments is so evident today that the rulers decide what is good for the ruled, the latter not even having any right to consultation. Governance is rapidly sliding away from the people, people-centric governance exists in text books only and 'democracy' is essentially becoming a right of the 'few' *vis-à-vis* the rest of the population. The Secretary General of the United Nations quite aptly mentioned:

> democracy is inherently attached to the question of governance, which has an impact on all aspects of development efforts. They are linked because democracy is a fundamental human right, the advancement of which is itself an important measure of development. They are linked because people's participation in the decision-making processes which affect their lives is a basic tenet of development.[34]

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[33] Abul Barkat, *Political Economy of Agrarian-Land-Aquarian Reforms in Bangladesh* (in Bangla) (Muktobuddhi 2016). (extracts on the back cover of the book)

[34] An Agenda for Development, Report of the Secretary General on Development and International Economic Cooperation. UNGAOR, 18th Session, agenda item 91; 120 UN doc. A/48/935 of 1994.

In the present day world when the international community is pursuing the policy of sustainable development goals popularly known as the SDGs, the Broken Men are being further distanced from the process of development — development is increasingly being defined as infrastructural development — constructing huge buildings and structures, express ways and subways, implementation of various mega-projects etc. without even inquiring whether the citizens are in favour of such development projects. Thus development strategy has failed to take into account the crux of all development initiatives — human development. The question is only but logical — can development be sustainable without human development?

In many jurisdictions the situation has become so authoritarian that questioning the scientific sustainability of any development project is considered as seditious and the consequence quite repressing for the Broken Men — unlawful detention, preventive detention (another way of trying to impute legitimacy to otherwise unlawful detention), extrajudicial killing, enforced disappearance, etc. have become the main tools of governance. Correspondingly, human rights are on the wane and the figure of the Broken Men is further fragmented and belittled.

7. Globalization and Human Rights

Globalization is both a cause and consequence of a unipolar world. If unipolarism, as evidenced from discussion above, has squeezed Broken Men in terms of human dignity and rights, globalization has further augmented the process and has thrown them from the frying pan to fire. Globalization has made the rich richer, and the poor poorer – both nationally as well as internationally. Inequality is inherent in the process of globalization. Writes an author:

> Economic globalization violates human rights more than it protects. This is partly due to its dogmatic adherence to the elusive virtues of neo-liberal free market orientation and partly due to its marginalizing effects on the sovereign competence of the state. The driving forces of economic globalization such as MNCs, the World Bank, the IMF and the WTO, operate transnationally without the constraint of jurisdictional limitations. Whereas the overwhelming majority of states, because of their inferior economic, political and strategic clouts can hardly exert any influence beyond their domestic jurisdiction, which is constantly being circumscribed by economic globalization. Global economic actors are becoming more powerful than states. Consequently, when human rights within a state are infringed by the policies and practices of global economic actors, the power of the former to prevent such infringement is bewildered by the power of the latter. This lopsided power balance between the competing interests results in human rights transgressions with impunity.[35]

[35] M. Rafiqul Islam, 'Protecting Human Rights in an Era of Globalization' in Dr. Mizanur Rahman (ed), *Human Rights and Globalization* (ELCOP 2003) 29.

It is not that transgressions of human rights take place only from across the borders, but very much within the boundaries of a nation state by its own 'democratic' rulers. While bad habits die hard, bad practices are embraced quicker. Thus if the Israeli onslaught on the Palestinians fighting for their right to self-determination continues with more brutality and impunity, if the *Rohingyas* are driven out of their motherland by the Myanmar regime through a policy no less than ethnic cleansing and genocide, if human rights sentinels of the West close their borders not to allow any refugees into their territories, when in pursuing its ultra-nationalistic objective of "Make America great again", the US construct mountain high walls along its borders with Mexico (we could continue with the list of such infringements of rights), the authoritarian governments elsewhere on the globe feel encouraged, stimulated and strong to subdue dissent on the national plane leading to further fragmentation of Broken Men. This, in a nutshell, is the picture of human rights in a globalized world.

8. Dead End for Human Rights?

The weakening figure of Broken Men in this globalized world is quite frustrating, to say the least. But does this mean a farewell to human rights for Broken Men? Not at all.

At least in our part of the globe we are witness to a movement gradually gaining momentum and which is thought to be the strategy to empower Broken Men. We fondly call this movement *Rebellious Lawyering* and those involved as the *Rebellious Lawyers*.[36] Elsewhere Prof. Rahman wrote:

> ...rebellious lawyering has already begun spreading its roots and will definitely usher in the true age of emancipation of the common people. The works of the rebellious lawyers are giving voice to the voiceless, power to those who believed in their destiny to live as the subordinated, making the hitherto invincible poor and the downtrodden visible in the eye of the law and the policy makers. ...
>
> Fundamental changes are in the offing and the rebellious lawyers are the glorious change-makers. These lawyers are dressed in traditional lawyers' outfits, sharing the chambers with traditional lawyers, walking the same corridors of law and power but endowed with un-parallel inner strength of mind. They know that their path is the true path of empowerment of the common people, they believe that it is not individual good but the common good they aspire for, they are convinced that true emancipation happens only when human dignity is protected, ensured and guaranteed at all times. They are taking huge steps yet making no sound. But their apparent seeking of solace in silence is leading to fundamental changes in how we live our lives in the future. The change is colossal. This is what we call a revolution.[37]

Verily, there is nothing for Broken Men to despair!

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[36] On Rebellious Lawyers and Rebellious Lawyering, see, Mizanur Rahman, *Anti-Generic Learning and Rebellious Lawyering: Reflections on Legal Education in Bangladesh* (Bijoy Prakash 2018) 208.

[37] Mizanur Rahman, 'The Story of Rebellious Lawyering or Approaching of a Silent Revolution' in Dr. Mizanur Rahman and others (eds), *Human Rights and Rebellious Lawyering* (ELCOP 2019) 11-12.

Compliance with International Law: Theoretical Perspectives

Liaquat A. Siddiqui*

1. Introduction

International law seems to regulate increasingly every aspect of our lives- public and private, as globalization and interdependence are becoming more and more a reality of modern world. In considering the effectiveness of international law, compliance has always been an issue of debate among the international law scholars. Without ensuring a robust compliance mechanism, international law is often reduced to a `tiger' made of paper having no teeth to bite. `Implementation' in its simplest form means enacting necessary domestic laws and regulations in order to give effect to a state's international law obligations. But `compliance' requires something more. It indicates both quantitative and qualitative conformity of a state's behavior to the rules of international law.[1] Compliance therefore has always been at the center of international law discourse.

However, in order to examine the compliance behavior of states with regard to obligations of international law, it is important to consider the theories on compliance propagated by prominent scholars representing various streams of international law. Theories are not abstract ideas, rather they are based on empirical data such as, real-life conflicts, disputes and case studies. They try to give us a deeper understanding as to why and how international law is created and obeyed. They focus on factors that influence compliance performance of states with regard to international law. These theories help us understand the functioning of international law in a complex world from different perspectives. A proper knowledge of these theories may help us design better international legal order to meet the newer challenges of the world community in future.

Theoretical discussion is important not only to understand the reasons for poor level of compliance by states with obligations of international law, but also to suggest measures to improve the existing compliance behavior of such states. Among the various theories of compliance, only a few have made some considerable efforts to understand and explain the compliance behaviour of states with regard to

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[1] See, generally for further discussion. Ronald B. Mitchell, 'Compliance Theory: An Overview' in James Cameron, Jacob Werksman and Peter Roderick (eds), *Improving Compliance with International Environmental Law* (Earthscan 1996); Roger Fisher, *Improving Compliance with International Law* (University Press of Virginia 1981) 20; Oran R. Young, *Compliance and Public Authority: A Theory with International Applications* (Johns Hopkins University Press1979) 104. Harold K. Jacobson and Edith B. Weiss, *Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project* (Brill 1995) 119-148.

international law in general and treaty commitments in particular.[2] This article therefore reviews the major theories on 'Why do nations obey international law?'. It examines the main arguments of these theories and gives the readers a comparative analysis in order to understand why and how states do comply with international law, from their relevant perspectives.

Due to time and space constraint, this article does not want to discuss traditional theories of compliance[3]. Nor does it want to explore extra-legal theories of compliance available in the literature of other disciplines.[4] It intends to focus mostly on the major contemporary veins of international legal scholarship which include the managerial school, fairness theory, transnational legal process and reputational theory. These theories underscore the role of international law, with various degrees, in influencing the compliance behavior of states with international law.

2. Managerial School

Managerial School, expounded by professor Abram Chayes and Antonia Handler Chayes of Harvard University, puts significant emphasis on the role of array of managerial techniques developed under regulatory treaty regimes in improving the compliance behavior of state parties.[5] These managerial techniques include information-gathering, reporting requirements, assessment and review of the compliance performance of state parties, monitoring etc. Reporting and information-

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[2] Teall E. Crossen, *Multilateral Environmental Agreements and the Compliance Continuum* (Expresso Preprint Series, University of Calgary 2003) 36. See also, 'Symposium on Method in International Law' (1999) 93 *The American Journal of International Law* 291-423.

[3] Traditional Theories such as, International Legal Positivism propagates that states comply with international law because they emanate from the free consent of sovereign states. For further discussion, see, Bruno Simma and Andreas L. Paulus, 'The Relationship of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 *The American Journal of International Law*303-304. John Austin, *The Province of Jurisprudence Determined*, etc. (Weidenfeld & Nicolson 1954) 127. For criticisms of positivist theory, see, Siegfried Wiessner and Andrew R. Willard, 'Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity' (1999) 93 *American Journal of International Law* 316. John K. Setear, 'An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law' (1996) 37(1) *Harvard International Law Journa*l 160.

[4] The major international relation theories relevant to compliance issue are Realist, Rationalist, and Constructivist. For example, the realist school of thought developed after the Second World War by Edward Hallett Carr, Hans J Morgenthau, George F. Kennan, and Stanley Hoffmann consider the pursuit and use of power and the anarchic structure of modern international relations as the primary determinant of international behaviour. This school essentially denies the relevance of international law and organisations to 'matters of vital national interest' or of 'high international politics'. To realists, law influences compliance behaviour only if the issue at stake is relatively unimportant, or a non-security matter. They have shown little interest in considering treaties as a source of international behaviour. See for further discussion, Hans J Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (revised by K.W. Thompson, McGraw-Hill 2005) 253.

[5] See, Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* (Second Printing, Harvard University Press1998) 22-28.

gathering techniques help monitor compliance progress and generate mutual confidence by providing transparency in decision-making.[6] On-site inspection is also used in environmental treaties in order to verify information or compliance performance. The assessment and review process what Chayeses call 'discursive process' help supervisory bodies identify causes of non-compliance or inadequate compliance.[7]

After reviewing various treaty regimes on trade, resource management, security, environment and human rights, Chayeses conclude that states have a propensity to comply with their treaty obligations and that non-compliance is much more the exception than the rule. They have identified three primary factors that contribute to this general propensity to comply. These are: efficiency, interests, and norms.[8] First, once a treaty regime is up and running, compliance is usually the most efficient choice for states. According to them, states are likely to adhere to the path identified by the treaty regime, rather than spending scarce resources on the continuous recalculation of the costs and benefits of a range of courses of actions. Complex organizations tend to adhere to authoritatively-established routines. Second, states do not form and join regimes lightly. Interest analysis suggests that states only conclude and adopt treaties that they think will best serve their interests. Treaty regimes are institutions in which we can expect the parties to have developed and expressed deeply sunk interests. Third, they emphasise the normative element of the compliance. People often follow the law out of a sense of duty and obligation even without calculating the possibility of punishment. Similarly, on the international level, pacta sunt servanda-'treaties must be observed by their parties in good faith' – has the compliance pull.[9]

Given that states have a general propensity to comply, the sources of residual non-compliance according to Chayeses are three: First, ambiguity of obligation which often results in non-compliance. However, they explain that imprecise treaty language is sometimes necessary in order to develop a regime to govern a complex and changing issue area. Second, lack of domestic capacity. Classical treaties entail inter-state obligations, but modern treaty regimes such as environmental treaty regimes require their state parties to address issues deeply related to socio-economic concerns. For example, sustainable development and change in energy policy and practice require a behavioural change of many small or big industries, business enterprises, which are deeply related to various socio-economic aspects of a society. It is possible that even when the political will is present, a state many lack necessary

6 ibid 154-173.
7 ibid 229-249.
8 ibid 3-7.
9 ibid 3-7.

technical, financial or administrative resources to implement their environmental treaty obligations fully.[10]

Since non-compliance is not wilful in most cases, Chayeses argue that a coercive 'enforcement model' for ensuring compliance is inappropriate. They observe that 'enforcement model' is a common pre-occupation of policy makers and scholars. They negate this pre-occupation by asking: Why focus on coercion and punishments when the major concern is not wilful disobedience but rather factors such as ambiguity of obligations and insufficient capacity?[11]

The approach of the Managerial School provides important insights into the causes of non-compliance and emphasizes the need for utilizing managerial techniques to bring a non-compliant state to a compliant situation. Chayeses' Managerial School has comprehensively explored the impact of various managerial techniques on state parties from a legal perspective. They underscore the need for domestic capacity building in improving the compliance behaviour of state parties especially developing country parties. In many areas of international law compliance of developing countries can be significantly improved by technological and financial support from developed countries. Unfortunately developing countries do not possess them. Nor their domestic priorities (fulfilment of basic needs) allow them to spend their scarce resources to resolve the global environmental problems such as, ozone depletion and climate change, created mostly by developed countries. This approach can explain many issues involved in the compliance behaviour of developing countries.

The most popular criticisms of the views of Managerial School are: first, it does not focus on customary international law and second, there is little focus on the internalisation of treaty norms into the domestic legal system of state parties.[12]

3. Fairness Theory

Thomas M. Franck, professor of law at New York University, is the proponent of fairness theory[13]. Although Franck's central question is not why do nations obey international law, he argues that a perception that law is fair and therefore it encourages compliance.[14] Franck's fairness theory contains two components, substantive and procedural. Substantive fairness refers to distributive justice or equity and procedural fairness refers to legitimacy. Although he notes difficulty in defining

[10] ibid 9-17.
[11] ibid 9-10.
[12] However, Abram Chayes expressed his School's view on customary international law issues. See, 'Implementation, Compliance and Effectiveness' (1997) 91 *Proceedings of the Annual Meeting (American Society of International Law)* 70.
[13] See, Thomas M. Franck, *Fairness in International Law and Institutions* (Clarendon Press, 1998).
[14] Harold H. Koh, Why do Nations Obey International Law? 106 *Yale L. J*., (1997), 2641.

equity, he observes that the allocation among states of scarce resources provides an area where notions of distributive justice are accepted as relevant in international law.[15] On the other hand, legitimacy refers to that attribute of a rule which conduces to the belief that it is fair because it was made and is applied in accordance with right process.[16]

Franck has developed a four-factor test to determine the legitimacy or the compliance pull of rules on states. These are 'determinacy', 'symbolic validation', 'coherence', and 'adherence'. 'Determinacy' makes a rule's massage clear.[17] 'Symbolic validation' is procedural ritual for the preparation of substantive rule.[18] 'Coherence' is the degree of connection between rational principles on the one hand, and a rule on the other. To divide a loaf of bread equally between two persons is a coherent rule, based on the principle of equal distribution. Giving the whole loaf to the person with bushier eyebrows is less coherent, because eyebrow bushiness possesses less generality and rationality as a principle of distribution.[19] 'Adherence' is the vertical nexus between a primary rule of obligation and a hierarchy of secondary rules identifying the sources of rules and establishing normative standards that define how rules are to be made, interpreted and applied.[20]

Franck has examined the Vienna Ozone Convention, Montreal Protocol and Climate Change Convention and holds that state parties to these treaties have adopted many provisions based on fairness in sharing the cost of remedying the global environmental problems of ozone depletion and climate change. These include a grace period to fulfil the reduction obligation and financial and technical assistance to developing countries. He argues that this is an acknowledgment of lesser-developed countries' fairness claims to exemption, to technology transfer, and to compensatory financing.[21]

He comments, 'the industrial world, which at first rejected all resource transfer, came to realize that it would be both fair, and ultimately, cheaper, for the rich nations to help the poor to adapt to the changes that global ozone layer protection will require of them'.[22] He considers the trade restriction provisions of the Montreal Protocol, which prevent free riding as mechanism for ensuring legitimacy of rules. Although he mentions about 'common but differentiated responsibility' and 'equity' as fair

[15] Thomas M. Franck, *Fairness in International Law and Institutions*, Ibid 79.
[16] ibid 26.
[17] Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press 1990) 52.
[18] ibid 90-95.
[19] ibid 150-153.
[20] ibid 184.
[21] Franck (n 14) 384.
[22] ibid 381.

principles, he has ignored the role of 'polluter pays principle', a widely acknowledged principle of liability in the domestic legal systems of developed countries, as a fair principle of distributing burdens of remedying such problems.[23] However, he suggests that substantial reduction in the rate of emissions of ozone depleting substances supports his case that fair agreements are more likely to be complied with.[24]

Franck's both components of fairness are important to encourage compliance with international law. However, his four factors are not easy to define in any objective way and provide little guidance for determining how to aggregate the four factors into a single judgement about legitimacy.[25] Moreover, Franck is not sure that 'legitimacy' is truly the determinant of compliance pull because states would like to violate a rule if it is unjust although legitimate.[26] However, Gerry J. Simpson suggests that it is impossible to reconcile procedural and distributive justice.[27]

Franck argues that states comply with international rules not primarily because they have consented rather because they are member of international community. According to him, a treaty to commit genocide would be invalid as it is inconsistent with community's basic public policy that is community's ultimate peremptory norms.[28] Although the Convention on the Prevention and Punishment of the Crime of Genocide was adopted in 1948 to prevent the participating countries from committing genocide in war and peacetime, the norm not to commit genocide is considered as norm of customary international law, and therefore prohibits all states whether or not they have ratified the Genocide Convention.

Although sanctions or coercive enforcement is not a prominent feature of Franck's theory, he does not explicitly rule out sanctions as an effective mechanism to secure compliance in some areas of international law. For example, he notes that sanctions may have had some effect in causing Rhodesia and South Africa to comply with international mandates.[29]

4. Transnational Legal Process

Transnational legal process, according to Harold Hongju Koh, professor of international law at Yale Law School, is 'the process whereby an international law

[23] ibid 380-393.
[24] ibid.
[25] Setear (n 4) 171-172.
[26] Franck (n 18) 238.
[27] Gerry J. Simpson, 'Is International Law Fair?' (1996) 17 *Michigan Journal of International Law* 615, 626.
[28] Thomas M. Franck, 'Legitimacy in the International System' (1988) 82(4) *American Journal of International Law* 705.
[29] ibid 290.

rule is interpreted through the interaction of transnational actors in a variety of law-declaring fora, then internalised into a nation's domestic legal system'.[30]

Transnational legal process has four distinctive features. First, it is non-traditional in the sense that it breaks down two traditional dichotomies between domestic and international, public and private. Second, it is non-statist in the sense that the actors in this process are not just, or even primarily, nation-states, but include non-state actors as well. Third, the process is dynamic, not static. Transnational law transforms, mutates, and percolates up and down, from public to the private, from the domestic to the international level and back down again. Fourth and finally, it is normative. From the interaction of actors in the transnational legal process, new rules of law emerge, which are interpreted, internalised, and enforced, thus beginning the process all over gain. The concept embraces not just the descriptive workings of a process, but the normativity of that process. It focuses not simply upon how interaction among actors shapes law, but also on how law shapes and guides future interactions, in short, how law influences why nations obey international law.[31]

In order to explain these four features of transnational legal process, Koh cites Iranian Hostages crisis. In the late 1960s, a California engineering firm called Dames & Moore signed a contract to conduct a nuclear power plant site study with the Atomic Energy Organisation of Iran. The agreement was negotiated against a 'public' backdrop not just of Iranian and United States domestic law, but of numerous bilateral and multilateral treaty commitments between the Iranian and United States governments. In 1979, the ouster of Shah and the seizure of 52 American hostages triggered a surge of emergency host and home-country regulations that dramatically affected these pre-existing private deals. The Atomic Energy Organisation cancelled the contract, upon which Dames & Moore sued Iran and its instrumentalities in United States district court. When the court vacated Dames & Moore's judicial attachment of Iranian bank property based on the 1981 executive orders implementing the US-Iran executive agreement that freed the hostages, Dames & Moore filed a new district court complaint against the US seeking to enjoin enforcement of those executive orders. The suit ultimately resulted in a historic loss in the United States Supreme Court and Dames & Moore proceeded to the Iran-United States Claims Tribunal. But the Tribunal excluded it from its jurisdiction depending on an Iranian forum-selection clause in the original contract.[32]

Koh observes that the Iranian Hostages crisis illustrates each of the four features of transnational legal process mentioned above. First, it does not fit traditional categories. It cannot be neatly cabined within 'domestic law' traditionally regarded as

[30] Harold H Koh, 'Bringing International Law Home' (1998) 35 *Houston Law Review* 623, 626.
[31] Harold H Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review*181, 184.
[32] ibid 184-185.

governing conduct within borders, or 'international law' which governs conduct across borders. Nor can it be characterised as 'public' international law, the law among nation-states, which encompasses what national do to or with each other or 'private international law, classically regarded as cross-border among non-state actors. Second, the key actors in this process include not only nation states, but also non-state actors such as the International Monetary Fund, various multinational enterprises (large banks freezing and transferring the assets), and the individual hostages.

Third, the process was dynamic, not static. A contract which was initially a private business deal between a US multinational and an organisation of Iranian government dissolved into a domestic legal dispute, then percolated upward into a public international dispute which was ultimately resolved by the US and Iranian governments by an agreement on the basis of public international and domestic public law. However, this triggered both domestic constitutional claims by a multinational corporation against its own government in its own domestic courts and international expropriation and breach of contract claims against a foreign government in a newly constituted international tribunal. Fourth, the interactions among these transnational players not only generated law (the domestic private law of letters of credit, the domestic public law of executive power, the international private law of dispute-resolution, and the public international law of diplomatic relations law) but generated new interpretations of those rules and internalised them into domestic law that now guides and channels those actors' future conduct.[33]

Transnational legal process is, according to Koh, normative, dynamic, and constitutive. The transaction generates a legal rule which will guide future transnational interactions between the parties; future transactions will further internalise those norms; and eventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process.[34] Koh cites the ABM Treaty Reinterpretation Debate to demonstrate how the world's most powerful nation, the United States, returned to compliance with international law. In 1972 the United States and the former U.S.S.R. signed the bilateral Anti-Ballistic Missile Treaty (ABM Treaty), which expressly banned the development of space-based systems for the territorial defense of the USA. Thirteen years later, in October 1985, the Reagan Administration proposed the Strategic Defense Initiative (SDI), popularly called 'Star Wars' in violation of the above Treaty.

The Reagan Administration proposed to reinterpret the plain language of the treaty to permit SDI without the consent of either the Senate or the Soviet Union. The controversy raged in many fora. Transnational legal actors such as a U.S. Senator

[33] ibid 185-186.
[34] Koh (n 15) 2646.

(Sam Nunn), a private 'norm entrepreneur' (Gerard Smith), and several nongovernmental organisations (the Arms Control Association and the National Committee to Save the ABM Treaty) formed an 'epistemic community' to address the legal issue. That community provoked a series of interactions with the U.S. government and challenged the Administration's new interpretation in both public and private settings, and succeeded in internalising the narrow interpretation into several legislative products. The executive branch responded by internalising that interpretation into its own official policy statement.[35]

According to Kho, actors obey international law as a result of repeated interaction with other governmental and nongovernmental actors in the international system. A state's violation of international law creates inevitable frictions that hinder its ongoing participation within the transnational legal process. For example, when US engaged in governmental kidnapping of Mexican citizens that activity impaired its ability to negotiate the North American Free Trade Agreement with the Mexican government. Similarly, when a developing nation defaults on a sovereign debt, that activity impairs its ability to secure new lending. When the US denies the jurisdiction of ICJ as a defendant, that decision impairs its ability to invoke the Court's jurisdiction as a plaintiff.[36] To avoid such frictions in a nation's continuing interactions, national leaders may shift over time from a policy of violation of international law to one of compliance. Through interaction actors create patterns of behaviour and generate norms of external conduct which they in turn internalise. States that abide by laws internalise international law by incorporating it into their domestic legal and political structures, through executive sanction, legislation, and judicial decisions which take account of and incorporate international norms.[37] As nations participate in the transnational legal process, through a complex combination of rational self-interest, transnational interaction, norm-internalisation, and identity formation, international law becomes a factor driving their international relations.[38]

5. Reputational Theory

Andrew T. Guzman, professor of law at Berkeley School of Law, University of California, has developed the reputational theory of compliance. The theory assumes that states are rational and act in their own self-interest.[39] The decision to honour or breach a promise made to another state imposes costs and benefits upon a country and its decision makers. The theory assumes that decision makers behave in such a

[35] ibid 2648.
[36] See, e.g., Nicaragua's suit against the United States, Military and Paramilitary Activities, *Nicaragua v. US* [1986] ICJ Report 14.
[37] ibid 204.
[38] ibid 205.
[39] See, Andrew T. Guzman, 'International Law: A Compliance Based Theory' (2001) UC Berkeley School of Law Public Law and Legal Theory Working Paper 47, 18.

way as to maximize the payoffs that result from their actions. Where the benefits of breach outweigh its costs, we expect a country to violate international law.[40] International law succeeds when it alters the payoffs in such a way as to get compliance with international law when, in the absence of such law, states would behave differently. In other words, international law succeeds when promises made by states generate some compliance pull.[41]

In a prisoner's dilemma game defection is the dominant strategy for each party and no cooperation will be achieved and that international law will be irrelevant. However, the prisoner's dilemma can be solved by establishing an enforceable agreement with a penalty clause for non-cooperation in a way that the penalty will change the payoffs enough to make cooperation a dominant strategy for each party. According to Guzman, to generate a model in which international law matters, it is, then, necessary to identify a mechanism through which violations are sanctioned in some fashion. Sanction, to him, encompasses more than just direct punishments resulting from a failure to live up to one's international obligations. It includes all costs associated with such a failure, including the punishment or retaliation by other states and reputational costs that affect a state's ability to make commitments in the future.[42]

He models international obligation as a two-stage game. In the first stage, states negotiate over the content of the law and the level of commitment. In the second stage, states decide whether or not to comply with their international obligations. A state's compliance decision is made on an assessment of its self-interest. This self-interest can be affected by international law in two ways. First, it can lead to imposition of direct sanctions such as trade, military, or diplomatic sanctions. Second, it can lead to reputational capital in the international arena. If the direct and reputational costs of violating international law are outweighed by the benefits thereof a state will violate that law otherwise it will comply.[43] Guzman notes that optimal compliance with international law is more likely if states face direct sanctions for such violations. This is because reputational sanctions are generally, though not always, weaker than an optimal sanction.[44]

If a party violates international law it will affect its reputation and will have negative effect in future interactions with other party. Although a reputational damage impacts country incentives, in some instances that impact will be insufficient to alter country's behaviour. Thus the model does not merely explain why nations comply with international law despite the weakness of existing enforcement

[40] ibid 40.
[41] ibid.
[42] Guzman (n 40) 18-22.
[43] ibid 24.
[44] ibid 46.

mechanism. It also explains why they sometimes choose to violate the international law. The theory thus reconciles the claim that international law affects behaviour with the fact that the law is not always followed.[45]

According to Guzman, when states cooperate in order to resolve straightforward coordination games, international law has a limited role to play. Where two neighbouring countries wish to shut down an international organize crime syndicate, cannot alone succeed without joint effort, enter into an agreement in which each promises to pursue the syndicate. As cooperation is the dominant strategy for each country, neither country has an incentive to violate its commitment. No threat of sanction is needed to achieve cooperation. Even the form of the agreement is not terribly important. An informal agreement could be equally effective.[46]

Although the punitive sanctions have the potential to be used as optimal sanctions, they are not generally imposed by neutral third parties but rather by injured states. Therefore, there is the risk that the sanctions will be excessive. Despite their shortcomings, according to Guzman, the relevance of punitive sanctions should not be dismissed too quickly. In some situation punitive sanctions may provide efficient incentives to states to comply with international law. In infinitely repeated games, where states interact repeatedly overtime, it may be worthwhile for states to develop reputations for punishing offenders. By punishing offenders today, states increase the likelihood of compliance tomorrow.[47]

Guzman views that all else equal, it is reasonable to expect that the compliance pull of international law will be the weakest when the stakes at issue are large. This is because the reputational effects have limited power. The likelihood that reputational effects are sufficient to ensure compliance grows smaller as the stakes grow larger. Reputation plays a more important role when the costs and benefits of a particular action are small[48].

The theory predicts that international law will have the smallest impact in those areas of greatest importance to countries such as laws of war, territorial limits, arms agreements, and military alliance. These areas are least likely to be affected by international law.[49] It suggests that many of the most central topics in traditional international law scholarship are the most resistant to influence. According to him, rather than concentrating on those topics that are of greatest importance to states, international law scholars may be better off to devote more attention to those areas in which international law can yield the greatest benefits. The most promising fields of

[45] ibid 26.
[46] ibid 36-37.
[47] ibid 48.
[48] ibid 49-53.
[49] ibid 68-71.

study, therefore, are those in which reputational effects are likely to affect behaviour. These include for example, the entire range of international economic issues, from trade to the international regulation of competition law to environmental regulation[50].

6. Comparative Assessment of the Theories of Compliance

It appears from the above discussion that the theories provide different explanations regarding why nations comply with international law. These explanations are sometimes similar, complementary or even contradictory to one another. In the following paragraphs an attempt has been made to assess the major arguments of the theories of compliance from a comparative perspective.

Broadly the theories examined above shows a preference between management or enforcement approach. According to the Chayeses, proponents of the managerial school, there is a general propensity of states to comply. Three factors, efficiency, interests and norms contribute to this general propensity of compliance. Since non-compliance is not wilful in most cases, they argue that a coercive enforcement model for ensuring compliance is inappropriate. According to them, management tools such as reporting, transparency, verification, monitoring, dispute resolution, capacity building encourage compliance. They ask why focus on coercion and punishments when the major concern is not wilful disobedience rather factors such as ambiguity and insufficient capacity.

Although Frank does not explicitly rule out the importance of sanction in improving the compliance behaviour in some areas of international law, he argues that fairness will motivate toward compliance. Koh, on the other hand, argues that nations obey international law because the norms are internalised into domestic normative system, therefore, enforcement through coercive measure is not an issue. Rather he argues that we should seek to acquire a greater understanding of the transnational legal process. Reputational theory, applying classical prisoner dilemma game, however, argues that where defection is the dominant strategy, direct sanction or reputational costs can influence states toward compliance. Guzman argues that when the costs of sanctions outweigh benefits of defection, nations will obey international law.

Franck's fairness theory emphasizes on the normative aspect of international law. He argues that states obey international law because they believe they ought to. Chayeses managerial school also emphasizes the normative element of law. According to them, people often follow law out of a sense of duty and obligation even without calculating the possibility of punishment. They view that on the international level *pacta sunt servanda* meaning treaties must be observed by their

[50] ibid.

parties in good faith, has compliance pull. Reputational theory also argues that where stakes are high, international law has little influence on state's compliance behaviour.

The role of fairness or legitimacy has been debated. Franck argues that if a law is fair it will encourage compliance. As the Vienna Ozone Convention and the Montreal Protocol contain fair provisions, he suggests that the evidence of substantial reduction of ozone depleting substances prove that fair agreements are more likely to be complied with. Koh argues that in order to find out why nations obey international law, one has to understand the role of transnational legal process. According to him, both the managerial theory and the fairness theory emphasize voluntary obedience. Neither Franck nor Chayeses explain how norms are internalized. Koh suggests that transnational legal process provides the missing link. According to Koh it is the transnational legal process that motivates states toward compliance. The process starts with an interaction provoked by one or more transnational actors. The international law is then interpreted and internalized into the domestic normative systems of the parties.

Another importance of the Koh's theory is that it highlights the role of various state and non-state actors at the domestic, regional and international level. They play key role in motivating states toward compliance. Reputational theory undermines the role of non-state actors in the international legal system.

Finally, managerial school argues that in the interdependent world, the need to belong to the community of states encourages compliance with international norms and therein lies the Chayeses' New Sovereignty. They observe that connection to the rest of the world and the political ability to be an actor within it are more important than any tangible benefits in explaining compliance with international regulatory agreements. Similarly, Koh views that the impetus of compliance is not so much a nation's fear of sanction, as it is fear of diminution of status through loss of reputation. Guzman's reputational theory appear to make similar claim that part of the answer to the compliance question is that states comply with international law to avoid a bad reputation on the world stage.

7. Conclusion

The major theories on compliance with international law by states, as examined above, appear to highlight different aspects of compliance process from their respective perspectives. They inform us how different factors such as, managerial techniques, notions of fairness, legitimacy or even sense of reputation can significantly influence the compliance behaviour of states with regard to international law obligations. Indeed a deeper understanding of these theories can help us improve existing compliance behaviour of states as well as design better compliance mechanisms to meet the future challenges of international community.

While some theories emphasize the role of managerial techniques, others underscore the need for enforcement mechanisms in improving compliance behaviour of states. Where the obligations are complex and require states to change socio-economic policies at deeper level over a long period of time and the issue is capacity building, perhaps managerial approach is better. For example, global environmental problems of ozone depletion, climate change, biodiversity loss etc. But in cases of violation of human rights, humanitarian rights, or arms control, where compliance is more a matter of will of the state authority, enforcement could be a good option. A compliance mechanism could also employ both managerial and enforcement techniques at the same time or it can employ different approaches at different levels of performance, depending on the objectives it wants to achieve. Montreal Protocol 1987 while uses managerial techniques to improve the compliance behaviour of developing countries, mandates at the same time for punishment measures for defecting states. For example, ban on the export and import of ozone depleting substances on states which stay out-side the regime of the Protocol but still want to reap the benefit of free-riding. The 'carrot and stick approaches'-considered to have played a significant role in the success of the Protocol.

Protection of Traditional Knowledge: Finding an Appropriate Legal Framework for Bangladesh

Dr. Mohammad Towhidul Islam[*] and Moniruz Zaman[**]

1. Introduction

A legal framework for intellectual property (IP) tends to protect and enforce the rights of owners and creators for their inventions and creations in the form of patent, copyright, trademark and others.[1] Such rights entitle the right holders with an exclusive legal right to prevent others from unauthorized uses of protected contents.[2] Multiple theories, i.e., justificatory theory and monopolization theory are taken to support the protection of intellectual property — providing the owner limited monopolies over the use of creative contents.[3] The justificatory theory which includes the labour theory, also known as the natural rights theory, justifies an individual's right to the product of his labour.[4] Again, the theory of monopolization justifies a monopoly over how other people make use of owners' copies of an idea.[5] For instance, the copyright holder or patent owner can control who can copy or reproduce the works or products, and can keep those off the market. Intellectual property rights (IPRs), ensuring ownership and monopoly over new creations, may arise from modifications of existing knowledge including traditional cultural expressions (TCEs) e.g. culture, stories, legends, folklore, rituals, songs, and laws,[6] and traditional knowledge (TK) e.g. tools and techniques for hunting or agriculture), midwifery, ethnobotany and ecological knowledge, traditional medicine, celestial navigation, craft skills, ethnoastronomy, climate, and so on.[7] However, who creates TCEs and TK and owns rights therein is a matter of controversy as the origin of such knowledge cannot be credited to any specific person. Hence, the protection of traditional

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1 Deborah E Bouchoux, *Intellectual Property: The law of Trademarks, Copyrights, Patents, and Trade Secrets* (4th edn, Cengage Learning 2012) 3.

2 David I Bainbridge, *Intellectual Property* (7th edn, Pearson Education Limited 2009) 11.

3 Mohammad Towhildul Islam, 'Implications of the TRIPS Agreement in Bangladesh: Prospects and Concerns' (2009) 6 *Macquarie Journal of Business Law* 4.

4 *Millar v. Taylor* (1769) 4 Burr. 2303, 98 Eng. Rep. 201 (Lord Mansfield CJ opined that, "It is just that an author should reap the pecuniary profits of his own ingenuity and labour").

5 Michele Boldrin and David K Levine, 'The Economics of Ideas and Intellectual Property' (2005) 102(4) *Proceedings of the National Academy of Sciences of the United States of America* 1252; Michael J Trebilcock and Robert Howse, *The Regulation of International Trade* (3rd edn, Routledge 2005) 398-99.

6 Bernard O'Connor, 'Protecting Traditional Knowledge: An Overview of a Developing Area of Intellectual Property Law' (2003) 6 *Journal of World Intellectual Property* 677, 678.

7 ibid.

knowledge seems to be one of the most complicated and contentious issues. The core of the controversy lies in the fact that TK which is usually considered as knowledge in the public domain, can be exploited without any cost, and even no respect or concern is shown to the relevant indigenous communities and local people who preserve and protect the knowledge.

To enquire how TK can be adequately protected in the absence of tailored legal instruments, it is required first to explain what 'traditional knowledge' actually is. In a narrower sense, TK commonly refers to knowledge, know-how, and practices maintained and developed by indigenous populations and local communities over generations of living. It evolves over centuries or even millennia by contributions of members of a particular society pursuant to the necessities of their local surroundings.[8] In a broader sense, TK includes songs, stories, dance, handicraft, local language, proverbs, folklore, beliefs, cultural values, rituals, genetic resources, construction technologies, medicinal and agricultural practices, including plant and animal breeding available in the public domain. Within the context of TK, the meaning of 'traditional' implies that such knowledge is transmitted orally over generations and that it has been evolved in the course of long experience pursuant to a transmuting environment.[9]

In the 21st century, holders of TK are found to face many challenges, and one of the growing concerns is 'bio-piracy' i.e. commercial misappropriation of traditional knowledge by an unauthorized third party without acknowledging the source or providing any form of compensation. Well-known examples include a patent on the use of neem, the patent on turmeric for healing wounds[10], the patent on an Amazonian healing drink made form a plant ayahuasca[11], the patent on an African sweetener serendipity berry (which produces Monellin)[12], the patent on an African appetite suppressant plant Hoodia[13], the patent on drought-resistant plant quinoa, and others.[14] It seems that western corporations, giant business houses, and research

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8 Shahid Ali Khan and Raghunath Anant Mashelkar, *Intellectual Property and Competitive Strategies in the 21st century* (Kluwer Law International BV 2006) 77.

9 Afifah Kusumadara, 'Protection and Sustainability of Indonesian Traditional Knowledge and Folklore: Legal and Non-Legal Measures' (2011) 8 *US-China Law Review* 542, 548.

10 Philippe Cullet and others, 'Intellectual Property Rights, Plant Genetic Resources and Traditional Knowledge' in Susette Biber-Klemm and Thomas Cottier (eds), *Rights to Plant Genetic Resources and Traditional Knowledge: Basic Issues and Perspectives* (CABI 2006) 112, 135.

11 O'Connor (n 6) 682-83 (Ayahuasca patent was claimed by an American citizen Lorren Miller, and he obtained U.S. Plant Patent No. 5751).

12 Monnelin was also patented by University of Pennsylvania (US) and Kirin Brewery Ltd. (Japan); see, Rachel Wynberg, 'Privatising the Means for Survival: The Commercialisation of Africa's Biodiversity' (*GRAIN*, 20 May 2000) <https://www.grain.org/article/33-privatising-the-means-for-survival-the-commercialisation-of-africa-s-biodiversity/print> accessed 23 February 2020.

13 Graham Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge* (Earthscan 2004) 53.

14 ibid.

companies have started to exploit the traditional knowledge without any acknowledgement and fair compensation for the indigenous communities who preserve and develop such knowledge over generations. Therefore, in today's IPRs regime, TK is at the risk of becoming extinct because the IPRs regime appears to be insufficient to prevent bio-piracy or to protect TK.

The United Nations Convention on Biological Diversity, 1992[15] is the only treaty that recognizes the significance of traditional knowledge for enhancing the conservation and use of natural resources. Article 8(j) of the Convention establishes principles of 'respect, require and maintain', along with the ethical issues like equitable sharing of benefits with the creators and holders of TK.[16] However, it 'does not recognize, and even less create, a property right in favour of indigenous peoples over their traditional knowledge.'[17] Further, the World Intellectual Property Organization (WIPO)'s Intergovernmental Committee (IGC) on 'Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore' is currently working on the development of an international set of instruments to protect genetic resources and associated traditional knowledge.[18] For the protection of TK, the IGC is undertaking formal negotiations with WIPO members to develop a uniform legal instrument. However, the Committee is facing challenges to formulate an effective instrument because of the non-participation of the local people and indigenous communities in these negotiations.[19]

Now, looking into Bangladesh, it can be mentioned that the country has very rich bio-diverse resources, adapted from its local environment; there are at least 45 different ethnic and indigenous communities living here, who possess their own traditions, cultures, way of life, and customs.[20] On multiple occasions, indigenous medicines like the medicinal plants used by the *Kabirajes* and folklores like 'Lalon

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15 The Convention on Biological Diversity at the United Nations adopted on 22 May 1992 and entered into force 29 December 1993 [hereinafter CBD].

16 ibid, art 8(j). It requires Contracting States to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices".

17 Brendan Tobin and Krystyna Swiderska, *Speaking in Tongues: Indigenous Participation in the Development of a Sui Generis Regime to Protect Traditional Knowledge in Peru* (IIED 2001) 11.

18 Veronica Gordon, 'Appropriation without Representation? The Limited Role of Indigenous Groups in WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore' (2014) 16(3) *Vanderbilt Journal of Entertainment and Technology Law* 629.

19 ibid.

20 International Labour Organization, 'Brochure: Building Capacities on Indigenous and Tribal Peoples' Issues in Bangladesh: Rights and Good Practices' (ILO, April 2017) 3.

song' have been misappropriated or misused.[21] This misappropriation takes place since the TK is largely unprotected due to the country's inadequate legal framework. Though Bangladesh has already signed several international conventions relating to protection of biodiversity related knowledge, still there exists a regulatory vacuum for which the Bangladeshi TK is vulnerable to misappropriation. The National Innovation and Intellectual Property Policy 2018[22] (National IP Policy) in its Goal no. 6 mentions that a new law will be enacted to protect TK, existing IP laws will be reviewed, and the database of TK will be set up. Though the national IP Policy gives a time frame for the goal[23], it does not specify the detailed procedure for implementing it. In this article, therefore, the primary focus will be on the modalities and way-outs to protect traditional knowledge both in IP and non-IP framework.

2. Traditional Knowledge of Bangladesh

Bangladesh, a prosperous and bio-diverse country, has its very own traditional farming systems like floodplain production systems, fishing, and local environmental management practices. Its floodplain production system is considered as unique examples of agroecological systems at the land/water interface.[24] It is also endowed with a vast knowledge of cultural traditions like handicrafts, songs, dances, ceremonies and tales, and most of them are undocumented. Therefore, these traditional knowledge and practices are weakening, and in many cases, vanishing altogether. This is because of the copying, selling, or using these traditional knowledge by unauthorized third parties.[25] For instance, a local laboratory developed 32 herbal formulations on Neem and continued its works under. However, later on, its collaboration with a local pharmaceutical company in 2013 weighed down its research works on herbal formulations using the traditional techniques.[26]

Despite the weakening trend, the following traditional knowledge have been commonly found in Bangladesh.

(a) Nakshi Kantha (embroidered quilt) - Nakshi Kantha requires an overarching craft skill as the embroidered surface of it encompasses a variety of folk

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21 Md. Razidur Rahaman, 'Protection of Traditional Knowledge and Traditional Cultural Expressions in Bangladesh' (2015) 20 *Journal of Intellectual Property Rights* 164.

22 National Innovation and Intellectual Property Policy 2018 (Bangladesh) [hereinafter National IP Policy 2018] <https://dpdt.portal. gov.bd/site/page/e99a643b-6362-4717-b707-237baa4724af/> accessed 7 September 2020.

23 ibid, appendix 1.

24 Mursaleena Islam and John B Braden, 'Bio-economic Development of Floodplains: Farming versus Fishing in Bangladesh' (2006) 11(1) *Environment and Development Economics* 95.

25 Rahaman (n 21) 164.

26 '*ACI's Deception Destroyed a Promising Domestic Industry'* [in Bengali] *The Daily Sangram* (Dhaka, 29 October 2015) <https://rb.gy/onj2e3> accessed 6 September 2020.

motifs derived from the surroundings of the artisan.[27] It tells stories of the artisans' sentiments and beliefs by drawings and stitching various objects like flowers, leaves, plants, and animals. It displays the numerous running stitches which are ingeniously employed to form motifs and border patterns with the folk art of Bangladesh and West Bengal, India. The form of quilting that prevails in Bangladesh is unique in the sense that it reflects and represents cultural beliefs and identity.[28]

(b) Jamdani (a fine cloth of "muslin" group) – the Bangladeshi weave Jamdani has multicoloured linear or geometric design patterns along with floral motifs all over the body and woven painstakingly by hand on the old fashioned jala loom (a weaving device).[29] The knowledge of weaving processes and patterns are orally passed from masters to apprentices through poetic recitation known as sloka or buli.[30] It means that the knowledge is undocumented, and it is feared that this knowledge may face the risk of extinction in this modern era of globalization.

(c) Khadi (Eco-friendly textile) – Khaddar or Khadi, Comilla's traditional handloom cloth, is a kind of hand-woven or handspun textile primarily made out of cotton. In the 12th century, Marco Polo had compared the khadi of Bengal with the top-notch version of the spider's web[31]. Even in 1921, Mahatma Gandhi came to Bangladesh to promote the khadi clothes of Comilla[32]. The cloth is primarily made out of hemp and may also include wool or silk, which are all spun into yarn on a charka (a spinning wheel).[33] The knowledge of the spinning and patterns of weaving khadi is known only to a handful of local weavers.

(d) Unani and Ayurvedic medicines – in traditional and alternative medicinal practices like Unani and Ayurvedic systems, about 500 medicinal plants have

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27 Martha Alter Chen, 'Kantha and Jamdani: Revival in Bangladesh' (1984) 11(4) *India International Centre Quarterly* 45, 47.

28 Afroza Zaman Anni, 'Nakshi Kantha: Emotions Wrapped Up in Quilts' *The Daily Sun* (Dhaka, 23 August 2019) <https://www.daily-sun.com/printversion/details/417358/Nakshi-Kantha:-Emotions-Wrapped-Up-In-Quilts> accessed 23 June 2020.

29 Mohammad Ataul Karim and Mohammad Ershadul Karim, 'Protection of 'Handicraft' as Geographical Indications under Municipal Law, TRIPS and BTAs vis-à-vis CETA: 'Bangladeshi Jamdani' as Case Study' (2017) 7(1) *Queen Mary Journal of Intellectual Property* 49, 51.

30 Sayyada R. Ghuznavi, 'Jamdani: The Legend and the Legacy' in National Crafts Council of Bangladesh (ed), *Textile Tradition of Bangladesh* (NCCB 2006) 48.

31 Mohammad Towhidul Islam and Md. Ahsan Habib, 'Introducing Geographical Indications in Bangladesh' (2013) 24 (1) *Dhaka University Law Journal* 51, 66.

32 Maheen Khan and Selim Ahmed, 'The Story of KHADI' *The Daily Star* (Dhaka, 13 December 2011) <https://archive.thedailystar.net/lifestyle/2011/12/02/centre.htm> accessed 12 March 2020.

33 Kriti Bhalla, Tarun Kumar and Jananee Rangaswamy, 'An Integrated Rural Development Model Based on Comprehensive Life-Cycle Assessment (LCA) of Khadi-Handloom Industry in Rural India' (2018) 69 *Procedia CIRP* 493.

been used, and the majority of the rural communities are dependent on traditional medications for illnesses such as fever, cold, cough, dysentery, and headache. For instance, durba grass (Cynodon Dactylon) is widely used for congealing blood. Other widely used medicinal plants are Ashwagandha (Withaniasomnifera), Ashok (Saracaindica), Amloki (Embelicaofficnalis), Arjun (Termanaliaarjuna), Bael (Aeglemermelos), Anantamul (Hemidesmusindicus), Gulancha (Tinosporacordifolia), Miers, Shatomuli (Asparagus racemosus), Gritokumari (Aloe indica), Apang (Achyranthes-paniculata), Crown flower (Calotropisgigantia), Kalomegh (Androghaphis-pariculata), Ulotkombol (Abromaaugusta) etc.[34]

(e) Culinary Goods – culinary products, having traditional varieties, may include aromatic rice, desi ghee, and turmeric. In Bangladesh, varieties of aromatic rice like Kataribhog, Kaligira are widely used to produce delightful traditional foods, e.g., Biriyani, Pitha, Payesh, and Polau.[35]

(f) Food stuffs – the country is very rich in varieties of foods bearing traditions of each locality. Biriyani and Bakorkhani of Old Dhaka, Manda of Muktagachha, Mymensingh, Chomchom of Porabari, Tangail, Doi (curd) of Bogra, Roshmalai of Comilla, Kachagolla of Natore, Khejur Gur (molasses) of Manikganj and Jessore could be named as some of such items.[36]

(g) Dry fish – people living in the coastal region use traditional sun-drying practices and smoking of fish, shrimp and other fishery goods which are sold domestically and internationally.[37] A Food and Agriculture Organization (FAO) data shows that fishing industries are continuously increasing in the world trade with the highest contribution from the developing countries with almost 56 per cent of the traded fishery products and Bangladesh is one of the countries.[38]

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34 Islam and Habib (n 31) 51, 65.

35 EAM Asaduzzaman and Andrew Eagle, 'Aromatic Rice, Sweet Scent of Success' *The Daily Star* (Dhaka, 05 April 2018) <https://www.thedailystar.net/country/aromatic-rice-sweet-scent-success-1558123> accessed 26 June 2020.

36 Sun Online Desk, 'Six Sweetmeats which Branding Bangladesh' *The Daily Sun* (Dhaka, 19 May 2016) <https://www.daily-sun.com/post/137548/Six-sweetmeats-which-branding-Bangladesh> accessed 29 June 2020.

37 Parimal Chadra Paul and others, 'A Review on Dried Fish Processing and Marketing in the Coastal Region of Bangladesh' (2018) 5(3) *Research in Agriculture Livestock and Fisheries* 381; see also, Mohammad Towhidul Islam, 'How Bangladeshi Women Can Power Change through Innovation' *The Daily Star* (Dhaka, 26 April 2018) <https://www.thedailystar.net/opinion/perspective/how-bangladeshi-women-can-power-change throughinnovation1567639#:~:text=Bangladeshi%20women%20can%20also%20claim,under%20the%20traditional%20knowledge%20regime> accessed 13 March 2020.

38 Food and Agriculture Organization of the United Nations (FAO), *Trade in Fish and Fishery Products* (FAO Support to the WTO Negotiations at the 11th Ministerial Conference in Buenos Aires, no. 18, 2017).

(h) Household and decorative – household products of canes or sheetal pati (cool mat made of a kind of plant) of Barisal, Comilla, Tangail and Sylhet remind us the tradition and expertise of the local makers.[39] Decoratives made of aluminium in Bikrampur or the ones made of brass in Jamalpur also have long traditions. Pottery items that had their concentrations in areas surrounding Dhaka and elsewhere in the country are also noteworthy.[40]

(i) Traditional Cultural Expressions – traditional cultural expressions include traditional songs i.e. Bhatiali, Baul, Marfati, Murshidi, and Bhawaiya, Jari, Sari, Lalon Geeti, etc., traditional dance i.e. Manipuri, Santhali etc., designs, ceremonies, tales and many other artistic or cultural expressions.[41]

(j) Genetic Resources – genetic resources (GRs), genetic material of plant or animal, are often connected to traditional knowledge and practices. GRs include plants (including trees), animals and crops, preparation or process i.e. techniques of using them for a final outcome, method of growing, harvesting, extracting, preparing, or applying them.[42]

Based on the above traditional knowledge, there are trade and businesses at home and abroad of local clothes, potteries and households, decorative pieces, handicrafts, indigenous foods, and herbal medicines. However, the trade is not satisfactory compared to the global context. For example, the size of the global exports of only handicrafts is almost US$15 billion a year, whereas Bangladesh's share is a negligible $8-9 million per annum.[43] In addition, economic conditions of people working with traditional knowledge are worsening, and there are changes in their traditional profession. Traditional knowledge is also disappearing as it is misappropriated by unauthorized third parties, impacting people's livelihoods and health as the 'Kabiraz' (herbal practitioners) are not able to use the traditional medicinal plants which are now patented by others,[44] replenishing the environment, and furthering climate change.[45]

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39 Mamun Chowdhury, 'Shital Pati' *The Daily Observer* (Dhaka, 13 October 2017) <http://www.theindependentbd.com/magazine/details/118488/Shital-Pati> accessed 15 March 2020.

40 Kazi Nazrul Islam, 'Shariatpur Pottery Items are Exported Worldwide but the Potters are not Getting their Fair Share' *Dhaka Tribune* (Dhaka, 21 January 2019) <https://www.dhakatribune.com/business/2019/01/21/shariatpur-pottery-items-are-exported-worldwide-but-the-potters-are-not-getting-their-fair-share> accessed 02 July 2020.

41 Ferdousi Rahman, 'Folk Songs of Bangladesh' *The Daily Star* (Dhaka, 27 March 2015) <https://www.thedailystar.net/arts-entertainment/music/folk-songs-bangladesh-73961> accessed 03 July 2020.

42 A K F H Bhuiyan, 'Farm Animal Genetic Resources in Bangladesh: Diversity, Conservation and Management' in *Farm Animal Genetic Resources in SAARC Countries: Diversity, Conservation and Management* (SAARC Agriculture Centre (SAC) 2014) 8.

43 Sharif Ahmed, 'Handicraft Exports See Steady Boom' *The Independent* (Dhaka, 01 January 2019) <http://theindependentbd.com/post/181332> accessed 25 March 2020.

44 Rahaman (n 21) 167.

45 ibid. The author showed that "farmers are exposed to modern farming techniques by abandoning their traditional farming knowledge and introducing modern varieties of corps caused a serious problem in agriculture".

3. Modalities and Approaches for Protecting Traditional Knowledge

Given the amorphous nature of traditional knowledge, there is no uniform system of effective protection measures. Various strategies have been followed to protect TK, whether positive or defensive.[46] While positive protection strategies rely on existing IP measures, defensive strategies prevent others from obtaining IP rights over pre-existing TK.[47] Generally, the defensive measure is the defensive use of the patent mechanism and the creation of traditional knowledge database.[48] By contrast, offensive or positive protection is the existing IP laws such as copyrights and related rights, trademarks, plant varieties protection, industrial designs, geographical indications, and trade secrets (unfair competition) law.[49] Conceptually, though both the strategies pose obstacles to the guardian of TK[50], a meaningful TK protection scheme may contain elements of both of these categories.

4. Conventional IP Protection Mechanism

The conventional IPRs system, commonly referred to as industrialized tools, promotes individual and corporate ownership with an aim to encourage innovation. Given the collective nature of TK, the classic IP instruments are not adequate for protecting genetic resources and community-based knowledge of the local and indigenous communities. Classic IP tools, or maybe their revised versions in some cases, can be used to protect TK though each of the tools has various benefits and deficiencies such as disclosure requirements and a fixed duration of protection. However, conventional IP instruments that can be used by the indigenous and local people in Bangladesh to protect their IP in TK may include trademarks, trade secrets, copyrights, patents, and geographical indications.

4.1. Patent

A patent is the first option for the local community to protect inventions arising of TK. Generally, a patent is a bundle of exclusive rights granted to the inventors for their inventions (processes or products) for a limited period of time. In Bangladesh, section 2(8) of the Patents and Designs Act, 1911 defines 'invention' as 'any manner of new manufacture and includes an improvement and an alleged invention'.[51] A

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46 Jonathan Curci, *The Protection of Biodiversity and Traditional Knowledge in International Law of Intellectual Property* (Cambridge University Press 2010) 20.

47 Pitipong Yodmongkon and Nopasit Chakpitak, 'Applying Intellectual Capital Process Model for Creating a Defensive Protection System to Local Traditional Knowledge: The Case of Mea-hiya Community' (2009) 7(4) *Electronic Journal of Knowledge Management* 518.

48 Margo A Bagley, 'The Fallacy of Defensive Protection for Traditional Knowledge' (2019) 58 *Washburn Law Journal* 323, 326.

49 Deepa Varadarajan, 'A Trade Secret Approach to Protecting Traditional Knowledge' (2011) 36(2) *Yale Journal of International Law* 371, 383.

50 ibid.

51 Patents and Designs Act 1911 (Bangladesh), s 2(8).

patent holder gets a certificate or document issued by the government department (for example in Bangladesh it is the Department of Patents, Designs and Trademarks) for his invention or innovation for a period of 16 years as per section 14 if the invention fulfils the criteria of new (novelty), inventive step (non-obviousness) and industrial application (usefulness in the industry).

Here, novelty means that the invention must be new, of which no prior art exists. Since TK is that knowledge, which is used and transmitted over generations, it cannot fulfil the requirement of a novelty for patent protection. Further, the notion of the prior art can be used as an effective strategy to provide defensive protection if TK is included efficiently in the prior art. A patent examiner while assessing the patentability of an invention can disprove the claimed invention to be patented if it is already in the prior art. To use this strategy, it is necessary for the indigenous community to maintain an open database for TK. Interestingly, the Draft Bangladesh Patent Act, 2019[52] specifically provides for defensive protection in some of its sections in order to cater to the protection of traditional knowledge. For instance, section 4(1)(o) of the draft Act specifically mentions that inventions from traditional knowledge or combinations of any traditionally known ingredients are outside the scope of patent protection. Additionally, section 16 mentions that any interested person can apply to the court for revocation of any patent, and the patent for the claimed invention will be invalidated if it can be proved that the invention contains ingredients replicated from traditional knowledge.

Further, TK patents in Bangladesh can be effectively utilized to protect mechanical innovations of traditional healers or farmers concerning products on traditional medicines, or processes of making such products, which may include cooling, drying, mixing, washing and moulding compositions for a herbal brew. However, there are numerous reasons for which patent law might not represent a feasible arrangement to protect biodiversity and associated traditional knowledge. First, the patent application requires disclosing the knowledge to the public after a certain period.[53] In Bangladesh, after eighteen months of a patent's approval, it is made available to the public. Second, the protection is limited in nature. For example, the patent is protected for 20 years under the TRIPS Agreement, 1994,[54] and in Bangladesh, it is protected for 16 years which may be extended up to another 10 years by presenting a petition to the government.[55] Third, it involves some stringent criteria as stated above like the 'criteria of novelty and inventive steps'.

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52 Draft Patent Act 2019 (Bangladesh) [On file with the author].

53 Marcia Ellen DeGeer, 'Biopiracy: The Appropriation of Indigenous Peoples' Cultural Knowledge' (2003) 9 *New England Journal of International & Comparative L*aw 179, 181.

54 Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994 (33 ILM 1197), art 33 [hereinafter TRIPS].

55 Patents and Designs Act 1911 (Bangladesh), ss 14, 15.

4.2. Copyright

A copyright is an exclusive right owed to the author of creative ideas which are expressed in a material form such as in a literary, musical, artistic, dramatic, or educational form.[56] In Bangladesh, the copyright lasts for 60 years plus the life of the author.[57] The Copyright Act, 2000 provides for the protection of original literary, artistic, musical and dramatic works.[58] Hence, the copyright can protect the original artistic works of the TK holders such as literary works (i.e. myths, tales, poems), theatrical works, musical works, textile works (i.e. garments, fabrics, carpets) and three-dimensional works (i.e. sculptures, pottery and ceramics).[59] It is to be remembered that for a work to be eligible for copyright, it does not compulsorily require to be registered but it must be expressed in a material form (commonly referred to as the 'fixation requirement').[60] As such, anyone reading or hearing the unwritten traditional literary and musical works can use those without infringing the copyright.[61]

However, the Copyright Act, 2000 grants exclusive rights only to 'creative individuals' and it does not acknowledge community ownership, and as such collective creativity of the local and indigenous communities does not fall within the ambit of copyright protection.[62] Though the Act of 2000 does not recognize 'folk knowledge', the draft Copyright Act, 2019 defines' folk knowledge' as folk skills, information, and culture handed over from generation to generation through oral, written or other means. In addition, tangible and intangible folk elements and expressions will be treated as 'folk culture'.[63] The culture of Bangladesh's ethnic minorities will also be part of these definitions. Significantly, the draft Act prohibits the use of folk knowledge or folk culture, and hence folkloric expressions are protected in perpetuity. By the help of this Act, indigenous artists of Bangladesh will be able to collect royalties from the users of their works. The example of this can be seen in an Australian case of *Milpurrurru & Ors v. Indofurn Pty Ltd & Ors.*[64], where Vietnam wove several carpets incorporating aboriginal designs of Australian artists. The court then held that the copyright of the aboriginal artists had been infringed and

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56 L Ray Patterson, 'Copyright and the Exclusive Right of Authors' (1993) 1 *Journal of Intellectual Property Law* 1.

57 Copyright Act 2000 (Bangladesh), s 24.

58 ibid, s 15.

59 Simon Stokes, *Art and Copyright* (Bloomsbury Publishing 2012) 3.

60 Evan Brown, 'Fixed Perspectives: The Evolving Contours of the Fixation Requirement in Copyright Law' (2014) 10 *Washington Journal of Law, Technology & Arts* 17, 18.

61 Josephine R Axt and others, *Biotechnology, Indigenous Peoples, and Intellectual Property Rights* (Congressional Research Service 1993).

62 Copyright Act 2000 (Bangladesh), s 14.

63 Draft Copyright Act 2019 (Bangladesh) [On file with the author].

64 (1995) 30 IPR 209.

the artists were to be given royalties for those carpets.[65] In this case, the court recognized the concepts of "cultural harm" and efficaciously utilized the realm of copyright to protect TK.[66] Hence, the copyright can successfully protect TK by promoting traditional values and preventing misuse of indigenous works.

4.3. Trademarks

The trademark protects brand names, symbols or signs that assist consumers to avoid confusion between similar products of different traders. In Bangladesh, the Trademarks Act, 2009 defines trademarks as 'registered marks' and also includes 'service marks' concerning the trade of goods;[67] and an individual may register a trademark by writing an application to the Registrar in the prescribed manner.[68] In all cases, a trademark should be distinctive and not deceptive.[69] Unlike patents, the registration ^{R} protects a trademark for seven years and is subject to indefinite renewals for ten years on each occasion on payment of prescribed fees.[70] An unregistered well-known trademark can also be protected by fulfilling the use requirements including a claim of trademark ^{TM} for products or service mark ^{SM} for services in a passing off action.[71] Trademarks, therefore, may be used to protect symbols or signs of manufactured goods and services offered by local people or indigenous communities. The native and indigenous group can now easily gain economic benefits by selling the TK products using the registered or claimed signs or symbols, even if there are no patents on those TK products.

Additionally, certification marks, another form of trademark, can be used to protect the procedure or process of making TK products of an indigenous group. Collective marks can also be used to protect products of a registered group or local community.[72] Countries like France, South Africa, Peru, and Chile are effectively using collective marks in the wine and spirit industries. In Bangladesh, collective marks also can be used to protect the community's TK.[73] Under collective marks, the community owns the mark and all of its members can use the mark like other trademarks.[74] Thus, trademarks can be

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65 Michael Blakeney, 'Milpurrurru and Ors vs. Indofurn Pty Ltd and Ors: Protecting Expressions of Aboriginal Folklore under Copyright Law' (1995) 2(1) *Murdoch University Electronic Journal of Law* <http://www5.austlii.edu.au/au/journals/MurUEJL/1995/4.html> accessed 03 April 2020.

66 O'Connor (n 6) 688.

67 Trademarks Act 2009 (Bangladesh), s 2(8).

68 ibid, s 15.

69 ibid, s 8.

70 ibid, s 22.

71 Shujie Feng, 'How Are Unregistered Trademarks Protected in China?' (2013) 44(7) *IIC-International Review of Intellectual Property and Competition Law* 815, 823.

72 Teshager W Dagne, 'Law and Policy on Intellectual Property, Traditional Knowledge and Development: Legally Protecting Creativity and Collective Rights in Traditional Knowledge-Based Agricultural Products through Geographical Indications' (2010) 11(1) *Estey Centre Journal of International Law & Trade Policy* 68, 82.

73 Trademarks Act 2009 (Bangladesh), s 2(25).

74 Paris Convention for the Protection of Industrial Property 1883 (828 UNTS 305), art 7bis.

an effective tool both in cases of adequate protection and indefinite duration, unlike the limited protection of patent and copyright.

4.4. Trade Secrets

Trade secrets can protect traditional knowledge as long as the knowledge remains secret.[75] In addition to the secrecy requirement, the knowledge must also possess commercial value and must not be in the public domain.[76] Trade secret creators, thus, have sole control over the goods or products, and the best example of it is the formula of Coca Cola beverages. TK holders of secret and sacred TK, like healers (shamans) or other specialist TK holders who have gathered knowledge through ages, can prevent knowledge from disclosure to others under the system of trade secrets. Usually, trade secrets are enforceable in the courts of Bangladesh by following contract law principles.[77] However, indigenous communities will no longer get the TK protection as a trade secret if the knowledge leaks into the public, and anyone can use that knowledge and reverse engineer it.

The native and indigenous community can collect royalties from a specific company by sharing the knowledge with a condition of confidentiality that the company will not publish the knowledge without permission of the TK holders. Generally, native tribes or traditional healers, who use plants for medicinal purpose, can make such arrangements with a particular outside organization. Such royalty payment arrangements remain intact even if the knowledge diffused into the public domain. As in the 'Listerine' formula case[78], an American citizen J J Lawrence developed an antiseptic mouthwash and named it as 'listerine' which was listed as a trade secret. He made royalty agreements with a pharmaceutical corporation. Later, the formula published in a journal and made the knowledge available to the public. The US court held that because of the trade secret licensing, the company had to pay royalties according to the agreement even if the formula is diffused in the public domain.[79]

4.5. Geographical Indications (GIs)

Geographical indications (GIs), another form of IP protection, provides protection to goods having specific geographical origin possessing geographical denomination, reputation or other characteristics even though the raw materials may

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75 Varadarajan (n 49) 375.

76 Ibid, 408.

77 Mohammad Towhidul Islam, *TRIPS Agreement of the WTO: Implications and Challenges for Bangladesh* (Cambridge Scholars Publishing 2013) 125.

78 *Warner-Lambert Pharmaceutical Company, Inc. v. John J. Reynolds, Inc.*, 178 F. Supp. 655; 1959 U.S. Dist. LEXIS 2567.

79 Stephen Hansen and Justin Van Fleet, *Traditional Knowledge and Intellectual Property: A Handbook on Issues and Options for Traditional Knowledge Holders in Protecting Their Intellectual Property and Maintaining Biological Diversity* (AAAS 2003) 29.

be sourced from elsewhere.[80] If a connection can be forged between products and geographical territory, a GI can be claimed to generate rewards for the members of an established community who maintains traditional methods in producing the products. GIs are especially designed to reward reputation and goodwill maintained from generations to generations.[81] As such, GIs may be the most suitable mechanism to protect TK-based products like indigenous handicrafts and agro-food products[82], especially from the perspective of a least developed country like Bangladesh. Considering the significance of cultural GI products, article 22 of the TRIPS Agreement makes it mandatory for its member countries to formulate legislation protecting GIs.[83] In Bangladesh, the Geographical Indications (Registration and Protection) Act, 2013[84] gives protection to both GI (goods originate from a geographical location having a reputation) and Appellation of Origin (goods originate from a geographical location having a reputation and the raw materials sourced therein as well) by providing provisions for registration of GIs. If the indication can be traced to its geographical origin, the unregistered GIs can also be protected.[85] The Act gives wider protection in the sense that it protects homonymous GIs as well.[86]

Like trademarks, GIs give perpetual protection as long as the traditional quality and reputation are maintained. Though geographical indications prevent misappropriation of indications, they do not protect the underlying knowledge per se.[87] It means that GIs are aimed at protecting the names of traditional products, not specific knowledge, or technology. Further, it is quite realistically impossible to protect all forms of TK only by using the single form of IP protection that is geographical indications; however, it is well recognized as a complementary tool to protect TK.[88]

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80 TRIPS, art 22.1.

81 Kal Raustiala and Stephen R Munzer, 'The Global Struggle over Geographic Indications' (2007) 18(2) *European Journal of International Law* 337.

82 Teshager Worku Dange, 'Harnessing the Development of Potential Geographical Indications for Traditional Knowledge Based Agricultural Products' (2010) 5(6) *Journal of Intellectual Property Law & Practice* 441.

83 See TRIPS, art 22(2)(a) (requiring that Members change their laws in order to give litigants the legal means to block "designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public"); see also, Kevin M Murphy, 'Conflict, Confusion, and Bias under TRIPS Articles 22-24' (2003) 19 *American University International Law Review* 1181, 1185.

84 Geographical Indications of Goods (Registration and Protection) Act 2013 [hereinafter GI Act 2013].

85 GI Act 2013 (Bangladesh), s 6(1).

86 ibid, s 7. It provides that a homonymous geographical indication of goods may be registered under this Act.

87 Annette Kur and Roland Knaak, 'Protection of Traditional Names and Designations' in Silke von Lewinski (ed), *Indigenous Heritage and Intellectual Property* (Kluwer Law International 2004) 227.

88 David R Downes, 'How Intellectual Property Could Be a Tool to Protect Traditional Knowledge' (2000) 25 *Columbia Journal of Environmental Law* 253.

5. Modalities and Possible Way-outs for Protecting Traditional Knowledge: Beyond IP Regime

At present, apart from the use of conventional IP law mechanism - four distinct modalities have been suggested: first is the use of access and benefit sharing (ABS) scheme with prior informed consent (PIC), the second one is the TK digital library models, third is the creation of *sui generis* (of its own kind) laws, and the fourth one is the contractual agreements.

5.1. Access and Benefit Sharing (ABS) Scheme mandating PIC

The CBD, along with a supplementary, non-binding agreement - the Nagoya Protocol, 2010[89] established the Access and Benefit Sharing (ABS) scheme to regulate the conditions for the access and benefit-sharing (ABS) of genetic resources, and associated TK.[90] The CBD requires its parties to promote sharing of benefits from the utilization of TK with local peoples and indigenous communities, while article 5 of the Nagoya Protocol[91] mandates to obtain the prior informed consent of the holders of TK and to share its benefits with them. Therefore, the ABS system aims to create a win-win situation – conserving biological resources and TK associated with those resources and generating prospects to obtain a fair and equitable share of benefits from each country's array of bio-diverse resources.

Access to genetic resources, benefit-sharing, and bioprospecting are the significant components of ABS regimes.[92] These aspects of the ABS regime should be prioritized and included in the respective regional and national ABS legislation.[93] Recently, Bangladesh has enacted the Bangladesh Biological Diversity Act, 2017[94], which introduces the ABS mechanism with an aim to confer fair and equitable

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89 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (adopted on 29 October 2010 in Nagoya and entered into force on 12 October 2014) (The Nagoya Protocol); see also, Press release of CBD <https://www.cbd.int/kb/record/pressRelease/81865?RecordType=pressRelease> accessed 6 September 2020 (Bangladesh is the forty-second signatory to the Nagoya Protocol).

90 Chidi Oguamanam, 'Genetic Resources, Access and Benefits Sharing: Politics, Prospects and Opportunities for Canada after Nagoya' (2011) 22(2) *Journal of Environmental Law and Practice* 87, 92-94.

91 The Nagoya Protocol, art 5 (art 5(2) states that "each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms.").

92 Krishna Prasad Oli and Tara Devi Dhakal, *Access and Benefit Sharing from Genetic Resources and Associated Traditional Knowledge* (International Centre for Integrated Mountain Development 2009) 19.

93 ibid.

94 Bangladesh Biodiversity Act 2017 <http://bdlaws.minlaw.gov.bd/bangla_pdf_part.php?id=1203> accessed 3 April 2020.

benefit-sharing by preventing the misappropriation and unapproved use of genetic resources. The Act provides a framework about when the transfer of research results based on biodiversity or biological resources will not be prohibited,[95] and how a person can apply for a patent or any other form of IPRs for an invention relating to biological resources found in Bangladesh. The Act prohibits anyone explicitly from applying for any IP right for any invention premised on any study or data on a biological resource obtained from Bangladesh without the prior approval of the National Biodiversity Committee.[96] However, the Committee may approve the application for such patents or other forms of IPRs relating to Bangladeshi biological resources by imposing specific royalties or benefit-sharing fees or both.[97] It may also impose conditions or lay down a procedure to share the economic paybacks from the commercial use of such IP rights.[98]

In addition, section 23(1) of the Plant Variety Protection Act, 2019[99] (the PVP Act) explains benefit-sharing as the action of giving a portion of the benefits to the breeder from a licensee or agent of plant varieties, and for which the farming community (the claimant) shall be entitled to demand such benefits under this Act.[100] The Act in section 17 proposes that applicants will not be given the PVP protection in case of failure to produce sufficient evidence of farmer's knowledge in breeding the variety.[101] The lifespan of plant varieties protection ranges from 14 to 16 years under section 22 of the Act.[102] A statutory authority named 'Plant Variety Protection Authority' is designed under section 4 of the Act to ensure farmers' access right of benefit-sharing arising from the utilization of plant genetic resources.[103]

5.2. TK digital library (TKDL) models

The TKDL is a protective anti-appropriation device, also considered a non-legal mechanism, which makes a compilation of TK in a digitized format so that it can be accessed by the patent examiners in future patent claims. So, by placing the knowledge in the public domain, it is easier to prevent others from obtaining a patent as the requirement of novelty cannot be claimed in respect of the disclosed information. However, the major problem of the TKDL system is that the information is in a searchable database; individuals with such information may claim a patent on a

95 ibid, s 4.
96 ibid, s 6(1).
97 ibid, s 6(2).
98 ibid, s 6(2).
99 Plant Variety Protection Act 2019 (Bangladesh) <http://bdlaws.minlaw.gov.bd/act-details-1287.html> accessed 20 February 2020 [hereinafter PVP Act 2019].
100 ibid, s 23(1)(e); see also, Mohammad Towhidul Islam, 'The Legal Regime of Plant Varieties and Farmers' Rights Protection in Bangladesh: Options and Challenges' (2018) 29 *Dhaka University Law Journal* 19, 30.
101 PVP Act 2019 (Bangladesh), s 17.
102 ibid, s 22.
103 ibid, ss 4, 6.

modified invention.[104] For instance, a local community of Bangladesh provides a piece of information to the TKDL regarding a medicinal plant for its healing abilities. Not let us say an outsider with such available information produces an entirely new drug, and if it fulfils the required levels of novelty and inventiveness, then the drug is patentable. The TKDL model can thus be regarded as double-edged, which can actually worsen the problem of unauthorized use of traditional knowledge.[105]

Looking at our neighbouring country India, it is using the TKDL format as defensive protection to protect its traditional medicinal knowledge. With the TKDL, India is capable of winning almost 105 claims on international patents like the patent on the use of turmeric[106] and another patent on the use of neem.[107] In Korea, the "Korean Intellectual Property Office (KIPO)" introduces the "Korean Traditional Knowledge portal (KTKP)" for documenting ancient Korean medicine.[108] Similarly, in China, there is a Chinese Traditional Medicine (CTM) patent database system.[109] So, it seems that the documentation of traditional knowledge in digital form has gained prominence in various nations in their fight against the biopiracy cases.

5.3. Sui Generis Modality

Given the existing IPRs regime, even with some modifications, is not adequate to protect traditional knowledge effectively, many countries like India, Brazil, Portugal, Peru, and the Philippines have adopted *sui generis* measures of TK protection.[110] The *sui generis* model is commonly referred to as the 'defensive community patent' model.[111] In order to make an IP system *sui generis*, it involves alteration of some of its characteristics to take care of the unique nature and features of TK, which leads to the creation of a distinct system.

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[104] Ikechi Mgbeoji, 'Patents and Traditional Knowledge of the Uses of Plants: Is a Communal Patent Regime Part of the Solution to the Scourge of Bio Piracy?' (2001) 9 *Indian Journal of Global Legal Studies* 163, 172.

[105] Chidi Oguamanam, 'Documentation and Digitization of Traditional Knowledge and Intangible Cultural Heritage: Challenges and Prospects' in Toshiyuki Kono (ed), *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable Development* (Intersentia 2009) 357-383.

[106] Case of Turmeric Patent (Curcuma longa) US Patent No. 54015041.

[107] Case of Neem Patent (Azadiracha Indica) EPO Patent No. 436257; see also, Kasim Musa Waziri, 'Protection of Traditional Knowledge in Nigeria: Breaking the Barriers' (2014) 29 *Journal of Law, Policy and Globalization* 176, 182.

[108] R Lakshmi Poorna, Mymoon Moghul and Arunachalam Hariharan, 'Preservation and Protection of Traditional Knowledge: Diverse Documentation Initiatives across the Globe' (2014) 107 *Current Science* 1240, 1242.

[109] ibid.

[110] Carlos Maria Correa, 'Traditional Knowledge and Intellectual Property: Issues and Options Surrounding the Protection of Traditional Knowledge' (2001) The Quaker United Nations Office (QUNO) Discussion Paper November 2001, 17.

[111] Mgbeoji (n 104) 163; see also, James D Nason, 'Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights Legislation' (2001) 12 *Stanford Law & Policy Review* 255.

A *sui generis* model law at the domestic level aims at protecting TK associated with the utilization of genetic resources, establishing prerequisites on access to biodiversity-related TK, and calls for respect, preservation and maintenance of the Cosmo vision, customs and practices of the concerned local and indigenous communities.[112] In order to avoid the conflict between a *sui generis* model law and the current national laws, a *sui generis* modality requires to amend relevant existing national legislation that governs intellectual property rights, protected areas, natural resources, land occupation and protection of the environment.

A number of *sui generis* legislative models exists around the world[113] like the 'Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions'[114]. The Model Provisions consist of 14 sections, and section 1 explains the principle of protection. Section 14 determines the 'conditions under which expressions of folklore originating from a community in a foreign country are protected'. Another legislative model is the 'Principles and Guidelines for the Protection of the Heritage of Indigenous People'[115] which is elaborated by the Sub-Commission on Prevention of Discrimination and Protection of Minorities.[116] Principle 3 of the 'Principles and Guidelines for the Protection of the Heritage of Indigenous People' states that, 'Indigenous peoples should be recognized as the primary guardians and interpreters of their cultures, arts and sciences, whether created in the past, or developed by them in the future'.[117] Other models include the 'Third World Network's Proposal for a Rights Regime for the Protection of Indigenous Rights and Biodiversity'[118], the 'Intellectual Integrity Framework of the RAFI'[119], the 'Model Biodiversity Related Community Intellectual Rights Act of the Research Foundation for Science, Technology and Ecology'[120], and

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112 Kerry ten Kate and Sarah A Laird, *The Commercial Use of Biodiversity-Access to Genetic Resources and Benefit Sharing* (Earthscan 1999) 33.

113 Shamama Afreen and Biju Paul Abraham, 'Biopiracy and Protection of Traditional Knowledge: Intellectual Property Rights and Beyond' (2008) Indian Institute of Management Calcutta Working Paper Series 629/September 2008 <https://www.iimcal.ac.in/sites/all/files/pdfs/wps-629_1.pdf> accessed 12 September 2020.

114 'Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions, with a commentary' <https://unesdoc.unesco.org/ark:/48223/pf0000220163> accessed 13 September 2020.

115 Principles and Guidelines for the Protection of the Heritage of Indigenous People (Draft) (UN, 21 June 1995).

116 (E/CN.4/Sub.2/1995/26).

117 Principles and Guidelines for the Protection of the Heritage of Indigenous People (n 115).

118 Third World Network, 'A Conceptual Framework and Essential Elements of a Rights Regime for the Protection of Indigenous Rights and Biodiversity' (1996) cited in G S Nijar, 'In Defence of Local Community Knowledge and Biodiversity: A Conceptual Framework and the Essential Elements of a Rights Regime' (1996) Third World Network Briefing Paper 1996, 1.

119 Rural Advancement Foundation International (RAFI), *Conserving Indigenous Knowledge: Integrating Two Systems of Innovation* (UNDP 1994) 1-79.

120 Model Biodiversity Related Community Intellectual Rights Act 1997 (Drafted by Research Foundation for Science, Technology and Ecology).

the 'Draft Legislation on Community Rights and Access to Biological Resources developed by the OAU'[121]. Most of these models are non-legal, and voluntary mechanisms and hence, cannot bind the countries to adhere to them.

A *sui generis* modality, thus, may contain some standard practices of IP protections along with the fusion of some other practices of protections for genetic resources. For instance, a country can offer protections for inventions with patent law, or it can protect plant varieties with Plant Varieties Certificate (PVC)[122], and it can nullify inappropriate patents. These fusion protections are found in the law 27811 of Peru, which combines several protection mechanisms like licenses, registers, competition law, trade secret and defensive protection principles.[123] A *sui generis* system of Costa Rica[124] suggests that TK can be protected even if it is not documented correctly, however in that case, the knowledge of the intellectual property office of the government about TK is necessary in order to enforce the protection. This system establishes a working relationship between the intellectual property office and local communities. So, it seems that a new *sui generis* mechanism can only be effective if it is based on the customary laws of indigenous people. By enacting the Biodiversity Act, Bangladesh has initiated its steps forward to craft a distinct system of law for the protection of genetic resources and biodiversity related TK.

5.4. Contractual Agreements

Contractual agreements,[125] containing especially the restrictions on the use of TK, are legally binding documents which regulate relationship between the society and the inventor.[126] Hence, contract-based agreements can be utilized as an additional apparatus to protect TK; agreements are also regarded as voluntary mechanism between the parties. Most importantly, these agreements include the duration of the agreement, patent specification, IP ownership, confidentiality clause and benefit sharing mechanism. National courts of Australia, New Zealand and South Africa

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[121] 'African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources' <https://www.wipo.int/edocs/lexdocs/laws/en/oau/oau001en.pdf> accessed 13 September 2020.

[122] Scott D Locke, 'Intellectual Property for the Botanist and the Plant Breeder: An Overview of Protection Afforded by Plant Patents and Plant Variety Protection Certificates' (2006) 6 *Chicago-Kent Journal of Intellectual Property* 198 (Plant Varieties Certificate is completely different than the plant patent).

[123] Muller Manuel Ruiz, 'The Legal Protection of Widely Shared and Dispersed Traditional Knowledge' in Daniel F Robinson, Ahmed Abdel-Latif, and Pedro Roffe (eds), *Protecting Traditional Knowledge* (Routledge 2017) 122, 123.

[124] Biodiversity Law 1998 (Costa Rica), art 82.

[125] For sample contractual agreements, see Michael A Gollin, 'Elements of Commercial Biodiversity Prospecting Agreements' in Sarah A Laird (ed), *Biodiversity and Traditional Knowledge: Equitable Partnerships in Practice* (Earthscan Publishing 2002) 310.

[126] Chidi Oguamanam, 'Beyond Theories: Intellectual Property Dynamics in the Global Knowledge Economy' (2009) 9 *Wake Forest Intellectual Property Law Journal* 104, 112.

have protected traditional knowledge through interpretations of contracts in many cases. Contractual agreements are commonly used to enforce 'benefit-sharing agreements' along with non-disclosure agreements which act as trade secrets. These contracts specifically clarify and elucidate the points of the utilization of the knowledge and specifics for benefit sharing. A notable example of this is the agreement between the San and Khoi communities and the Council for Scientific and Industrial Research (CSIR) of South Africa concerning the patents on the traditional use of the Hoodia plant.[127]

The most commonly used contractual agreements are (a) confidentiality or non-disclosure agreements, (b) exclusive license agreements, (c) non-exclusive licensing agreements, and (d) agreements for material transfer.[128] Among the limitations, there are some major deterrents in this mechanism like high transaction costs, disparity in bargaining powers between contracting parties and lack of legal expertise. So, the question, whether the contract modality is an equitable one or not, still remains unanswered, even though contract could be a very flexible instrument to protect TK.

6. Way Forward for Bangladesh

The advent of biotechnology and genetic engineering, protected by IP regime, entails new protection modalities for traditional knowledge. A single model, particularly a 'one size fits all' solution, cannot be applied in isolation to meet the concerning issues of TK. A multiplicity of diverse modalities, including IP and non-IP apparatuses, are essential for the protection and prevention of misuse of TK. Depending on the diverse legal and infrastructural capacities, Bangladesh should attempt to craft a comprehensive model for the protection of TK. The particular protection system should encompass a package of legal, non-legal, and voluntary mechanisms along with adaptations of existing IPRs.

To address this challenge, Bangladesh should initially categorize all kinds of TK within its geographical boundaries and should recognize the efforts and role of the relevant indigenous people from whom TK is derived. Consequently, the country's existing IP rights protection mechanism requires to be efficiently utilized with a focus to maintain an equilibrium between the adequate protection and promotion of the use of TK. However, in the longer term, the development of a *sui generis* law is needed for responding to the needs of indigenous communities. The government should act pro-actively to adopt a clear national policy to ensure the protection of TK, especially taking India as an example in this regard and the end result must be aimed at

[127] Roger Chennells, 'Traditional Knowledge and Benefit Sharing after the Nagoya Protocol: Three Cases from South Africa' (2013) 9 *Law Environment & Development Journal* 163, 169.

[128] Charles R McManis, 'Intellectual Property, Genetic Resources and Traditional Knowledge Protection: Thinking Globally, Acting Locally' (2003) 11 *Cardozo Journal of International & Comparative Law* 547, 559; see also, Hansen and Van Fleet (n 79) 31.

formulating an internationally acceptable regime that affords befitting protection to TK holders.

7. Conclusion

Given the current legal framework of Bangladesh, a single option or modality cannot comprehensively serve as an appropriate protection mechanism for TK. Since the existing IP regime is immensely inadequate to protect the interests of the TK holders, a *sui generis* full-fledged model should be established- based on the international instruments- to serve the purpose. This article shows that among the conventional IP instruments, patent can serve as a defensive protection mechanism by utilizing the notion of the prior art, whereas TK holders can collect royalties under the realm of copyright. However, both the instruments offer protection only for a certain period. In this regard, trademarks and trade secrets can be termed as effective tools to protect TK as they provide protection for an indefinite duration. Turning to the geographical indications, it provides for a perpetual protection as long as the traditional quality is maintained. Considering the downsides of classical IP tools, several other possible way-outs have also been suggested like the ABS mechanism, confidentiality agreements and the TKDL models. This article strongly recommends that the national laws concerning intellectual property and genetic resources should be amended to avoid the conflict between the *sui generis* law and the national legislation. In that way, both existing national laws and the new *sui generis* law can provide a realistic and appropriate dual framework for protecting the traditional knowledge *per se*.

The Scope of Statutory Protection on the Use of Identical or Confusingly Similar Names by Businesses in Bangladesh

Dr. Shima Zaman*

1. Introduction

The concomitant purpose of protection of consumers from various misleading or unfair practices and the protection of goodwill of businesses are among the cardinal objectives of corporate law. There is no doubt that exactly identical name between two commercial entities would confuse consumers. However, the law goes beyond this and frowns upon names which may not necessarily be identical, but confusingly similar and may thus, encroach on the goodwill of a business and also mislead the customers.[1] Thus, the reach of the legal restriction transcends beyond outright identical names and also applies to names which may cause deception of confusion. Otherwise, it would not only be deceit on consumers, but many unscrupulous would be able to unfairly profit by piggybacking on the reputation built by other businesses. Statutes on commercial law does this. In keeping with this trend, Section 11 of the *Companies Act* 1994 does the same (as did its predecessor *Companies Act 1913*) seeks to do this in the case of company names. This Section proscribes the use of an identical or deceptively similar name by two companies. This article would conduct an in-depth analysis of this Section and other relevant statutory provisions dealing with company names. It would also thoroughly analyse a decision of the Appellate Division of the Supreme Court (AD) in *Shafquat Haider & Ors v M. Al-Amin & Ano*.[2]

Shafquat Haider case presents a good case study on the problem that may sometimes arise with businesses operating on identical or confusingly similar names. If both of those entities in question happens to be incorporated business, Section 11 of the *Companies Act 1913 or Companies Act 1994* may provide ample remedies against any unfair use of the name of a company by another one. However, this article will demonstrate that Section 11 is only applicable to incorporated entities and also there is no specific law in Bangladesh offering protection against unfair

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1 For a comprehensive analysis of company name related disputes in other jurisdictions, see JB Cilliers, 'Similar Company Names: A Comparative Analysis and Suggested Approach - Part 2' (1999) 62 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)* 57; JB Cilliers, 'Similar Company Names: A Comparative Analysis and Suggested Approach - Part 1' (1998) 61 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)* 582; Thomas G. P. Guilbert, 'Corporate Names and Assumed Business Names: Deceptively Similar Creates a Likelihood of Confusion' (1983) 62 *Orlando Law Review* 151.

2 1991 11 BLD (HCD) 284, on appeal (1987) 7 BLD (AD) 130 [*Shafquat Haider v M. Al-Amin*].

competition per se.[3] Thus, potentially an action for passing off would seem to be the only viable remedy for affected business be that incorporated or unincorporated. However, this article would demonstrate that an action for passing off may not always offer ample protection. Hence, it recommends that there be some changes made in the *Companies Act 1994* along the lines of the relevant provisions in the *Companies Act 2006* of the United Kingdom and *Companies Act 2013* of India which may prove to be useful in giving adequate remedies to businesses.

The following parts of this article discuss the value of a company name and the rationale behind the protection of a company's name, the relevant provisions of the statute in force in Bangladesh. It also thoroughly analyses the relevant decision of the AD, and also examines some other relevant reported cases of home and abroad. It argues that while business operating for many others may be easily protected from the unscrupulous or deceitful appropriation of its name by other businesses, the relatively new entrants to the market may find it difficult to get a suitable remedy. More importantly, a statutory remedy may offer more clarity and certainty than that of action for passing off, a common law-based remedy. Furthermore, a statutory remedy which is enforceable by presenting an application to the Registrar of Joint Stock Companies (RJSC) may also be prompter and less costly. The readers of this article should note that a company's name may also give rise to issue with conflicting domain names, but that issue is beyond the scope of the paper.[4]

2. The Importance of and Rationale for Protection of Business Names

While the observation that "to the person going into business, name selection is usually dealt with after most of the other aspects of the enterprise have been considered and acted upon to a substantial extent"[5] may be true for some business, the choice of name for companies is by no means a peripheral task as it may have perennial legal as well as commercial consequences. Without a name, a company cannot be incorporated as a corporate actor. The business reality of the contemporary world makes the name of a company something so important that every business would vigorously seek to protect it. Naturally, just like human beings are known by their names, the name is essential to the very existence of a company; it is one of the

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[3] While there is the *Consumer Rights Protection Act 2009*, the scope of that legislation is rather narrow and it only applies to some sort of small-scale remedies offered to consumers affected by legal infractions of businesses. The various remedies a business may need against any practice by its competitors is not covered by this law. For a scholarly analysis of the Act, See Dr. Shima Zaman, 'Revisiting the Consumer Rights Protection Act, 2009' (2016) 27(2) *Dhaka University Law Journal* 1.

[4] See, Alan I. Cyrlin, 'Reducing a Company's Risk over Domain Name Disputes' (1999) 81 *Journal of the Patent and Trademark Office Society* 42; See also, Adam Chase, 'A Primer on Recent Domain Name Disputes' (1998) 3 *Virginia Journal of Law & Technology* 1; See more Neal J. Friedman & Kevin Siebert, 'The Name Is Not Always the Same' (1997) 20 *Seattle University Law Review* 631.

[5] John W. Ennis, 'Some Problems in Choosing a Commercial Name' (1954) 28 *Temple Law Quarterly* 123.

indispensable attributes of a company, and is the very way of identification.[6] Indeed, it is by its name that the company would seek to protect its legal identity notwithstanding the persistent changes in its membership, its charter, and various array of commercial activities.[7] Or perhaps, more appropriately, as pointed by a scholar that the name may be more important for a company than a natural person in that "[i]individuals may be identified by their physical peculiarities, but a corporation, which has been said to be 'intangible, invisible, and existing only in contemplation of law' is identified by its name."[8]

Just as human beings may fondly cherish interactions with other human beings, the same may also to some extent, apply to interactions with juristic entities such as companies. Even a casual customer may recall a fair deal received from a company and may remember the corporate name in case occasion again arises for purchasing the goods or services or patronising that same company in future occasions.[9] Thus, for a company the necessity for preserving and continuing to operate under one name may be like that of an individual who is persistently meeting new people who would know that individual by her/his name the consistency of which is important.[10] The prudent promoters of a company would naturally invest effort in choosing a name that will be able to attract the attention and that the consuming public will be able to remember it.[11] Indeed, it may be fairly said that by protecting the registered name of a company, the law in effect grants it a de facto monopoly of conducting corporate activity under the name so registered.[12]

Increased industrial and commercial activities coupled with technological advancement have resulted in an increase in the number of incorporated entities and have raised questions relating to the name of companies not raised hitherto.[13] Significant investment in advertising has made the stakes in the company name even higher, as has already been pointed out here that it is a crucial marketing factor in

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6 Cilliers (n 1) 582-583.

7 ibid.

8 B. A. Whitney, 'The Corporate Name' (1930) 2 *Corporate Practice Review* 43.

9 ibid 44.

10 ibid.

11 Lucian W. Beavers & William R. Laney, 'Choosing and Protecting the Corporate Name' (1977) 30 *Oklahoma Law Review* 507.

12 See also Hambidge, 'A Tale of Two Names: The Protection of a Company Name with Specific Reference to the Companies Amendment Act 18 of 1990' (1990) 2 *South African Mercantile Law Journal* 333.

13 Cilliers (n 1). However, it would be rather simplistic to assume that the concern of the protection of businesses from the deceptive use of names is only a contemporary concern. While modern technologies and importance of advertisement may have made the stakes higher, it would seem that businesses for a very long period of time clearly realised the value of protecting their names because of its close association with goodwill. For early expositions of this matter, see for example, W. W Putnam, 'Unfair Competition by the Deceptive Use of One's Own Name'(1898-1899) 12 *Harvard Law Review* 243; 'Corporations - Right to Corporate Name' (1908) *Canadian Law Times*, 28(8) 641.

gaining familiarity among prospective customers.[14] The name of a company is not only a matter of distinctiveness and legality but also of appealing to customers or performance in search engines etc. A study has even concluded that companies with names that are easier to pronounce may outdo companies with difficult to- pronounce names in the early days of trading.[15] The name of a company may also be directly linked with its profit as it may be associated with its performance in internet search engines. This has given rise to a practice that companies may seek particularly imaginative names to increase the likelihood that their sites will top the search results.[16] Given the use of online search engines in the day to day urban life of people in advanced economies such an investment would be clearly rational therein, and it may also be so in an economically developing country like Bangladesh.[17]

More often than not a successful business enterprise would acquire so much commercial goodwill[18] in respect of its products or services that members of the public and consumers would associate with the company name so that a company name has become a more and more valuable asset in itself.[19] Any laxity in choosing an appropriate name for a company may bring about catastrophic results for the company it as its chosen name may then infringe someone else's trade name or mark.[20] After investing much time and money in establishing the goodwill and notoriety of the chosen name, the company may be required to abandon the name that

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[14] ibid. See also, Laura A. Heymann, 'A Name I Call Myself: Creativity and Naming' (2012) 2 *University of California Irvine Law Review* 585, 594, citing James Gleick, 'Get Out of My Namespace' (*New York Times*, 21 March 2004) § 6, at 44 noting that often pharmaceutical companies would spend millions on market research to make sure that their names become appealing.

[15] ibid, Heymann, citing Adam L. Alter & Daniel M. Oppenheimer, *Predicting Short-Term Stock Fluctuations by Using Processing Fluency,* (2006) 103 Proceedings of National Academy of Sciences 9369, 9371.

[16] ibid, citing Seth Godin, 'The New Rules of Naming' (*Seth Godin's Blog*, 16 October 2005) < https://seths.blog/2005/10/the_new_rules_o/ > accessed 20 November 2020.

[17] As per the data of Bangladesh Telecommunication Regulatory Commission, the telecommunications regulator in Bangladesh, as of June 20202, there were more than 100 million internet subscribers in Bangladesh, see 'Number of Internet Users Crosses 103 Million in Bangladesh' *The Financial Express* (Online, 7 August 2020) <https://thefinancialexpress.com.bd/trade/number-of-internet-users-crosses-103-million-in-bangladesh-1596786757> accessed 16 October 2020. Thus, it would seem that at least more than half of the population have an active internet connection. This number of people with internet access, concomitant with a tendency of online shopping, it is possible that online presence would be a critical factor for many businesses in Bangladesh in the near future, if it already has not become so. However, a caveat has to be that the number of internet subscriptions in and of itself does not offer an unequivocal picture about the time spent on the internet, let alone any usage of such internet connections for accessing goods and services offered by businesses.

[18] Lord MacNaghten in *The Commissioners of Inland Revenue v Muller & Co's Margerine Ltd* [1901] 1 AC 217, 223-224, has defined goodwill eloquently in the following words: "It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of a good name, reputation, and connection of a business . . . It is the one thing which distinguishes an old established business from a new business at its first start."

[19] ibid.

[20] Beavers & Laney (n 11).

it has already chosen, advertised, and functioned upon.[21] While there seems to be no precedent for this in Bangladesh, in other jurisdictions, not just the company itself, but also corporate officers have been liable in damages as joint tort feasors in the violation of the trademark rights of others by choosing names impinging on the property right of the plaintiffs.[22] Thus, it is incumbent on the promoters to resort to due diligence in choosing an appropriate name for their proposed company.

3. The Statutory Provisions on Company and Partnership Names

Before moving on to discuss the facts of the case or analyse the decision of the AD, it may be useful to analyse the relevant provision of the *Companies Act 1913* and its successor, the *Companies Act 1994*. Section 11 of both of these laws deal with name of companies. Section 11(1) of the *Companies Act 1913* provided (as does the *Companies Act 1994*) that a company would not be registered by a name identical with that by which a company in existence is already registered, or so nearly resembling the name that there is a likelihood of using the name to deceive, unless the company in existence is in the course of being dissolved and it signifies its written consent to such use.

Section 11(2) provided that if a company, through inadvertence or otherwise, is, without the consent as referred to in sub-section (1), gets registered by a name identical with that by which a company in existence is previously registered, or so nearly resembling the name that there is a likelihood of using the name to deceive, the first mentioned company would, on the direction of the Registrar, change its name within a period of one hundred and twenty days. Under the current law, if it does not do so, the company and its responsible officials would be liable to pay a fine.[23] However, under the *Companies Act 1913*, no corresponding provision existed. It is important to note here that the onus is on the applicant for the registration of a new company, i.e., the promoters to ensure that the name for their proposed company does not match with the name of any existing company. Under the current Companies statute in force, upon the payment of a nominal fee, the Office of the RJSC provides a name searching service as is required by Section 11(9). The provision requires that the RJSC would advise the applicant within a month of the application. However, it would appear from the wording used in the Section that such a search by the RJSC would only be limited to the similarity with the name of companies already registered. The search would have nothing to do with any similarity of name with other forms of businesses nor any trade mark associated with an incorporated or unincorporated entity.

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21 ibid.

22 ibid.

23 Companies Act 1994 (Bangladesh), s 11(3). Section 11 of the Companies Act 1913 did not have any corresponding provision.

Furthermore, Section 11(5) of the *Companies Act 1994* stipulates that no company would be registered by a name containing in any form the name or any abbreviation of the name of the United Nations or of any subsidiary body set up by the UN or of the World Health Organisation unless the company has obtained the previous written authorisation of the Secretary General or Director General of the respective organisation. Apart from the *Companies Act 1994*, Sections 3 to 7 of the *Bangladesh Names and Emblems (Prevention of Unauthorised Use) Order 1972* also enshrines certain restriction on company names that may deceive consumers. In particular, Section 3(1) provides that none authority would register a company or firm or other body of persons which bears a name, or any abbreviation of a name which are specified in the Schedule.[24] The focus of this law is the protection of the public from deception than the protection of goodwill of any particular business entity. Restrictions along the line of this latter set of provisions designed to protect public and the misleading use of the Government, Bangabandhu, and UN, WHO, and other international organizations also exist in Sections 58(3), 58(3)A, 58(3)B of the *Partnership Act 1932*.[25]

4. The Facts of the Case

Mr. M. Al-Amin and his mother, Dr. Jahan Ara Begum, were owners of fifty percent shares and are two, out of four Directors of Ciproco Computers Limited, which was registered in June 1985. They filed an application for winding up of the Company essentially claiming that there is a deadlock in the Company arising from the difference of opinion among the two competing groups of shareholders each holding 50 per cent shares in the Company.[26] Mr. Sahfquat Haider, and his wife, the opposite parties, were also owners of fifty per cent shares in the Company, and the remaining two directors of the Company, were. Mr. Al-Amin was the chairperson of the board of directors and Mr. Haider was the managing director. The Company was engaged in import, sale and servicing of computer machines of various kinds which were manufactured by reputed foreign businesses.[27] For some time following the incorporation, the Company was doing business in computer machinery smoothly, but then the relationship between the petitioners and the opposite parties crumbled.[28] Hence, Mr. Al. Amin and his mother, filed an application under Section 162 of the

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[24] The schedule includes the Bangladesh flag; official seal, insignia or coat-of-arms of the Government of the People's Republic of Bangladesh; or official seal, insignia or coat-of-arms of the any Ministry of the Government of the People's Republic of Bangladesh; the name, title or semblance or any variation of Bangabandhu; or the name of a foreign state.

[25] Thus, it is apparent these provisions are not enacted for protecting the name of a partnership as such, rather for achieving certain public purposes.

[26] *Shafquat Haider v M. Al-Amin* (n 2), para 1.

[27] ibid, para 2.

[28] ibid.

Companies Act 1913 for winding up of the company alleging deadlock in its affairs due to the dispute between the two factions of the directors.[29]

Following the winding up petition, the opposite parties in the winding up proceeding and appellants in the case before the AD filed an application for temporary injunction praying that the respondents be restrained from carrying on a business in the name of Ciproco Computers.[30] They alleged that the respondents even requested Company's customers to cancel their existing orders with the Company and issue new orders to Ciproco Computers as opposed to Ciproco Computers Ltd as they pretended the former was going to take the place of the latter.[31] They claimed that as the winding up petition was pending before the HCD, such a practice was an unfair effort to entice away the customers of the Company to his personal business at the detriment of the company.[32]

The respondents claimed that the Ciproco Computers was actually in existence since 1981, well before the Ciproco Computers Ltd was incorporated and started its operation well ahead of the Ciproco Computers Ltd.[33] Mr. Al Amin, the respondent no.1 claimed that he was the promoter of Ciproco Computers Ltd and he invited Mr. Shafqat Haider as to join the Company and made him the managing director. He also showed that he had a trade mark registration in January 1984 under the *Trade Marks Act 1940* with the words 'Ciproco Computers' in favour of his separate private business.[34] Respondent no. 1, Mr. Al-Amin contented that he revealed in a board meeting of Ciproco Computers Ltd. that he would resume his personal business and the trade license was a mere formality as already was the proprietor of the registered trade mark 'Ciproco'.[35]

However, the AD noted that there was evidence of the activities of the business of the respondent between 1981 and 1983. However, there was no evidence presented to it indicating that respondent no.1 carried on his personal business, that is Ciproco

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29 It may be pertinent to mentioned that the High Court Division of the Supreme Court ultimately rejected the winding up petition alleging that the application of the petitioner was not justified, see *M. Al Amin and another v Shafquat Haider and another* (1991) 11 BLD (HCD) 284. However, it may be argued that in view of the deadlock between the two factions of shareholders and directors, winding up could potentially have been a remedy in the case. For instance, in *Bengal Waterways Ltd. v Rahimuddin Ahmed*, (1982) 34 DLR (AD) 47, it was decided by the Appellate Division that although deadlock in the affairs of the company is not mentioned as a ground for winding up of a company, the Court may do so if it deems that such an order would be just and equitable. The Court [at para 22, also observed that "it is a well-settled principle that a private limited company can, if circumstances so permit, be wound up on the principle of dissolution of partnership firm."

30 *Shafquat Haider v M. Al-Amin* (n 2), para 3.

31 ibid.

32 ibid.

33 ibid, para 4.

34 ibid.

35 ibid.

Computers after the incorporation of the Company.[36] In other words, in the period intervening the incorporation of Ciproco Computers Ltd and the disagreement between the two factions, no evidence of business activity of the business 'Ciproco Computers' was presented to the Court. Thus, the Court found that Ciproco Computers was trying to unfairly gain from the goodwill of Ciproco Computers Ltd. This was all the more evident to the AD from the fact that Ciproco Computers obtained trade license only on 28 May 1986, only around two weeks before the commencement of the winding up proceedings. The Court discussed a number of Indian and English cases and observed that when there were similarities between the name of companies, courts have in some cases ordered injunction, and in some others, the courts have refused to do so.[37] The Court observed that the demarcation line in those cases was "whether the similarity of name or mark was such as to create confusion or deceive the public."[38] And applying that test, the AD had no difficulty in arriving at the conclusion that there was not only a similarity in the name of the two enterprises but also a strong likelihood of confusion among the consumers.[39]

The AD also rightly found that the action of the respondent, was, in fact, deceptive. Therefore, the AD upheld the application for injunction and ordered that respondent No. 1 to restrain from using the trade name "Ciproco Computers" till the High Court Division (HCD) decides the winding up petition. But the AD refrained from passing any order on respondent No. 1 performing his duties as the Chairperson of Ciproco Computers Ltd possibly because that was more to do with the winding up proceedings pending before the HCD and had no direct bearing in the case at hand where the core issue was the promotion of his personal business at the expense of the Company.

5. Analysis of the Decision of the Appellate Division and the Scope for Amending the *Companies Act*

Based on the decision of the AD in this case, it may be said that the statutory restraint on using an identical or confusingly similar name as provided for in Section 11 of the *Companies Act* may not only always be limited to other incorporated entities but in appropriate cases may well be also applicable to unincorporated business entities particularly when there is a deceptive practice by someone. At least, in this case, the Court though referred to Section 11 of the *Companies Act* 1913 it clearly did not find itself to be constrained by the express wordings in the Section. Indeed, Section 11 of neither the *Companies Act 1913* nor the *Companies Act 1994* says anything about the similarity of names between corporate and unincorporated entities. It is interesting to

[36] ibid, para 5.
[37] ibid, paras 6-9.
[38] ibid, para 10.
[39] ibid.

note that the HCD took a very narrow and literal view of the matter.[40] Obviously, due to the distinct characteristics of a partnership and a company, the finding of the HCD is legally tenable. It is well-known that when a sole ownership business or a partnership business is transformed into a body corporate, its legal character (if not always the factual character) completely changes.[41]

However, it would be respectfully submitted that the HCD's technical reading has ignored the commercial reality. The HCD could, and it would be argued here should have considered the reality of the relevant market. Had the relevant market i.e. the market of computer and its accessories were limited to persons with expertise in law and/ commerce, the technical legal difference between a corporate and unincorporated business would have been apparent to customers which would have dispelled any potential confusion (even though the unfairness of a party to the Company doing personal business in competition with that of the Company could arguably be an issue).[42] It is dubious that few if at all any of the customers of Ciproco Computers would have noticed let alone appreciated the difference between Ciproco Computers Ltd, a private company and Ciproco Computers, an unincorporated

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40 ibid.

41 This point is eloquently made by Lord Macnaghten in *Salomon v. Salomon & Co. Ltd.* [1897]' AC 22, 51:

> The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.

42 The issue of unfairness may be exemplified by reference to the decision *Sidebottom* v *Kershaw, Leese & Co* [1920] 1 Ch 154 (CA) .In that case, a private company in which majority of the shares were owned by the directrs, the articles of association was altered empowering directors to commpel any shareholder with a competing business to transfer his shares at their respective fair value to nominees of the directors. *Sidebottom*, a minority shareholder with a competing business, sued for a declaration invalidaiting the special resolution altering the memorandum of association. His claim failed as Lord Sterndale MR, at 165-166 explained the rationality of the alteration in the following words:

> In my opinion, the whole of this case comes down to rather a narrow question of fact, which is this: When the directors of this company introduced this alteration giving power to buy up the shares of members who were in competing businesses did they do it *bona fide* for the benefit of the company or not? It seems to me quite clear that it may be very much to the benefit of the company to get rid of members who are in competing businesses. … [L]ooking at it broadly, I cannot have any doubt that in a small private company like this the exclusion of members who are carrying on competing businesses may very well be of great benefit to the company. That seems to me to be precisely a point which ought to be decided by the voices of the business men who understand the business and understand the nature of competition, and whether such a position is or is not for the benefit of the company. I think, looking at the alteration broadly, that it is for the benefit of the company that they should not be obliged to have amongst them as members persons who are competing with them in business, and who may get knowledge from their membership which would enable them to compete better.

partnership.[43] It is quite probable that all that would have mattered to the average customers dealing with the Ciproco Computers is the words 'Ciproco Computers'.[44]

It would appear that in the present case, there was solid evidence of unfair conduct on the part of the respondents and also that they were obviously associated with the appellant company and it would seem that these factors have influenced the AD's ultimate finding in the case.[45] Let us assume that in a future case, where some persons related to an unincorporated entity uses names similar to that of a company with which they have no formal or informal link, technically by doing this, they would not violate any provision of the *Companies Act* or the *Partnership Act 1932*. As apparently, the name search function of the RJSC would only be limited to the search of the identical or deceptively similar name of existing corporate entities, it is logical to deduce that it would be unable to identify any overlap at that stage. It is unknown how the Court would resolve such a case.[46] Obviously, an action for passing off may be an option for proceeding against the unfair practice of the unincorporated business.[47] The tort of passing off would afford a remedy against any deceptive invasion of a property interest in the goodwill of a business, which may injured by the misrepresentation on the part of another person that the latter's good or services are the goods or services of the first person.[48]

Suffice to say that passing off being a common law remedy, the *Trade Marks Act 2009*[49] or other relevant statutory laws in force in Bangladesh does not mention the prerequisites for bringing an action for passing off.[50] For instance, in *Ewing v Buttercup Margarine Co Ltd*, the petitioner company which was carrying on business with the trade name of the Buttercup Dairy Company, was held by the English Court to be entitled to obtain an injunction for preventing a newly registered company from conducting business under the name of Buttercup Margarine Co, as the Court opined that the consumers could reasonably perceive that newly registered company was associated with the business of the petitioner.[51] However, the same restriction would not apply when the name is too descriptive or is used as a common word, as Aerators Ltd v Tollitt, the suit of a company named Aerators Ltd, against another company Automatic Aerators Patents Ltd, as the English Court held that 'Aerator' was a too

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43 Md. Rizwanul Islam, 'Use of Similar Names by Companies' *The Daily Star* (Online, 23 December 2014) <http://www.thedailystar.net/use-of-similar-names-by-companies-56593> accessed 1 October 2020.

44 ibid.

45 ibid.

46 ibid.

47 ibid.

48 Gail Evans, 'Passing off' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press, 2008) 874.

49 Act No. 19 of 2009.

50 Md. Rizwanul Islam, 'Bangladesh' in Hendrik Vanhees (ed), *International Encyclopedia of Laws: Intellectual Property* (last updated version, Kluwer Law International 2020) 79.

51 [1917] 2 Ch 1.

common word which could not be monopolized by a particular company.[52] However, when the descriptive name assumes a secondary name as distinct from the ordinary meaning of the word/s or the descriptive word is accompanied by various other features, it would be eligible for protection.[53]

Such a presumption of confusion may not operate when the business of the two parties are in totally unrelated areas.[54] However, suffice to say that although passing off is an alternative remedy, in an action for passing off, the plaintiff business would be compelled to satisfy a higher threshold than that of a statutory action for infringement. This is because that it is relatively well-known that there are three pre-conditions for succeeding in an action of passing off, namely: (1) the petitioner must establish that its business enjoys sufficient goodwill (2) the defendant is liable for misrepresentation in the course of business to customers or potential customers about the relevant good/s or service/s which would likely deceive the latter that the defendant's good/s or service/s are actually that of the plaintiff's, and (3) the misrepresentation is actually occasioning loss actual loss to the plaintiff's business or would likely to do son.[55] While the first and third elements may be provable by any business, the existence of goodwill may prove to be a thorny issue for most new businesses. Having said that, it is well-established that the registration of a company name, in and of itself, cannot give unqualified right to use that name and the company may still be answerable in action for passing off.[56]

Let us assume, a hypothetical scenario that the appellant and respondents in the Ciproco Computer Case were unrelated to each other. Let us further assume that Ciproco Computers started its business earlier and then Ciproco Computers Ltd was incorporated and both of these two entities have been concurrently in operation. Then Ciproco Computer as the prior in business sues Ciproco Computers Ltd for passing off. It is possible that if they are operating for the nearly same length of time, then both of the two may have some degree of goodwill. In this case of potentially concurrent use of similar name, instead of ordering an injunction in favour of one of the businesses, the Court may order the successor in time to use the name with a caveat that it uses This firm has no connection with the original firm Ciproco. Although the modification of name as envisaged in the case of a confusing name is an

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52 [1902] 2 Ch 319.

53 *Deputy Registrar, Trademarks, Chittagong v. M/S. Popular Polish House* (1969) 21 DLR (SC) 114.

54 *Dunlop Pneumatic Tyre Co Ltd v Dunlop Motor Co Ltd* [1907] AC 430. But the presumption would not be dispelled when the goods are not identical but somewhat related, for example in Long's Hat Stores Corporation v. Long's Clothes, Inc., New York Supreme Court, Appellate Division, 231 N. Y. Supp. 107, Long's Hat Stores Corporation could obtain an injunction against Long's Clothes, Inc., reproduced in 'Corporation Entitled to Enjoin Use of Name Similar to Its Corporate Name' (1929) 13 *Business Law Journal* 298.

55 Evans (n 48).

56 Wim Alberts, 'The Right to Use a Registered Trade Mark or Company Name' (2006) 14 *Juta's Business Law* 110, 112.

alternative, if the second business has invested enough money in its marketing, this concurrent use with caveat could be an option.

Another option could have been to give the right to third parties to challenge the impending registration of a company on the ground the registration of a company under a proposed name would be undesirable. On a cursory reading Section 11(4) of the *Companies Act 1994* it may appear that under the existing provision, there is a scope for this. However, indeed that Section only confers on the Government a right to declare by notification in the Public Gazette that no company would be registered in names which have been declared as undesirable. The objective of Section 11(4) is clearly that of the protection of public benefit. This is by no means a right conferred upon a private party. If third parties could challenge the proposed registration of a name or apply for its change on the ground that it impinges upon its reputation, that could afford an opportunity to any well-established unincorporated entities to challenge the registration of a company name. A model for this exists in Section 69 of the *Companies Act 2006* of the United Kingdom. Section 69(1) states that a "person … may object to a company's registered name on the ground that it is the same as a name associated with the applicant in which he has goodwill, or (b) that it is sufficiently similar to such a name that its use in the United Kingdom would be likely to mislead by suggesting a connection between the company and the applicant." Objections of this nature has to be presented to a Company Names Adjudicators who are appointed by the Secretary of State.[57] The persons appointed need to possess legal or other experience which in the Secretary of State's opinion render them suitable for appointment.[58]

Clearly, the scope of this provision is much broader than the corresponding provision in Section 11 of the Companies Act 1994 as in force in Bangladesh, as the latter only applies to the similarity in name between two companies, but the former has no such limitation. If an objector to a name proposed for a company can prove either of the elements of Section 69(1), the company must prove that:

(a) that the name was registered before the commencement of the activities on which the applicant relies to show goodwill; or

(b) that the company—

  (i) is operating under the name, or

  (ii) is proposing to do so and has incurred substantial start-up costs in preparation, or

  (iii) was formerly operating under the name and is now dormant; or

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[57] Companies Act 2006 (the United Kingdom) ss 69, 70.

[58] ibid, s 70(1).

(c) that the name was registered in the ordinary course of a company formation business and the company is available for sale to the applicant on the standard terms of that business; or

(d) that the name was adopted in good faith; or

(e) that the interests of the applicant are not adversely affected to any significant extent.[59]

The registration of a company name may also come in conflict with the owners of a prior registered trade mark owned either by a company or unincorporated entity. This is because there may also be the owners of a trade mark with whose trade mark, the name of a company is confusingly similar. Currently, the Companies Act 1994 does not contain any provision in this regard. However, the Indian *Companies Act 2013* provides a provision which may serve as a model for the Companies Act 1994. Section 16(1)(b) of the *Companies Act 2013* of India provides:

On an application by a registered proprietor of a trade mark that the name is identical with or too nearly resembles to a registered trade mark of such proprietor under the Trade Marks Act, 1999, made to the Central Government within three years of incorporation or registration or change of name of the company, whether under this Act or any previous company law, in the opinion of the Central Government, is identical with or too nearly resembles to an existing trade mark, it may direct the company to change its name and the company shall change its name or new name, as the case may be, within a period of three months from the issue of such direction, after adopting an ordinary resolution for the purpose.[60]

While such an unincorporated entity who is affected by the clash with its trade mark may always bring an action for passing off, the challenge to registration being an administrative remedy before the RJSC would seem to be much less costly and expeditious. It would be submitted that should the Parliament make any changes to the existing law giving the third parties an option to challenge the registration of a name, instead of creating a new class of persons such as the Company Names Adjudicator in the United Kingdom, the RSJC could be vested with this function.

6. Conclusion

As the economy of Bangladesh progresses, it is likely that the investment would increase and the number of both incorporated and unincorporated business would also increase. In a similar vein, the number of registered trademarks is also likely to increase in Bangladesh. Thus, it is possible that the confusing similarity between the names of a company and an unincorporated business or between a corporate name

[59] Companies Act, 2006 (the United Kingdom), s 69(4).
[60] Companies Act 2013 (India), s 16(1)(b).

and registered trade mark would give rise contentious situations. The analysis of this article would clearly connote that neither Section 11 nor any other provision in the Companies Act would likely be applicable to resolve such a conflicting situation. It would be interesting to notice how in future the Supreme Court handles a situation in like what happened in *Ciproco Computers*. All that can be said is that a strictly literal reading by courts as was done by the HCD in the current case may help unscrupulous businesses to gain an unfair advantage over those businesses who might have gained popularity among consumers.

While an action for passing off may offer some remedies in many cases, due do the relatively stringent requirements of succeeding in an action for passing off; some businesses may not be able to succeed in an action for passing off. In other words, the parties who are relatively newcomers in the market may struggle to succeed in the alternative course of action of passing off. That being said, in practice, the very fact that the defendant has tried to pass off his goods as that of the plaintiff would in itself may be presumptuous to imply that the plaintiff has a goodwill in the relevant market. When both the plaintiff and the defendant would deal in identical goods, that presumption may be stronger, but when they would deal in unrelated goods or services, the presumption may be weaker. Thus, in the latter case, the evidentiary threshold of deception or likely confusion among consumers would be much higher. However, as can be gleaned from the decision of the HCD in *Ciproco Computers* that the outcome of an action in absence of an explicit statutory remedy is uncertain. Hence, it would be argued here that amendment to the *Companies Act 1994* along the lines of Section 69 of the *Companies Act 2006* of the United Kingdom and Section 16 *Companies Act 2013* of India could offer a much more direct and predictable outcome. Not only that, but amendments of this nature could also be more affordable than a protracted court battle.

A Gentle Breeze on the Wheels of Fair Justice for Women in Bangladesh: An Empirical Evaluation of Family Courts' Mediation Underpinning Rawls' Theory of Justice

Dr. Jamila A. Chowdhury[*] and Ifat Mubina Eusuf[**]

1. Introduction

In contemporary literature, it is often applauded that increased practice of mediation is improving access to justice for the disadvantaged or poor by shrinking their *'social exclusion'* to access to justice. In its narrower sense, access to justice means access to the formal adjudicative process in the court system or access to litigation[1]. Therefore, the doctrine of *'social exclusion'* echoes *'limited access to the full range of social citizenship rights, which precludes the poor from exercise of such rights'* from the formal adjudicative process[2]. In its broader sense, however, access to justice includes justice delivered to *'all'*, especially the poor, through both formal adjudicative and informal non-adjudicative process[3]. Hence, in its broader sense, the increased practice of mediation has potentials to improve access to justice for the disadvantaged, especially for the poor women in Bangladesh. Family mediation in Bangladesh is often acclaimed for providing low-cost, quick access to justice for poor women who would otherwise be deprived of a mechanism to resolve their post-separation disputes. It has been contended that *'the caravan of judicial justice provides first-class seats and that of mediation justice only economy class'*.[4]

Further, it is also argued by scholars in Western liberal democracies that because of power disparities and family violence, even women from well-off families may lack the ability to negotiate effectively during mediation and therefore may fail to attain fair outcomes. Thus, mere boosting up the accessibility of justice through mediation does not necessarily ensure that mediated outcomes are fair and equitable.

Consequently, to substantiate the validity or invalidity of this claim, the present paper firstly operationalized the notion of 'fair' justice. Then the next part introduced some significant issues, including the procedural and distributive variation of fairness and their relative importance in providing justice. This part further elaborated how

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1 AG-AGD, *A strategic framework for access to justice in the federal civil justice system* (Australian-Government Attorney General's Department 2009).

2 Hilary Sommerlad, 'Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid' (2004) 31(3) *Journal of Law and Society* 345, 349.

3 Michael Zander and Hamlyn Trust, *The Hamlyn Lectures: The State of Justice*, (Sweet & Maxwell 2000); See also, AG-AGD (n 1).

4 Laurence Boulle, *Mediation: Principles, Process, Practice* (Butterworths 1996) 55.

legal provisions could be used as a benchmark in this process. While analyzing the fair justice criteria, the empirical data were collected from *all* three family courts of Dhaka for the last five years from 2015 to 2019.

By examining the empirical data on outcomes of family courts through trial vis-à-vis mediation, this paper indicated the volatility of mediated outcome over the last five years (2015-2019) in different family courts of Dhaka raised a concern on the fairness of justice through mediation. To emphasize the importance of this fairness issue, this paper allied with the procedural leverage by the mediator that poor and vulnerable women may get through the practice of normative evaluative mediation. If such practice is equally and effectively applicable in family courts in Bangladesh, the notion of the Constitutional mandate of positive discrimination will also be promoted. In the later part of this paper, a theoretical basis for providing procedural leverage through evaluative mediation in family courts are established under the *difference principle* or Rawls' second principle of justice.

Although Rawls' theory constitutes a core of the argument placed in this paper, it is not a widely used theory in the field of mediation. Hence, the context in family courts and its linkage with some operational criteria on the fairness of justice are discussed first to clarify the perspective, instead of perplexing the readers by introducing weighty theoretical issues ahead. After that, training on normative evaluative mediation and accreditation for mediators are suggested to institutionalize the fair mediation practices in Bangladesh in its conclusion.

2. Operationalizing the Criteria of 'Fair' Justice: Setting the Benchmark for Evaluation

Scholars have defined *'justice'* positively from two different viewpoints, i.e. *'availability'* and '*accessibility'*.[5] Accessible justice should not only be speedy, *'but above all things, [it should be] cheap'* as well.[6] Criteria for accessible justice are those which *'make justice easier to access, simpler to comprehend, quicker to deliver, and more certain'.*[7] However, justice, in general, has another inherent normative meaning of being *'fair'*. Fairness is a criterion that does not discriminate between two persons based on their colour, sex, race, educational attainment, economic status or any other aspect of their life. Therefore, while operationalizing access to fair justice in the context of family mediation in Bangladesh, this paper perceived justice of two folds:

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5 Hans Kelsen, *What is Justice?* (The Law book Exchange 2000).

6 Willard Estey, 'The Changing Role of the Kudiciary' (1985) 59 *Law Institute Journal;* 1076.

7 Roslyn Atkinson, 'Access to Justice: Rhetoric or Reality' (Australian Law Reform Agencies Conference, Wellington, April 2004) 6; See also, Wilfried Scha'rf(ed), *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice System* (Penal Reform International, November 2000).

- ***Firstly***, the positive view to ensure that people have *'physical access'* to the available justice delivery system,[8] such as court, tribunal, or any other informal forums delivering justice; and
- ***Secondly***, the normative view, to ensure that the *'justice delivery system'* (i.e. procedure) accessed by people is providing a fair justice[9] for all. If the justice delivery system is not fair, mere physical access to court, tribunal, or any other justice mechanisms may not ensure access to *'quality'* justice.

Hence, there are two contesting views regarding the fairness of justice. While many scholars are concerned about *'procedural'* fairness or fairness in the grievance handling process[10], others are concerned about the *'quality'* of the outcome[11]. Those who support procedural fairness argue that fairness in grievance handling process leads to greater satisfaction of the aggrieved person and also a fair outcome. Nevertheless, supporters of the later view show their concerns that a fair process may not end up with a fair outcome[12] . All these different views on access to fair justice have been categorically compiled by Lord Woolf[13] in his '*General principles to access to justice'*. As advised by Lord Woolf, to ensure access to fair justice in a civil justice system, the system should be just in its outcome; it should be fair by ensuring that litigants have an equal opportunity regardless of their resources to assert or defend their legal rights. Under a 'fair' justice system, every litigant has an adequate opportunity to state his own case and answer to his opponent's. The system should deal with cases with reasonable speed and should be understandable to those who use it. It should provide as much certainty as the nature of the particular case allows and involves procedures and cost proportionate to the nature of the case.

The following sections will unfold and examine all these criteria of *'accessible'* and *'fair'* justice and then critically analyze the extent to access to fair justice for women through mediation under family courts of Bangladesh.

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8 AG-AGD (n 1).

9 Boulle (n 4).

10 Jean Landis and Lynne Goodstein, 'When is Justice Fair? An Integrated Approach to the Outcome versus Procedure Debate' (1986) 11(4) *American Bar Foundation Research Journal* 675; Tom Tyler, 'What is Procedural Justice? Criteria used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 (1) *Law and Society Review* 103; Terry Carney, 'Client Assessment of Victoria's Guardianship and Administration Board' (1989) 15 (3&4) *Monash University Law Review* 229.

11 Tom Beauchamp, 'Distributional Justice and the Difference Principle' in H Gene Blocker and Elizabeth Smith (eds), *John Rawls' Theory of Social Justice: An Introduction* (Ohio University Press 1980) 5; See also, Robert Buttram, Blair Sheppard and Robert Folger, 'Equity, Equality and Need: Three Faces of Social Justice' in Barbara Bunker and Jeffrey Rubin (eds), *Conflict, Cooperation, and Justice: Essays Inspired by the Work of Morton Deutsch* (Jossey-Bass 1995).

12 Carrie Menkel-Meadow, 'Pursuing Settlement in Adversary Culture: A Tale of Innovation Co-opted or the Law of ADR' (1991) 19(1) *Florida State University Law Review* 1.

13 Harry Woolf, *Access to Justice Interim Report to the Lord Chancellor on the Civil Justice System* (Bernan Assoc 1995).

3. Measuring Access to 'Fair' Justice: Procedural Justice vs Distributive Justice

As mentioned above, scholars have a clear distinction when they come to the question of whether a dispute resolution system can ensure fair justice to its recipients. In many cases, scholars examine the fairness of a process or measure *'procedural justice'* to comment on the overall fairness of justice.[14] Other scholars emphasize *'distributive justice'* because a fair process may not ensure fair outcomes, and participants of a dispute resolution process may not be happy with the outcome – even when they acknowledge positive aspects of the process.[15] As explained later in this paper, justice is defined as the state of affairs when a *'person has been given what he [or she] is due or owed and therefore has been given what he [or she] deserves or can legitimately claim'*.[16] Following this argument, this part will discuss the notions of procedural and distributive justice.

3.1 Procedural justice

As mentioned earlier, while determining the fairness of a legal system, many scholars have emphasized the procedural justice or fairness of the process through which a decision has been made. As observed by Tyler, four essential criteria that make a dispute resolution process fair are *'consistency, accuracy, bias suppression and representation'*.[17] It is argued that a fair process leads to a fair outcome.[18] Thibaut and Walker, for the first time, indicated two essential factors — *'process control'* and '*decision control'* — against which we may measure the fairness of a justice system.[19] While *'decision control'* means the ability of parties to influence the outcome of a dispute resolution process, *'process control'* refers to the influence an individual has on the process through which a decision has been settled upon.[20] Scholars sometimes put more emphasis on participation (representation, as termed by Tyler) as the key to attaining a fair outcome and raising the voices of participants in the dispute resolution process.[21] Other scholars, however, state that parties may not

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14 Tyler (n 10); Carney (n 10).

15 Karen Cook and Karen Hegtvedt, 'Distributive justice, equity, and equality' **(**1983**)** 19 *Annual Review of Sociology* 217; See more, John Cooley, *Mediation Advocacy* (2nd edn, NITA 2002); See also, Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (2nd edn, LexisNexis Butterworths 2002).

16 Beauchamp (n 11).

17 Tyler (n 10) 105.

18 Landis and Goodstein (n 10); Tyler (n 10); Carney (n 10).

19 Thibaut and Walker, cited in Tyler (n 10) 104.

20 Laura Klaming and Ivo Giesen, 'Access to Justice: The Quality of the Procedure' (2008) *TISCO Working Paper Series on Civil Law and Conflict Resolution Systems* 002/2008<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091105> accessed 10 September 2020.

21 John Konley and William O'Barr, *Just Words: Law, Language, and Power* (2nd edn, University of Chicago Press 2005).

be satisfied with the outcome attained, even when they admit that the dispute resolution process is fair.[22]

3.2 Distributive justice

Distributive *'principles function to divide given collections of benefits and burdens to known individuals when there is such a collection to be divided'*.[23]The principles of distributive justice are usually evaluated under three competing criteria – equality, equity and need.[24] While under egalitarian theory, everyone should get an equal share from a common pool of goods or services distributed among all. According to equity theory, a distribution is made according to the effort a person made when compared with another. The socialist theory, on the other hand, emphasizes the need for an individual. It neither requires a distribution to be equal for all nor considers the contribution made by each person when compared with others.[25] As is discussed in the later part of this paper, outcomes attained through litigation can ensure all these three criteria of justice simultaneously. Therefore, in this paper the three terms: *'equality'*, *'equity'* and *'need'* are not treated separately; rather all three criteria of distributive justice have been used simultaneously by using the more generic term *'fairness'*.

3.3 Procedural justice vs Distributive justice: Are they equally important to ensure fair justice?

As *'process is not all'*[26] and the fairness of process may not ensure the fairness of outcome always.[27]At the same time, distributive justice is equally essential based on equality, equity and need. Therefore, both procedural justice and distributive justice have been emphasized for measuring the fairness of mediated outcomes in this paper. While measuring distributive justice, the outcome attained through litigation is used as a benchmark for a fair outcome. The next section elaborates the rationale for taking legal provisions as normative benchmarks to measure the fairness in the mediated outcome.

3.4 Law as a normative benchmark to evaluate distributive justice

Standards set out in law are sometimes considered fair outcomes for a dispute resolution process as the law could be a combination of all three criteria of

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22 Astor and Chinkin (n 15).
23 Beauchamp (n 11) 134.
24 Buttram, Sheppard and Folger (n 11) 261; Two other criteria used are: (1) according to societal contribution and (2) according to merit. See, Beauchamp (n 11) 134; See more, Nicholas Rescher, *Distributive Justice*: C*onstructive Critique of the Utilitarian Theory of Distribution* (Bobbs-Merrill 1966).
25 Beauchamp (n 11).
26 Menkel-Meadow (n 12).
27 ibid 220.

distributive justice — equality, equity and needs.[28] There may be errors in judgments, but their expected average outcome is considered to be fair.[29] Further, litigation is *'a system which "knowingly struggles against inequalities'.*[30] Hence, when citizens respect and accept the probity of those who make laws and those who apply them because it struggles against inequalities, the law provides a benchmark outcome that is generally accepted as legitimate. The legitimacy of legal benchmarks is essential if we want to take it as a benchmark for the mediated outcome because all parties must accept a negotiated settlement as legitimate. Using the notions of Rawls' theory of justice, the subsequent section 6.3 of this paper discusses how the family laws involving abstract rules and individuation can be considered as fair.

3.5 Evaluative mediation vs litigation: Which one may create better procedural leverage for the susceptible women?

The process of litigation is different from the process of conducting evaluative mediation. In the formal litigation process, a judge follows an equal procedure for all. On the other hand, an evaluative mediator tries to attain equitable mediated outcomes for disadvantaged who may not be able to continue their cases through litigation, due to financial constraints, lengthy litigation process, fear from the other party, little understanding of the litigation process and so on. Due to these constraints, the disadvantaged, especially women, may decide to drop out their cases. However, in optimal condition, the purpose of an evaluative mediator is to minimize the disparity between parties by setting and maintaining the ground rules that everyone has a fair chance to raise their voices and participate in the negotiation process. In other words, one should not overpower others through abusive language or dominant gesture. Evaluative mediators also have an opportunity to control the use of those social discourses in the mediation table that may disempower women or promote masculinity among husbands.

In Bangladesh, family court judges mandatorily try to reach an amicable solution between parties through mediation at pre-trial stage under section 10 of the *Family Courts Ordinance, 1985*. Therefore, when a family court judge-mediator practices evaluative mediation in his/her chamber, he/she has an opportunity to create some procedural leverage for the disadvantaged party. In Rawls' theory of justice, as elaborated more later in section 6 of this paper, such practices of extra care have been

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[28] John Griffiths, 'The General Theory of Litigation: A First step' (1983) 4(2) *Zeitschriftfür Rechtssoziologie - The German Journal of Law and Society* 145; Maurits Barendrecht, José Mulder and Ivo Giesen, 'How to Measure the Price and Quality of Access to Justice?'(2006) *Social Science Research Network*<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=949209> accessed 9 October 2019.

[29] John Rawls, *The Law of Peoples* (Harvard University Press 2002); See also, Barendrecht, Mulder and Giesen, ibid

[30] Astor and Chinkin (n 15) 74.

rationalized under the *'Difference principle'* or through the application of affirmative discrimination to vulnerable parties attending mediation as incorporated under Article 28(4) of the Constitution of Bangladesh.[31] It is assumed that the widespread practice of evaluative mediation can minimize the gap between outcomes attained through mediation and litigation. The better practice of evaluative mediation may emancipate mediated outcomes from the extent of vulnerability faced by parties and make mediated outcomes more predictable, as in the case of trial. Therefore, by comparing the outcome attained through mediation and litigation, we can perceive the quality of evaluative mediation practised in family courts of Bangladesh.

4. Collection of Empirical Data: Some Methodological Issues

Empirical data were collected from court registries of three family courts of Dhaka district (i.e. 2nd, 3rd and 5th courts) to compare the disposal rate and the outcomes attained through mediation with that of litigation. Aggregate data on the total number of disputes resolved through litigation and mediation was collected from respective court registries. Court registry data was explored further to calculate the total amount of decree granted each year, respectively, for all cases resolved through litigation and mediation. All these aggregate data was collected from each of the three family courts for five years from 2015 to 2019. For better triangulation, data from a set of individual case files of both litigation and mediation were also collected in the three family courts of Dhaka for a period of five years from 2015 to 2019.

The post-separation entitlements are measured by the amount that women are entitled to receive in compliance with the court decrees under mediation or litigation. It is pertinent to remind here that in the family courts of Bangladesh when the parties sign a mediated agreement, the judge-mediator attest the agreement as a compromise decree. Like other contested decrees, compromise decrees are equally enforceable by the courts. However, no further appeal is granted when parties resolve their dispute under a compromise decree[32]. Since individual case files were not recorded digitally, it was not feasible to get a holistic comparison between the outcome of litigation and mediation. Thus, sixty case files from three courts (twenty from each court) were chosen under the limited functionality of the courts during the COVID-19 pandemic. These files were selected from the already resolved cases during the last five years (2015-2019). The required information from the individual case-files were collected

[31] Article 28(4) of the Constitution of the Peoples' Republic of Bangladesh [hereinafter The Constitution of Bangladesh 1972] provides that *'Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement or for any backward section of citizen.*

[32] Jamila A. Chowdhury, *ADR Theories and Practices: A Glimpse on Access to Justice and ADR in Bangladesh* (London College of Legal Studies (South) 2013).

in July 2020, when the countrywide lock-down was trimmed down due to COVID-19 crisis. Otherwise, the number of individual case files could be even higher.

Although several issues, including dower, past and post-divorce maintenance of wife, child maintenance, and child custody are resolved through family courts only the financial aspects of the decrees, which are only stipulated explicitly in the *Kabinnama* (i.e. Contract of marriage) are considered in this paper to compare between the compromise decrees and the contested decrees. Since financial and non-financial obligations are separately defined in family courts, such partial analysis based only on the financial outcomes will not overawe the quality of fairness established under this paper. Further, dower consists of a lion share in family court decrees attained either through litigation or mediation. Therefore, while comparing financial outcomes between cases resolved through mediation and litigation, the rate of resolution and realization of dower money is shown as two different fairness criteria in this paper.

5. Women's Access to Fair Justice in Family Courts: A Premise for the Proposition of this Paper

Contemporary literature on mediation around the globe has acclaimed mediation on the ground of its better accessibility in terms of the litigation. In an earlier study, the time to resolution for court-connected mediation was observed as one of the significant advantages that may persuade parties to choose mediation instead of a formal trial to resolve their disputes[33]. Delay in litigation:

> [h]as reached a point where it has become a factor of injustice, a violation of human rights. Praying for justice, the parties become part of a long protracted and torturing process, not knowing when it will end.[34]

In contrary, when the mediation process started to gain its outcome, and the backlog of cases in the formal courts set to alleviate gradually, the Former Chief Justice KM Hasan applauded the success of mediation as follows:

> Within this short period [since the introduction of mediation from June 2000 up to May 2001], the mediation course embraced an unexpected and commendable success. The average rate of substantive disposal by mediation has come up to 60 [per cent] in comparisons with contested decrees.

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[33] Mustafa Kamal, 'Introducing ADR in Bangladesh: Practical Model' (Alternative dispute resolution conference In quest of a new dimension in civil justice system in Bangladesh, Dhaka, October 2002); See also, Begum A. Siddiqua, *The Family Courts of Bangladesh: An appraisal of Rajshahi Sadar Family Court and the Gender Issues* (Bangladesh Freedom Federation 2005); See more, Jamila A. Chowdhury, *Women's Access to Justice in Bangladesh through ADR in Family Disputes: Lessons from Egypt* (Modern Book Shop 2005).

[34] Shah Alam, 'A Possible way out of backlog in our judiciary', *The Daily Star* (Dhaka, 16 April 2000). See also, Jamila A. Chowdhury, *Gender Power and Mediation: Evaluative Mediation to Challenge the Power of Social Discourses* (Cambridge Scholars Publishing 2012).

Highlighting the improved realization of money through mediation, as further stated by CJ Hasan[35]:

> Statistics show that the total realization of money, through execution of the decree in suits disposed of, by litigation], is far below the total realization of money in disputes settled through mediation. From 1985 to 2000, the total money realized in connection with family courts cases of the three courts is Tk. 6,199,759.5. In contrast, the total realization through mediation since the introduction of mediation in the same courts from June 2000 up to May 2001, i.e. in twelve months is Tk. 50, 94,501.

While discussing the fairness of justice attained through mediation, it has been argued by scholars in Western democratic countries that, because of many factors, including gender role ideology, and power disparities, family violence, women may lack the ability to bargain effectively during mediation, and therefore may fail to attain fair outcomes through mediation.[36] In this paper, however, it is demonstrated that in Bangladesh, the type of mediation practised is evaluative in nature, and conducted under the shadow of the law. In evaluative mediation, mediators can focus their normative views on the content of a dispute and assist parties to understand their rights and liabilities under different contexts relating to their dispute.

Thus, when a mediator makes evaluative mediation (i.e. evaluations under the shadow of the law), the best outcome that parties can expect from mediation is the fair outcome that other claimants under similar contexts may expect to get through litigation. Further, women can participate in the mediation process and can understand the process[37]. Therefore, at the inception of the paper, it is not striving to assume that practice of evaluative mediation in Bangladesh not only ensures better access to justice, quick resolution of disputes and greater realization of decree money in a shorter period when compared to litigation but also has a potential to ensure fair outcomes for women.

To validate the claim (i.e. whether normative evaluative mediation is providing fair outcomes), Rawls' theory of justice is applied in this paper to compare outcomes obtained through family mediation and those obtained through litigation, taking the

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[35] Justice Hasan, 'Alternative Dispute Resolution' in Wali-ur-Rahman and Mohammad Shahabuddin (eds), *Judicial Training in the New Millennium: An Anatomy of BILIA Judicial Training with Difference* (Bangladesh Institute of Law and International Affairs 2005) 123-36.

[36] Diane Neumann, 'How Mediation can Effectively Address the Male-Female Power Imbalance in Divorce' (1992) 9(3) *Mediation Quarterly* 227; See also, Carol Watson, 'Gender Versus Power as a Predictor of Negotiation Behaviour and Outcomes' (1994) 10(2) *Negotiation Journal* 117; Joan Kelly, 'Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention' (1995) 13(2) *Mediation Quarterly* 85; Kathy Mack, 'Alternative Dispute Resolution and Access to Justice for Women' (1995) 17(1) *Adelaide Law Review* 123; Rachael Field, 'Mediation and the Art of Power (im) Balancing' (1996) 12 *Queensland University Technology Law Journal* 264.

[37] Jamila A. Chowdhury, *Mediation to Enhance Gender Justice in Bangladesh: Navigating Wisdom in Asia and the Pacific* (London College of Legal Studies (South) 2018).

outcomes of litigation as a benchmark for this purpose. As the outcomes attained through litigation follow the fair benchmarks of law, outcomes achieved through litigation will is used as the benchmarks of fairness to evaluate the mediated outcome under similar contexts. However, outcome attained through mediation usually varies from the outcome attained through litigation, under similar contexts. As observed by Mnookin and Kornhauser,[38] though parties to mediation keep the legal standard in mind while making negotiated agreements under the presence of a mediator, they may tailor the standard outcomes according to their own needs and interests. As explained further in the later part of this paper, fulfilling such needs and interests can also be considered as fair.[39]Taking the outcomes mentioned in the law as a benchmark for distributive justice are justified as long as they do not worsen the situation of the least advantage taking the notion of *'equality'*. However, movements away from equality are justified only if they benefit the least advantaged.[40] Therefore, it may be desirable that mediated outcomes differ from the expected outcomes attained through litigation as the former is motivated by the notion of *'equity'*. In contrast, the notion of *'equality'* drives the later. Further, as stated earlier, the Constitution of Bangladesh has granted the possibility to make affirmative discrimination to the vulnerable section of our society.

As discussed, the deviation of mediated outcome from their legal standards may be desirable by vulnerable women who need immediate cash after divorce. Further, the provision of affirmative discrimination in the Constitution has granted us a legal mandate to practice such discrimination for the greater interest of women, and other vulnerable section of the society. Nevertheless, how may we consider mediated outcomes fair for women who could attain even better outcomes through litigation?

In her earlier research[41], Chowdhury demonstrated that even if the amount of decree attained by women through mediation remains less than the amount of decree attained through litigation, the net financial gain through mediation may remain equitable and fair. For instance, in case of mediation, a part of the decree amount is usually paid by parties as lump-sum payments and the remaining in a few other monthly instalments. However, in most of the cases, decree attained through

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38 Robert Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The case of Divorce' (1979) 88(5) *Yale Law Journal* 950.

39 Morton Deutsch, 'Equity, Equality, and Need: What Determines Which Value will be used as the Basis of Distributive Justice?' (1975) 31(3) *Journal of Social Issues* 137; See also, Morton Deutsch, *Distributive justice: A Social-psychological Perspective* (Yale University Press1997); Elizabeth Mannix, Margaret Neale and Gregory North craft 'Equity, Equality or Need? The Effects of Organizational Culture and Resource Valence on Allocation Decisions' (1995) 63 *Organizational Behaviour and Human Decision Processes* 276.

40 Hardy Jones, 'A Rawlsian Discussion of Discrimination' in H Gene Blocker and Elizabeth Smith (eds), *John Rawls' Theory of Social Justice: An introduction* (Ohio University Press 1980) 270.

41 Jamila A. Chowdhury, 'Women Access to Justice in Bangladesh: Is Family Mediation a Virtue or a Vice?' (PhD thesis, University of Sydney 2011).

litigation need to file execution suits that may take three or more years on average. During these three or more years, women have to bear lawyers' fee and other costs for attending courts.

Women who settle through mediation are free from such extra expenses. As discussed, this comparison of outcomes from mediation and litigation used the primary data collected for this paper from three different family court registries in Dhaka, Bangladesh. Due to its more concrete and quantitative nature of family disputes, distributive justice has been taken as the prime consideration in this paper for the evaluation of fairness in mediated outcomes in comparison with the outcome attained through litigation. However, as discussed earlier, the notion of *'fair'* justice is linked with both procedural justice and distributive justice. Therefore, while conducting normative evaluative mediation under the shadow of the law, judge-mediators in family courts have opportunity to provide some extra procedural care to vulnerable women making them more comfortable to negotiate with their husbands, reducing the possibility of a power play by creating some ground rules of participation by both parties or superseding some gender-discriminatory dominant social discourses by gender-neutral legal discourses. Such procedural leverage cannot be applied by judges when women seek to attain their decree through litigation. Hence, judge-mediators in family courts have an opportunity to leverage better procedural fairness for vulnerable women that in turn, improves the distributive fairness of mediated outcomes in comparison with outcome attained through litigation.

As discussed later, under Rawls' theory of justice, such procedural leverage is ethically justified, though not equally applicable under the contemporary practice of mediation in all the family courts of Bangladesh. Analyzing family courts' data on resolution of cases and realization of decree money under mediation and litigation, this paper demonstrates the possibility that the procedural leverage under normative evaluative mediation may not be practised equally and effectively by all different family courts to make mediated outcomes fair and competitive for women.

6. Rawls' Theory of Justice: Evaluating Fair Outcome in Mediation using 'Difference Principle'

In this paper, Rawls' theory of justice is applied to examine fairness in mediated outcomes. Although in his 1958 paper, Rawls' confined his analysis of the theory of justice to the practices of society, the same theory of justice can also be used at the individual level. As observed by Rawls', *'The term "person" is to be construed variously depending on the contexts. On some occasions, it may also imply human individuals. However, sometimes it may also refer to nations, provinces, business firms, churches, teams, and so on'.*[42]

[42] John Rawls, *A theory of Justice* (Oxford University Press 1971) 193-94.

6.1 Rawls' first principle: Equality for all

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.[43] For instance, the right to access to justice has been emphasized in different articles of the Constitution of Bangladesh, which is the Supreme law of the land[44]. Article 27 of the Constitution declares: *"All citizens are equal before law and are entitled to equal protection of law."* Article 31 enumerates equal protection of the law as an inalienable right of every citizen of Bangladesh by stating that, *"To enjoy the protection of the law, and to be treated in accordance with the law, and only in accordance with the law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh..."*. Though the term *'access to justice'* is not categorically included in these articles, the essence of access to justice is incorporated with the terms *'equal'* and *'protection of the law'*. Thus, while reading both articles together, it can be assumed that people's right to access justice (protection of the law) is inalienable and equal, irrespective of the poor and rich. By placing these rights as fundamental (as enumerated in Part III of the Constitution) — the violation of which can be enforced by law — it can be assumed that the Constitution asserts a Constitutional *'guarantee'* of these rights.[45] Article 26 of the Constitution reconfirms that any part of law made contrary to any fundamental right granted under the Constitution will be void from the commencement of the Constitution. The fundamental principles of state policy, as discussed under Part II of the Constitution also emphasize this issue. Though fundamental principles are not legally enforceable, these principles act as a guide to the interpretation of the Constitution and also carry as an ideological and promotional value for the government. As stated in the Constitution of Bangladesh[46]:

> [t]he principles set out in this part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens...

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43 ibid 250.

44 The Constitution of Bangladesh 1972, art 7(2). Article 7(2) of the Constitution of Bangladesh provided that, *"This constitution, as the solemn expression of the will of the people, the Supreme law of the Republic and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."*

45 ibid, art 44(1). Article 44(1) provides that *"The right to move the High Court Division in accordance with clause (1) of Article 102, for the enforcement of the rights conferred by this part [Part III] is guaranteed".* Again, Article 102 (1) states that *"The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution."*

46 ibid, art 8.2.

6.2 Rawls' second principle: Individuation and affirmative discrimination

The fundamental state policy under Article 11 of the Constitution states that *"The Republic shall be a democracy in which fundamental human rights and freedoms… shall be guaranteed…"*[47] As the right to access to justice is one of the fundamental human rights recognized in the *United Declaration of Human Rights, 1948*, protection of this right is also incorporated as a fundamental state policy. Therefore, when Articles 8(2), 11, 27 and 31 are read together, it establishes the notion that right to access to justice is constitutionally recognized as a fundamental right and also promoted to ensure this right by incorporating in it as a fundamental principle. Similarly, the *Second Principle* of Rawls' states that social and economic benefits are to be arranged so that they are both: (i) to the most effective use of the *least advantaged*, and (ii) attached to offices and positions open to all under conditions of fair equality of opportunity.[48]

The two principles of Rawls' are concerned with the allocation of basic liberties and that of primary goods. The first principle is concerned with the distribution of basic liberties,[49]while the second one is concerned with the distribution of primary goods that create social and economic disparity. In his theory, the first principle considered by Rawls' is related mainly to the rights we usually consider as fundamental rights and human rights under different Constitutions and Conventions. Rawls' considered the distribution of the second set of goods, i.e. social and economic goods from a different perspective. He accepted a *'difference principle'* to distribute these goods among its recipients based on their position as '*least advantaged'* in the society. The difference principle of Rawls' theory of justice advocates the distribution of economic and social goods and services following the social theory of need. Unequal treatment among persons is justified *if such treatments enhance the utility of the most disadvantaged section of society*.

> [T]he Difference Principle requires that the basic structure be arranged in such a way that any inequalities in prospects of obtaining the primary goods [or services] of wealth, income, power and authority must work to the greatest benefit of those persons who are the least advantaged with respect to these primary goods [or services].[50]

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47 ibid, art 11.

48 Rawls (n 42) 302-3.

49 By the term basic liberties, Rawls' means, (i) freedom of participation in the political process (the right to vote, the right to run for office etc.); (ii)freedom of speech (including freedom of the press); (iii) freedom of conscience (including religious freedom); (iv) freedom of the person (as defined by the concept of the rule of law); (v) freedom from arbitrary arrest and seizure, and (vi) the right to hold personal property.

50 James Buchanan, *The Limits to Liberty* (The University of Chicago Press 1975) 10.

For example, the Constitution of Bangladesh admits affirmative discrimination in law towards the backward section of the society[51] and also recognizes the equality of its citizens.[52] While clarifying the principle of *'equality before law'* and the principle of *'affirmative discrimination'*, in *Anwar Hossain Chowdhury v. Bangladesh* Sahabuddin Ahmed, J observed that:

> Equality before law is not to be interpreted in its absolute sense to hold that all persons are equal in all respects disregarding different conditions and circumstances in which they are placed or special qualities and characteristics which some of them may possess but which are lacking in others.[53]

That is to say, the principle of equality before law has to be illustrated not in its absolute sense,[54] rather in its relative sense, depending on the persons *'who are not by nature, attainment or circumstances in the same position, as the varying needs of different classes of persons often require separate treatment'*.[55] Thus, following the Constitution, different laws and government policies recognize special treatment for women and disadvantaged sections of the society.

6.3 Notions of abstract rule and individuation

As observed by Sunstein, a court may provide justice on the basis of two different types of principles: abstract rules and individuation.[56] Abstract rules specify legal standards unambiguously and are equally applicable for all. According to Rawls' first principle of justice, the law can be considered as an abstract rule when it takes place in *'a hypothetical situation in which people are behind a "veil of ignorance" of their positions in society, i.e., their social status, wealth, abilities, strength, etc.'*[57] For example, the Constitution of Bangladesh declares that *'all citizens are equal before law and are entitled to equal protection of law'*.[58] This principle of justice should attempt to give guidance to justice through abstract rules laid down in advance of actual applications and will be equally applicable in similar situations. But such abstract rules may not provide justice to the poor and vulnerable

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51 The Constitution of Bangladesh 1972, Art 28(4).

52 Article 27 ensures equality before law to all its citizens. Article 31 of the Constitution also provides that, "*To enjoy the protection of the law, and to be treated in accordance with the law, and only in accordance with the law, is the inalienable right of every citizen…"*_The Constitution of Bangladesh 1972.

53 *Anwar Hossain Chowdhury v Bangladesh* (1989) 41 DLR 43, 45.

54 Ian Brownlie, 'The Rights of Peoples in Modern International Law' (1985) 9 *Bulletin of the Australian Society of Legal Philosophy* 104; Brij Sharma, *Introduction to the Constitution of India* (4thedn, 2009).

55 Prafullah Padhi, *Labor and Industrial Laws* (Prentice-Hall 2007) 5.

56 Cass R. Sunstein, 'Two Conceptions of Procedural Fairness' (2006) 73(2) *Social Research* 619.

57 James Konow, 'Which is the Fairest one of the All? A Positive Analysis of Justice Theories' (2005) 41 *Journal of Economic Literature* 1188, 1195.

58 The Constitution of Bangladesh 1972.

who have *special needs*. Therefore, we may not use abstract rules[59] as benchmarks of fairness as such laws advocate equal distribution among all without considering the special needs of the poor and disadvantaged in society. The Constitution of Bangladesh has also mandate to the principle of positive discrimination to promote poor and disadvantaged in society.

6.4 Financial outcome of normative evaluative mediation under the shadow of the law

The shadow of legal norms in negotiating disputes is reflected between the parties while determining the mediated outcomes. *To divorcing spouses and their children, family law is inescapably relevant. The legal system affects when a divorce may occur, how a divorce must be procured, and what the consequences of divorce will be.*[60] Thus, we can expect that mediated outcomes follow the shadow of legal principles. Critics, however, sometimes argue that under western-style *facilitative* mediation, parties make their own decisions based on their interests and the mediator, being neutral, only facilitates parties to attain the decision through negotiation.[61] Therefore, we can expect that, unlike western-style mediation, in the current practice of *evaluative* family mediation in Bangladesh, mediators' evaluations are greatly influenced by the fairness benchmarks set by family laws and those benchmarks will be reflected in the outcome of mediations. While conducting the mediation, mediators can use both rules and individuation to enhance the welfare of disadvantaged women through mediation. As observed, family mediators in Bangladesh conduct normative evaluative mediation under the shadow of the law and inform parties about their rule-bound legal rights. However, as explained in the next section, while making such evaluations, mediators may diverge from the expected outcome of litigation to enhance the welfare of the women through mediation.

7. Enhanced Access to Fair Outcome Attained in Family Courts: Litigation vs Mediation

Scholars around the world have identified numerous reasons why family mediation can provide better access to justice for women. Among other reasons, it is less costly in comparison with the trial, provides a quick resolution that also reduces lawyers' cost and additional associate costs to attend courts. Therefore, after the inception of

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59 'Rule-bound judgments focus on the arbitrariness and error that come from the exercise of unbounded discretion; those who favour individualized judgments focus on the arbitrariness and error that come from rigid applications of rules.' 'Public authorities should avoid 'balancing tests' or close attention to individual circumstances. They should attempt instead to give guidance to citizens through clear, specific, abstract rules laid down in advance of actual applications'; Cass Sunstein, 'Two Conceptions of Procedural Fairness'(2006) 73(2) *Social Research* 619, 620.

60 Mnookin and Kornhauser (n 38) 951.

61 Allan Stitt, *Mediation: A practical guide* (Cavendish 2004).

the reformed ADR movement in 2000 at three model-pilot family courts of Dhaka (the same three courts were also considered for this study), rate of resolution through mediation remained high in comparison with total disposal of cases.

7.1 Resolution of disputes in family courts: A comparative analysis between mediation and litigation for the last five years (2015-2019)

The purpose of analysis in this section is to examine the present-day success of mediation and understand its recent trends. In other words, this paper explores whether the current trend of mediation in the three family courts is consistent, which was attained considerable achievements through the same three family courts in 2000 remains valid under the contemporary practice of the last five years (2015-2019).

Table 1: Disposal in Family Courts, Dhaka 2015-2019

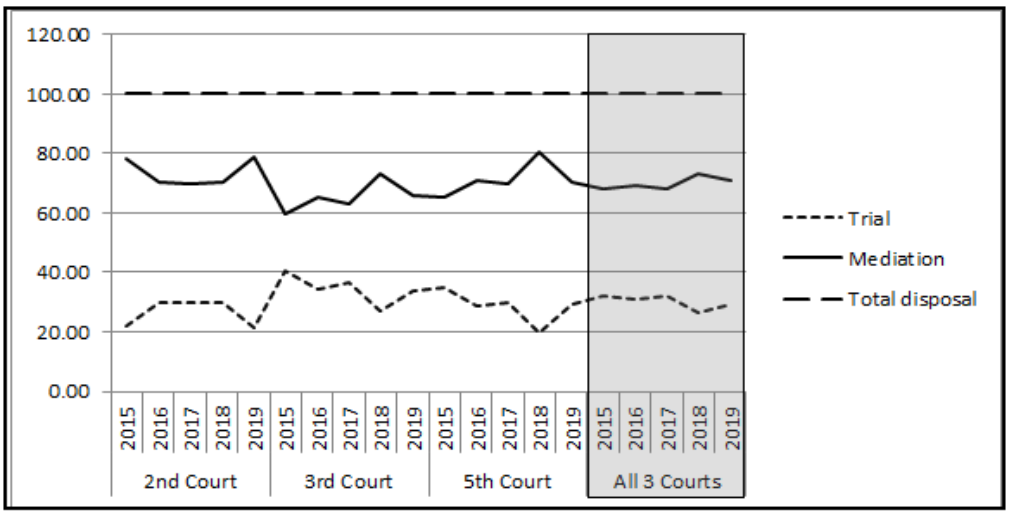
Family Court	Year	Disposal by Trial	Disposal by Mediation	Total disposal of family cases
2nd Court	2015	227.0	816.0	1043.0
	2016	356.0	838.0	1194.0
	2017	363.0	850.0	1213.0
	2018	336.0	789.0	1125.0
	2019	244.0	902.0	1146.0
	Average	305.2	839.0	1144.2
3rd Court	2015	392.0	587.0	970.0
	2016	291.0	550.0	841.0
	2017	319.0	550.0	869.0
	2018	171.0	466.0	637.0
	2019	587.0	1140.0	1727.0
	Average	352.0	658.6	1008.8
5th Court	2015	305.0	569.0	874.0
	2016	253.0	529.0	872.0
	2017	243.0	568.0	811.0
	2018	105.0	434.0	539.0
	2019	385.0	923.0	1308.0
	Average	604.6.0	880.8.0	880.8
All 3 Courts	2015	924.0	1972.0	2887.0
	2016	900.0	1917.0	2907.0
	2017	925.0	1968.0	2893.0
	2018	612.0	1689.0	2301.0
	2019	1216.0	2965.0	4181.0
	Average	915.4 (30.2%)	2102.2 (69.3%)	3033.8 (100.0%)

Source: Empirical data collected from the Family Courts, Dhaka in July 2020

As depicted in Table 1, the total number of disposal of family disputes is increasing in all three courts except in 2018 when due to some reason, total disposal

in all three courts declined in comparison with total disposal in 2017. Even in case of a general decline in disposal, the 2nd family court, Dhaka outperformed the other two courts. The number of disposals through mediation vs litigation varies over the years.

Figure 1: Maturity of disposal through mediation in family courts



Source: Empirical data collected from the Family Courts, Dhaka in July 2020

Nevertheless, the number of disposals through mediation always remains markedly higher than the number of disposals attained through litigation. The ratio of disposal through mediation vs litigation and their trend over the years can be perceived better through Figure 1 above. As depicted in Figure 1, though rates of disposal through mediation and litigation differed over the years in each of the three courts, variance in disposal rates through both mediation and litigation have always maintained a limit of 20per cent.

For instance, the rate of disposal through mediation in any of the three family courts never declined below 60 per cent nor increased above 80 per cent during the five-year tenure (2015-2019) covered under this study.

Therefore, we can reasonably perceive that after the inception of mediation in a reformed movement of ADR in 2000, the disposal rate in family mediation during the last five years attained its long-term threshold and becomes more predictable. This kind of consistent performance in the disposal of family disputes through mediation is essential not only for the policymakers but also for the justice seekers, to get a reasonable projection before choosing mediation as an effective tool to resolve their disputes. However, quick disposal of family cases from court dockets is not the sole objective that women may aspire to attain from mediation. Such access to justice and quick disposal of cases should be *'just'* in its outcome. Although this paper

demonstrates that the resolution of disputes in family courts through mediation have already achieved the criteria of fair justice as indicated by Lord Woolf, the same is not correct for realization attained through mediation in all family courts equally. Therefore, better resolution of cases through mediation is not enough until cases resolved through mediation also attracts better realization of decree amounts in comparison with the litigation.

7.2 Realization of financial outcome in family courts: A comparative analysis between mediation and litigation for the last five years (2015-2019)

Many western scholars often argue that the outcome of mediation may not be fair, especially in many developing countries where women remain less empowered, face frequent family violence, and stay silent in mediation out of fear, or a self-helpless attitude developed through a long-persistent deprivation received from their family and society[62]. Thus, there remains a possibility that gendered power disparity and family violence in Bangladesh might hinder women's access to fair outcomes through mediation. Further, as warned by the expectation state theory of negotiation as provided by Watson, even women with superior power may lose negotiation when her counterpart is a male person[63].

However, the context and practice of mediation in Bangladesh and other eastern countries are different from western democratic countries where mediators follow a mere facilitative mediation, where party autonomy and self-determination construe the cornerstones of facilitative mediation. Departing from facilitative mediation, eastern countries, including Bangladesh, follow an evaluative mode where family court judges may apply their procedural power and others powers of mediators as propounded by Mayer[64] to maintain better equity in negotiation during mediation. In evaluative mediation, a judge-mediator may conduct normative evaluative mediation under the shadow of the law and control the use of social discourses by the other parties to emancipate women rights from marginalizing social discourses and ensure fair outcome through mediation inside the mediation room — not beyond the room. A family court judge-mediator cannot eradicate the gendered power disparity and dominant social discourses that exist in society.

Though contemporary literature has discussed elaborately various benefits of and barriers to attaining even better disposal rate through mediation, the *'equity'* issue

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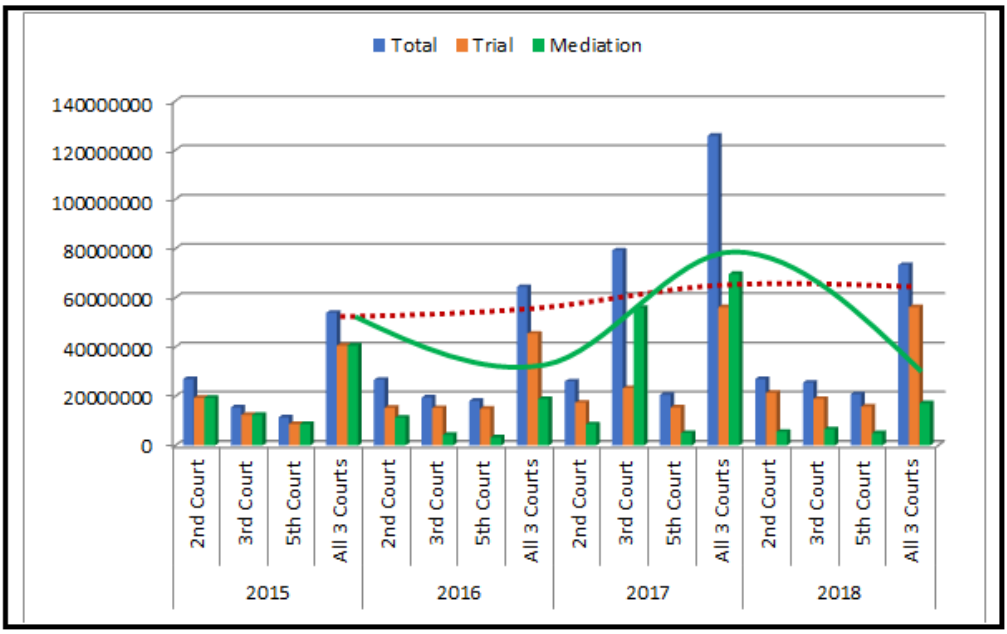
62 Chowdhury (n 34).

63 ibid.

64 Mayer's typology rests on his explicit inclusion of 'structural power' that includes '*the objective resources people bring to a conflict, the legal and political prerogatives, the formal authority they have and the real choices that exist'*. He has identified different forms of power that are held by a mediator during mediation like procedural power, formal authority, legal prerogatives, definitional power etc. See more, Bernard Mayer 'The Dynamics of Power in Mediation and Negotiation' (2000)16(1) *Mediation Quarterly*75.

remains mostly unexplored, especially in the context of Bangladesh. Hence, the purpose of this section is to compare the output attained through mediation and litigation in general and conclude on the potential of family mediation to provide fair justice for women in Bangladesh. Figure 2 compared the total amount recovered in the family courts of Dhaka under both litigation and mediation.

Figure 2: Fluctuations in mediated outcomes and its potentials for further development



Source: Empirical data collected from the Family Courts, Dhaka in July 2020

In litigation, judges equally follow the procedure of litigation set in family laws and the substantial laws governing post-divorce payments to Muslim women are more or less limited to the marriage contract. Therefore, the total decree amount for cases resolved through litigation remains stable over the years. This steady amount of decree (from Tk. 40 million to Tk. 56 million), as shown by the dotted trend line in Figure 1, is consistent with the steady number of cases resolved through litigation (20 per cent to 40 per cent of total cases in Figure 1). Therefore, as identified by Lord Woolf under his fair justice criteria, family cases resolved through litigation are getting more predictable both in terms of rate of resolution (quantity) and amount of decree (quality). However, the total decree amount for cases resolved through mediation, as shown by the solid trend line in Figure 2, is marked with high variability (from TK. 17 million to TK. 70 million) over the years. Therefore, family cases resolved through mediation are getting more predictable in terms of rate of resolution (quantity) but still remain many variables in terms of the amount of decree (quality).

However, the contrary opinion may suggest such high variability can be analyzed that the fluctuation in the aggregate amount of decree through mediation may result from the difference of the amount of dower claimed by the parties in any particular year. For instance, in one suit, the dower fixed at the time of marriage may be high due to the financial conditions and social status of the bride and groom. On the other hand, in many cases, the claimed amount of dower and maintenance may be low depending upon their status. Thus, at the time of resolving the cases through mediation, the settled amount of dower amount may sharply rise and fall in relevant years irrespective of the fact of little variance in the number of disposal of suits.

If this is the case, we may expect a similar yearly variance for cases settled through litigation. However, as shown in Figure 2, the more stable dotted line showing aggregate decree values through litigation over the year does not support this notion. Therefore, as indicated by Lord Woolf, the resolution of disputes in family courts have already attained the predictability criteria of fair justice. However, the same is not valid for realization achieved through mediation in family courts. Therefore, financial outcome through mediation still requires more equitable and competitive in comparison with litigation. In order to get a more detailed image in this regard, a more rigorous comparison between financial outcomes attained through mediation and litigation is compiled in the next section to clarify this issue further. Analysis in the next section is based on data collected from individual case files taking dower value as a proxy to the socio-economic condition of women attending mediation and litigation.

7.3 Comparative financial outcomes attained through mediation and litigation: An empirical evaluation of the realization of dower money

Dower was explained earlier as a safeguard for Muslim women against post-divorce economic vulnerability. Repaying unpaid dower to a wife after divorce is not only a religious obligation for Muslim husbands but also a legal responsibility for them under s. 10 of the *Muslim Family Laws Ordinance, 1961*.[65] Therefore, in the case of litigation, judges in family courts always make full provision for the repayment of unpaid dower to women after divorce. As already discussed, during mediation, clients may make agreements that deviate from the rules stated in the law. For example, as demonstrated in Table 3, women in mediation may make mediation agreements that involve taking less than their full amount of unpaid dower. Whether such deviations in the mediated outcome can benefit women is our next concern in this paper. Criteria given by Mnookin and Kornhauser[66] are used to evaluate the fairness of mediated outcomes compared with litigation outcomes.

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[65] The Muslim Family Laws Ordinance 1961 (Bangladesh). Section 10 of the Ordinance provides that, *"Where no details about the mode of payment of dower are prescribed in the nikahnama, or the marriage contract, the entire amount of the dower shall be prescribed to be payable on demand."*

[66] Mnookin and Kornhauser (n 38).

Table 2: Realization of dower as financial outcome through litigation in family courts

Family court	Cases Observed	Avg. Amount of Unpaid Dower Claimed	Avg. Amount of unpaid Dower Realized	% of dower realized on an average	Total Decree value realized as a % of dower value
2nd Court	15	345,000	302,539	87.69	138.12
3rd Court	14	407,786	407,786	100	122.77
5th Court	13	437,176	437,176	100	142.42
All 3 Courts	**42**	**396,654**	**382,500**	**96.43**	**128.72**

Source: Empirical data collected from the Family Courts, Dhaka in July 2020

Table 2 indicates that on average in three family courts of Dhaka, the realization of dower amount through litigation varies from around 88per cent to 100per cent of the claimed unpaid dower. For the three courts together, the average realization of unpaid dower remains 96.43per cent. The last column of Table 2 indicates that on average, the total decree value received by women through litigation was 128.72per cent of their unpaid dower value (or Tk 510,573). Similar data were collected in all three family courts for cases resolved through mediation, which is depicted in Table 3.

Table 3: Realization of dower as financial outcome through family court mediation

Family court	Cases Observed	Avg. Amount of Unpaid Dower Claimed	Avg. Amount of unpaid Dower Realized	% of dower realized on average	Total Decree value realized as a % of dower value
2nd Court	13	649,111	358,111	55.17	69.42
3rd Court	11	261,112	197,777	75.74	80.85
5th Court	11	533,000	390,000	73.17	118.21
All3 Courts	**35**	**488,659**	**319,348**	**65.35**	**77.74**

Source: Empirical data collected from the Family Courts, Dhaka in July 2020

As demonstrated in Table 3, on average, in three family courts of Dhaka, the realization of unpaid dower amount through mediation varies from 55.17per cent to 75.74per cent of the unpaid dower amount claimed by women. For the three family courts together, the average realization of unpaid dower remains only 65.35per cent. The last column of Table 3 indicates that on average, the total decree value received by women through mediation was only 77.74 per cent of their unpaid dower value (or Tk 379,884). Therefore, on average, women who resolve through mediation may receive Tk 130,698 (510,573 - 379,884) less in their total decree value in comparison with their counterpart who resolve through litigation.

As discussed, the amount recovered under normative evaluative mediation depends on the application of *'standard'* techniques attached to this mode that many of our family court judges are not adaptable due to a lack of institutional training on mediation. A further consideration in the variation of the realization of unpaid dower amount allowed by different courts indirectly substantiates our earlier claim that due to a lack of training on *'standard'* techniques of normative evaluative mediation. As a

result, the quality of evaluation applied by three family courts may not follow any established *'objective standard'*; instead, remain subjective upon the judge-mediators. For instance, in both 3rd and 5thfamily courts, women attain almost three fourth of their unpaid dower through compromise decree under mediation. In contrast, in the 2nd court, women get a compromise decree to realize only 55 per cent of their unpaid dower money through mediation. That means, the attitude to a fair outcome for women applied under 3rd and 5th court is also apparent from the 100 per cent decree for the realization of unpaid dower under litigation, while in 2nd court women are yet to sacrifice around 12 per cent of their unpaid dower claimed under litigation. Therefore, setting an objective standard for normative evaluative mediation and ensuring its application through training is essential to attain a more equitable and fair outcome for women through mediation.

8. Conclusion

It is also argued that despite gender power disparity and family violence in Bangladesh, the interventionist, and legally informed role of mediators contributes to fair outcomes for women through normative evaluative mediation under the shadow of the law when compared with litigation. As discussed earlier in the paper, procedural leverage through normative evaluative mediation has a robust theoretical linkage with Rawls' second principle of justice. Therefore, unlike western-style facilitative mediators, our mediators have a more significant opportunity to apply individuation through Rawls' second principle of justice. Application of individuation principle, while practicing normative evaluative mediation, would promote fair justice to vulnerable women who may not be able to attain such outcome, due to some practical constraints mentioned earlier. Analyzing family courts' data for the last five-year (2015-2019) on the resolution of cases and realization of dower money under mediation and litigation, it is demonstrated that despite the positive threshold attained in the rate of disposal through mediation, still, there seems to be a window of opportunity to improve recovery under family mediation and ensure more fair outcomes in comparison with cases resolved through litigation.

Further, there is a possibility that the procedural leverage under the normative evaluative mediation, as suggestive under the Rawls' second principle of justice, may not be practiced equally and effectively by all family courts to make mediated outcome more equitable and fair for women. As a result, the performance of all family courts in terms of realizing financial outcome is not evenly persuasive. Thus, to mitigate the considerable variance from one court to another, training of judge-mediators on the objective benchmark on normative evaluative mediation is necessary to enhance an equitable justice for women. Consequently, women can attain more fair outcomes from family courts' mediation in Bangladesh than they can through litigation.

Features of the Investor State Dispute Settlement (ISDS) Provisions under Bilateral Investment Treaties (BITs) of Bangladesh: An Overview

Dr. Rumana Islam[*]

1. Introduction

The world politics during 1960s till early 1990s is marked by different events and dramatic changes in world economy, trade and flow of foreign direct investment (FDI) with the impacts of cold-war, expansion of communism, protectionism towards foreign investment, state policy of nationalization of natural resources sector in the newly emerged independent states and later the proliferation of globalization in a bipolar word. However due to the decline and fall of communism in former Soviet Union and the world becoming a more unipolar in absence of a strong and influencing communist bloc, the early 1990s was the perfect time for expanding the Western agenda of proliferation of the bilateral investment treaty (BIT) program which was once initiated by the then West Germany in 1959.[1] The early 1980s and the post-communist era is also marked as the period as a universal acknowledgement that, 'capitalism and private ordering are superior to socialism and state ownership of production."[2] This also reflected in the change of attitude towards the BIT program by different countries, and even those countries, especially the Latin American countries which once were opposing the idea of BIT programs and any international settlement of disputes through an arbitral tribunal against the host state[3]. Such change of attitude is well described by Ranjan who states that,

> ...many countries saw BITs as a commitment to liberal economic policies and as instruments that could further the objectives of a liberal foreign investment regime and lead to greater investment flows especially into developing countries. Bilateral Investment Treaties signed during this period followed a neoliberal template that favoured a minimalist state. Thus, these treaties (also known as the first generation of BITs) contained very broad and substantive guarantees to foreign investors with limited or no provisions recognizing host state's right to regulate in public interest.[4] [footnotes in the original text omitted]

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1 Prabhash Ranjan, *India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash* (Oxford University Press 2019) 5.

2 Ranjan, ibid, citing, Jonathan R. Macey and Geoffery P. Miller 'The End of History and the New World Order: The Triumph of Capitalism and the Competition between Liberalism and Democracy' (1992) 25 *Cornell International Law Journal* 275, 283.

3 See M. Sornarajah, *International Law on Foreign Investment Law* (3rd edn, Cambridge University Press 2010) 183-187.

4 Ranjan (n 1) 8.

As an impact of this liberalization towards foreign investment and proliferation of BITs and with the expansion of globalization the flow of FDI from the North to the South increased as a natural outcome. With the increase of flow FDI from the capital exporting countries to capital importing countries which are mostly the developing countries, the number of investor state dispute settlement (ISDS) also has significantly risen on global scale.[5] The ISDS is basically done in two ways, either by inserting an ISDS clause in the particular Bilateral Investment Treaty (BIT) or multilateral treaties between two contracting countries and in absence of any such BITs or other investment treaties, by the parties inserting such an arbitration clause in joint venture agreement (JVA) concluded between the foreign investor and host state or its state enterprises. One core reason for the proliferation of BIT program by the capital exporting countries was to make the ISDS an integral part of the BITs. The idea of having an option for ISDS was done with an aim that this mechanism would give the foreign investors the right to bring any allegation of breach of committed standards of protection in those BITs against the host states or any unreasonable interference amounting to expropriation (both direct or indirect) or for a regulatory measures taken by the host state affecting those investment protection standards.

Except very few exceptions the ISDS provision is a common feature appearing in almost every BITs that exists today. Though the forums (*ad hoc* or institutional) that the parties select for such investor state dispute resolution and their preference over each other (the forums) and the relations between these forums and the exceptions of specific issues as prescribed in the BITs either devised as essential security interest or general exceptions or non-precluded measures (NMPs) from the ambit of the ISDS clauses largely varies on the different articulations of those ISDS provisions.

Thus, with the proliferation of the BIT programs the ISDS provisions also became a core feature of international investment law. Though many states argued that all claims against the host state must be dealt by the local courts instead in an international for, but very few BITs actually provided in their ISDS clause an option for local remedies that the foreign investors must exhaust before bringing a claim against the host state in an international forum.[6] In majority of these BITs the ISDS as they are drafted provide unequivocal consent to arbitration to foreign investors.[7] Since the sole purpose of BIT program initiated by the West was for with an aim to

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5 See e.g., UNCTAD Report on ISDS <https://unctad.org/system/files/official-document/diaepcbinf 2020d6.pdf> accessed 1 November 2020>

6 Rudlof Dolzer and Christoph Scheruer, *Principles of International Investment Law* (Oxford University Press 2008) 265; Also see e.g. *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Annulment, 14 June 2010, paras 43-57; *General Ukraine Inc v Ukraine*, ICSID Case No. ARB/00/9, Award 16 September 2003, para 13.4.

7 Ranjan (n 1) 2; Also see, Christoph Scheruer 'Consent to Arbitrate' in Muchlinski, Freericoe Ortino and Christoph Schreur (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 835-6.

provide maximum protection to foreign investors, this is also reflected in the ISDS clauses stipulated in the BITs, that ensures that the host states can be charged responsible for the exercise of their public power by a third party–the international tribunals, which has the power to reassess the regulatory actions taken by the host state, including all kinds of powers that a state can exercise through its state organs–the executive, judicial or legislative.[8] It is also relevant to mention that, the ISDS provisions in the BITs exist along with the State-Sate Dispute settlement (SSDS) provisions that allows the contracting parties to bring cases against each other. However, unlike ISDS, the SSDS does not concern settlement of a dispute regarding violation or breach of a treaty obligation, rather, it concerns the 'interpretation or application' of the treaty.[9] Therefore the ISDS and SSDS have different mandates.[10]

With this contextual background of the BITs concluded between the developed countries and developing countries and the purpose of inserting an ISDS clause, this article will make a close examination of the ISDS provisions under the BITs of Bangladesh to see how these clauses are articulated and find out the features of these clauses that can be summarized based on an overarching similarities between these clauses and also to find out to what extent such clauses provide for regulatory freedom for Bangladesh as the host state when read with other provisions of the BITs.

2. Features of ISDS Provisions of BITs of Bangladesh

The common features that, the BITs include in their ISDS clause are the forums for the dispute settlement, if there is any alternative to dispute settlement (like mediation or conciliation) or if there is any scope to refer the dispute to the domestic courts or any requirement of exhausting of local remedies before going to an international forum. Apart from these there might be also other specific ISDS features contained in the particular clause in the BITs. These are not common to every BITs, by can be randomly found in different BITs. Therefore, these features do not include a generic feature of ISDS provisions. These other specific features include, provisions such as limitation period for submission of the claims for disputes, if any provisional measures is required power to do so, consolidation of claims, limiting the types of the remedies that can be available through the Award(parties sometimes specify available types of remedies), provisions on treaty interpretation–this is sometimes also refereed to joint committee of the parties if limits issues to be submitted by the

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8 Ranjan (n 1) 3; Also see e.g., Andreas Kullick, *Global Public Interests In International Investments Law* (Cambridge University Press 2012) 93; Also see generally e.g., Stephen W. Schill, *Multilateralization of International Investment Law* (Cambridge University Press 2009).

9 Ranjan (n 1) 2. Also see e.g., *Republic of Italy v Republic of Cuba*, Final Award, Ad Hoc Tribunal, 15 January 2008.

10 Ranjan ibid.

contracting parties before the tribunal (renvoi), provisions regarding regulating submissions by non-disputing State parties, requirement of transparency in arbitral proceedings, whether the documents can be made publicly available, provisions as to whether hearings of the proceedings are to be open to the public, provisions regarding *amicus curiae* submissions by third (non-disputing) parties.

Just after Bangladesh had enacted it's The Foreign Private Investment (Promotion and Protection) Act, 1980[11] keeping pace with trend of the developing countries it also resorted to signing of BITs to promote flow of FDIs with different countries. These BITs were typically seen by the developing countries to be the conducive that foreign investors liked to have for their protection.[12] As to the total number of BITs signed by Bangladesh the UNCTAD's Investment Policy Hub website, shows in its Bangladesh BIT profile that, the country has signed 30 BITs with 28 countries.[13] Though the other available information on the number of BITs signed by Bangladesh for example the Bangladesh Investment Development Authority (BIDA) websites[14] shows different number but the BIDA website does not provide the text of the BITs nor any kind of information on the additional BITs that it mentioned by BIDA could be located elsewhere, this article will rely on the information provided by UNCTAD's Investment Policy Hub website and endeavor to examine those listed BITs.

With only two exceptions, namely the Bangladesh-Germany BIT (1981)[15] and Bangladesh-Republic of Korea BIT (1986)[16] every BIT signed by Bangladesh predominantly provides for an enforcement mechanism of ISDS, generally conferring the rights of the foreign investors to have the right to take the recourse to

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11 See <http://bdlaws.minlaw.gov.bd/act-597.html> accessed 1 November 2020.

12 On proliferation of BIT program see generally Kenneth J. Vandevelde, 'The Political Economy of a Bilateral Investment Treaty' (1998) 92(4) *The American Journal of International Law* 621-641; Kenneth J. Vandevelde, 'U.S. Bilateral Investment Treaties: The Second Wave' (1993) 14 *Michigan Journal of International Law* 621.

13 See e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/countries/16/bangladesh> accessed 1 November 2020.

14 See e.g., <http://bida.gov.bd/?page_id=2552> accessed 1 November 2020. The BIDA website refers to a Bangladesh-Belarus BIT. But the only information available information found is that, Bangladesh has signed a MOU with Belarus on agriculture and food, see <https://www.thedailystar.net/news-detail-235653> accessed 14 October 2020 and has signed an Agreement on Trade and Economic Cooperation, see e.g., <http://mfa.gov.by/en/press/news_mfa/e33df1a3af362d77.html> accessed 14 October 2020.

15 Agreement between the Federal Republic of Germany and the People's Republic of Bangladesh concerning the Promotion and Reciprocal Protection of Investments [hereinafter Bangladesh-Germany BIT (1981)] signed 6th May, 1981 and came into force on 14th September 1986. For full text of the BIT see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/264/download> accessed 1 November 2020.

16 Bangladesh-Republic of Korea BIT (1986) singed on 18th June 1986 and came into force on 6th October, 1988. For full text see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/270/download> accessed 1 November 2020.

international arbitration against Bangladesh on different forums by sidestepping the country's domestic court system. Apart from the ISDS the BITs of Bangladesh also provide provisions for subrogation, settlement of disputes between the contracting parties and practical matters regarding the treaties such as when they shall come into force, its duration, its termination, provision on different investment protection standards like the fair and equitable treatment (FET) standard, the most favored nation (MFN) treatment standard, national treatment (NT) standard, protection against expropriation, to lesser degree some NPMs, the definition of an investment under the BIT and some also provide the procedure of its amendment if any. The majority of the BITs in Bangladesh reflects the typical template of most developing countries, or better to say the first general of BITs concluded between the developed countries and the developing countries which were actually designed to provide maximum protection for the foreign investors. This was the predominant perception of the function of the BITs that once shaped the international legal regime of law on foreign investment during the post WWII till late nineties. Though it is always debated to the extent how far these BITs have contributed and will contribute to increase the FDI influx into the country is doubtful.

The following part of the article will provide an overview of the features of the ISDS provisions in the existing BITs of Bangladesh as they have been articulated. Some of them have uniformity though they largely differ on their verbalisation. Some of these provisions are all comprehensive ISDS clause while some have preferred to adopted only few selected forums. The discussion is periodized in chronological order into four decades staring from 1980 when Bangladesh signed its first BIT.

2.1 BITs of the First Decade (from 1980-1990)

During the first decade Bangladesh signed nine BITs, mostly with capital exporting Western countries. Apart from the two BITs signed during this period, namely Bangladesh-Germany BIT (1981) and Bangladesh-Republic of Korea BIT (1986)[17], the rest others has ISDS provisions.

Bangladesh-UK BIT (1980)[18] is the first BIT signed by Bangladesh with its former colonial power. Also interesting it is the only BIT signed by Bangladesh which came into force the very moment it was singed. Article 8 of the BIT under the heading 'Reference to International Center for Settlement of Investment Disputes"

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[17] Bangladesh-Republic of Korea BIT (1986) singed on 18th June 1986 and came into force on 6th October, 1988. For full text see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/270/download> accessed 1 November 2020.

[18] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments signed on 19th June 1980 and came into force on the same day. See, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/277/download > accessed 1 November 2020.

refers thereby as the heading suggests only to International Center for Settlement of Investment Disputes (ICSID) for ISDS. There is no mention of any other features of the ISDS provisions and nor does the BIT provide any regulatory freedom or policy exception for ISDS brought by the foreign investors. Similar provision is stipulated in Bangladesh-BLEU (Belgium-Luxembourg Economic Union) BIT (1981)[19] in its Article 6 referring only to ICSID as the forum of ISDS under the treaty. However, the Bangladesh-BLEU (1981) BIT does also in its Article 6(1) refer to voluntary ADR by way of mediation and conciliation as an alternative to ISDS. It is also to be noted that, Article 6(1) categorically mentions that all kinds of disputes covered under the treaty can be brought before ICSID except 'matters relating to tax disputes'. Therefore, this is the only limitation for investors to bring a claim against the host state to ISDS under the treaty. Bangladesh-US BIT (1986)[20] in its Article VII deals with ISDS provisions, which also prescribes voluntary ADR (conciliation/mediation) alternative to arbitration. The prescribed forums are the local courts and ICSID and the relationship between these two forums are 'fork on the road'. The text of Bangladesh-France BIT (1985)[21] in its Article 8 prescribes for two forums, the local courts and ICSID without providing any reference to the relation between these two forums, as well as it prescribes for voluntary ADR as an alternative to ISDS.[22] Bangladesh-Turkey BIT (1987)[23] prescribed in its Article VI, the only forum for

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19 Bangladesh BLEU BIT (1981) signed on 22nd May 1981 and came into force on 15th September 1987. For full text see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/262/download> accessed 1 November 2020.

20 Bangladesh-US BIT (1986) signed on 12th March 1986 and came into force on 25th July 1989. For full text see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/278/download> accessed 1 November 2020.

21 Bangladesh-France BIT (1985) signed on 10th September 1985 and came into force on 9th October 1986. see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/263/download> accessed 1 November 2020.

22 Article 8 of Bangladesh-France BIT (1985) states,
"1. Any dispute relating to an investment shall be raised by the investor of one Contracting Party to the other Contracting Party by written notification accompanied by a sufficiently detailed request. Such a dispute is preferably settled by amicable arrangement between the parties to the dispute or, in the event of failure, by internal appeal, by conciliation between the Contracting Parties through the diplomatic channel or by any other means.
2. In the absence of agreement between the parties to the dispute, within six months of the date of its notification, the dispute is, at the request of either of the two parties concerned, submitted to the International Center for Settlement of Investment Disputes (hereinafter referred to as "the Center"), established by the Convention for the Settlement of Investment Disputes between States and nationals of other States, signed in Washington on March 18 1965.
For this purpose, each Contracting Party agrees to submit such a dispute to the Center.
3. A Contracting Party to a dispute may not, at any stage of the conciliation or arbitration procedure or of the execution of the arbitral award, object to the fact that the national or the company party to the dispute under insurance, compensation for all or part of the losses."

23 Bangladesh-Turkey BIT (1987) signed on 12th November 1987 and came into force on 21st June 1990. For full text see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/ treaty-files/277/download> accessed 1 November 2020.

ISDS is ICSID, however this is replaced by the Bangladesh-Turkey BIT (2012)[24] which is yet to come into force. The 1987 BIT with Turkey is distinct from the rest other BITs signed during this decade as it is the only one and the first one for Bangladesh which provided public policy areas excluded from ISDS claims in its Article X, which reads as

> 1. This agreement shall not preclude the application by either Party of measures necessary for the maintenance of public order and morals, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

As it will be seen later part of the discussion this exclusion of public policy areas from ISDS is not reflected in most of the BITs signed by Bangladesh.

Bangladesh-Romania BIT (1987)[25] is an interesting one. The treaty does not provide a separate clause on ISDS like other BITs, but it prescribes the scope of ISDS only in the occasion of expropriation under its Article 4 which is titled as "Expropriation and Compensation", therefore making the scope of ISDS under this treaty a very limited one. Article 4 (2) & (3) reads as follows:

> (2) If a dispute between an investor and the Contracting Party in the territory of which the investment has been made, with regard to the amount of compensation, continues to exist after the final decision of the national tribunal or of another competent body in the country in which the investment has been made, either of them is entitled to submit the dispute, for conciliation or arbitration, within two months after the exhaustion of domestic remedies or after the Expiry of the term provided on the next paragraph, to the International Centre for the Settlement of Investment Disputes, according to procedure provided for in the Convention opened for signature at Washington On 18 March 1965.
>
> (3) However, the condition relating to the exhaustion of the ways of remedies provided for in the legislation of the Contracting Party in the territory of which the investment has been made, cannot be opposed by this Contracting Party to the investor of the other Contracting Party after a term of six months running from the date of the first act of judicial procedure for the settlement of this dispute by the tribunal."

Therefore, this BIT is unique in the sense that an investor can bring a claim for ISDS before ICSID only in the event of expropriation and that too is subject to certain limitations set forth in Article 4 described above and also subject to exhaustion of

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[24] Bangladesh-Turkey BIT (2012), signed on 12th April 2012, replaced Bangladesh-Turkey BIT (1987); for full text of Bangladesh-Turkey (2012) BIT see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/274/download> accessed 1 November 2020.

[25] Bangladesh-Romania BIT (1987) signed on 13th March 1987 and came into force on 31st October 1987. For full text of the BIT see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5129/download> accessed 1 November 2020.

local remedies. Therefore, this BIT does not have ISDS clause separately but prescribes the local courts and ICSID as forums only limited to expropriation claims.

The Bangladesh-Italy BIT (1990)[26] is the only BIT so far signed by Bangladesh under which a claim was brought by the investor against Bangladesh in ICSID.[27] Article 9 of the BIT deals with ISDS provisions. In Article 9(1) is provides limitation of provisions subject to ISDS, as it states, "... relating to compensation for expropriation, nationalization, requisition or similar measures including disputes relating to the amount of the relevant payments…". Article 9(2) refers to domestic courts, UNCITRAL and ICSID as forums for ISDS, without any reference to relationship between these forums.

2.2 BITs of the Second Decade (from 1991-2000)

During this decade the country went through significant political change, when the long military dictatorship was overthrown from power as a result of political uprising against the regime and the country entered into its current 'democratic phrase' through a general election held in December, 1991. However, during this period, the two regimes that was in power through the 1991 and 1996 general elections, have concluded in total eleven BITs, all having provisions for ISDS in almost similar verbatims but also variant in terms of giving an advantage or imposing limitations upon the investors or the host state. Bangladesh-Netherlands BIT (1994)[28] in its Article 9 provides ICSID as the only forum for ISDS. The clause is a very short one and does not provide any other reference to any general or specific features of ISDS provisions. Article 6 of Bangladesh-Malaysia BIT (1994)[29] prescribes only ICSID as the venue for conciliation or arbitration. One interesting point is in Article 6(3) (iii) which states that,

> *In the event of disagreement as to whether conciliation or arbitration is more appropriate procedure, the opinion of the investor concerned shall prevail*. The Contracting Party which is a party to the dispute shall not raise as an objection, defense or right of set-off at any stage of the proceedings or enforcement of an award the fact that the investor which is the other party to the dispute has received or will receive, pursuant to an insurance or guarantee contract, an indemnity or other compensation for all or part or its losses and damages. [emphasis added]

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[26] Bangladesh-Italy BIT (1990) signed on 20th March 1990 and came into force on 20th September, 1994. For full text of the BIT see .e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/268/download> accessed 1 November 2020.

[27] Saipem S.p.A. v. People's Republic of Bangladesh (ICSID Case No. ARB/05/7) Award dated 30th June, 2009. For text of the Award see, e.g., <https://www.italaw.com/sites/default/files/case-documents/ita0734.pdf> accessed 13 October 2020.

[28] Bangladesh-Netherlands BIT (1994) signed on 1st November, 1994 and came into force on 1st June 1996. For full text see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/271/download> accessed 1 November 2020.

[29] Bangladesh-Malaysia BIT (1994) signed on 12th October 1994 and came into force on 20th August 1996. For full text see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5126/download> accessed 1 November 2020.

Thereby Article 6(3) (iii) of the aforesaid Bangladesh-Malaysia BIT (1994) gives the investor an advantage to choose the appropriate forum that it might think appropriate to bring a dispute against the host state.

On the other hand, Bangladesh-China BIT (1996)[30] rather imposes a restriction upon the investors on specific matters. In its Article 9, the BIT prescribes forums such as domestic courts, *ad hoc* tribunals and ICSID referred to sub-clause 2 to 4. of Article 9. Article 9(3) puts an embargo upon the investor stating that,

> If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in paragraph 1 of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal. *The provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in the paragraph 2 of this Article*. [emphasis added]

Article 9(2) states that, if the dispute between the investor and the state cannot be settled through, negotiations it shall be entitled to submit to the local courts. Therefore Article 9(2) and (3) read together implies that, once a dispute concerning amount of compensation or expropriation has been submitted before the domestic courts, the investor is barred from initiating an arbitration procedure on these two matters. Article 9(4) also prescribes the appointment procedure of arbitrators of the tribunal.

Bangladesh-Poland BIT (1997)[31] in its Article 7 stipulates ISDS and prescribes forums such as the *ad hoc* tribunals established under UNCITRAL rules, ICSID and as well as other forums in its Article 7(2), particularly mentioning the "a court of arbitration in accordance with the Rules of Procedure of the Arbitration Institute of the Stockholm Chamber of Commerce," and "the court of the arbitration of the Paris International Chamber of Commerce". Article 7 does not mention the relationship between these forums. It is also to be noted the limitation provided in Article 7(5) of the BIT upon the host state, which reads as follows:

> The Contracting Party which is a party to the dispute shall at no time whatsoever during the procedures involving investment disputes, *assert as a defense its immunity or the fact that the investor has received compensation under an insurance contract covering the whole or part of the incurred damage or loss.* [emphasis added]

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[30] Bangladesh China BIT (1996) signed on 12th September, 1996 and entered on 25th March 1997. The full text of this BIT is not publicly available. However, it is available only for the subscribers to Investment Claims, e.g. <https://oxia.ouplaw.com > 12 October 2020..

[31] Bangladesh-Poland BIT (1997) signed on 8th July 1997 and came into force on 19th November 1999. For full text of the BIT see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5127/download> accessed 1 November 2020.

Bangladesh-Japan BIT (1998)[32] provides in its Article 10 ISDS along with voluntary ADR (conciliation/mediation). Article 10 also refer two forums for ISDS, the domestic courts of the host state and ICSID and requires in Article 10(3) that local remedies must be exhausted before going to the international forum for arbitration suggesting, that the relation between the two forums are 'fork on the road'.[33] Signed in the same year, similar verbatim appears Article VIII of Bangladesh-Indonesia BIT (1998)[34] which refers to voluntary ADR (conciliation/mediation) and prescribing two forums for ISDS in its Article VIII (3)- domestic courts and ICSID, but does not mention the relationship between these two forums like that of Bangladesh-Japan BIT (1998). Exactly similar provision like the Bangladesh-Indonesia BIT (1998) is found in Bangladesh-Philippines BIT (1997)[35] in its Article IX.[36]

Bangladesh-Democratic Republic of Korea BIT (1999)[37] even after two decades of its signing is yet to come into force. Article 7[38] of the BIT deals with ISDS provision. Drafted perhaps in the bluntest verbal it does not provide any alternatives to arbitration and the domestic courts as the only means of resolving a dispute between an investor and the host state. This is the only BIT which does not provide any other forum apart from the domestic courts. This makes this particular ISDS provision a distinct one.

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[32] Bangladesh-Japan BIT (1998) signed on 10th November, 1998 and came into force 25th August 1999. For full text see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/269/download> accessed 1 November 2020.

[33] Therefore Article 10(3) of the Bangladesh- Japan BIT (1998) reads as follows:
"So long as and investor of either Contracting Party is pursuing administrative or judicial settlement within the territory of the other Contracting Party concerning a dispute that may arise out of investment made by such investor, or in the event that a final judicial settlement on such dispute has been made, such dispute shall not be submitted to arbitration referred to in the provisions of the present Article."

[34] Bangladesh-Indonesia BIT (1998) singed on 9th February 1998 and came into force on 22nd April, 1999, for full text see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/266/download> accessed 1 November 2020.

[35] Bangladesh-Philippines BIT (1997) singed on 8th September, 1997 and came into force on 1st August 1998, for full text see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/272/download> accessed 1 November 2020.

[36] Article IX of Bangladesh-Philippines BIT (1997) ibid, refers two forums for ISDS, namely the domestic courts and ICSID but without prescribing the relation between these two forums. It does not contain any other common features or special features of ISDS provisions

[37] Bangladesh-Democratic Republic of Korea BIT (1999), signed on 21st June 1999, for full text see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5128/download> accessed 1 November 2020.

[38] Article 7 of Bangladesh- Democratic Republic of Korea BIT (1999) states,
"(1) Any dispute which may arise between investor of one Contracting Party and other Contracting Party in connection with investment shall, as far as possible, be settled amicably through consultations between the parties to the dispute.
(2) If these consultations do not result in a solution within six month from the date of the request for settlement, the investor shall be entitled to submit the case to the competent court of the Contracting Party in the territory of which the investment has been made".

In the year 2000, Bangladesh singed three BITs. Article 8 of Bangladesh-Switzerland BIT (2000)[39] and Article 10 of Bangladesh-Uzbekistan BIT (2000)[40] contains almost wordings on provision on ISDS mechanism under the aforesaid BITs prescribing ICSID as the only forum.[41] The Bangladesh-Austria BIT (2000)[42] is different from rest other BITs, so far singed by Bangladesh; as rather than a single Article or clause this BIT has separate chapter to elaborately deal with different issues related to investment between the two contracting parties. Accordingly, Chapter Two, Part One of the BIT (from Articles 11-17) deals with ISDS, each Article different aspects of the ISDS mechanism.[43] As forums for ISDS in its Article 12 it refers to all the possible recourse, i.e. domestic courts, ICSID, UNCITRAL and other forums (ICC). As regards relationship between the forums in its Article 12 (1) (a) and (b) it prescribes for preserving right to arbitration after domestic court proceedings. This BIT also contains a special feature of ISDS which states a limitation period of 60 days for submission of claims in its Article 12 (2). Article 17 of the BIT also contains specialty as it makes an elaborate description of the scope of the Awards.[44] Article 17(1) (c) provides for restitution in kind in appropriate cases. Other BITs signed by Bangladesh do not prescribe such elaborate provision on Awards and enforcement.

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[39] Bangladesh-Switzerland BIT (2000) signed on 14th October, 2000 and came into force on 3rd September 2001. The BIT is available in both French and English. For full text of the BIT in English see, e.g. <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4807/download> accessed 1 November 2020.

[40] Bangladesh-Uzbekistan BIT (2000) signed on 18th July 2000 and came into force on 24th January 2001. For full text of the BIT see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/279/download> accessed 1 November 2020.

[41] Article 8(2) of Bangladesh-Switzerland BIT (2000) prescribes for voluntary ADR (conciliation/mediation) as an alternative to arbitration.

[42] Bangladesh-Austria BIT (2000) signed 21st December 2000 and came into force 1st December 2001. For full text see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/z170/download> accessed 1 November 2020.

[43] Each Articles under Chapter Two, Part One deals with different issues, these are namely, Article 11 (scope and standing), Article 12 (Means of Settlement, time period), Article 13 (contracting party consent), Article 14 (place of arbitration), Article 15 (indemnification), Article 16 (Applicable law) and Article 17 (Awards and Enforcement). It does not provide any policy exception clause for ISDS nor does prescribe for any alternative to arbitration

[44] Article 17 (1)of Bangladesh-Austria BIT (2000) reads as follows:
"(1) Arbitration awards, which may include an award of interest, shall be final and binding upon the parties to the dispute and may provide the following forms of relief:
(a) a declaration that the Contracting Party has failed to comply with its obligations under this Agreement;
(b) pecuniary compensation, which shall include interest from the time the loss or damage was incurred until time of payment;
(c) restitution in kind in appropriate cases, provided that the Contracting Party may pay pecuniary compensation in lieu thereof where restitution is not practicable; and
(d) with the agreement of the parties to the dispute, any other form of relief."

2.3 BITs of the Third Decade (from 2001-2010)

During this period Bangladesh signed six BITs, some of which have certain distinctive features of their own. For example, Bangladesh-Islamic Republic of Iran BIT (2001)[45] is the only BIT which starts with 'In the name of God". Article 13 of the Bangladesh-Iran BIT (2001) prescribes for ISDS. This Article does not refer to any forums of ISDS like other BITs, rather it is left open for the parties to decide how they are going to appoint the arbitrators to form a tribunal for settling the dispute between the investor and the host state. It further stipulates that if the parties fail to appoint an arbitrator then the parties can make a request to President of the International Court of Justice to appoint an arbitrator. Another interesting part of Article 13(1) is, it states, "…. However, the umpire shall be a national of a state having diplomatic relation with both Contracting Parties". Therefore, there is a nationality embargo in appointing arbitrator under this BIT in terms of diplomatic relation with both contracting parties.

Bangladesh-Thailand BIT (2002)[46] provides ISDS mechanism in its Article 9 and as forums for arbitration it provides for the domestic courts of the host state and *ad-hoc* tribunals established under UNCITRAL rules without mentioning any reference to the relation between these two prescribed forums. It is also noteworthy that it does not refer to ICSID which is bit unusual, the reason might be that, though Thailand had signed the ICSID Convention in 1985, but it is yet to ratify the Convention.[47] Though India never even signed the ICSID Convention but Bangladesh-India BIT (2009)[48] does mention, ICSID as a forum for ISDS. This clause does not refer to other specific features of ISDS, but Article 9(3) is of particularly noteworthy, which states:

> 3. The arbitral tribunal established under this Article *shall reach its decision on the basis of national laws and regulations of the Contracting Party,* which is a party to the dispute, the provisions of the present Agreement, as well as applicable rules of international law. [emphasis added]

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[45] Bangladesh-Iran BIT (2001) signed on 29th April 2001 and came into force on 5th December 2002. For full text of the BIT see e.g. <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/267/download> accessed 1 November 2020.

[46] Bangladesh-Thailand BIT (2002) signed on 9th June 2002 and came into force on 12th January 2003. This 2002 BIT replaced Bangladesh-Thailand BIT (1988). For full text of the 2002 BIT see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5130/download> accessed 1 November 2020.

[47] See e.g. <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> accessed 1 November 2020.

[48] Bangladesh-India BIT (2009) was signed on 9th February 2009 and it came into force on 7th July 2011. For full text of the BIT see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/265/download> accessed 1 November 2020.

Therefore Article 9(3) of Bangladesh-Thailand BIT (2002) particularly mentions national law as the applicable law for the dispute resolution, which is not found in other BITs singed by Bangladesh.

Bangladesh-Singapore BIT (2004)[49] similar to many other BITs discussed above, in its Article 7 provides ICSID as only forum for ISDS along with a provision for alternative to arbitration namely, voluntary ADR (conciliation/mediation)[50]. Article 7 of the Bangladesh-Vietnam BIT (2005)[51] prescribes for domestic courts, international conciliation, ICSID and UNCITRAL as forums for ISDS and the relationship between these forums are 'fork on the road'. Bangladesh-India BIT (2009)[52] in its Article 9 provides for ISDS. Article 9(2) (b) refers to conciliation under UNCITRAL. The means of forums for arbitration it refers to domestic courts of the host state, ICSID and UNCITRAL without suggesting any reference between these forums. Article 12(2) of the BIT provides for essential security exception clause in case of extreme emergency. The language of the ISDS provision in Bangladesh-India BIT (2009) is quite different than the standard clauses drafted in the other BITs signed Bangladesh as it elaborately articulates the step by step process of ISDS forums under the treaty.[53] Similar approach is found in Bangladesh-Denmark BIT (2009)[54] in its

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49 Bangladesh-Singapore BIT (2004), signed 24th June 2004 and came into force on 19th November, 2004. For full text of the BIT see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4885/download> accessed 1 November 2020.

50 Article 7(2) of Bangladesh Singapore BIT (2004) Ibid.

51 Bangladesh -Viet Nam BIT (2005) signed 1st May, 2005 and yet to come into force. For full text of the BIT see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5131/download> accessed 1 November 2020.

52 Bangladesh-India BIT 2009 (n 48).

53 Article 9 of Bangladesh India BIT (2009) ibid, reads:

"(1) Any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

(2) Any such dispute which has not been amicably settled within a period of six months may, if both Parties agree, be submitted:

(a) for resolution, in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Party's competent judicial, arbitral or administrative bodies; or

(b) to the international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law.

(3) Should the Parties fail to agree on a dispute settlement procedure provided under paragraph (2) of this Article or where a dispute is referred to conciliation but conciliation proceedings are terminated other than by signing of a settlement agreement, the dispute may be referred to Arbitration. The Arbitration procedure shall be as follows:

(a) If the Contracting Party of the Investor and the other Contracting Party are both parties to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965 and the investor consents in writing to submit the dispute to the International Centre for the Settlement of Investment disputes such a dispute shall be referred to the Centre; or

Article 9 which prescribes forums for ISDS are domestic court of the host state, ICSID, UNCITRAL, ICC and other forums as well, without clearly suggesting the relation between these prescribed forums.

2.4 BITs of the Fourth Decade (from 2010-2020)

This is the decade when the current government came to power in 2009 and put attraction of FDI as one of its top priority. Accordingly, the government has taken different initiatives to attract FDI flow in the country. Therefore, since attraction of FDI was one of the major national targets of the government one could easily expect that there would be a proliferation of BITs in Bangladesh as it was evidenced in other developing countries. However, in reality Bangladesh signed only three BITs during this period. Whether that shows a rather cautious step by Bangladesh in signing BITs is difficult to say, as two of these BITs are merely reproduction of the previous BITs signed by Bangladesh. Article 9 of Bangladesh-UAE BIT (2011)[55] states about ISDS provision. Article 9(3)(a) requires exhausting of local remedies before going to an international forum.[56] It only refers to ICSID as a forum for investor state dispute and therefore the relationship between the two prescribed forums is "local remedies first".

(b) If both parties to the dispute so agree, under the International Centre for the Settlement of Investment Disputes Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding proceedings governed by Additional Facility Rules, 1979; or

(c) To an ad hoc arbitral tribunal by either party to the dispute in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976, subject to the following modifications:

(i) The appointing authority under Article 7 of the Rules shall be the President, the Vice-President or the next senior Judge of the International Court of Justice, who is not a national of either Contracting Party. The third arbitrator shall not be a national of either Contracting Party.

(ii) The parties shall appoint their respective arbitrators within two months.

(iii) The arbitral award shall be made in accordance with the provisions of this Agreement and shall be binding for the parties in dispute.

(iv) The arbitral tribunal shall state the basis of its decision and give reasons upon the request of either party.

(4) Neither Contracting Party shall pursue through diplomatic channels any dispute submitted to a body or conciliation forum under paragraph(2), or referred to arbitration under paragraph (3) until the proceedings have terminated and a contracting Party has failed to abide by or to comply with the award or decision rendered by such body or conciliation Forum or Arbitration Forum."

[54] Bangladesh-Denmark BIT (2009) signed 5th November, 2009 and came into force on 27th March 2013. For full text of the BIT see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5125/download> accessed 1 November 2020.

[55] Bangladesh-UAE BIT (2011) signed 17th January, 2011 and yet to come into force. For full text of the BIT see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/276/download> accessed 1 November 2020.

[56] Article 9(3)(a) With respect to paragraph 1 of this Article, if the dispute cannot be settled amicably within the period of three months, the Parties to the dispute should pursue the following procedures:
a) If the dispute is not amicably settled within three(3) months as referred to in paragraph 1 then it shall be filled to the competent authorities or arbitration centres thereof, constituted under the laws of the Contracting Party, in whose territory the investment was made exhausting all local remedies;

The other BIT signed during this period, the Bangladesh-Turkey BIT (2012) in its Article 10 stipulates the ISDS provision.[57] The text of the treaty is drafted in the most common terms and does not include any other specific features that some other ISDS provisions include. It does provide for referring the dispute to the domestic courts of the host state[58] and prescribes ICSID and UNCITRAL as forums for ISDS and it does not provide any alternative to arbitration. Article 10(4)(a) states that investments which only have acquired prior permission can enjoy the benefits under this section of ISDS.[59] Thus, relationship between the two forums are 'fork in the road'. One positive feature of this BIT is that, in its Article 4 which states about protection of public health and environment, prescribes for exclusion of policy areas from ISDS[60] thereby the only BIT signed by Bangladesh which reflects few features of new generation of BITs. The text of Bangladesh-Cambodia BIT (2014) is not available in public domain therefore unable to make any comment on the ISDS provision in this particular BIT. It is to be noted that Bangladesh has not signed any BIT with any Latin American or African countries, but now considering to sign FTA with African countries.[61]

2.5 Treaties with Investment Provisions (TIPs)

In this discussion it is also pertinent to mention that, apart from the BITs Bangladesh also has signed some multilateral treaties on trade, commerce and investment having provisions on investment protection which are knows as Treaties with Investment provisions (TIPs). Some of these are the UN's Economic and Social Commission for Asia and the Pacific came up with this Framework Agreement on the Promotion,

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57 Bangladesh-Turkey BIT (2012) (n 24).

58 See e.g., Article 10(2) (a) of Bangladesh-Turkey BIT (2012) Ibid., states,
"2. If these disputes, cannot be settled amicably within six (6) months following the date of the written notification mentioned in paragraph l, the disputes can be submitted, as the investor may choose, to: (a) the competent court of the Contracting Party in whose territory the investment has been made, or ..."

59 Bangladesh-Turkey BIT (2012) Ibid, Article 10(4.) states,
"Notwithstanding the provisions of paragraph 2 of this Article;
(a) only the dispute arising directly out of investment activities which have obtained necessary permission, if any, in conformity with the relevant legislation of both Contracting Parties on foreign capital, and that effectively started shall be subject to be jurisdiction of the International Center for Settlement on Investment Disputes (ICSID) or any other international dispute settlement mechanism as agreed upon by Contracting Parties.

60 Bangladesh-Turkey BIT (2012) Ibid, Article 4 (Protection of Public Health and Environment) states,
"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.

61 See e.g., <https://thefinancialexpress.com.bd/trade/bd-plans-signing-ftas-with-african-countries-1593836160> accessed 1 November 2020.

Protection and Liberalization of Investment between Asia-Pacific Participating States in 2009 (shortly known as the Asia-Pacific Trade Agreement (APTA) (2009)[62], yet to come into force), the South Asian Free Trade Area (SAFTA) Accord 2004[63] and the Bangladesh-EC Cooperation Agreement (2000),[64] none of these three TIPS contain any provision on ISDS. The only TIPs signed by Bangladesh that contains ISDS is the OIC Investment Agreement (1981)[65], which in its Article 17 provides for ISDS suggesting scope for conciliation and arbitration.[66] It is to be noted that, eight BITs signed by

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62 APTA Investment Agreement (2009) singed on 15th December 2009. The treaty is yet to come into force. The member states of the treaty are China, Republic of Korea, Lao People's Democratic Republic and Sri Lanka. For full text of the treaty see, e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2591/download> accessed 1 November 2020. It is also to be noted here that this treaty does not overlap with other treaties concluded between the state parties, such as the China-Republic of Korea FTA (2005), China-Japan-Republic of Korea Trilateral Investment Agreement (2012), ASEAN-China Investment Agreement (2009) and ASEAN-Republic of Korea Investment Agreement (2009).

63 South Asian Free Trade Accord (2004) was signed on 6th January 2004 and came into force on 1st January 2006. This is a trade agreement between all South Asian Association for Regional Cooperation (SARRC) countries, namely, Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. For full text of SAFTA see e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2671/download> accessed 1 November 2020.

64 Cooperation Agreement between the European Community and the People's Republic of Bangladesh on Partnership and Development (Bangladesh EC Cooperation Agreement) was signed on 22nd May 2000 and came into force on 1st March 2001. For full text of the treaty see., e.g., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2399/download https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3088/download> accessed 1 November 2020.

65 Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference (OIC) was signed on 5th June 1981 and it came into force on February 1988. For full text of OIC Investment Agreement see e.g., see https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2399/download Accessed 1 November 2020.

66 Article 17 of OIC Investment Agreement, ibid, reads as follows

"1. Until an Organ for the settlement of disputes arising under the Agreement is established, disputes that may arise shall be entitled through conciliation or arbitration in accordance with the following rules and procedures:

1. Conciliation

a) In case the parties to the dispute agree on conciliation, the agreement shall include a description of the dispute, the claims of the parties to the dispute and the name of the conciliator whom they have chosen. The parties concerned may request the Secretary General to choose the conciliator. The General Secretariat shall forward to the conciliator a copy of the conciliation agreement so that he may assume his duties.

b) The task of the conciliator shall be confined to bringing the different viewpoints closer and making proposals which may lead to a solution that may be acceptable to the parties concerned. The conciliator shall, within the period assigned for the completion of his task, submit a report thereon to be communicated to the parties concerned. This report shall have no legal authority before a court should the dispute be referred to it.

2. Arbitration

a) If the two parties to the dispute do not reach an agreement as a result of their resort to conciliation, or if the conciliator is unable to issue his report within the prescribed period, or if the two parties do not accept the solutions proposed therein, then each party has the right to resort to the Arbitration Tribunal for a final decision on the dispute.

Bangladesh, discussed above co-exists the OIC Investment Agreement of 1981. Needless "to mention these are the ones with the countries who are also OIC member states and signatories of the OIC Investment Agreement (1981).[67]

3. Summary of the features of ISDS provisions in BITs of Bangladesh

With very few exceptions, every BIT that Bangladesh has singed predominantly provides for an enforcement mechanism of ISDS, generally conferring the rights of the foreign investors to have the right to take the recourse to international arbitration against Bangladesh on different forums by sidestepping the country's domestic court system.[68] From the discussion made above it is difficult to conclude that all the ISDS provisions are of similar verbatim, some of which are of course. But nevertheless, all these ISDS provisions have their own distinct feature in terms of articulation and mentioning the forums, though there are definitely an overarching similarity between these BITs. However, from the discussion made above based on the articulation of the ISDS provisions in Bangladesh BITs the features of these clauses can be summarized as follows:

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b) The arbitration procedure begins with a notification by the party requesting the arbitration to the other party to the dispute, clearly explaining the nature of the dispute and the name of the arbitrator he has appointed. The other party must, within sixty days from the date on which such notification was given, inform the party requesting arbitration of the name of the arbitrator appointed by him. The two arbitrators are to choose, within sixty days from the date on which the last of them was appointed arbitrator, an umpire who shall have a casting vote in case of equality of votes. If the second party does not appoint an arbitrator, or if the two arbitrators do not agree on the appointment of an Umpire within the prescribed time, either party may request the Secretary General to complete the composition of the Arbitration Tribunal.

c) The Arbitration Tribunal shall hold its first meeting at the time and place specified by the Umpire. Thereafter the Tribunal will decide on the venue and time of its meetings as well as other matters pertaining to its functions.

d) The decisions of the Arbitration Tribunal shall be final and cannot be contested. They are binding on both parties who must respect and implement them. They shall have the force of judicial decisions. The contracting parties are under an obligation to implement them in their territory, no matter whether it be a party to the dispute or not and irrespective of whether the investor against whom the decision was passed is one of its nationals or residents or not, as if it were a final and enforceable decision of its national courts."

[67] These includes Bangladesh-Indonesia BIT (1998) ((n 34); Bangladesh-Republic of Iran BIT (2001) ((n45); Bangladesh- Malaysia BIT (1994) ((n 29); Bangladesh-Pakistan BIT (1995) text not available, Bangladesh-Turkey BIT (1987) (n(23); Bangladesh-Turkey BIT (2012) (n 24); Bangladesh-UAE BIT (2011) Supra note 55; and Bangladesh-Uzbekistan BIT (2000) Supra note 40. For a list of other BITs signed by the other member states, as well as different FTAs and other Investment related Agreements that coexists with the OIC Investment Agreement (1981) see e.g., https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3092/oic-investment-agreement-1981- Accessed 1 November 2020.

[68] The BITs which provides scope for the local courts as ISDS forum are Bangladesh-US BIT (1986) (n 20) Article VII; Bangladesh-France BIT (1985) (n 21) Article 8; Bangladesh-Romania BIT (1987) ((n 25) Article 4; Bangladesh-China BIT (1996) (n 30) Article 9; Bangladesh-Japan BIT (1998) (n, 32) Article 10; Bangladesh-Indonesia BIT (1998) (n 34) Article VIII (3); Bangladesh-Philippines BIT (1997) (Supra note 35) Article IX; Bangladesh-UAE BIT (2011) (n 55) Article 9(3)(a).

(a) BITs which provide an all comprehensive ISDS clause which prescribes all possible forums for an investor-state dispute;

(b) BITs which provides limited scope for ISDS forums, including either only the local remedies or specific forum like that of the ICSID as the only option for an investor-sate dispute.

(c) BITs that categorically mentions the relation between the forums (i.e. fork on the road).

(d) BITs that categorically mentions 'local remedies first"

(e) BITs which provides exception to ISDS ambit (like exception to tax or expropriation related disputes from ISDS)

(f) BITs which provides specific requirement as to the appointment or nationality of the arbitrator

(g) BITs which provides for non-precluded measures (NPMs) or general exceptions from the scope of the ISDS claims.

4. Conclusion

With the proliferation of the BIT program with ISDS provisions, also has significantly led to the increasing number of investor state dispute.[69] In comparison to other developing countries the number of investors claims against Bangladesh is rather low. But with the increase of flow of FDI, there is every possibility that the number of ISDS claims against Bangladesh is likely to sufficiently increase in the coming days. Past experience of ISDS claims made against host developing countries says that foreign investors have made their claims on wide range of issues of regulatory measures covering from national security, public interest, environmental protection, public health to taxation policies. A successful ISDS claim also means that, awarding damages to the foreign investor in compliance with the arbitral award is actually making that payment from the tax payer's money to the foreign investors.[70] The amount of compensation awarded by the arbitral tribunals in the disputes that arose out of Argentine financial crisis,[71] recent Spanish debt crisis[72] and

[69] See UNCTAD Report on ISDS, (n 5).

[70] Ranjan (n 1) 11.

[71] See generally e.g., Rumana Islam, *The Fair and Equitable Treatment Standard (FET) in International Investment Arbitration: Developing Countries in Context* (Springer 2018) Ch.6;

[72] García-Castrillón CO, Spain and Investment Arbitration: The Renewable Energy Explosion, <https://www.cigionline.org/publications/spain-and-investment-arbitration-renewable-energy-explosion> accessed 14 August 2020; López-Rodríguez AM and Navarro P (2016), Investment Arbitration and EU Law in the Aftermath of Renewable Energy Cuts in Spain, 25 Eur. Energy & Envtl. L. Rev. 2; Behn D and Fauchald O Kristian, (2015) Governments under Cross-Fire: Renewable Energy and International Economic Tribunals, 12 Manchester J. Int'l Econ. L. 117-139.

the disputes that arose against Egypt as an aftermath effect of the Arab Spring crisis,[73] are good example of such pain that a country needs to bear to satisfy the claims of the foreign investor.

The danger of the host developing states is that they get caught for wide range of their sovereign decisions even if they have exercised such powers for the sake of public interest is due to the fact that the investor protection standards are drafted in vaguely in the texts of the treaties (for example the FET standard)[74] and due to the fact that, the ISDS provisions are also drafted vaguely with a broad net.[75] The very notation of the idea of devising the BIT program by the West was to ensure that certain conditions were imposed upon the regulatory behaviours of the host state and accordingly protect the foreign investors and their investments from the undue and arbitrary interferences by the host states.[76] It is interesting to note that despite the attraction of FDI being the top priority over the last decade if we look into number of BITs concluded by Bangladesh are very few. Even in terms of change of approach Bangladesh rather remained silence and in a way failed to alter its BIT regime in response to the changing Global South context where there is a dramatic shift of attitude from foreign investor protection to host state priority, even if we take the example of neighbouring India, who has come up with their own Indian Model BIT (2016)[77] putting host state's interest as its core feature. Thus, there is a strong need to review the existing BIT regime of the country, and specially the ambit of the scope of the ISDS provisions contained in those BITs, with an aim to reconsider its conventional international treaty making practice. Bangladesh needs to align its future of investment treaty making practice with the demands set forth by the current trends on recognizing the host state's need to adopt the scope of the ISDS provisions read with other general exceptions and NPM clauses in the BIT that would address the regulatory freedom for public interest manifestations of Bangladesh as the host state.

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73 Vaughan J (2013), Arbitration in the Aftermath of the Arab Spring: From Uprisings to Awards, The Ohio State Journal of Dispute Resolution 28(2) at pp. 491-518; An Arab Spring of treaty arbitration? <https://vannin.com/press/pdfs/arab-spring-of-treaty.pdf> accessed 14 August 2020.

74 See generally, Islam, (n 71).

75 See e.g., Ranjan (n 1, 15); Suzanne Spears 'The Quest For Policy Space in a New Generation of International Investment Agreements', 13 Journal of International Economic Law (2010), 1040; Ma Coldfelter 'The Adaptation of States to the Changing World of Investment Protection through Model BITs' 24 ICSID Review of Foreign Investment Law (2009) 165.

76 See Dolzer and Schereur (n 6), 13.

77 Indian Model BIT (2016) for full text <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download> accessed 1 November 2020.

The Origin of the Covid-19 Pandemic: Legal Obligations of China under International Law

Dr. Arif Jamil*

1. Introduction

Covid-19 is an outbreak of an infectious (human to human) disease that has reached the status of pandemic. It has spread all over the world and has claimed thousands of lives. Covid-19 comes as a new strain of Corona virus with no cure available, at the time of writing this article. The scientific community bears the pressure of finding a cure or vaccine for the virus.[1] However, many countries lack the infrastructure and preparedness for tackling this ever fast spreading infectious disease. Most of the developing and least developed countries do not provide free healthcare for the non-communicable diseases. It is necessary to keep in mind that bio-safety is one of the most crucial matters in the modern age. Thus, this article investigates the proximate cause of the outbreak and emphasizes the necessity of pandemic preparedness for a country. There are different views regarding the origin and spread of the Covid-19. The popular views regarding the origin of this Covid-19 virus are: *zoonotic transmission* (transmitted from wildlife to human) and a lab-escape, though there lacks credible evidence as to the source of this pandemic. The article meticulously analyses facts surrounding the outbreak in the probable "country of origin" and looks for the "patient zero".[2] Furthermore, the article also emphasizes the legal and international obligations of the country of the origin of the pandemic. Finally, it suggests some recommendations useful for the policy-makers to better prepare for an infectious disease outbreak of any scale.

2. The Covid-19 Pandemic and some Observations

The World Health Organization (WHO) describes pandemic as "the worldwide spread of a new disease".[3] The U.S. Department of Health and Human Services defines pandemic as "[a]n epidemic of disease, or other health condition, that occurs

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1 The world must admit that the academics, researchers and scientists belong to a disproportionately lower income group than musicians and actors (in some countries) and sports stars.

2 Danny De Vaal, 'What is Patient Zero? Why is it Important to Find Patient Zero in an Outbreak and is There Any Previous Examples?' *The Sun* (UK Edition, 26 March 2020) <https://www.thesun.co.uk/news/5878645/patient-zero-meaning-disease-outbreak-viral-bacteria/> accessed 29 August 2020 ("Patient zero is a term used to describe the first human infected by a disease.").

3 World Health Organization, 'What is a Pandemic?' (*Emergencies preparedness, response*, 24 February 2010) <https://www.who.int/csr/disease/swineflu/frequently_asked_questions/pandemic/en/> accessed 2 April 2020.

over a widespread area (multiple countries or continents) and usually affects a sizeable part of the population."[4] However, bio-threats are persistent, emerging and recurring, as interaction between humans and other life forms are obvious on the earth. There are multiple risk factors that give rise to a pandemic. Nita Madhav et al. (2018) observed: "Pandemic risk is driven by the combined effects of spark risk (*where* a pandemic is likely to arise) and spread risk (*how likely* it is to diffuse broadly through human populations)."[5] The impact of a pandemic stretches from the "shattered mental health of the population" to "a grim economy of a country", and the depression can be persistent for a long period of time.

Regarding *the infection source of this novel Corona virus*, a publication by the Tianjin Municipal Office of the Cyberspace Affairs Commission, We Doctor's Digital General Hospital and China Press of Traditional Chinese Medicine stated:

> The infection source of 2019-nCoV has not yet been found. The gene sequence of 2019-nCoV is similar to the SARS coronavirus. However, SARS coronavirus has been proved to stem from the coronavirus that wild animals (bats) carry. At present, most cases admitted have exposure history of "Huanan Seafood Market," where the wild animals were sold, and vendors and customers there have [had] the chance to be in contact with wild animals-carried coronavirus.[6]

The fact that first few patients in China had exposure history of "Huanan Seafood Market,"[7] does not automatically offer any theory that the virus was transmitted from wild animal to human. A zoonotic spark causing transmission of the "pathogen of animal origin" to "human population" is not evident from the available facts. However, all zoonotic sparks do not cause massive spread (transmission from animal to human and or human to human) of the pathogen resulting to a pandemic. Nita Madhav et al. (2018) reported:

> Most zoonotic pathogens are not well adapted to humans (stages 2-3), emerge sporadically through spillover events, and may lead to localized outbreaks, called stuttering chains (Pike and others 2010; Wolfe and others 2005). These episodes of "viral chatter" increase pandemic risk by providing opportunities for viruses to become better adapted to spreading within a human population.[8]

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4 U.S. Department of Health and Human Services, *Understanding HIV/AIDS Glossary Pandemic* <https://aidsinfo.nih.gov/understanding-hiv-aids/glossary/545/pandemic> accessed 2 April 2020.

5 Nita Madhav and others, 'Pandemics: Risks, Impacts, and Mitigation' in Dean T. Jamison and others (eds), *Disease Control Priorities: Improving Health and Reducing Poverty* (3rd edn, The World Bank 2018) 316.

6 We Doctor Tianjin Digital Hospital, 'Handbook of Prevention and Treatment of the Pneumonia Caused by the Novel Coronavirus (2019-nCoV)' *China Daily* (Global Edition, 03 February 2020) <https://www.chinadaily.com.cn/a/202002/03/WS5e380559a31012821727483d.html> accessed 31 March 2020.

7 ibid.

8 Nita Madhav and others (n 5) 319.

Further investigation needed to learn how well a pathogen like Covid-19 can transmit from animal to human to result to an accidental zoonotic spark. Kristian G. Andersen et al. (2020) claimed that *natural selection* might be behind the spark of the infection and they rule out the possibility of the virus being a "laboratory construct" and their publication stated: "It is possible that a progenitor of SARS-CoV-2 [Covid-19] jumped into humans, acquiring the genomic features […] through adaptation during undetected human-to-human transmission."[9] Kristian G. Andersen et al. (2020) also warned:

> Basic research involving passage of bat SARS-CoV-like coronaviruses in cell culture and/or animal models has been ongoing for many years in biosafety level 2 laboratories across the world, and there are documented instances of laboratory escapes of SARS-CoV. We must therefore examine the possibility of an inadvertent laboratory release of SARS-CoV-2 (FN omitted).[10]

However, according to Kristian G. Andersen et al. (2020), "no animal coronavirus has been identified that is sufficiently similar to have served as the direct progenitor of SARS-CoV-2, the diversity of coronaviruses in bats and other species is massively under sampled."[11] So, there is a group of people in the scientific community who believe in "natural selection" theory;[12] but *this theory is also an assumption*[13] based on inconclusive evidence.

About the publication of Vineet D Menachery et al. (2015), Nature News's editors wrote the following note: "We are aware that this story is being used as the basis for unverified theories that the novel coronavirus causing COVID-19 was engineered. There is no evidence that this is true; scientists believe that an animal is the most likely source of the coronavirus."[14] There is actually no proven theory (scientifically proven and accepted by the world) regarding the source of the infection of Covid-19, at the time of this writing. The only "Wuhan-virus (Covid-19) genome study results" available (Xintian Xu et al. (2020)), was conducted by China, not by

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9 Kristian G. Andersen and others, 'The Proximal Origin of SARS-CoV-2' (2020) 26(4) *Nature Medicine* 450, 451.

10 ibid, 451-52.

11 ibid, 451.

12 ibid, 450.

13 In their (Kristian G. Andersen and others) language: "*[M]ost likely* the result of natural selection" [emphasis added]. ibid.

Kristian G. Andersen and others concluded: "[W]e propose two scenarios that can plausibly explain the origin of SARS-CoV-2: (i) natural selection in an animal host before zoonotic transfer; and (ii) natural selection in humans following zoonotic transfer." ibid.

14 Declan Butler, '*Engineered Bat Virus Stirs Debate over Risky Research' Nature* (12 November 2015) <https://www.nature.com/news/engineered-bat-virus-stirs-debate-over-risky-research-1.18787#/b1> accessed 24 April 2020 (Editors' note, March 2020).

any independent outsider scientists. However, it is beyond doubt that countries have failed miserably in the containment of the spread of the infection.

Furthermore, the elderly age group seems to be the most vulnerable patient population with higher rate of mortality. Robert Verity et al. (2020) reported:

> It is clear from the data that have emerged from China that case fatality ratio increases substantially with age. Our results suggest a very low fatality ratio in those under the age of 20 years. As there are very few cases in this age group, it remains unclear whether this reflects a low risk of death or a difference in susceptibility, although early results indicate young people are not at lower risk of infection than adults. (FN omitted)[15]

2.1 Patient Zero in China, Italy, France, Iran and the USA

The Economic Times reported: "Wei Guixian, as identified by The Wall Street Journal, was selling shrimps at the Huanan Seafood Market on December 10 [of 2019] when she developed a cold."[16] Though she is considered as the patient zero by many sources, for this Covid-19 in China and the world, she might not be the real patient zero, as the available data on this outbreak are rather conflicting. China News Service (CNS) reported:

> [A]ccording to a study by Chinese researchers published in *The Lancet* on January 24 [of 2020], the first patient presented symptoms consistent with COVID-19 on December 1 [of 2019] and had no exposures to the market.
>
> It is also unclear whether Wuhan is the real ground zero of the deadly outbreak after all. China's top epidemiologist Zhong Nanshan said recently at a press conference that there is no evidence showing that COVID-19 originated in Wuhan.[17]

Jackson Rayan reported: "[T]he very first patient identified had not been exposed to the market, suggesting the virus may have originated elsewhere and been transported to the market, where it was able to thrive or jump into new hosts — whether human or animal."[18] Furthermore, Josephine Ma reported: "According to the government data seen by the Post, a 55 year-old from Hubei province could have been the first

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[15] Robert Verity and others, 'Estimates of the Severity of Coronavirus Disease 2019: A Model-Based Analysis' (2020) 20(6) *The Lancet Infectious Diseases* 669, 676.

[16] 'A Wuhan Shrimp Seller Identified as Coronavirus 'Patient Zero' *The Economic Times* (30 March 2020) <https://economictimes.indiatimes.com/news/international/world-news/wuhan-shrimp-seller-identified-as-coronavirus-patient-zero/articleshow/74870327.cms> accessed 2 April 2020.

[17] Gu Liping (ed), 'COVID-19 'patient zero' may remain an unsolved mystery' *Ecns.cn* (25 March 2020) <http://www.ecns.cn/news/society/2020-03-25/detail-ifzusrwx0577281.shtml> accessed 5 April 2020. Ecns.cn is the official English-language website of China News Service (CNS), a state-level news agency sponsored and established by Chinese journalists and renowned overseas Chinese experts on October 1, 1952.

[18] Jackson Rayan, 'Coronavirus explained: Symptoms, lockdowns and all your COVID-19 questions answered' (*CNET*, 17 April 2020) <https://www.cnet.com/how-to/coronavirus-explained-symptoms-lockdowns-and-all-your-covid-19-questions-answered/#wherefrom> accessed 18 April 2020.

person to have contracted Covid-19 on November 17. From that date onwards, one to five new cases were reported each day."[19]

Patient zero in Italy and the spread of the infection seems to be quite a story. Two Chinese tourists were detected on 29 January, 2020 as Italy's first Covid-19 case.[20] The health authority failed to take notice of the "the first locally transmitted case in Italy",[21] when on "18 February, a 38-year-old man went to the […] hospital in the sleepy northern town of Codogno"[22] with corona virus like symptoms but he was allowed to return home. However, *the infection might had been spreading for quite a while around that time without being detected or reported*. Only those two dates mark as the important events. Other infections spreading around those dates seem to be likely and remained unnoticed. Furthermore, there are claims suggesting that "the coronavirus reached Italy from Germany".[23] China News Service (CNS) reported:

> Massimo Galli, director of the Biomedical Research Institute, told Reuters that the epidemic probably started well before Italy's "patient one" fell ill. By analyzing genetic sequencing of the virus, Galli's team in Milan found evidence suggesting that the virus was brought to Italy by someone infected in the German city of Munich between January 19-22.[24]

Just "twenty days after the first locally transmitted case, authorities had confirmed 12,462 cases, 827 people had died and 1,028 were in intensive care units."[25] Italian politicians took this outbreak very lightly and they thought it was not a serious virus. The Wuhan experience was totally ignored. Alessio Perrone reported: "Lombardy governor Attilio Fontana (of the far-right League) told the regional parliament the coronavirus was "just a little more than normal flu" on February 25 [of 2020]."[26] Other politicians went on to celebrate life when Italy was approaching a precarious pandemic. Politician Nicola Zingaretti[27] had "a public aperitivo [supper] in Milan"[28] and '[t]he mayor of Milan Giuseppe Sala […] launched a campaign called "Milan doesn't stop", encouraging the Milanese not to be afraid.'[29] Just a few weeks later, Italy counted thousands of deaths from the Covid-19 infection. The mortality rate in Italy is

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19 Josephine Ma, 'Coronavirus: China's First Confirmed Covid-19 Case Traced Back to November 17' *South China Morning Post* (International Edition, 13 March 2020). <https://www.scmp.com/news/china/society/article/3074991/coronavirus-chinas-first-confirmed-covid-19-case-traced-back> accessed 18 April 2020.

20 Alessio Perrone, 'How Italy became the Ground Zero of Europe's Coronavirus Crisis' (*Wired*, 14 March 2020) <https://www.wired.co.uk/article/coronavirus-italy> accessed 5 April 2020.

21 ibid.

22 ibid.

23 ibid.

24 Gu Liping (ed) (n 17).

25 Alessio Perrone (n 20).

26 ibid.

27 Within few days he was diagnosed positive for Covid-19. ibid.

28 ibid.

29 ibid.

comparatively higher than other countries with similar health systems and some suggests the reason being the elderly (aged 65 or above) population makes up the 22.6 percent[30] of the total population. However, Alessio Perrone, while quoting Nino Cartabellotta,[31] explained the reasons why the early outbreak in Italy went unnoticed:

> There could be different reasons why these initial contagions were not spotted. "One, it could be that some suspected pneumonia cases were not tested [for coronavirus]," For example, reports emerging in Italian media suggest that hospitals in the outbreak area observed unusually high numbers of pneumonia cases one month before the outbreak. (These have not been confirmed as coronavirus cases yet.)
>
> "Two, it could be that there weren't any severe cases, that they only emerged in a clinically mild way," "and three, it depends on the level of attention that health policies place on [finding] the coronavirus."[32]

The first few cases in France were related to Wuhan. Sibylle Bernard Stoecklin et al. (2020) reported:

> Case 1 was a 48-year-old male patient living in France. He was travelling for professional reasons in China […] including Wuhan when he experienced his first symptoms […] on 16 January. He flew back to Bordeaux, France on 22 January via Shanghai, Qingdao and Paris Charles de Gaulle airports. […]. He sought medical attention from a general practitioner on 23 January, where he was suspected of COVID-19[…]. Infection was confirmed on 24 January by the National Reference Centre [….].
>
> The patient arrived in Wuhan on 13 January, did not report any visit to markets, exposure to live animals or contact with sick persons during his stay. […].
>
> Case 2 was a 31-year-old Chinese male tourist who had left Wuhan on 18 January and arrived in Paris on 19 January. […]. Case 3 was a 30-year-old Chinese female tourist who travelled with Case 2. […]. On 24 January, they were advised by the Chinese embassy to seek medical attention at the national hotline (SAMU-centre 15) and were immediately transferred to a regional referring hospital […]. Infection with SARS-CoV-2 was confirmed on 24 January for both of them by the National Reference Centre (Figure).[…].
>
> Neither of the two cases reported any visit to markets, exposure to live animals or contact with sick persons during the 14 days before symptom onset. Both visited a hospital in Wuhan on 16 January for an unrelated medical condition in Case 3 […].[33]

These initial three cases confirmed on 24 January in France, are known to be the first cases of novel Corona virus in the Europe.[34] China News Service (CNS) reported that, "[t]he first confirmed case of coronavirus [January 20, 2020] in the U.S. was

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30 ibid.
31 President, GIMBE Foundation.
32 ibid.
33 Sibylle Bernard Stoecklin and others, 'First Cases of Coronavirus Disease 2019 (COVID-19) in France: Surveillance, Investigations and Control measures' (2020) 25(6) *Euro Surveillance* 1, 4.
34 ibid 1.

[…] [a] 35-year-old man from Washington state, who came back from Wuhan"[35] and "an unnamed merchant from Qom who traveled to China regularly for work, was believed to be the country's [Iran] potential patient zero, according to Iran's health minister Saeed Namaki."[36]

The outbreak seems to have assume its enormous proportions by the end of the January 2020. It had reached many countries by the end of January. During February 2020, the containment seems to have been less effective. In March 2020, the Covid-19 pandemic went global. Some of the infected countries (France, Iran, USA) at the initial stage have traced its infection origin among the travelers from Wuhan or China. However, *findings from the "sewage water study" in Spain and Italy leads the search for the origin of the outbreak to a different direction*. Catalan News reported: "A study led by the University of Barcelona (UB) has detected the presence of SARS-CoV-2 in wastewater samples from Barcelona on March 12, 2019."[37] This study result indicates *the presence of the virus before China reported its first case*. Liu Caiyu reported: "The presence of COVID-19 in Spain's sewage offers a clue on the virus' existence, either in people or animals, before China reported its first COVID-19 patient in December 2019, Chinese experts said, after Spain detected the presence of the novel coronavirus in March last year, and Italy made similar findings."[38]

Dr. Ananya Mandal wrote:

> Italian researchers have found traces of the novel coronavirus SARS-CoV-2 in sewage wastewater that indicates that the virus may have been in circulation since December 2019. This controversial discovery shows that even before the first case was reported in Wuhan, China, in late December 2019, the virus had already arrived in northern Italy.[39]

2.2 The Outbreak in China and Reporting Issues

Dr. Li Wenliang, the ophthalmologist from Wuhan (epicenter of the outbreak in China), who shared the news of the outbreak with his colleagues, were harassed on

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35 Gu Liping (ed) (n 17).

36 ibid.

37 Catalan News, *SARS-CoV-2 detected in Barcelona water study from March 2019* (26 June 2020) <https://www.catalannews.com/society-science/item/sars-cov-2-detected-in-barcelona-water-study-from-march-2019> accessed 22 August 2020. The Catalan News Agency (CNA) is a news agency owned by the Catalan government. Barcelona is the capital and largest city of the autonomous community of Catalonia, as well as the second most populous municipality of Spain.

38 Liu Caiyu, 'COVID-19 in Spain Sewage Brings Origin of Virus a Step Closer' *The Global Times* (27 June 2020) <https://www.globaltimes.cn/content/1192756.shtml> accessed 22 August 2020.

39 Ananya Mandal, 'Italy's Sewage Water Shows SARS-CoV-2 Presence Prior to Reported Outbreak in Wuhan' *News-Medical.Net* (20 June 2020) <https://www.news-medical.net/news/20200620/Italye28099s-sewage-water-shows-SARS-CoV-2-present-prior-to-reported-outbreak-in-Wuhan.aspx> accessed 29 August 2020 ("A report was released this week on the findings of this analysis of sewage water from various water treatment plants. From the samples obtained in Milan and Turin on the 18th of December 2019, the team found the presence of the SARS CoV-2.").

allegations of spreading rumor and disrupting the law and order.[40] The Guardian reported:

> Li had posted to a group chat with other medics about some patients showing signs of a new Sars-like illness in early December, well before Chinese authorities admitted to the outbreak of a novel coronavirus.
>
> Police detained Li a few days later for "spreading false rumours" and forced him to sign a police document admitting that he had "seriously disrupted social order" and breached the law. Officers said eight people had been disciplined for spreading rumours in relation to the virus […].[41]

This incident suggests that local authorities in China suppressed the news of the outbreak in Wuhan at the inception. The Chinese official report on Li's death[42] did not accuse him of disrupting public order but they 'maintained that Li had not verified the information before sending it, and it was "not consistent with the actual situation at the time".'[43] The Chinese authority should have taken Li's observations seriously and focus on containment of the outbreak.

The publication by Xintian Xu et al. (2020)[44] was accepted for publication on January 16, 2020. It stated: "[N]o obvious evidence of human-to-human transmission was reported".[45] It seems from the available facts that there should not be doubt regarding *human to human transmission* in the second week of January 2020.

China's performance on containment of the disease and prevention of the new infection in the subsequent months, e.g., 1st week of April, show how highly capable China is as a nation in containing the spread of an infectious disease. Why did it underperform in the initial weeks of the outbreak? China admitted certain failures of the concerned departments in Wuhan: "slow in response, lost control in the prevention process and ignorant of their job duties during the epidemic."[46]

When the first "*reported outbreak*" happened in Wuhan, China, it continued to spread, as a "*human to human transmission*". The pandemic could have been averted by imposing a timely lockdown. Instead of preventing the spread of the infection and

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40 'Chinese Inquiry Exonerates Coronavirus Whistleblower Doctor' *The Guardian* (International Edition, 20 March 2020) <https://www.theguardian.com/world/2020/mar/20/chinese-inquiry-exonerates-coronavirus-whistleblower-doctor-li-wenliang> accessed 8 April 2020.

41 ibid.

42 He contracted the virus and died subsequently.

43 Chinese Inquiry Exonerates Coronavirus Whistleblower Doctor (n 40).

44 Xintian Xu and others, 'Evolution of the Novel Coronavirus from the Ongoing Wuhan Outbreak and Modeling of its Spike Protein for Risk of Human Transmission' (2020) 63(3) Science China Life Science 457, 457-60.

45 ibid 457 ("One genome sequence (WH-Human_1) of the Wuhan CoV was first released on Jan 10, 2020, and subsequently five additional Wuhan CoV genome sequences were released").

46 'Wuhan Police Apologize for Reprimanding Doctor who Sounded Early Alarm on COVID-19 (*CTGN*, 20 March 2020) <https://news.cgtn.com/news/2020-03-19/Admonition-letter-to-Dr-Li-Wenliang-improper-investigation-OZvG7i94Fa/index.html> accessed 8 April 2020.

making the information public, China suppressed the news of the outbreak by silencing the whistle blower doctor at the inception of the crisis. Suppressing the news of the outbreak has allowed the infection to spread fast to the community level. Robert Verity et al. (2020) reported: "In international Wuhan residents repatriated on six flights, we estimated prevalence of infection of 0·87% (95% CI 0·32–1·9; six of 689)."[47] Hence, the infection spread through not only by the "travellers from Wuhan" but also by the "panicked foreign residents" of Wuhan that were repatriated to their countries of origin. Robert Verity et al. (2020) made the following comment after presenting their data analysis results on "individual-case data for patients who died from COVID-19" in China and some other countries:

> The world is currently experiencing the early stages of a global pandemic. Although China has succeeded in containing the disease spread for 2 months, such containment is unlikely to be achievable in most countries. Thus, much of the world will experience very large community epidemics of COVID-19 over the coming weeks and months.[48]

This prediction turned out to be true for many countries.

3. Essential Features of Covid-19 and the Challenges Countries Face

The Handbook of Prevention and Treatment of the Pneumonia Caused by the Novel Coronavirus (2019-nCoV) by the Tianjin Municipal Office of the Cyberspace Affairs Commission, We Doctor's Digital General Hospital and China Press of Traditional Chinese Medicine identified this novel corona virus and its features as following:

> Coronavirus is a kind of virus widely existing in nature. It is the largest known RNA virus in the genome and is named coronavirus, as its form is similar to the crown under the electron microscope. […]. It can cause respiratory tract, digestive tract, and nervous system diseases of humans and animals. […]. So far, in addition to the new coronavirus [Covid 19], we have found six kinds of coronaviruses such like HCoV-229E, HCoV-OC43, SARS-CoV, HCoV-NL63, HCoV-HKU1, and MERS-CoV that can infect humans. […]. Pneumonia caused by the novel coronavirus was found in central China's Wuhan City, Hubei Province in December 2019. It has been proved to be an acute respiratory infectious disease caused by a new type of coronavirus. The new coronavirus is a new strain of coronavirus that has not yet been previously found in the human body. The World Health Organization named the coronavirus 2019-nCov, namely a new coronavirus.[49]

Xintian Xu et al. (2020) reported after studying the "Wuhan CoV (novel coronavirus) genomes":

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[47] Robert Verity and others (n 15) 675.
[48] ibid 676.
[49] We Doctor Tianjin Digital Hospital (n 6).

> Overall, there is considerable genetics distance between the Wuhan CoV and the human-infecting SARS-CoV, and even greater distance from MERS-CoV. This observation raised an important question whether the Wuhan CoV adopted the same mechanisms that SARS-CoV or MERSCoV used for transmission cross species/humans, or involved a new, different mechanism for transmission.[…]. The Wuhan CoV S-protein and SARS-CoV S-protein shared an almost identical 3-D structure in the RBD domain, thus maintaining similar van der Waals and electrostatic properties in the interaction interface. [….]. Our work points to the important discovery that the RBD domain of the Wuhan CoV S-protein supports strong interaction with human ACE2 molecules despite its sequence diversity with SARS-CoV S-protein. Thus the Wuhan CoV poses a significant public health risk for human transmission via the Sprotein– ACE2 binding pathway.[50]

Therefore, Xintian Xu et al. (2020) concluded that "the Wuhan CoV S-protein is regarded to have strong binding affinity to human ACE2"[51] and thus will be susceptible of human to human transmission; but the paper allowed ambiguity on this matter saying: "[a]lthough no obvious evidence of human-to-human transmission was reported, there were exported cases in Hong Kong China, Japan, and Thailand."[52] It is pertinent to mention here that, from the beginning of the first few *reported cases* in Wuhan, China, the nature of "human to human transmission" of this outbreak was downplayed, which has resulted in the uncontrolled spread of the virus.

Vineet D Menachery et al. (2015) created a chimeric virus and reported:

> Here we examine the disease potential of a SARS-like virus, […].-Using the SARS-CoV reverse genetics system, we *generated and characterized a chimeric virus* expressing the spike of bat coronavirus SHC014 in a mouse-adapted SARS-CoV backbone. The results indicate that group 2b viruses encoding the SHC014 spike in a wild-type backbone can […], *replicate efficiently in primary human airway cells* and *achieve in vitro titers equivalent to epidemic strains of SARS-CoV*. [….]. On the basis of these findings, we synthetically re-derived an infectious full-length SHC014 recombinant virus and demonstrate robust viral replication both in vitro and in vivo. *Our work suggests a potential risk of SARS-CoV re-emergence* from viruses currently circulating in bat populations.[53] [FN omitted; Italics added]

This 2015 publication of Vineet D Menachery et al. predicted that an infection may spread from wild animals like bats to humans.[54] However, this kind of publication

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50 Xintian Xu and others, 'Evolution of the Novel Coronavirus from the Ongoing Wuhan Outbreak and Modeling of its Spike Protein for Risk of Human Transmission' (2020) 63(3) *Science China Life Sciences* 457, 458-60.

51 ibid 460.

52 ibid 457.

53 Vineet D. Menachery and others, 'A SARS-like Cluster of Circulating Bat Coronaviruses Shows Potential for Human Emergence' (2015) 21(12) *Nature Medicine* 1508, 1508.

54 "[T]he documented high-frequency recombination events in CoV families underscores the possibility of future emergence and the need for further preparation". ibid 1512.

also provides knowledge for manipulation of potentially lethal pathogens of animal origin.[55]

At the time of writing this article, Covid-19 is a *pandemic*, with no cure available. The respiratory care required for providing life saving support to Covid-19 positive patients are inadequate not only in the countries with the poor healthcare systems, but also around the entire world with a few exceptions. Countries with infrastructure and preparedness for endemic, epidemic and pandemic are able to tackle some of the unforeseeable healthcare crises but countries with poor healthcare systems are at a loss with the outbreak. China has controlled the spread of Covid-19 infection within its border in a short period of time but has failed to prevent it from spreading outside the country. Countries with top health systems in the world like the U.K. (41,498) Italy (35,473 (15%)), Spain (29,011) and France (30,602 (26%)) have counted large percentage of fatalities (of closed cases) among the Covid-19 infected population.[56] At the time of this writing, the outbreak is spreading like bushfire with different the rate of fatalities in different countries but the total number of infections and deaths of closed cases (847,126 (5%))[57] are frightening.

The search for vaccine and cure has brought to the fore the importance of:

- "investing in scientific research";
- "providing incentive to the scientists, researchers and academics" for original research; and
- "prioritizing individual States' agenda" for welfare and protection of their citizens.

Furthermore, countries have differing degrees of preparedness and abilities to fight this ever fast spreading infectious disease. Nita Madhav et al. (2018) reported:

> Well-prepared countries have effective public institutions, strong economies, and adequate investment in the health sector. They have built specific competencies critical to detecting and managing disease outbreaks, including surveillance, mass vaccination, and risk communications. Poorly prepared countries may suffer from political instability, weak public administration, inadequate resources for public health, and gaps in fundamental outbreak detection and response systems.[58]

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55 "On the basis of these findings, scientific review panels may deem similar studies building chimeric viruses based on circulating strains too risky to pursue, as increased pathogenicity in mammalian models cannot be excluded." ibid.
There should be proper evaluation of risk and gain for conducting this kind of studies that create seriously harmful pathogen. "[T]he potential to prepare for and mitigate future outbreaks must be weighed against the risk of creating more dangerous pathogens." ibid.

56 Worldometer, 'Covid-19 Coronavirus Pandemic' (10:06 GMT, August 30, 2020) <https://www.worldometers.info/coronavirus/country/spain/> accessed 30 August 2020.

57 ibid.

58 Nita Madhav and others (n 5) 320.

4. The Legal Issues: An Analysis from International Law Perspective

Article 1 of the draft articles on Responsibility of States for Internationally Wrongful Acts, 2001 of the International Law Commission (ILC) states: "Every internationally wrongful act of a State entails the international responsibility of that State."[59] Article 2 explains the "[e]lements of an internationally wrongful act of a State" as following: "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State."[60]Article 4(1) also makes it clear that "[t]he conduct of any State organ shall be considered an act of that State under international law".[61]

Should it not be an *international obligation* of a State to contain a highly contagious disease? Failure of containment of Covid-19 can be understood as failure of performing the duty of State responsibility. Therefore, proper "reporting" of the outbreak may be considered as an international responsibility of the State. The pandemic of Covid-19 may:

- make the world realize the need to develop a multilateral treaty on how to deal with "infectious disease outbreak";
- propel the international community to assess, evaluate and outline the responsibility of the country of origin of outbreak and in appropriate cases, determine the liability; and
- create a platform for consensus and bring the world together.

The Covid-19 related law suits pending at different forums may provide direction and precedents for the future. However, "no-harm principle" as customary international law had been applied in many law suits[62] concerning transboundary environmental harm. This principle may be invoked in different cases of transboundary harm inflicted on other States due to the failure of exercising diligence by country of the origin of the harm.

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59 United Nations, 'Responsibility of States for Internationally Wrongful Acts' [2001] (2) *Yearbook of the International Law Commission* <https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> accessed 22 August 2020.

60 ibid.

61 ibid. (Article 4(2) says: "An organ includes any person or entity which has that status in accordance with the internal law of the State").

62 E.g., Trail Smelter Case (United States, Canada), UNRIAA, Vol. III, pp. 1905-1982;
ICJ, Judgement, Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), 2010 ICJ Reports, p. 56 para.101 ("A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation "is now part of the corpus of international law relating to the environment").

Furthermore, Article 8 of the Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research talks about the "[s]cientific quality" of the biomedical research and emphasized that "[a]ny research must be scientifically justified, meet generally accepted criteria of scientific quality and be carried out in accordance with relevant professional obligations and standards under the supervision of an appropriately qualified researcher."[63] Gain of function researches should justify the scientific and ethical standard and not be openly accessible by anyone except the responsible authorities. The 2015 publication of Vineet D Menachery et al.[64] should have been considered as a confidential reporting.

However, Article I of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (hereinafter the "Biological Weapons Convention"), 1972[65] states:

> Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:
>
> (1) microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes.[66]

If the Covid-19 is a lab-construct, then the country of the origin of this virus should be legally answerable and this Convention may direct the consequence of the outcome from the institutional investigation.

As an inter-governmental global organization and in accordance with the mandate, the World Health Organization (WHO) needed to work with the countries more actively in the beginning of this outbreak, verify information and provide answers to the key questions resonating regarding the origin of the Covid-19 pandemic. WHO affirms in the Preamble of its Constitution: "Unequal development in different countries in the promotion of health and control of diseases, especially communicable disease, is a common danger."[67] Therefore, there exists high

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63 Council of Europe, *Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research* <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008371a> accessed 26 August 2020.

64 Vineet D. Menachery et al., 'A SARS-like Cluster of Circulating Bat Coronaviruses Shows Potential for Human Emergence' (2015) 21(12) *Nature Medicine* 1508, 1508-13.

65 UNODA, *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction* <http://disarmament.un.org/treaties/t/bwc> accessed 18 April 2020.

66 UNODA, *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction* <http://disarmament.un.org/treaties/t/bwc/text> accessed 18 April 2020.

67 World Health Organization, 'WHO Remains Firmly Committed to the Principles Set Out in the Preamble to the Constitution' <https://www.who.int/about/who-we-are/constitution> accessed 10 October 2020.

expectation from the international community and also the member states that WHO definitely will investigate into the matter and take necessary initiatives to frame a legal instrument of state responsibility for prevention of spread of this kind of diseases.

4.1 Law Suit in the United States against China

Missouri State Government filed a law suit[68] against the Chinese government over its improper handling of the Covid-19. Meaghan Wray reported quoting from the case document:

> During the critical weeks of the initial outbreak, Chinese authorities deceived the public, suppressed crucial information, arrested whistleblowers, denied human-to-human transmission in the face of mounting evidence, destroyed critical medical research, permitted millions of people to be exposed to the virus, and even hoarded personal protective equipment, thus causing a global pandemic that was unnecessary and preventable.[69]

This is not the first of its kind; this law suit is the second one. And probably many more law suits will follow regarding how this outbreak originated and the losses countries suffered from it.

4.2 Criminal Complaint before the International Criminal Court for Crimes Against Humanity and Genocide Against China

Freedom Watch, Inc filed a complaint at the International Criminal Court against (a) the People's Republic of China, (b) the People's Liberation Army, the official military of China, (c) The Wuhan Institute of Virology and Agency of the Government of China (d) Shi Zhengli, Director of the Wuhan Institute of Virology (e) Major General Chen Wei of China's People's Liberation Army (as defendants) alleging the release of Covid-19 from the biological laboratory (Wuhan Institute of Virology) in the city of Wuhan, China by the defendants.[70] The complainant (FREEDOM WATCH, Inc.), therefore, prayed:

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[68] *The State of Missouri v. The People's Republic of China*, *The Communist Party of China, National Health Commission of the People's Republic of China, Ministry of Emergency Management of the People's Republic of China, Ministry of Civil Affairs of the People's Republic of China, People's Government of Hubei Province, People's Government of Wuhan City, Wuhan Institute of Virology, and Chinese Academy of Sciences*, Case: 1:20-cv-00099 Doc. #: 1 <https://ago.mo.gov/docs/default-source/press-releases/2019/prc-complaint.pdf?sfvrsn=86ae7ab_2> accessed 26 November 2020.

[69] Meaghan Wray, 'Missouri Sues China for 'Deceit' over Coronavirus Threat' *Global News* (22 April 2020) <https://globalnews.ca/news/6851812/missouri-sues-china-coronavirus/> accessed 24 April 2020.

[70] FREEDOMWATCH, *Klayman/Freedom Watch Update Complaint at Int'l Criminal Court Over Covid-19 Pandemic!* <https://www.freedomwatchusa.org/klaymanfreedom-watch-update-complaint-at-intl-criminal-cou> accessed 18 April 2020.

> Complainants respectfully request that the Prosecutors Office of the International Criminal Court open an investigation to determine the origins of the COVID-19 virus including its likely release from the Wuhan Institute of Virology and the Defendants' willful interference with attempts to fight the spread of the disease and develop treatments, tests, and a vaccine and once the facts alleged herein are confirmed to conduct criminal war crimes prosecutions to and try, convict and sentence to life imprisonment the Defendants herein.[71]

Whether the International Criminal Court can entertain this complaint as a crime against humanity and genocide against China is questionable. There are clearly given definitions and criteria for the genocide (article 6), crimes against humanity (article 7) and war crimes (article 8) in the Statute of the International Criminal Court (hereinafter mentioned as "Rome Statute") and death caused by pandemic, if found to be man-made, is not incorporated there in clear terms.[72] It may require further interpretation and modification of the Rome Statute, 1998 for the International Criminal Court to entertain such complaints filed by the Freedom Watch, Inc. However, it is worth observing how the court reply to the cases on Covid-19 pandemic and if they attach any liability on China.

5. Conclusion by Way of Recommendations

The sewage water study report from Spain show that the virus was circulating much before the first reported case of Wuhan. This information is a game changer. So which is the country of origin of this novel corona virus? Is it Wuhan or Barcelona? It will be wise to conclude by saying that further studies may reveal more links to the origin of this virus. Amid the ambiguities regarding the origin of the outbreak, there lacks credible evidence as to the source of the pandemic, at the time of writing this article. However, China suppressed at the initial stage of the outbreak in Wuhan, two vital information essential to prevent the infectious disease from becoming a pandemic:

(i) that a novel Corona virus is spreading; and

(ii) that it is certainly positive (infectious) for human to human transmission.

Moreover, the "outbreak of an infectious disease" should be "reported" and failure to warn the international community may be considered as failure of the "State Responsibility". Therefore, the draft UN document (International Law Commission's report) on State Responsibility (Responsibility of States for Internationally Wrongful Acts, 2001)[73] can be considered as foundation for a new "Treaty" to address the

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71 ibid <https://www.freedomwatchusa.org/pdf/200416-FINAL%20InternationalCriminalCourt Complaintsupplementdraft8.pdf> accessed 10 October 2020.

72 International Criminal Court, *Rome Statute of the International Criminal Court 1998* <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> accessed 10 October 2020.

73 United Nations (n 59).

responsibility of States on "failure of efficient reporting" of the outbreak of a highly infectious disease.

Regarding the origin of the virus, *further research is needed* to confirm if the "natural selection" theory is solid to justify that the virus might have jumped to humans from bats or pangolins (animal origin). A zoonotic spark causing transmission of the "pathogen of animal origin" to "human population" is not evident from the available facts.

I recommend that every State shall take certain measures to prepare itself for a pandemic outbreak and maintain certain rules of good governance relating to public health system:

- Prioritize "bio-safety" and recognize the "right to healthcare" for their population and implement it.
- Invest more public money in scientific research.
- Endemic, epidemic and pandemic preparedness is not a seasonal thing; it is rather about building the permanent facilities to tackle the unforeseeable health crisis.
- Openness, transparency and accountability are foundations of every functional State that would not export a pandemic to the world! Suppressing the news of the outbreak of an infectious disease can lead to the catastrophic consequences. Therefore, countries must practice *proper reporting protocols*.
- Gain-of-function research as part of biomedical researches should be carefully evaluated by the ethics committee and if approved, the bio-safety measures must be appropriate and the results should not be openly accessible by the world. Only regulatory authorities and scientific committees should have the results shared among the known, selective and responsible group of people. Declan Butler wrote quoting Simon Wain-Hobson,[74] 'that the researchers have created a novel virus [SHC014; Vineet D Menachery et al. (2015)] that "grows remarkably well" in human cells. "If the virus escaped, nobody could predict the trajectory" '.[75]

Finally, I will condense the key recommendations directly in line with Nita Madhav et al. (2018) who convincingly mentioned: "The most cost-effective strategies for increasing pandemic preparedness, especially in resource- constrained settings, consist of investing to strengthen core public health infrastructure, including water and sanitation systems; increasing situational awareness; and rapidly extinguishing sparks that could lead to pandemics."[76]

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[74] Virologist, Pasteur Institute, Paris.
[75] Declan Butler (n 14).
[76] Nita Madhav and others (n 5).

Judicial Recognition of Constitutional Conventions: The Elements Revisited

Moha. Waheduzzaman*

1. Introduction

In the study of constitutional law, it is now firmly established that two sets of rules should be remembered to fully apprehend the constitution of a country.[1] Those rules are commonly referred to as the 'laws of the constitution' and 'conventions of the constitution'. In countries, where there are written constitutions, the laws of the constitution are usually contained in that written document and their violation also entails legal consequences. On the other hand, the conventions of the constitution usually grow up around and upon the principles of the written constitution of a country.[2] Regarding the growth of conventions in the constitutional system of a country, Hood Phillips observes: "With passage of time, in working a constitution and running the state affairs, many precedents occur and practices develop. When such precedents and practices are found to have been consistently followed, they are

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1 Dicey, who was much anxious in English jurisdiction to distinguish conventions from laws on the basis of their 'court enforceability', also recognizes the need of having knowledge of conventions to fully apprehend a constitution. To express in Dicey's own words: "But a lawyer cannot master even the legal side of the English constitution without paying some attention to the nature of those constitutional understandings which necessarily engross the attention of historians or of statesmen. He ought to ascertain, at any rate, how, if at all, the law of the constitution is connected with the conventions of the constitution; and a lawyer who undertakes this task...to the English polity the whole of its peculiar colour." Albert V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, MacMillan Press 1959) 417-18.

2 Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1972) 83. Jennings mentions in this regard the conventions of the US Constitution: "Thus a whole host of conventions has grown up around and upon the Constitution of the United States, regulating, for instance (apart from legislation, which also applies), the method of electing the President, the composition and operation of his Cabinet, his relations with Congress, and so on." ibid (internal citation omitted). Mahmudul Islam also cites from US Constitution: "Many conventions have also developed in the United States relating to election of the President, the formation, selection and functioning of the President's Cabinet, senatorial approval of certain political appointments and other matters." Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers 2012) 4. In passing, it may, therefore, be noted that conventions are peculiar not only to unwritten constitutions, as in Great Britain, but may be found to a greater or lesser extent in countries with written constitutions as well. Wheare realizes to this effect that "in all countries usage and convention are important and that in many countries which have Constitutions usage and convention play as important a part as they do in England." KC Wheare, *Modern Constitutions* (2nd edn, Oxford University Press 1966) 122. AV Dicey was also well aware of this when he observed in relation to US Constitution that "It may be asserted without much exaggeration that the conventional element in the Constitution of the United States is as large as in the English Constitution." Cited in Wheare, ibid.

treated as constitutional conventions."[3] They, therefore, are the "rules of political practice"[4] and regarded commonly as the 'non-legal'[5] rules of a constitution. These conventions or 'unwritten rules'[6] are found in almost all established constitutions and also soon developed even in the newest ones.

The conventions, therefore, are also not uncommon to the written constitutional law of Bangladesh. However, the moot question that has vexed the Supreme Court of Bangladesh in dealing with them is whether they are *enforceable* in a *court of law* or not. One may find conventions of many and varied dimensions in actual working of the constitutional governmental system of Bangladesh. But the only constitutional practice of political actors that has come before the court and judges have also discussed the issue at some length is the convention of President's 'consultation' with the Chief Justice in the matter of appointment of Judges of the Supreme Court of Bangladesh. Article 95(1) of the original Constitution of 1972 provided that "the Chief Justice shall be appointed by the President and other Judges shall be appointed by the President *after consultation with the Chief Justice."* [7] Likewise, the President was also required to *consult* the Chief Justice to appoint Additional Judges under Article 98 of the Constitution. By the Constitution (Fourth Amendment) Act, 1975[8], the phrase 'after consultation with the Chief Justice' was omitted both from Articles 95 and 98 of the Constitution.[9]

However, despite the deletion of the expression 'consultation' by the Fourth Amendment, all appointments as Judges of the Supreme Court were in fact made by the President after consultation with the Chief Justice and that was so made even "during the Martial Law regime though the matter of consultation was not reflected in the Notification."[10] This conventional consultation was breached only once by the Executive in 1994 when 9 Additional Judges were appointed to the High Court Division without consultation with the Chief Justice. Following a protest, however, the Notification "was rescinded and fresh appointments were made, recognizing in the fresh Notification itself, that the appointments were made in consultation with the Chief Justice."[11]

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3 O Hood Phillips, *Constitutional and Administrative Law* (7th edn, Sweet & Maxwell) 77.

4 ibid 28.

5 For example, O Hood Phillips regards conventions not laws as they are "not enforced by the Courts or by the House of Parliament." ibid.

6 The accuracy of using the expression 'unwritten rules' to describe conventions has been discussed in brief in the next Part of the study under the heading "The Meaning of Constitutional Conventions". See, generally notes 35 to 43 and the accompanying texts.

7 Emphasis added.

8 The Constitution (Fourth Amendment) Act 1975 (Bangladesh).

9 The said phrase was restored to Article 95 by the Second Proclamation (Seventh Amendment) Order, 1976 [Second Proclamation Order No. VI of 1976] but was soon omitted by the Second Proclamation (Tenth Amendment) Order, 1977 [Proclamation Order No. I of 1977] and finally by the Constitution (Fifth Amendment) Act, 1979 [Act I of 1979].

10 *State v Chief Editor, Manabjamin* (2005) 57 DLR (HCD) 359, 448.

11 Mustafa Kamal, *Bangladesh Constitution: Trends and Issues* (2nd edn, University of Dhaka 1994) 30.

This convention of 'consultation' in the matter of appointment of Judges has been the subject matter of dispute and discussion in some leading cases before the Supreme Court of Bangladesh. The cases are: *State v Chief Editor, Manabjamin*[12]; *Idrisur Rahman v Bangladesh*[13]; and, *Bangladesh v Idrisur Rahman*[14]. The Appellate Division of the Supreme Court, in the specific context of *Idrisur Rahman (AD)*[15] where the question concretely arose for determination, held in favour of 'court enforceability' of the convention of 'consultation'. In view of the binding nature of the decision of the Higher Judiciary as declared by Article 111 of the Constitution, the *Idrisur Rahman (AD)*[16] decision of the Appellate Division of the Supreme Court may be said to represent the law regarding the status of constitutional conventions in Bangladesh. It may also be pertinent to mention in this regard that the Supreme Court of Bangladesh in all three cases[17] dealing with conventions relied heavily as to whether or not the constitutional practice of 'consultation' by the political actors has become an *established conventional rule* in course of time to reach their conclusions.

The question regarding the enforcement of constitutional conventions in a court of law also came up for judicial consideration before the Supreme Court of India. Dealing with the question, Kuldip Singh J of the Indian Supreme Court held his views as under:

> We are of the view that there is no distinction between the "constitutional law" and an established "constitutional convention" and both are binding in the field of their operation. Once it is established to the satisfaction of the court that a particular convention exists and is operating then the convention becomes a part of the "constitutional law" of the land and can be enforced in the like manner.[18]

The above mentioned view of the Indian Judge may be stated to represent in general the status of constitutional conventions within the framework of its constitution. The judges of the Supreme Court of Bangladesh built mainly on this view of the Indian Judge. In all three cases dealing with conventions, the judges cited with approval the above quoted view of Kuldip Singh J[19] so as to form their opinion to enforce judicially an *established* constitutional convention and, accordingly, enforced in *Idrisur Rahman* (AD)[20] the convention of 'consultation' regarding the appointment of Judges of the Supreme Court against the executive government of the state. It is at

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12 (2005) 57 DLR (HCD) 359 (hereinafter *Manabjamin*).
13 (2009) 61 DLR (HCD) 523 (hereinafter *Idrisur Rahman* (HCD)).
14 (2010) 15 BLC (AD) 49 (hereinafter *Idrisur Rahman* (AD)).
15 ibid.
16 ibid.
17 *Manabjamin* (n12), *Idrisur Rahman* (HCD) (n13) and *Idrisur Rahman* (AD) (n 14).
18 *S.C. Advocates-on-Record Association v India* (1994) AIR (SC) 268,404.
19 *Manabjamin* (n 12) 453 and 455, *Idrisur Rahman* (HCD) (n 13) 542 and 579, and *Idrisur Rahman* (AD) (n 14) 90.
20 *Idrisur Rahman* (AD) (n 14).

this point that the present author felt an urge to write on the *nature* and *status* of constitutional conventions for the author could not at all agree with the views or stand taken by the Supreme Court of Bangladesh on some significant aspects of conventions.

In view of the author, in course of its judgment in *Idrisur Rahman* (AD),[21] the Appellate Division of the Supreme Court of Bangladesh adopted erroneous view of laws and conventions of the constitution on a number of grounds.

First and foremost, the Supreme Court failed to maintain distinction between *recognition* and *enforcement* of conventions in a court of law. A court may recognize the *existence* of a convention but may at the same time deny *enforcing* the same in the instant case. The distinction is maintained even by courts in England. The Supreme Court relied mostly on English literature, particularly of Jennings, to enforce in its jurisdiction the convention of 'consultation'.[22] True, Jennings provided some standard tests to determine the existence of a convention, but not that he did not maintain distinction between *recognition* and *enforcement* of conventions. The *Idrisur Rahman* (AD) [23] decision of Bangladesh Supreme Court makes no discussion on this aspect (*recognition* and *enforcement*) of the distinction between *laws* and *conventions* of the constitution. The Supreme Court simply applied the Jennings test to determine in its jurisdiction the existence of the convention of *consultation*, found it as an *established convention* and *enforced* it in the instant case. This particular pattern of analysis and judgment leaves the author with no option but to hold that the Court in fact could not appreciate the distinction between *recognition* and *enforcement* of conventions in a court of law. One may, in this context, argue that the Supreme Court understood the distinction but did not find it necessary to analyze the point. This contention cannot be accepted because, in such a case, it may be counter argued, the Supreme Court was *of necessity* bound to distinguish the situations of Bangladesh from that of English jurisdiction so as to justify its not maintaining the distinction since for basis of its judgment it relied heavily on English literature where the distinction is maintained. But the Supreme Court did not also distinguish the situations of Bangladesh from that of English jurisdiction. Thus, the Supreme Court neither did feel it necessary to draw distinction between *recognition* and *enforcement* of conventions in a court of law nor to distinguish between the two jurisdictions so as to justify its not maintaining such distinction.

Second, the Supreme Court also failed to appreciate distinction between the expressions *unconstitutional* and *unlawful* as maintained in English jurisdiction. This

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[21] ibid.

[22] For the Appellate Division's heavy reliance on English authority in *Idrisur Rahman* (AD), see, *Idrisur Rahman* (AD) (n 14) 88-92.

[23] *Idrisur Rahman* (AD) (n 14).

failure expedited the Court's enforcement of the convention of 'consultation' immediately after it could establish its existence without entering into any further inquiry as to the attending circumstances and conditions that may be regarded necessary for judicial enforcement of conventions in a given case.

Third, the Supreme Court did not find any distinction between *laws of the constitution* and an *established constitutional convention*. Thus, on this view of the Court, the status of 'laws of constitution' and an 'established convention' are same in its jurisdiction. It is submitted that the Court has been influenced by the writings of Jennings to hold an extreme view such as this. Dicey held the distinction between laws and conventions of the constitution on the ground of their 'court enforceability'. True, Jennings provided a different explanation from that of Dicey but only to exemplify the fact that the distinction is not as simple and unambiguous as Dicey suggested or contemplated. Jennings, the author begs to argue, even after his different explanation, maintained the distinction between *conventions* and *laws of the constitution* strictly so called and — importantly and interestingly — he, too, maintained the distinction mainly on the ground of their *enforceability* in a *court of law*.

In the backdrop of the above mentioned failures of Bangladesh Supreme Court, the author undertakes this study to reflect on the *nature* and *status* of conventional rules within the framework of Bangladesh Constitution. The author, however, submits that any research study to accomplish this broad task should revolve mainly around these five questions. *First*, how should a court determine or establish the *existence* of conventions in its system? This deals with the *recognition* criteria of conventions in any constitutional system. *Second*, should there be any distinction between *laws* and established *conventions* of constitution? *Third*, how should a court differentiate between mere judicial *recognition* and actual judicial *enforcement* of conventions in a concrete case? These questions for an adequate answer require a thorough and critical comparative discussion between *laws* and established *conventions* of the constitution. *Fourth*, what *significance* may still remain of conventions if laws and conventions of the constitution are accepted to be different from each other in terms, *inter alia*, of their *recognition* and *enforcement* in a court of law? The answer to the question reflects on the *nature* of operation of conventions i.e. the *effect* in practice of the operation of conventions on laws of constitution, or how the two sets of rules *interact* with each other in actual functioning of the governmental system of a country. *Fifth*, how should a court determine the *conditions* and *circumstances* of judicial enforcement of an established constitutional convention? This specifically deals with the issues or concerns of actual *judicial enforcement* (as opposed to mere *judicial recognition*) of established conventions within the framework of any given constitution.

It is obvious that in a single research article one cannot seek to answer all of the above enumerated questions pertaining to any broad overall research venture reflecting on the *nature* and *status* of constitutional conventions. The present author has not been any exception to this as well. To the best of the knowledge of the author, there has not been any published research work in Bangladesh addressing any one of the above mentioned aspects of the conventional rules of constitution. Since no research work has yet been undertaken on the subject, the present author prefers in this study to pursue the first of the above enumerated questions i.e. the question of judicial *recognition* of conventions in a constitutional system.

Besides the laws of the constitution, one should also have enough mastery on conventions of the constitution to fully comprehend its constitutional system. Superior Courts on occasions, as has happened for Bangladesh Supreme Court in *Idrisur Rahman* [24], recognize and enforce constitutional conventions in appropriate cases. Again, apart from the courts, any person responsible for constitutional interpretation or interested in constitutional law needs also to learn the *interaction* between laws and conventions of its constitutional system. In all these cases, either the judge or any such person should know, first of all, whether the particular convention with which he is dealing does in fact exist or not in its constitutional system. Before deciding on the *interactive* effect or *enforceability* status of conventions, confusion may arise as to the very *existence* of the convention itself. Hence, judges, lawyers and academicians dealing with any convention would require establishing in its system the *existence* of the conventional rule first.

But no research study (even globally) has yet been undertaken focusing exclusively on the constituent elements of a convention. In such a vacuum, the present study seeks to reflect on the essential elements of a convention that may be regarded necessary to be fulfilled before a court may give *recognition* to (and if necessary to *enforce* thereof) a convention in a given case. The study, the author believes, would attain two-fold objectives in the field of constitutional law. *First*, it would help one identifying the *existence* of any convention in its system and also help to understand better the *nature* of conventional rules of its constitutional system. *Second*, the first attained objective, in turn, would help facilitating the judges, lawyers and any academic researcher in the respective field to inquire into further questions or issues on conventions, such as, how to draw distinction between *laws* and established *conventions* of constitution, what in practice is the interactive *effect* of conventions on laws of constitution, and finally how to determine on the *enforceability* status of a particular convention in its system. Thus, the present study though limited only to reflecting on the *recognition* criteria of conventions, may, from a broader perspective, contribute to the overall better understanding and

[24] ibid.

appreciation of the laws and conventions of any state constitutional jurisdiction in general.

At the outset, however, one thing should be made clear. The author, in the present study, does not claim to create the constituent elements of conventions *de novo*. The standard tests provided by Jennings in this regard are followed consistently both in the scholarly literature and by the courts of divergent jurisdictions. The Supreme Court of Bangladesh and Canada, for example, have adopted the Jennings test to determine within their respective jurisdictions the *existence* of particular conventions.[25] But thus far no research undertaking has been taken to examine in detail or elaborate on the views of Jennings that comprise the constituent elements of a convention. This is what is omitting in the existing constitutional law literature which the author attempts to supply in the present research study.

To accomplish the task of the study, the author has divided it into four Parts. Part 1 introduces one with the *background, rationale* and *significance* of the study. Part 2 attempts to form a general and preliminary understanding of the *meaning* of constitutional conventions with a view to entering into a far more rigorous analysis of the essential elements of conventions in the immediately following Part of the study. Part 3 takes note of and examines in detail all those essential elements that constitute a convention. In course of its analysis, it identifies the *lead characteristic* mark of conventions and on that basis also seeks to distinguish them from the three other 'non-legal' concepts of constitution: *habits*, *understandings* and *practices*. In any system, one understands better *what a thing is* when he understands *what the thing does* for the system. The study, therefore, in this Part also undertakes an inquiry into the *purposes* these conventions serve for the constitutional system of a country. This, however, has been done not in isolation of or by means of a full-fledged separate study on *purposes* but as component of one of the essential elements of convention. Part 4 concludes by summarizing the findings and arguments of the study.

2. The Meaning of Constitutional Conventions

What are conventions of the constitution? There is a fairly lengthy literature on the subject but the author found the classic exposition of Ivor Jennings most appropriate and convenient as the starting point for the discussion. Regarding the inevitable nature of conventions in the system of government, Jennings wrote:

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[25] Bangladesh Supreme Court in *Idrisur Rahman* (AD) (see, (n14)) applied the Jennings test to establish within its jurisdiction the convention of 'consultation' in the matter of appointment of Judges of the Supreme Court. The Canadian Supreme Court applied the same test in *Patriation Reference* (see, (n 72)) to determine within its jurisdiction the existence of a convention that the 'Constitution of Canada cannot be amended without first obtaining the consent of the Provinces.'

> But men being what they are, they tend to follow rules of their own devising; they develop habits in government as elsewhere...Indeed, people begin to think that the practices ought to be followed. It was always so done in the past, they say; why should it not be done so now? Thus within the framework of the law there is room for the development of rules of practice, rules which may be followed as consistently as the rules of law, and which determine the procedure which the men concerned with government must follow.[26]

Thus, the constitutional authorities "who take decisions create precedents which others tend to follow, and when they have been followed long enough they acquire the sanctity and the respectability of age."[27] Such precedents of political and constitutional actors may or may not be followed in subsequent cases but a series of precedents all pointing in the same direction surely evidences for a particular body of rules existing in the constitutional system. After being so established, these rules carry the idea that "they not only are followed but they have to be followed"[28] in future similar cases. This precisely is the idea of this body of 'non-legal' rules of the constitution. They have been given various names by authors of different ages of some recognized merit. To quote Ivor Jennings again:

> These rules Mill referred to as "the unwritten maxims of the constitution." Twenty years later Dicey called them "the conventions of the constitution" while Anson referred to them as "the custom of the constitution."[29]

Jennings found all of the above expressions to be problematic since, in his view, none of the phrases exactly expresses what is actually meant by this body of rules of the constitution.[30] The expression 'unwritten maxims' of *Mill* is problematic since the judge made common law of England are also as 'unwritten' "as those outside the

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[26] Jennings (n 2) 80. As to the inevitable nature of conventions in the system of government, this view of Holdsworth is also illuminating: "Conventions must grow up at all times and in all places where the powers of government are vested in different persons or bodies – where in other words there is a mixed constitution. 'The constituent parts of a state, said Burke, are obliged to hold their public faith with each other, and with all those who derive any serious interest under their engagements, as much as the whole state is bound to keep faith with separate communities.' Necessarily conventional rules spring up to regulate the working of the various parts of the constitution, their relation to one another and to the subject." William Holdsworth, 'The Conventions of the Eighteenth Century Constitution' 71 *Iowa Law Review* 162. Quoted in Jennings (n 2) 82 (internal citation omitted).

[27] Ivor Jennings, *Cabinet Government* (3rd edn, Cambridge University Press 1959) 2.

[28] ibid.

[29] Jennings (n 2) 81(internal citations omitted). Regarding the existence of this body of rules, this brief description of Jennings is also illuminating: "There is a whole complex of rules outside 'the law', nowhere inconsistent with it but nowhere recognized by it, which can be stated with almost as much precision as the rules of law. Such rules have been set out by many authorities; they are discussed in Parliament; they are appealed to whenever dispute arises. They are called by various names, but are now commonly referred to as 'constitutional conventions'." Jennings (n 27) 2 (internal citations omitted).

[30] Jennings (n 2), ibid.

law."[31] Similarly, the term 'convention' coined by *Dicey* is also problematic since it always "implies some form of agreement, whether expressed or implied"[32], while the expression 'custom' employed by *Anson* "assumes first that the law enforced in the courts need not be custom, and secondly that an extra-legal rule cannot be created by express agreement."[33] Despite these difficulties, Jennings preferred to employ the term 'convention' in his book *The Law and the Constitution* and the present author has also used the same expression for this body of rules of the constitution in this study since the phrase of Dicey has acquired general acceptance or "has now been sanctioned"[34] by many years of common use by judges of divergent jurisdictions as well as the authors of constitutional law.

However, by whatever name one may prefer to call them, KC Wheare has indicated that there are at least two sources for this body of 'non-legal' rules of the constitution to come into existence.[35] Sometimes a course of conduct may persist in for "over a long period of time and gradually attain first persuasive and then obligatory force."[36] Wheare views them as conventions arising out of 'custom'.[37] He, however, further reiterates that "a convention may arise much more quickly than this."[38] This may happen where there is an "agreement among the people concerned to work in a particular way and to adopt a particular rule of conduct."[39] This rule is "immediately binding" and it is, Wheare says, a convention.[40] For conventions of this latter kind Wheare observes as follows:

> It has not arisen from custom; it has had no previous history as a usage. It springs from agreement. Its basis is indeed very like that of the conventions which are drawn up in international relations. They are held to be morally binding and politically binding, but until they are enacted by the appropriate machinery of a state they do not in most countries alter the law or form part of the law.[41]

Conventions, therefore, are not necessarily and not always the 'unwritten' rules of a constitution. Keeping in view the conventions of this latter kind which arise from agreement and might easily be written down, Wheare stresses how unsatisfactory is the distinction between law and convention as being the 'written' and 'unwritten'

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31 ibid.
32 ibid.
33 ibid.
34 ibid.
35 Wheare (n 2) 122.
36 ibid.
37 ibid.
38 ibid.
39 ibid.
40 ibid.
41 ibid.

rules of the constitution.[42] It is a distinction, Wheare emphasizes, "which is seldom applied accurately and is seldom, if ever, profitable."[43] While this view of Wheare may hold good or true in the context of English constitutional law (and may indeed be applicable for some other jurisdictions as well), there is no reason it should be taken to be of universal application. In Bangladesh, for example, being based mainly on custom and precedent (precedent not in the sense of 'case law' but as 'practices' of political and constitutional actors), constitutional conventions are usually the 'unwritten' rules of the constitution.

Before parting with this Part of the study, it would be pertinent to take note of an interesting fact that "matters which in one country are regulated substantially by usage and convention are in others regulated by law."[44] Conventions are not only "reduced to writing but also enacted as part of the Constitution."[45] To mention just a few, In England, the Queen has the legal right to refuse to give the royal assent to Bills passed by the House of Commons and Lords. By convention, the Queen must assent to such Bills unless advised to the contrary by her government. This conventional rule of the UK Constitution has been enshrined in Article 80 of Bangladesh Constitution. Again, the Queen in England will appoint, by convention, as Prime Minister the leader of the political party with the majority of seats in the House of Commons. Article 56(3) of Bangladesh Constitution embodies this conventional provision of the UK Constitution. To cite yet another example, in England, the ministers of the Crown are by convention both individually and collectively responsible to the parliament. In Bangladesh, the provision for collective ministerial responsibility has been ensured in Article 55(3) of the Constitution.

The above cited examples are by no means intended to be exhaustive for the purpose, but are only to give a flavour of the nature and forms of constitutional conventions of one country that may form part of the written constitutional law of another country. To conclude this Part of the study, one should finally remember that *constitutional law* together with *constitutional convention* make up the *total constitution* of a country. After having these general understandings of constitutional conventions, the author may now turn into the more rigorous analysis of the elements

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[42] ibid 123. Dicey also did not mean by conventions the 'unwritten rules' of English Constitution. He sought to clarify: "The one exception which can be taken to this picture of our conventional constitution is the contrast drawn in it between the "written law" and the "unwritten constitution"; the true opposition as already pointed out, is between laws properly so called, whether written or unwritten, and understandings, or practices, which, though commonly observed, are not laws in any true sense of that word at all. But this inaccuracy is hardly more than verbal, and we may gladly....which make up our body of constitutional morality." Dicey (n 1) 420.

[43] Wheare ibid.

[44] ibid 133.

[45] ibid.

of constitutional conventions that need to be fulfilled before a court may give *recognition* to (and if necessary to *enforce* thereof) a convention in a given case.

3. The Elements of a Constitutional Convention

One may ask this straightforward question: when is it possible to say that a convention has been established? Jennings very categorically answers: "We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?"[46] Nobody has yet come forward with a better explanation than this regarding the standards to determine the *existence* of a convention in any constitutional system. Three essential characteristic features of a constitutional convention emerge from the test adopted by Jennings: *precedent*, *normativity* (rule) and *reason* for the rule. The elements need some elaboration and the author begins to deal first with *precedent*.

3.1 Precedent

It is worth mentioning at the outset that conventions are not precedents of a 'court of law' and as such not *prima facie* authoritative like judicial precedents. And more obvious than this is the fact that they are also not in the nature of statutory commands which it is the function and duty of the courts to obey and enforce. They are simply acts (or omissions) of political and constitutional actors or institutions of government of a state. If in a situation there is no act of the authorities, there is no firm convention regulating the situation. Therefore, to satisfy the existence of a convention, *first* of all, one must establish that the constitutional actors behaved in the past in a certain way governing a particular question of constitutional importance. Every act of the constitutional authorities in this sense is a precedent. But not every precedent creates a rule and as such also not a convention. This turns on the *normative* aspect of the rule, the second characteristic feature of a convention.

3.2 Normativity

It would be profitable, in view of the author, to begin discussion of this Section of the study with reference to the oft-quoted passage from AV Dicey's *Introduction to the Study of the Law of the Constitution*. In this Book, Dicey expressed his views on the two sets of rules that make up the English Constitution as under:

> The rules which make up constitutional law, as the term is used in England, include two sets of principles or maxims of a totally distinct character.
>
> The one set of rules are in the strictest sense *'laws'*, since they are rules which (whether written or unwritten, whether enacted by statute or derived from the mass

[46] Jennings (n 2) 136.

> of custom, tradition, or judge made maxims known as the common law) are enforced by the Courts; these rules constitute 'constitutional law' in the proper sense of that term, and may for the sake of distinction be called collectively the *'law of the constitution.'*
>
> The other set of rules consist of *conventions, understandings, habits or practices* which, though they may regulate the conduct of the several members of the sovereign power, of the Ministry of the other officials, are not in reality laws at all since they are not enforced by the Courts. This portion of constitutional law may, for the sake of distinction, be termed the *'conventions of the constitution'*, or constitutional morality.[47]

This view of Dicey involves two important aspects in relation to the study of the *nature* and *status* of conventional rules of the constitution. *First*, Dicey equates or rather to employ the more accurate and exact terms has not drawn any distinction between 'conventions' at the one hand and the other apparently seeming concepts used by Dicey himself, such as, 'habits, understandings and practices' at the other hand. *Second*, Dicey draws distinction between 'laws' and 'conventions', but that is so drawn only on the basis of their 'court enforceability' ignoring or without mentioning at all the other aspects of their similarities and/or dissimilarities. While one may certainly find these limitations of Dicey's work, the present author, however, besides this, would seek to elucidate the *nature* and *status* of conventional rules on the basis of, *inter alia*, the two aspects identified from Dicey's analysis itself. However, in the present study, the author shall deal only with the *lead* characteristic mark of conventions and how on that basis they may be different from the other 'non-legal' concepts of the constitution.[48]

3.2.1 The Main Characteristic of a Convention

Dicey's analysis[49] suggests that 'conventions' are of the same quality as 'understandings, habits or practices'. They are, however, not really so. But how may one distinguish conventions from these other apparently seeming concepts of a constitution? To distinguish conventions from these concepts of a constitution, it is necessary first to identify the *main* characteristic mark of convention itself. It is indeed the idea of a 'rule' which is central to the understanding of conventions and on that basis they may be distinguished from these other 'non-legal' concepts of a constitution.

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[47] Albert V. Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan Press 1885) 23, 24 (emphasis added). This view has been reiterated in a latter edition also: "it is seen to consist of two different parts; the one part is made up of understandings, customs, or conventions which, not being enforced by the courts, are in no true sense of the word laws; the other part is made up of rules which are enforced by the courts, and which, whether embodied in statues or not, are laws in the strictest sense of the term, and make up the true law of the constitution." Dicey (n 1) 469-70.

[48] The second aspect which Dicey's analysis omitted i.e. the distinction between laws and conventions apart from 'court enforceability', fall beyond the limited scope of the present study.

[49] Dicey (n 47).

A 'rule' is usually defined as "a statement prescribing the conduct which is required in a given situation and which imposes an obligation on those who are regulated by the rule".[50] HLA Hart, in his *The Concept of Law*, took recourse to some strands of distinction to make clear the idea of a 'rule'. Those strands of distinction have been summarized by McLeod as the distinction between *personal habits* and *social rules*; the distinction between *being obliged* and *being under an obligation*; and, the distinction between *external* and *internal* aspects of rules.[51] A thorough analysis of Hart's understandings of law as 'system of rules' is not the object of this article as well as his in depth analysis of the several strands of distinction in relation to a 'rule' also falls beyond the limited scope of the present study. It would suffice here only to produce his arguments on the *internal aspects* of rules which are very much reflective of the characteristic features of a 'rule'. In Hart's own words:

> What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgments that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of "ought", "must", and "should", "right" and "wrong".[52]

One may identify a number of features of a 'rule' from this analysis of Hart. However, the present author prefers to take into account three characteristic features of a 'rule' that seem to appear very prominently from this analysis of Hart and also relevant for purposes of the present study. *First,* rules involve the idea of obligations or, in other words, rules create obligations. For a person to be under an obligation, there must exist a rule. To state in negative terms, when there is no rule there is no obligation. To give one common example, suppose, a gunman, A, demands money from a victim, B. According to the ordinary use of language, one "would say that B *is obliged* to hand over the money (because he fears the consequences if he does not do so), but one would not say that B *is under an obligation* (or *owes a duty*) to comply with A's demand."[53] The command of the gunman was no more than an order backed by threats and not a 'rule' and as such creating no 'obligations' for the victim B to comply with. *Second,* the obligation – created by a 'rule' – is 'normative' in character. By this is meant that the rule is 'prescriptive' – prescriptive of what 'ought' or 'ought not' to be done as a course of conduct in a given case. It thus dictates the appropriate form of action in a particular situation. *Third,* breach or violation of the 'rule' (that is to say, the 'obligation') gives rise to a legitimate ground for criticism.

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50 Hilaire Barnett, *Constitutional and Administrative Law* (4th edn, Cavendish Publishing 2002) 28.
51 Ian McLeod, *Legal Theory* (2nd edn, Palgrave Macmillan 2003) 77.
52 HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 57.
53 McLeod (n 51) 78 (emphasis in original).

3.2.2 Distinguishing Conventions from other Non-Legal Concepts of Constitution

Conventions of the constitution involve the idea of a 'rule' with characteristic features identified and analyzed above. And on this basis, one may seek to distinguish 'conventions' from 'habits, understandings and practices', the other 'non-legal' concepts of the constitution.

a. Habits

It has now been very common to cite the example of tea or coffee drinking to distinguish *habits* from any *normative* idea. The present author also uses here the same example. Suppose, a person invariably drinks tea in the afternoon. Is the fact of drinking tea a 'habit' or a 'rule' with respect to that person? The fact of drinking tea, when correctly analyzed, is nothing more than *an instance of individual behaviour* and cannot be called a rule. And it remains so, even if the fact of drinking tea in the afternoon is very widespread in the concerned society. In such a case, it may be a good example of "convergent behaviour"[54] and as such "a large number of instances of individual behaviour"[55] but nevertheless not a rule. Because in all such cases the behaviour remains only a *descriptive* phenomena. It is simply reflective of an actual observable conduct. The observation is a statement of what 'is' and not what 'ought to' be. This is typically the characteristic feature of habits which do not prescribe or dictate what *ought to* happen but are merely *descriptive* of what in fact does happen. Furthermore, if the person fails to drink tea in the afternoon, or drinks coffee instead, that action is not going to give rise to any ground for criticism because a mere *habit* (not being a 'rule') imposes no obligation. It is, however, very different with the breach of a constitutional convention which will invariably give rise to a legitimate ground for criticism. Conventions are thus in this way distinguished from habits.

b. Understandings

As has already been seen, Dicey also equated the term 'understandings' with conventions of a constitution. The word 'understanding' "connotes a mutual agreement between relevant actors as to the pertinent subject matter, or the manner in which it is appropriate to respond or react to a given situation."[56] Understandings may be brought about by some form of previous conduct or mutual recognition although that may not necessarily be a prerequisite for their existence.[57] Sometimes, an 'understanding' may well be relied on by the parties, as are conventions.[58] It is, therefore, necessary for one to learn their distinctions. I quote with approval the following view of Barnett reflecting on the distinction:

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54 ibid 77.
55 ibid.
56 Barnett (n 50) 29.
57 ibid.
58 ibid.

> Most importantly, an understanding, while imposing some *weak* form of *moral obligation* will not, in the case of failure to comply with its terms, give rise to a sanction in the form of criticism of the same magnitude as that of a breach of a constitutional convention. The explanation for this lies in the fact that *an understanding* – as opposed to a convention – *does not amount to a rule*, and accordingly is not obligation imposing to the same degree as a convention.[59]

c. Practices

Finally, comes the concept of 'practice' for consideration. In our everyday life, it is a commonplace assertion that *it is our practice to do* the thing in one or the other particular way. This type of statement "conveys the message that past experience of doing something in a particular way is the correct way of proceeding and that, unless there are justifiable reasons for not so doing, the practice will be adhered to."[60] A practice thus differs from a mere habit "on the basis that it imports a notion of *reflectiveness*, the idea of the 'right' way of reacting to a situation."[61] But the notion of *reflectiveness* in this sense is shared also by conventions of a constitution. How then is a convention different from a practice or usage of a constitution? Barnett draws the subtle differences which I approvingly quote as under:

> The borderline between the two is admittedly fine. It may be, however, that the correct dividing line is drawn on the basis of the concept of obligation and rule, and that it is legitimate to argue that whilst a practice imposes some form of weak obligation – and requires some justification for departure from the practice – the practice is no more than an emergent or potential convention and has not yet acquired the binding characteristic of a rule.[62]

Much has been said regarding the *lead* characteristic mark of conventions, the *normativity* of precedent. And it is also seen that conventions on this basis may well be distinguished from the three other 'non-legal' concepts of constitution: habits, understandings and practices. However, to give the analysis far more completeness, I may just add in supplement the following eloquent expression of Jennings made in the context of requirement of *normativity* of a precedent:

> It is clear, in the first place, that *mere practice is insufficient*. The fact that an authority has always behaved in a certain way is no warrant for saying that it ought to behave in that way. But if the authority itself and those connected with it believe

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59 ibid (emphasis added).

60 ibid.

61 ibid (emphasis added).

62 ibid. Wheare also observes the same though couched in a different language: "By 'convention' is meant a binding rule, a rule of behaviour accepted as obligatory by those concerned in the working of the constitution; by usage is meant no more than a usual practice. Clearly a usage might become a convention. What is usually done comes to be what is done. It is often difficult to say whether a particular course of conduct is obligatory or persuasive only, and it is convenient in such a case to be able to say that it is certainly a usage and probably or doubtfully , as the case may be, a convention." Wheare (n 2) 122.

> that they *ought to* do so, then the convention does exist. This is the ordinary rule applied to customary law. *Practice alone is not enough. It must be normative.*[63]

Jennings justifies the above explained requirement of *normativity* with reference to some examples in the British context: "It can hardly be contended that if once the House of Lords agrees with the House of Commons it is henceforth bound to agree with the lower House. Again, the fact that George V asked Mr Baldwin and not Lord Curzon to form a Government in 1922 does not of itself imply that the King must never in future appoint a peer as Prime Minister."[64]

Thus, the fact that the constitutional actors have once behaved in a certain way does not bind him to act in that way in the absence of *normativity* of the precedent. However, even normativity itself may be *not enough* to create a convention is well exemplified by its third element as provided below.

3.3 Reason

In the tests supplied by Jennings, we have just seen, *normativity* itself is not enough to establish the existence of a convention. In addition, there must be a *reason* for the rule. As Jennings puts it: "They do not exist for their own sake but because there are *good reasons* for them." [65] Jennings goes on to elaborate:

> For neither precedents nor dicta are conclusive. Something more must be added. As in the creation of law, the creation of a convention must be due to the reason of the thing because *it accords with the prevailing political philosophy*. It helps to make the democratic system operate; it enables the machinery of State to run more smoothly; and if it were not there friction would result.[66]

And Jennings finally concludes: "A single precedent with a good reason may by enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it." [67]

The forceful analysis of Jennings clearly establishes that a precedent even with *normative* characteristic does not definitely prove anything. Rather, the normative

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[63] Jennings (n 2) 134-35 (emphasis added). Barnett sums up in this way: "A conventional rule may be said to exist when a traditional practice has been consciously adopted and recognized by those who operate the constitution as the correct manner in which to act in a given circumstance. A practice will be seen to have become a convention at the point at which failure to act in accordance with it gives rise to legitimate criticism." Barnett (n 50) 31.

[64] Jennings (n 27) 6.

[65] ibid 7 (emphasis added).

[66] ibid 136 (emphasis added). I may quote another similar observation of Jennings in this regard: "Precedents create conventions because they have reasons of a general nature which relate them to the *existing political conditions* and because they are generally recognized to be sensible adaptations of existing conventional rules *to meet changed* or *changing political conditions*." Jennings (n 27) 8 (emphasis added).

[67] Jennings (n 2) ibid.

value of a precedent depends upon its being in accord with the prevailing political philosophy or with the principles of the constitution as currently accepted. Viscount Esher, an authority on precedents and confidential adviser of Edward VII and George V, once observed that "Precedent, like analogy, is rarely conclusive".[68] Approving Esher's view, Mackintosh has also argued that the precedents have "no independent existence or validity".[69] Rather, they represent "a correct decision or action in certain political circumstances".[70] Accordingly, "Searching for a precedent is really looking for a case where previous exponents of the constitution have solved a similar difficulty *in an approved fashion*." [71]

From perusal of the views so far quoted, it can definitely be concluded that one way the previous difficulty may be said to have been solved *in an approved fashion* is when the convention accords with the *prevailing political philosophy* of the time. Indeed, the requirement of a convention's being in accord with the prevailing political philosophy has repeatedly been asserted by both judges and authors of constitutional law. It is to be found, for example, in the view of the Canadian Supreme Court in *Reference re Amendment of the Constitution of Canada*: "The main purpose of constitutional conventions is to ensure that the legal framework of the constitution will be operated in accordance with the *prevailing constitutional values or principles* of the period."[72] Barnett also observes to the similar effect: "Whether the outcome is deemed to be correct or not will depend on the acceptability of that action *in light of current political practice*."[73] Same is echoed in the words of Holdsworth: "these conventions are always directed to secure that the constitution works in practice in accordance with the *prevailing constitutional theory* of the time."[74]

In any system, one cannot understand completely *what a thing is* unless he understands *what it actually does* for the system. The element 'reason' of conventions should be considered with some more space and importance because this element in some measure reflects also on *what conventions actually do* for the constitutional system of a country. This method of stating the thing resembles more with the inquiry of *purposes* of conventions in any constitutional system. In relation to conventions, the inquiries as to the *reasons* for their existence, or alternatively the *purposes* they serve for the constitutional system are somewhat same. To clarify further, we have found a convention's being in accord with *prevailing political philosophy* as one of

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68 Viscount Esher, *The Influence of King Edward, and Essays on other Subjects* (John Murray 1915) 167.

69 JP Mackintosh, *The British Cabinet* (3rd edn, Stevens 1977) 13.

70 ibid.

71 ibid (emphasis added).

72 (1981) 1 SCR 753. Quoted in Barnett (n 50) 39 (emphasis added). See also, Islam (n 2) 5-7. (Hereinafter *Patriation Reference*).

73 Barnett (n 50) 32 (emphasis added).

74 William (n 26). Quoted in Jennings (n 2) 83 (emphasis added).

the reasons for their existence in a system. In terms of a *purpose* analysis, this may be stated in this way that conventions serve the purpose of working a constitution in accord with the *prevailing political philosophy* of the time. There is thus no distinction of substance between the inquiries as to *reasons* for their existence or *purposes* they serve for the constitutional system of a country. I now, therefore, turn to inquire into some purposes in addition to or different from a convention's being in accord with the *prevailing political philosophy* of time.

There is some literature that reflects on *purposes* conventions serve or ought to serve for the constitutional system of a country. This passage, for example, of Jennings is reflective of a convention's serving the purpose of bringing *national co-operation* and making the constitution work in accordance with its *spirit*: "A constitution does not work itself; it has to be worked by men. It is an instrument of national co-operation, and the spirit of co-operation is as necessary as the instrument. The constitutional conventions are the rules elaborated for effecting that co-operation."[75] A constitution should accommodate itself with the changing realities and needs of time. Conventions, in addition to formal amendment and judicial interpretation, may also serve this purpose. Jennings identifies this purpose of conventions as well: "Also, the effects of constitution must change with the changing circumstances of national life. New needs demand a new emphasis and a new orientation even when the law remains fixed. Men have to work the old law in order to satisfy the new needs. Constitutional conventions are the rules which they elaborate."[76] Conventions may also serve the purpose of harmonizing relations and free development of law and legal institutions. Jennings in support of these purposes quotes from a conference report:

> The association of constitutional conventions with law has long been familiar...It has provided a means of *harmonizing relations* where a purely legal solution of practical problems was impossible, would have impaired *free development* or would have failed to catch the *spirit* which gives life to institutions. Such conventions take their place among the constitutional principles and doctrines which are in practice regarded as binding and sacred whatever the powers of Parliaments may in theory be.[77]

The purposes of conventions thus far enumerated may generally hold good for constitutions operating in any jurisdiction. Dicey, in English jurisdiction, also sought to explore the purposes of conventions. In course of ascertaining the relation between laws and conventions, Dicey found a characteristic common to all or most of conventions of English Constitution. The 'common quality' Dicey identified in them is that they regulate the mode in which the *discretionary* powers of Crown and

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[75] Jennings (n 2) 82.

[76] ibid.

[77] Report of the Conference on the Operation of Dominion Legislation 1929 (Cmd.3479) 20. Quoted in Jennings, ibid, 85.

Parliament ought to be exercised.[78] But what *end* is secured by regulation of such discretionary powers? Dicey found it in securing the ultimate supremacy of the electorate as the true political sovereign of the state. In Dicey's own words:

> They have all one ultimate object. Their end is to secure that Parliament, or the Cabinet which is indirectly appointed by Parliament, shall in the long run give effect to the will of that power which in modern England is the true political sovereign of the State – the majority of the electors or (to use popular though not quite accurate language) the nation.[79]

This view Dicey repeatedly asserted: "Our modern code of constitutional morality secures, though in a roundabout way, what is called abroad the "sovereignty of the people"."[80] "In short", Dicey reiterates again, "the validity of constitutional maxims is subordinate and subservient to the fundamental principle of popular sovereignty."[81] Though Dicey held this view of ensuring *ultimate supremacy of electorate* as purposes of conventions in the context of English Constitution, his description may be applied for constitutions of other jurisdictions as well. Wheare, for example, justifies Dicey's thesis in the context of US Constitution. For a fuller understanding, I quote Wheare at some length:

> When the power of veto of the head of the state is nullified, or when the electoral colleges of the United States cease to have any discretion to elect a President, we see the development of rules which are intended to remove obstacles from the giving effect to the will of the people.
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> The point is illustrated in a different way when we ask why, if convention has nullified the veto power of a King in a European country or in the British Commonwealth, the veto power of the President of the United States has not been nullified also. The answer would seem to be that the President is elected by the people and he may claim the right to express their will as much as Congress can.
>
> Had the American President continued to be elected indirectly by the electoral colleges in practice as the law of the Constitution intended, it may well be that his veto power would have been greatly restricted, if not nullified, by convention. The explanation of the survival and indeed extended use of the President's veto power is, of course, more complicated than this, but the fact of his election by the people is certainly relevant to it.[82]

It has been said much, within the limited scope of the present study, on the elements of a convention (in light of Jennings test) particularly on the requirement of *normativity* and the *reasons* for they exist or *purposes* they serve for the constitutional system of a country. The three-fold tests of Jennings may be adopted

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78 That is why Dicey described conventions as the "rules for determining the mode in which the discretionary powers of the crown (or of the Ministers as servants of the Crown) ought to be exercised." Dicey (n 1) 422-23.

79 ibid 429.

80 ibid 431.

81 ibid 437.

82 Wheare (n 2) 135-36 (paragraphs are creation of the author).

by any person responsible for constitutional interpretation to determine within its jurisdiction the existence of a convention. The Supreme Court of Canada, for example, applied the Jennings test in *Patriation Reference*[83] to determine within its jurisdiction the existence of a convention that the Constitution of Canada cannot be amended without first obtaining the consent of the Provinces.

4. Conclusion

To sum up the preceding analysis, mere *precedent* (act or omission of the constitutional authorities governing a particular situation) is not enough to establish the existence of a convention. The practices of political and constitutional dignitaries of the state should be *normative* involving in it the idea of 'rule' and 'obligation'. Furthermore, there must also be some *reason* for existence of the rule in the constitutional system of the state. Applying these three-fold identifying criteria of Jennings, the Supreme Court of Bangladesh found 'consultation' (with the Chief Justice in the matter of appointment of Judges of the Supreme Court) as an established constitutional convention in its system.[84]

To apply the Jennings test in the specific context of *Idrisur Rahman*,[85] the Appellate Division of Bangladesh Supreme Court found an unbroken line of *precedent* (excepting the only departure made in 1994) [86] of the executive's 'consultation' with the Chief Justice in the matter of appointment of Judges of the Supreme Court. The political actors in the precedents believed also that they were *bound* by the conventional rule of 'consultation' which satisfies the second requirement of a convention, *normativity*. The convention of 'consultation' in the instant case served the purpose of selecting the best from amongst those available for appointment as Judges of the Higher Judiciary. It is obvious that the Chief Justice of Bangladesh has the expertise knowledge about the ability and competency of a candidate for Judgeship in Superior Court. The Appellate Division thus found also the *reasons* for existence of the conventional rule of 'consultation' in its system.

This author is of the view that there is no problem if any Superior Court, as has been done by the Bangladesh Supreme Court[87], seeks to determine the *existence* of a convention in its system applying the three-fold test of Jennings. The author, however, submits that the *recognition* criteria of a convention has nothing to do with the question of its *enforcement* since a Superior Court may *recognize* the existence of a convention in its system but may at the same time deny *enforcing* the same in the instant case. The Appellate Division of Bangladesh Supreme Court in its *Idrisur Rahman*[88] decision

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83 See, (n 72).
84 See, *Manabjamin* (n12), *Idrisur Rahman* (HCD) (n13) and *Idrisur Rahman* (AD) (n 14).
85 See, *Idrisur Rahman* (AD) (n 14).
86 See, above text accompanying notes 10 and 11.
87 See, *Manabjamin* (n12), *Idrisur Rahman* (HCD) (n13) and *Idrisur Rahman* (AD) (n 14).
88 See, *Idrisur Rahman* (AD) (n 14).

applying the Jennings test found 'consultation' as an established convention and just enforced the same against the executive government of the state. It is submitted that this particular one-dimensional approach or inquiry of the Court is not sufficient enough to determine the question of a convention's *enforceability* within the framework of any given constitution. If a political practice has not yet hardened into the norm of an *established* convention, no question of its recognition and/or enforcement arises. At the same time, if an established conventional rule is found to be in existence, its recognition and enforcement by courts cannot be said to be automatic. Rather, a court in such a case before enforcing the convention should enter into some interrelated themes and inquires of special importance in this regard. The related inquires may shortly be stated as below.

First, the courts should try to ascertain whether the conventional rule in the instant case is law itself or just a source of law. And any norm or rule existing in the system is law or not should be decided taking into account the relevant materials available in the legal system including, *inter alia*, the constitution and statutes. If it is found to be a law for the system, the court may or, rather may be said to be bound to enforce the convention in the given case. On the contrary, it may indeed be found that the conventional rule is just a source of law. In such a case, the convention may form part of the law of the land either by legislative incorporation in statutes or by judicial recognition in a concrete case. *Second*, a court's main function is not to make law but to interpret law in deciding disputes. Hence, a court's authority to make law by judicial precedents in appropriate cases though recognized and approved, the power is very much limited and always subject to some conditions and circumstances under the case. There is no reason why the same position should not obtain in cases of constitutional conventions also. It is, therefore, submitted that the questions relating to *enforcement* of constitutional conventions should be subjected to same limitations and judges exercising jurisdiction under any state constitution must of necessity see whether the *conditions* and *circumstances* are satisfied before they may *enforce* any convention in a given case. *Third*, courts should also deal whether this particular approach towards the question of *enforcement* of constitutional conventions commensurate in large measure with the nature and role of judicial power in a tripartite system of government or in the respective jurisdictions they are functioning.

Unfortunately, the Appellate Division of Bangladesh Supreme Court in its leading *Idrisur Rahman*[89] decision on constitutional conventions did not at all address the above enumerated *circumstances* and *conditions* before *enforcing* the convention of 'consultation' against the executive government of the state.[90] But, in view of the

[89] ibid.

[90] A discussion on the attending *circumstances* and *conditions* for determining the *enforceability* status of a convention in a given case demands for a separate full-fledged study on the subject. Any inquisitive researcher may undertake the task of filling up the vacuum of Supreme Court's *Idrisur Rahman* (see, *ibid*) verdict in this regard. The present author himself, however, hopes to undertake in future another research study on the subject.

present author, the Court, in exercise of the judicial power of the state, was of necessity bound to deal with these essential aspects of judicial *enforcement* of conventional rules of the constitution. The Court thus simply failed to appreciate distinction between mere *recognition* and actual judicial *enforcement* of conventions in a given case. Furthermore, in Court's view, there is also just no distinction between 'laws of constitution' and an 'established constitutional convention'.[91] The present author could not but respectfully disagree with this view of the Bangladesh Supreme Court. The English literature, particularly of Jennings, on which the Court heavily relied on for its reasoning and reaching conclusion[92], also maintains distinction between *recognition* and *enforcement* of conventions in a court of law.[93]

To conclude, the present study, in the wake of Appellate Division's enforcement of the convention of 'consultation' in *Idrisur Rahman* [94], revisits the constituent elements of a convention. The study, therefore, as it claimed in the *Introductory Part*, deals only with one of the aspects involving the *nature* of conventional rules of constitution i.e. their *recognition* criteria. Conventions are just one of the various other 'non-legal' concepts of a constitution. In course of analysis of the constituent elements, the study reveals how convention as a 'non-legal' concept differs from those other 'non-legal' concepts of the constitution. The study both elaborates on the element 'reason' of conventions and relates this to *purposes* they serve for any constitutional system. This would help one knowing better the *reasons* for or *legitimacy* of existence of this body of rules in its constitutional system. To learn the *effect* of operation of conventions as well as the attending *circumstances* and *conditions* of their judicial enforcement are essential to the understanding of the nature and status of conventional rules within the framework of any given constitution. The present study enlightening one with the constituent elements and help removing the cloud and confusion that may persist over the very *existence* of the convention itself, would go a long way for any inquisitive reader interested in constitutional law to facilitate and enhance his understanding and knowledge of the *interactive* effect and *enforceability* status of conventions within the framework of any state constitutional jurisdiction.

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91 See, notes 18 and 19 and the accompanying texts.

92 See, *Idrisur Rahman* (AD) (n 14).

93 See, Jennings (n 2) 107 and 121. The UK Supreme Court has reiterated the distinction between mere *recognition* and *enforcement* of conventions in a recent case also. See, *R. (Miller) v Secretary of State for Exiting the European Union* [2017] U.K.S.C. 5. For detail of the case, see, Farrah Ahmed, Richard Albert, & Adam Perry, 'Judging Constitutional Conventions' (2019) 17(3) *International Journal of Constitutional Law* 787. See also, Farrah Ahmed, Richard Albert, & Adam Perry, 'Enforcing Constitutional Conventions' (2019) 17(4) *International Journal of Constitutional Law* 1146 (holding the view that courts should limit themselves to enforcing power-shifting conventions only).

94 See, *Idrisur Rahman* (AD) (n 14).

Strengthening the National Human Rights Commission of Bangladesh through a Legislative Amendment to Fulfill its Commitments Under Sustainable Development Goals (SDGs)

A B M Asrafuzzaman*

1. Introduction

As a member of the UN, Bangladesh is under international obligations to promote, protect, and enforce human rights and human development under a variety of international Conventions and instruments, including the International Covenant on Civil and Political Rights 1966 (ICCPR), the International Covenant on Economic Social and Cultural Rights 1966 (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Paris Declaration, and the Sustainable Development Goals (SDGs).To fulfill those commitments, the National Human Rights Commission of Bangladesh (Commission or NHRC) could have played a significant role in safeguarding human rights. Because of some inherent lacunae in the National Human Rights Commission Act 2009 (NHRC Act), the Commission has, to a substantial extent, failed to promote, protect, and enforce human rights and human development in Bangladesh. These lacunae include: (1) an incomplete definition of "human rights"; (2) a defective appointment procedure and very minimal qualifications for the appointment of Chairman and commissioners, and the insufficient number of permanent members of the Commission; (3) a lack of enforcement mechanism in the hands of the NHRC and inability to provide interim relief to aggrieved complainants; (4) it has only investigative power and its recommendations to the government are non-binding; (5) the Commission's lack of independence from the government; (6) the exclusion of some significant issues from its jurisdiction. To strengthen the Commission's power of promotion, protection, and enforcement of human rights, the government must significantly amend the NHRC Act to address these lacunae and to fulfill its international commitments.

This paper will first provide an overview of Bangladesh's human rights commitments under international law. Part II will discuss the historical background, composition, power, and functions of NHRC. Part III will depict human rights conditions in Bangladesh. Part IV will delve into the judicial approach towards the actions of the NHRC. Part V will identify the flaws and lacunae in the NHRC Act. Part VI will scrutinize key provisions of the NHRC Act and compare them to the enabling provisions of the human rights bodies of India, Nepal, and South Africa. Finally, Part VII will

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recommend amendments to the NHRC Act based on those flaws and comparisons. This paper will explore the likely results of amendments to the NHRC Act based on logical inference (less on empirical observation). The author acknowledges that full implementation of the NHRC Act, even if amended, will be challenging.

2. Bangladesh's Human Rights Commitments and the NHRC

2.1 Definition of Human Rights

"Human rights" has been defined by the international human rights documents, the NHRC Act, and human rights scholars. The word "human" implies human beings and "rights" signifies entitlement. Thus, whenever and wherever a human being is born, he/she will be entitled to certain basic rights from the very day of his/her birth. These fundamental rights can be termed as natural rights. These rights are not conditioned on nationality, race, religion, sex, or other immutable traits. The philosophy is that the concept of human rights does not entail recognition or ratification by the State because they are natural rights of human beings.

The NHRC Act defines "Human Rights" as Right to life, Right to liberty, Right to equality and Right to dignity of a person guaranteed by the Constitution of the People's Republic of Bangladesh and such other human rights that are declared under different international human rights instruments ratified by the People's Republic of Bangladesh and are enforceable by the existing laws of Bangladesh.[1] This definition does not cover all traits of human rights. It encompasses only the human rights which have been recognized by the Constitution of Bangladesh, enforceable by law, and contained in different international instruments ratified by Bangladesh. The plain language of the definition expressly concentrates more on civil and political rights than the social, economic and cultural rights of the citizens.

2.2 International Commitments Behind the Formation of the NHRC

2.2.1 Key Human Rights Instruments Adopted by Bangladesh

Bangladesh has commitments to protect, promote, and enforce human rights and human development under the Charter of United Nations, ICCPR, ICESCR, CEDAW, Universal Declaration of Human Rights (UDHR), Convention on the Rights of the Child 1989 (CRC), Convention on the Elimination of All Forms of Racial Discrimination 1965 (CERD), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT), Convention on the Rights of Person with Disabilities, 2006 (CRPD), SDGs, Paris Declaration, and Vienna Declaration.

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[1] National Human Rights Commission Act 2009 (Bangladesh) (hereinafter NHRC Act 2009), s 2(f) <https://nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/law/de62d323_fe91_45f0_9513_a0d36ab77fdf/NHRC%20Act%202009_1_.pdf> accessed 12 July 2020.

The underlying purpose of the UN Charter is to impose an obligation on its members to take initiatives to respect and recognize human rights and the fundamental freedom of people without any distinction as to race, sex, religion, ethnicity, or language.[2] One of the core goals of it is to ensure peace within and among States. It is implausible to achieve this goal without the proper implementation of human rights. Consequently, the UN charter, in its starting provisions, has contained articles urging member States to respect human rights and fundamental freedoms.

The ICCPR casts obligations upon the State Party to undertake proper measures to respect civil and political rights, such as freedom of expression, recognized in the Covenant to all individuals within its territory and subject to its jurisdiction, without distinction of any kind, such as race, color, sex, language, religion, political or other opinions, national or social origin, property, birth or other status.[3] Consequently, every member State is obliged to fulfill all civil and political rights of the people guaranteed under this Convention. It also requires that when fundamental freedom of any person will be violated, he/she will have an adequate remedy under the law, and the State shall guarantee that the competent authorities shall enforce such remedies when granted.[4] It imposes a duty upon the State to ensure the equal right of people to the enjoyment of all civil and political rights outlined in this covenant.[5] Thus, it casts an obligatory duty upon the State not only to take proper measures to enforce the rights enshrined in it but also to enforce remedy when granted to the victim. It also urges the State to endorse the principle of equality between men and women in enjoying their civil and political rights and prohibits gender discrimination.

The ICESCR sets forth economic, social, cultural rights and requires each State Party to undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[6] It stipulates that the States Parties to this Covenant shall undertake to guarantee that the rights enunciated in the Covenant will be exercised without any kind of discrimination.[7] It also requires that the States Parties to this Covenant shall undertake to make sure the equal right of people to the enjoyment of all economic, social, and cultural rights outlined in this covenant.[8] Thus, every State Party is obliged to take adequate measures to guarantee

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2 UN Charter 1945, preamble and art 1(3).
3 International Covenant on Civil and Political Rights 1966 (ICCPR), art 2(1).
4 ibid, art 2(3).
5 ibid, art 3.
6 International Covenant on Economic Social and Cultural Rights 1966 (ICESCR), art 2(1).
7 Ibid, art 2(2).
8 ibid, art 3.

economic, social, and cultural rights mentioned in it without any kind of distinction. It also urges the State Party to make sure equality between men and women in the realization of these rights.

The CEDAW talks about the equal rights of men and women. It requires the State to take all measures to eliminate all kinds of discrimination against women and safeguards to protect the rights of women. However, Bangladesh has reservations to Article 2 and 16(1)(c), which deal with the State's obligation to take steps to wipe out all kinds of discrimination against women and to safeguard equal rights of women concerning the family law issues. By this reservation, Bangladesh has skipped core obligations under this Convention. It is pertinent to mention here that the Constitution of Bangladesh has guaranteed the equal rights of both men and women in all spheres of the State.[9] Despite this kind of reservation, Bangladesh has the fundamental constitutional mandate to eliminate all kinds of discrimination irrespective of gender in state and public life.

The CRC stipulates that States Parties shall respect and safeguard the rights outlined in this Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his/her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.[10] It requires that no child shall be subjected to arbitrary or unlawful intrusion with his or her privacy, family, home or correspondence, or unlawful attacks on his/her honor and reputation.[11] The child has the right to the protection of the law against such interference or attacks.[12] It also requires that States Parties shall undertake to protect the child from all forms of sexual exploitation and sexual abuse.[13] It provides that States Parties shall make sure that no child shall be subjected to torture or other cruel, inhuman, or degrading treatment or punishment.[14] The combined effect of the provisions of the CRC requires that every State Party shall care for the rights of the children within its territory. Thus, every State will take all legal safeguards to protect the rights of the children. They are also duty-bound to provide the effective and appropriate remedy to children who become the victim of unlawful torture and intrusion. Bangladesh has reservations to article 14(1) and 21of this Convention. Article 14(1) requires that States Parties shall respect the right of the child to freedom of thought, conscience, and religion. It takes reservations on the ground that in

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9 Constitution of Bangladesh 1972, art 28.
10 Convention on the Rights of the Child 1989 (CRC), art 2 and 4.
11 Ibid, art 16(1).
12 Ibid, art 16(2).
13 Ibid, art 34.
14 Ibid, art 37(a).

Bangladesh, most people believe in Islam, and renunciation of Islam is a great sin.[15] However, it is contrary to the Constitution of Bangladesh, which recognizes secularism as one of its four fundamental principles. Hence, Bangladesh cannot maintain any specific tenet of religion. Despite this reservation, Bangladesh has a constitutional obligation to abide by the secular principle in administering its activities.

The CAT requires that each State Party shall take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction.[16] It states that each State Party shall ensure that any individual who alleges that he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined by its competent authorities.[17] It also requires that steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation because of his complaint or any evidence given.[18] It also stipulates that each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[19] Thus, under the CAT, each State Party must take all appropriate steps to protect its people from the cruel, inhuman and degrading treatment or punishment and at the same time, the State shall take proper measures to afford a quick and effective remedy to the person who is the victim of unlawful torture.

The Sustainable Development Goals (SDGs) are the blueprint to build a better and more sustainable future for all people around the world. They focus on the global challenges including poverty, quality health, quality education, gender inequality, climate change, environmental degradation, sustainable energy, economic development, peace, and justice. All the contracting parties have pledged to fulfill these goals by taking robust action within their respective countries by 2030. It requires that independent, accountable, pro people, and inclusive institutions are necessary to fulfill these goals. Goal five of the SDGs requires that every State Party shall take proper steps to achieve gender equality and empower all women and girls.

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15 'Reservations to the Convention on the Rights of the Child: A Look at the Reservations of Asian State Parties' (*International Commission of Jurists*, 1 February 1994) <https://www.icj.org/wpcontent/uploads/2013/10/Asia-Convention-Rights-of-the-Child-non-legal-submission-1994-eng.pdf> accessed 20 March 2020.

16 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT), art 2(1).

17 ibid, art 13.

18 ibid.

19 ibid, art 16.

Goal ten entails that every State Party shall take appropriate measures to reduce inequality within and amongst States. Goal 16 requires that every State shall promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable, and inclusive institutions at all levels. The core spirit of the SDGs is to ensure human rights for all. It advocates that without the realization of human rights, it is implausible to ensure sustainable development. After all, it urges that without founding an effective, accountable, and inclusive institution, it may be implausible to enforce, protect, and promote human rights and human development.

2.2.2 The Paris Principles and the Formation of National Human Rights bodies

The obligations outlined in the instruments described above form the foundation for establishing national human rights institutions like Bangladesh's NHRC for the protection, promotion, and enforcement of human rights and human development. Because of repeated violations of human rights by States worldwide, the representatives of most States met in Paris to think about how to make up the human rights Conventions more effective in the lives of citizens. Consequently, representatives of States developed the Paris Principles, which urge every member State to set up a national human rights institution to protect, promote, monitor, and fulfill the human rights of the people. The UN Commission on Human Rights and the UN General Assembly approved these principles subsequently.[20] Thus, it became the obligation of all member States to establish national human rights institutions for the protection and promotion of human rights and human development.

The World Conference on Human Rights reiterates the importance and constructive role played by national human rights institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights.[21] This Conference encourages the establishment and strengthening of national institutions, having regard to the "Principles relating to the status of national institutions" and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level.[22] To comply with obligations under the above mentioned international legal instruments, the Parliament of Bangladesh has enacted the NHRC Act to found NHRC in order to promote, protect, and monitor the human rights of the people of Bangladesh.

[20] General Assembly Resolution 48/134 of 20 December 1993.
[21] Vienna Declaration and Program of Action 1993, art I (36).
[22] ibid.

3. The NHRC of Bangladesh

3.1 The Historical milieu of the formation of the NHRC

In the 1990s, the civil society and international community raised their voices demanding the setting up an independent and neutral State institution to ensure the accountability of the State.[23] It was anticipated that this institution would offer the State with the necessary guidelines and recommendations for guaranteeing human rights. This institution was also expected to pave the way for the protection of human rights defenders. Consequently, in 1996, the government took a strategy to gauge the prospect of forming the NHRC.[24] Afterward, with the assistance of UNDP, a draft Act was proposed in 1998 to form the Commission. However, the legacy of negligence and ineptitude of the previous regime was still prevalent. Thus, the issue was untouched and under consideration for a prolonged period. At last, a Commission was established on the 1st September of 2008 with the promulgation of the National Human Rights Commission Ordinance 2007, by the caretaker government (an interim non-elected government). A three-member Commission began functioning on 1st December 2008.[25] However, the NHRC takes the present shape and comes into people's discussion after the enactment of the NHRC Act 2009, on 14th July 2009. The NHRC started functioning in June 2010 under this Act. The second Commission worked for two terms consecutively until June 2016. Then the fourth Commission commenced its journey on the 2nd August of 2016. The present one is the fifth Commission, which has taken charge on the 22nd September of 2019.[26] The Chairman of the first Commission was a former Justice of the Supreme Court of Bangladesh; the second & third Commission was a professor of law; the fourth was a former bureaucrat, and the fifth Commission is also a retired bureaucrat.

3.2 Composition of the NHRC

Under the NHRC Act, the Commission shall consist of a Chairman and not more than six members. The Chairman and one member of the Commission shall be full time, and other members shall be honorary. Among the members, at least one shall be a woman, and one shall be from an ethnic group. The Chairman shall be the chief executive of the Commission.[27] The President shall, upon the recommendation of the selection committee, appoint the Chairman and the members of the Commission.[28] To

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23 Ain O Salish Kendra, *Report on Civil Society Dialogue with National Human Rights Commission Bangladesh* <http://www.askbd.org/ask/2017/12/10/report-civil-society-dialogue-nhrc/> accessed 20 March 2020.

24 ibid.

25 ibid.

26 National Rights Commission Bangladesh, *Annual Report* (NHRC 2018) 13 <http://nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/cb8edec9_5aee_4b04_bf2a_229d9cd226a0/Annual%20Report-2018%20English.pdf> accessed 25 March 2020.

27 NHRC Act 2009 (Bangladesh), s 5.

28 ibid, s 6(1).

make a recommendation on the appointment of the Chairman and members, a selection committee shall consist of the following seven members, namely:- (a) the Speaker of the House of the Nation who shall also be its President; (b) Minister, Ministry of law, Justice, and Parliamentary affairs; (c) Minister, Ministry of Home Affairs; (d) Chairman, Law Commission; (e) Cabinet Secretary, Cabinet Division; (f) Two Members of the Parliament, nominated by the Speaker of the House of the nation, out of whom one shall belong to the ruling party and the other from the opposition party.[29] To make a recommendation on the appointment of the Chairman and the members, the selection committee shall recommend two names against each vacant post based on the decision of the majority of the votes of the members present in the meeting. In case of equality of votes, the persons presiding over the meeting shall have the right to exercise a casting vote.[30]

No person shall be eligible for appointment to the post of the Chairman or member of the Commission or shall hold a post if he is below 30 and over 70 years of age. The Chairman and the members shall, subject to the provision of this section, be appointed from amongst the persons who have remarkable contributions in the field of legal or judicial activities, human rights, education, social service, or human welfare.[31]

Thus, the Commission has only two permanent members, including its Chairman; and all other members are honorary. Honorary members do not actively take part in the functions of the NHRC. They only join in the meetings of the NHRC. It may be challenging for only two members to run all the functions of the NHRC efficiently around the entire country.

The President appoints the Chairman and members based on the recommendation of the selection committee, but the majority of the members of the selection committee belong to the ruling party and only one member from the opposition party. Hence, the government has scope to nominate those persons who will work on behalf of it and are likely to turn a blind eye to the government's role in human rights abuses.

3.3 Functions of the NHRC

The NHRC, a statutory body, has been founded to protect, enforce, and promote human rights in Bangladesh. Under the NHRC Act, it is obliged to undertake and implement diversified functions for the promotion and protection of human rights. As per section 12 (1) of the NHRC Act, it shall execute all or any of the following functions, namely:

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[29] Ibid, s 7.
[30] ibid.
[31] NHRC Act 2009 (Bangladesh), s 6.

- investigate any complaint against human rights breaches either on the complaint or *suo motu.*
- visit any jail or correctional centers, and such other similar places and make recommendations to the government thereon for the development of those places and their conditions.
- conduct research on various international documents relating to human rights and provide the government with necessary recommendations to enforce them.
- scrutinize the proposals for new legislation for verifying their compliance with international human rights benchmarks and to make recommendations for amendment to the appropriate authority.
- inquire complaints related to the infringement or possibility of the breach of human rights and resolve the issue through mediation.
- provide legal support to the victim of violations of human rights.
- conduct research on the human rights situation of the country.
- create consciousness as to human rights through enormous publicity and publications.
- provide training for members of law enforcement agencies and other persons concerned regarding the protection of human rights.
- perform such other functions, as may be necessary for the promotion of human rights.

Any careful reading of the abovementioned provisions relating to the functions of the NHRC, will show that it has possibly been overburdened with a bundle of duties to promote, enforce, and protect human rights and human development in Bangladesh. However, the execution and implementation of these functions depends on the will of the government.

4. Human Rights Conditions in Bangladesh

The fundamental rights of people guaranteed under the Constitution of Bangladesh are more in their breach than their observance, let alone all human rights. The daily newspapers of Bangladesh report human rights violations every day. The human rights report of newspapers, NHRC, national and international NGOs, and international human rights organizations reveal a pattern of increasing violations of human rights in Bangladesh. Recently, Bangladesh has graduated from the least developed countries category to a developing country. Though a little bit of advancement of socio-economic human rights is evident from the human rights report of NHRC and NGOs, civil and political rights are flouted and abused awfully in Bangladesh. The following types of violations of human rights are widespread and increasing alarmingly.

4.1 Arbitrary Arrest and Detention

Arbitrary detention is a frequent phenomenon in Bangladesh. The government agencies detain people without showing sufficient cause to protect the interests of the government. The law enforcement agencies (Police, Rapid Action Battalion and Detective Branch) also arrested at least 100 students, most of whom participated in the quota reform and road safety protest movements in 2019.[32] The Special Powers Act,1974 allows law enforcement agencies to arrest and detain an individual without an order from a magistrate or a warrant when such an agency contemplates that individual may be involved in a prejudicial act, which is a threat to security, interest and public order of the State. They can also detain people without producing them before the court for a prolonged period under this Act. The law enforcement agency rationalizes most of the arbitrary arrest and detention under this Act.

4.2 Extrajudicial Killing

The number of extrajudicial killings is increasing gradually in Bangladesh. The year of 2017 has witnessed an anti-drug drive in which more than 300 people were killed for allegedly being connected with the drug/narcotics business.[33] More than 388 people were killed by the security forces in alleged extrajudicial executions, 279 people were killed before the arrest, 97 people were killed after the arrest, and others were killed after torture or other means.[34] According to ASK reports from newspapers and its own source, 437 persons have been victims of extrajudicial killing from January to October 2018.[35] Human Rights Support Society (HRSS), a domestic human rights organization, reported that the security forces killed more than 400 individuals in crossfire incidents from January to September.[36] These reports clearly shows that the government is curtailing the right of the accused to assure trial. The law enforcement agency is killing people in the name of cross fire arbitrarily and without giving them an opportunity of being heard or fair trial.

4.3 Unlawful Torture and Inhuman Treatment

Inhuman treatment and unlawful torture are frequently used to extract information from accused persons. In most cases, an accused is compelled to make involuntary extrajudicial confession due to such inhuman treatment or unlawful

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[32] Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices: Bangladesh* (US Department of State 2019) <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/bangladesh/> accessed 20 March 2020.

[33] Ain O Salish Kendra (n 23) 18.

[34] Amnesty International, 'Bangladesh 2019' <https://www.amnesty.org/en/countries/asia-and-the-pacific/bangladesh/report-bangladesh/> accessed 20 March 2020.

[35] Tamanna Hoq Riti in Maimuna Syed Ahmed (ed), *National Human Rights Commission, Bangladesh: Existing Challenges and Expectations of Civil Society* (Ain O Salish Kendra 2018) 23-24 <https://www.askbd.org/ask/wp-content/uploads/2019/02/NHRC-Report_English.pdf> accessed 15 February 2020.

[36] Bureau of Democracy, Human Rights, and Labor (n 32).

torture. The security forces reportedly use threats, beatings, kneecappings, electric shocks, and sometimes commits rapes and other sexual abuses in extracting confessional statement from the accused.[37]

In August of 2019, the UN Committee Against Torture (CAT) expressed deep concerns over allegations of widespread use of torture, mistreatment and soliciting the payment of bribes by Bangladeshi law enforcement officials to extract confessions. The CAT report also condemned the lack of publicly accessible information on abuse cases and the failure to ensure accountability for law enforcement agencies, particularly the Rapid Action Battalion (RAB).[38] Although inhuman treatment and unlawful torture violate fundamental rights and human rights, they are usually employed by law enforcement agencies to gather information as to the commission of offenses. The cardinal principle of human rights is that nobody shall be compelled to give evidence against himself. Therefore, inhuman treatment and torture to extract information is a grave violation of human rights.

4.4 Forced Disappearance

Many people including wealthy businesspeople, political opponents, as well as critics of the government are frequently disappeared in Bangladesh. In most instances, the law enforcement agencies are assumed to be involved in such incidents. According to media reports, some of disappearances occurred in 2018. Mention may be made to Shajol Chowdhury's abduction. Mr. Shajol, an owner of several businesses, including a shipbreaking venture in Chittagong, has returned home a week after being abducted.[39] According to ASK reports from national dailies, a total of 34 persons were victims of abduction, disappearance, and went missing in 2018. Of them, 19 have been traced subsequently, most of whom are in prison in different cases.[40] The HRSS affirmed that there were 58 enforced disappearances from January to September, and Odhikar asserted that there were 83 enforced disappearances from January to November of 2019.[41] These reports reveal that enforced disappearance have become turned out to be a common incident in Bangladesh. The government did not take any appropriate steps to stop this kind of violation of human rights. The government did not even respond to a request from the UN Working Group on Enforced Disappearances to visit the country.[42] The report also implies that the government has failed to prevent this kind of severe violation of human rights.

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37 ibid.
38 ibid.
39 Ain O Salish Kendra (n 23) 17.
40 Abu Ahmed Faijul Kabir, Anirban Saha and Hasibur Rahman, *Human Rights Situation of Bangladesh in 2018: An Observation* (Ain O Salish Kendra 2019) 6. <https://docs.google.com/viewerng/viewer?url=http://www.askbd.org/ask/wpcontent/uploads/2019/06/ASK-HR-Booklet-English-2018-Correction-20-06-19.pdf> accessed 30 March 2020.
41 Bureau of Democracy, Human Rights, and Labor (n 32).
42 ibid.

4.5 Infringements of Rights of the Marginalized Communities

Religious minority groups and ethnic communities are frequent victims of the attacks and violations of human rights in Bangladesh. In February 2018, two *Marma* girls in Rangamati were sexually assaulted by members of Ansar. In August 2018, 06 people were killed in Khagrachari by some miscreants.[43] The NHRC urged the government to strengthen the law and order situation in Chittagong Hill Tracts areas to provide security to the ethnic minority people.[44] At least 43 indigenous political activists were killed and 67 injured mostly because of fighting between political factions.[45] Police had not recorded first information report against Muslim villagers accused of vandalizing and burning approximately 30 Hindu houses in Rangpur in November 2017 in response to a rumored-on Facebook post demeaning Islam.[46] These reports explore that religious minorities and ethnic communities are the vulnerable victims of violations of human rights in Bangladesh. Their human rights and fundamental freedoms are frequently flouted.

4.6 Violations of Women's Rights

Bangladesh's women are frequently victims of infringements of human rights and fundamental rights. Due to the lack of appropriate action and effective remedy, the number of violations in this arena is rising alarmingly. The report of the Global Alliance of National Human Rights Institutions (GANHRI) reveals that its members, including India, Nepal, and South Africa except Bangladesh, have taken the initiatives to prevent gender-based violence against women.[47] The following kinds of violations of women's human rights are widespread in Bangladesh.

4.6.1 Rape

According to ASK documentation, a total of 732 women were victims of rape and gang-rape in the year 2018. Among them, 63 were murdered after rape, and 7 committed suicide.[48]

4.6.2 Stalking and Sexual harassment

In 2018, a total of 173 women and men became victims of sexual harassment and other kinds of violence; among them, 116 were women. As many as 8 women

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[43] Ain O Salish Kendra (n 23) 20.
[44] ibid.
[45] Amnesty International (n 34).
[46] Bureau of Democracy, Human Rights, and Labor (n 32).
[47] Alexandre Bouchard and others,
Preventing and Eliminating All Forms of Violence against Women and Girls: The Role of National Human Rights Institutions - A Contribution to the Review and Priority Themes of CSW63 (GANHRI 2018) <https://nhri.ohchr.org/EN/Documents/DIMR_GANHRI%20CSW%20Report_final%20BF.pdf> accessed 20 March 2020.
[48] Ain O Salish Kendra (n 40).

committed suicide due to sexual harassment. Twelve persons, including 3 women, were murdered.[49]

4.6.3 Dowry and Domestic Violence

In 2018, a total of 195 women became victims of physical torture for dowry. Of them, 85 died, and 6 committed suicide because of torture. In that year, a total of 409 women were victims of domestic violence.[50]

4.6.4 Violence Against Domestic Worker and Acid Throwing

In 2018, as many as 54 women domestic workers became victims of torture. Among them, 4 were victims of rape, 26 were physically tortured, and 18 died of torture and other causes. This year, as many as 22 women were victims of acid attacks, and 1 of them died consequently.[51]

These reports reveal that the human rights of the women are seriously under threat and their rights are not safeguarded. Despite having equal rights provision in the Constitution, women do not have equal share over the property. Though women are entitled to have special protection for their rights, they are contravened enormously in Bangladesh.

5. Abuses of Children's Rights

Children are entitled to have special safeguards for their rights. However, their rights are flagrantly contravened in Bangladesh. According to the NHRC monitoring report, 169 children were raped in 2018.[52] As per ASK report, 1011 children became victims of various forms of torture in 2018. Due to physical torture, murder after rape as well as murder after a failed attempt to rape, killing after kidnapping and disappearance, altogether 283 children were killed, and of them 28 were victims of a mysterious death.

Moreover, as many as 444 children became victims of sexual harassment and rape.[53] The report uncovers that children's rights are not safeguarded, and they are the frequent victims of breaches of human rights. There is also a lack of child-friendly measures in Bangladesh for the security and benefit of the children.

6. The response of Bangladesh to the United Nations or Other International Human Rights Bodies

It is well well-known to the government of Bangladesh that human rights are infringed and not protected. Hence, when the international human rights bodies

[49] ibid.
[50] ibid.
[51] ibid.
[52] Ain O Salish Kendra (n 23) 19.
[53] Ain O Salish Kendra (n 40).

request to visit Bangladesh to understand the real picture of contraventions of human rights, in most cases, the government refuses to allow such a visit. The report confirms that the government did not respond to the request of the UN Working Group on Enforced Disappearances to visit the country. The Office of the UN Resident Coordinator in Bangladesh testified 15 other awaiting requests for UN special rapporteurs to visit the country, including the special rapporteur on extrajudicial killing, summary or arbitrary executions; the special rapporteur on the rights to freedom of peaceful assembly and association; and the special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.[54]

As a member of the UN, Bangladesh has the obligation to cooperate with international bodies to ensure peace within and beyond the State. If such international bodies could visit Bangladesh, they might have been acquainted with the real picture of the infringements of human rights. Realizing the human rights situation, they could assist Bangladesh in protecting and promoting human rights appropriately.

6.1 Report of Human Rights Bodies of Bangladesh

The human rights report of ASK of 2017 noted that insufficient fund, inadequate support staffs and nominal government's support limit the Commission's effectiveness and independence.[55] It also remarked that Nasima Begum, former senior secretary of the Ministry of Women and Children Affairs, was appointed the NHRC's Chairman in September 2019. This appointment prompted sharp criticisms from civil society, who questioned the government's selection process, and condemned the Commission's effectiveness and independence as almost all members were former government bureaucrats.[56] This report reveals that the NHRC is mostly reliant on the government, and simultaneously, it is also unduly influenced by the government. It has also remarked that the appointment procedure of the Chairman and commissioners are not fair and transparent at all.[57]

6.2 The Universal Periodic Review (UPR) of the UN of Bangladesh

It is a procedure under which every member of the UN must submit the report of human rights conditions and measures that the government has taken to protect, enforce, and promote human rights within a country. The UPR of 2018, states that Bangladesh's initiative tool to strengthen the national human rights institution (NHRI) is applauded. Michelle Bachelet (High Commissioner for Human Rights) encourages increasing independence and effectiveness of the NHRC, bringing it into

54 Ain O Salish Kendra (n 23).
55 ibid.
56 ibid.
57 ibid.

full compliance with the Paris Principles, including by ensuring its ability to directly investigate alleged human rights violations perpetrated by the security forces and by making adequate resources available.[58] Thus, the government of Bangladesh has been instructed to empower the NHRC in full conformity with the Paris Principles. In the third Cycle UPR of Bangladesh, Germany raised three relevant questions. It questioned about what is the current status on the withdrawal of reservations on articles 2 and 16.1(c) of the CEDAW that Bangladesh agreed to; What steps has the Government of Bangladesh undertaken to fight impunity in recorded cases of extrajudicial killings, enforced disappearances, and torture; and what does the Government of Bangladesh intend to do to guarantee freedom of expression in the new Digital Security Act.[59] These three questions were asked because the infringements of human rights regarding these three areas are very high in Bangladesh. Bangladesh has not replied to these questions appropriately. Considering this report, it is obvious that international communities are not satisfied; rather, they are concerned about the human rights conditions, violations, and abuses in Bangladesh.

7. Public Opinion as to the Violations of Human Rights

As human rights are usually breached in Bangladesh, many prominent citizens from diverse experiences have raised their voices as to the abuses of human rights. Habib Zafarullah[60] & Mohammad Habibur Rahman[61] opine that the state of human rights in Bangladesh is far from acceptable, although the concentration on this issue has sharpened significantly. The country's law and order condition portray an awful picture. The situation deteriorated to the extent that police involvement in theft, robbery, and rape frequently appearing in the news. Governments, past and present, have perpetrated severe human rights abuses.[62] Numan Mahfuj[63], and Md. Mizanur Rahman[64] opine that while evaluating human rights and human security scenario in Bangladesh, it is unquestionably evident that fundamental human rights are severely

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58 Working Group on the Universal Periodic Review, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Bangladesh* (United Nations Human Rights Council 2018) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/050/26/PDF/G1805026.pdf? Open Element> accessed 20 July 2020.

59 ibid.

60 Habib Zafarullah received a Ph.D. in Public Administration from the University of Sydney and currently teaches Political Science and Public Policy at the University of New England, Australia.

61 Mohammad Habibur Rahman is a Professor of Public Administration at the University of Dhaka.

62 Habib Zafarullah & Mohammad Habibur Rahman, Human Rights, 'Civil Society and Nongovernmental Organizations: The Nexus in Bangladesh' (2002), vol. 24, no. 4, Hum. Rts. Q. 1011, the Johns Hopkins University Press, p. 1011-1034. Hein Online, accessed 20 April 2020.

63 Numan Mahfuj is a lecturer, Department of Public Administration, Jagannath University, Dhaka.

64 Mizanur Rahman is an Assistant Professor, Department of Public Administration, Bangabandhu Sheikh Mujibur Rahman Science and Technology University, Gopalgonj, Dhaka.

flouted, leaving people inhumanly unprotected.[65] Barrister Md. Abdul Halim[66] and Dr Abdullah A. Dewan[67] mentioned in a newspaper article that instances of gross human rights violations(HRVs) by law enforcing agencies, local political leaders, elected representatives, private companies, land grabbers, slum evictions and so on are pouring in expressed on a daily and hourly basis.[68] The former US Ambassador to Bangladesh, Dan Mozena his concern to the NHRC's Chairman of that time Dr Mizanur Rahman that 51 percent of the country's 153 million people are not cognizant of human rights and recommended him to raise people's consciousness (The Daily Sun, 25th July, 2013).[69] Maliha Khan, a graduate of the Asian University for Women and human rights activist, writes in the Daily Star newspaper that the NHRC Act states that the Commission is an independent statutory body, yet, in many aspects, it acts as a watchdog. While it has the power to investigate complaints of human rights violations, it does little beyond basic fact-finding and writing a report. It does not follow through until official investigations end or are brought to a satisfactory close. She also says that the year 2018 was tumultuous. The quota reform and road safety movements saw students, teachers, and journalists attacked while trying to protest peacefully or covering the protests, pre, and post-election violence, and extrajudicial killings in anti-narcotics drive-by security forces which claimed the lives of around 300 people.[70] One of the journalists of the Daily New Age newspaper, published an article on 11th February 2020, that the country witnessed a total of 391 alleged extrajudicial killings and that the human rights situation in the country remained quite alarming throughout the year. The public opinion as to the condition of the rule of law is also shocking in Bangladesh. The report demonstrates that in 2020, the position of Bangladesh is 115 out of 128 countries, and the observance of the rule of law in Bangladesh is decreasing every year.[71] This report is prepared based on public opinion. Thus, the opinion of the public reveals that the contraventions of fundamental rights and human rights are ever-increasing in Bangladesh.

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65 Numan Mahfuj and Md. Mizanur Rahman, 'Ensuring Human Security in Bangladesh: Role of National Human Rights Commission (NHRC)' <https://www.academia.edu/37437897/Ensuring_Human_Security_in_Bangladesh_Role_of_National_Human_Rights_Commission_NHRC> accessed 20 April 2020.

66 Md. Abdul Halim is an Advocate in the Supreme Court of Bangladesh.

67 Dr. Abdullah A. Dewan is a Professor of Economics, Eastern Michigan University, USA.

68 Md Abdul Halim and Abdullah A Dewan, 'Is National Human Rights Commission (NHRC) A Show and Tell Institution Part II?' *The Daily Sun*, (Dhaka, 27 July 2013) <https://www.academia.edu/36846951/Is_National_Human_Rights_Commission_Nhrc_A_Show_And_Tell_Institution_Part-I> accessed 20 April 2020.

69 ibid.

70 Maliha Khan, How independent and effective is the NHRC, 'Your Right To Know' *The Daily Star*, (Dhaka, 17 July 2019) <https://www.thedailystar.net/star-weekend/cover-story/human-rights-how-independent-and-effective-the-nhrc-1769992> accessed 25 April 2020.

71 World Justice Project, *The World Justice Project Rule of LawIndex2020* (World Justice Project 2020) <https://worldjusticeproject.org/sites/default/files/documents/Bangladesh%2%202020%20WJP%20Rule%20of%20Law%20Index%20Country%20Press%20Release.pdf> accessed 30 April 2020.

8. Judicial attitude towards the NHRC

The NHRC has the authority to proceed to the court to get redress for the infringements of human rights on behalf of victims. In *Children's Charity Foundation Bangladesh Vs. NHRC*[72]**,** popularly known as the *Khadiza* torture case, the petitioner alleged that the torture and abuse of domestic worker *Khadiza Akhter* was perpetrated by her employer in the Mirpur of Dhaka. On 6th December 2013, police rescued her from her employer's house and got her admitted to Dhaka Medical College Hospital with injuries on different parts of her body. Before filing the writ petition, a letter was sent to the NHRC to take action against the violators of human rights by the Children's Charity Foundation Bangladesh, but it did not take any significant step at all. The High Court Division (HCD) of the Supreme Court of Bangladesh, in its observation, directed the NHRC to raise any matters before the court, if the government authorities concerned do not comply with the Commission's recommendations. The court also pronounces that the NHRC is not doing enough to protect the victim of human rights violations. The HCD also opined that the rights body's "negligence" is frustrating.[73] It is pertinent to comment that the petitioner raised the issue that due to the defective appointment procedure, the NHRC has become a club of former bureaucrats and for which it cannot go against the government's agenda.[74] The respondent, Fauzia Karim, who was also a member of the NHRC, argued that the NHRC does not have enough power to protect human rights within the NHRC Act.[75] From the arguments of the parties and opinions of the court, it may be assumed that the NHRC has neglected to protect and promote human rights in Bangladesh due to the lacunae within the NHRC Act.

9. Comparative Analysis of Human Rights Institution of Bangladesh, India, Nepal, and South Africa

9.1 Comparison between Bangladesh and India

There is a significant deficiency in the appointment procedure of the Chairman and members of the NHRC of Bangladesh. The above discussion reveals that even a person who does not have any legal expertise in human rights may be appointed as the Chairman and members of the Commission.[76] Consequently, the appointed office bearers of the Commission may not realize the real meaning of human rights and their proper enforcement mechanisms. Thus, the lack of required legal knowledge in human rights and their enforcement mechanisms may indirectly hinder them from performing their duties properly and effectively. Whereas, the Protection of Human

[72] Writ Petition No 16386 of 2018, Judgment on 11.11.2019(HCD), judgment has not been yet reported.
[73] Maliha Khan (n 70).
[74] Writ Petition No 16386 of 2018 (n 72), para 4.10.
[75] ibid.
[76] NHRC Act 2009 (Bangladesh), s 6(2).

Rights Act 1993 of India stipulates that the Chairman and two members of the Commission must be appointed from persons who have been or are Chief Justice or Judges of the Supreme Court or High Courts of India and another two members shall be appointed from persons having knowledge of or practical experience in, the matters relating to human rights.[77] Thus, India has emphasized more on the legal background in selecting Chairman and members of the NHRC, perhaps considering the above consequences.

This Act of India, in contrast, provides for the institution of Human Rights Courts for speedy trial of offenses arising out of contravention of human rights.[78]As human rights are the most crucial and specialized area of jurisprudence, it entails special protection. It is plausible that a special court may protect and enforce breaches of human rights appropriately and effectively. The NHRC Act does not have any provision like this. Consequently, the sufferers of abuses of human rights do not get proper remedies in Bangladesh.

9.2 Comparison between Bangladesh and Nepal

Although as per the NHRC Act 2009, the NHRC is an independent statutory body[79], in reality, it is not as independent as is necessary for its proper and independent functioning. For several purposes, including those of finances, it has to depend on the government and other agencies.[80] In contrast, the Constitution of Nepal provides that the Commission is the Constitutional body.[81] As the Constitution is the supreme law of a country, provisions of it are given prime importance, and everybody, including the government cares about the Constitutional mandate. It is thought that a Constitutional body is more powerful than the statutory body due to its Constitutional status. A Constitutional body is only answerable to the Constitution. Legally, a Constitutional body is given a higher rank than a statutory body. Thus, a Constitutional body can act more effectively, appropriately, and independently than the statutory body.

The Constitution of Nepal authorizes that the Commission in accomplishing its functions and duties may use the authority to order compensation to the victims of human rights infringements.[82] The NHRC of Bangladesh might have the legal power to award compensation to the victims of human rights violations as interim relief. However, there is no such provision in the NHRC Act to award compensation to sufferers for abuses of human rights instead it has the power to recommend to the government to award aid (not compensation) to the victim as an interim relief during

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77 Protection of Human Rights Act 1993 (India), s 3(2).
78 ibid, s 30.
79 NHRC Act 2009 (Bangladesh), s 3(2).
80 ibid, s 24(4)(a).
81 Constitution of Nepal 2015, Part 25, art 248.
82 ibid, art 249(3)(d).

the period of investigation or inquiry.[83] It, in effect, means that aid is possible only when the government thinks it fit and proper. Thus, the aid measure is dependent on the mercy of the government. This factually transfers the balance of convenience to the government and therefore makes the NHRC actions conditional upon the satisfaction of the former. Thus, the actual power to decide aid belongs to the government. This hinders the NHRC to ensure justice for the victim.

The Constitution of Nepal has not excluded any authority from the purview of its Commission.[84] However, the NHRC Act of Bangladesh stipulates that notwithstanding anything contained in section12 (1), the following matters shall not be included into the functions or duties of the Commission; issues relating to the cases being tried before a court; or any issue relating to the service matters of the public servants of the Republic and any employee engaged in the service of a statutory public authority which is triable in any tribunal established under the Administrative Tribunals Act, 1980(Act VII OF 1981).[85] It may be assumed that the authorities who are beyond the jurisdiction of the NHRC deal with several crucial human rights issues. Keeping them out of its jurisdiction in such areas, where a right can be infringed in any form not only limits the power of the NHRC but also implies that some breaches, even if they occur, stand outside the jurisdiction of the Commission forever. This somewhat indemnity is dangerous for a human rights culture as if it affords a kind of permission for some infringements to continue.

9.3 Comparison between Bangladesh and South Africa

As argued above, the NHRC is, in effect, merely a recommendatory body. It cannot pass any mandatory decision or direct the government to modify or change the draft bill of legislations that do not comply with the human rights obligation of Bangladesh. It is only authorized to make recommendations to the government for taking appropriate measures, and the government is not legally obligated to comply with recommendations forwarded by the Commission. In comparison, the Constitution of South Africa stipulates that the Commission possesses the power to take steps to guarantee appropriate redress for human rights violations.[86] Thus, the South African Commission has extensive authority to implement human rights by offering a proper remedy to victims. Whereas the NHRC of Bangladesh does not have any authority over anyone for the enforcement of human rights or the execution of its decision. It also has no power to take binding initiatives for the implementation and protection of human rights. The Constitution of South Africa also provides that the commission is a Constitutional body.[87] In contrast, the same is a statutory body in Bangladesh.

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[83] NHRC Act 2009 (Bangladesh), s 19(2).
[84] Constitution of Nepal 2015, art 249.
[85] NHRC Act 2009 (Bangladesh), s 12(2).
[86] Constitution of South Africa 1996, s 184(2)(b).
[87] ibid, s 184.

The South African Commission has a mandate to get a report from each department of government every year to uncover what they have done to promote human rights in their work.[88] This is a vital provision that paves the way for the Commission to overview the functions of each department of government and prepare human rights assessment based on that report. Consequently, each department of government may be more alert in the fulfillment of human rights obligations and in developing human rights culture. In India, obeying the orders of the Commissions has become a convention though it is still a pretty borderline case.[89] In Bangladesh, the NHRC has no authority to ask for report or even the reason for the non-compliance of its recommendations.

10. Lacunae in the NHRC Act

The NHRC Act, if we consider it as a statement of the State, in the fulfillment of its international commitment to protect and promote human rights and human development, its linguistic mandates portray the pros and cons within it. If these are assessed against any practical parameter, a near correct result of the legal provisions can be assumed. The GANHRI (Global Alliance of National Human Rights Institutions) categorizes the national human rights institutions on the basis of their performance and compliance of its enabling Act with the Paris Declaration. Its report confirms that the NHRC of Bangladesh is now in the 'B' category.[90] It also reveals few lacunae and limitations of the existing NHRC Act of Bangladesh, which are obstacles for the NHRC to be elevated to 'A' category which are as follows:

- inadequate definition of Human Rights;
- lack of transparency in the selection process of the Chairman and members;
- limitation in enjoying full economic freedom;
- and limited jurisdiction in investigating violations of human rights by law enforcement agencies i.e., police and security forces.[91]

This report uncovers that the NHRC cannot do well in protecting and promoting human rights due to some inherent lacunae within the NHRC Act. The NHRC Chairman argues that the NHRC does not have enough power to fight against all the facets of human rights violations (HRVs).[92] He routinely grumbles that the

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88 South African Human Rights Commission Act 2013, preamble; Constitution of South Africa 1996, s 184(3).

89 A H Monjurul Kabir, 'A National Human Rights Commission for Bangladesh' (December 1999) 18 Focus<http://www.hurights.or.jp/archives/focus/section2/1999/12/a-national-human-rights-commission-for-bangladesh.html> accessed 14 January 2020.

90 Ain O Salish Kendra, 'Report on Civil Society Dialogue with National Human Rights Commission Bangladesh*'* (n23).

91 ibid.

92 Halim and Dewan (n 68).

Commission lacks any authority to take action for HRVs by disciplinary forces.[93] Thus, because of shortcomings in the NHRC Act, the NHRC is failing to protect human rights adequately. It is evident that the NHRC Act is by and large a monistic instrument that very improperly burdens the NHRC with responsibilities for which there are no guarantees in the Act of mutual or corresponding obligations. This absence of counterbalancing formulation in the provisions of the Act makes most of its claims, statements somewhat phony. This is apparent, especially when compared to a similar yet functionally better model. The generality of such asymmetries significantly weakens the normative strength of the law and efficacy of the NHRC. A glimpse of this imbalance is described below:

10.1 Flaws in the Definition of "Human Rights"

The definition of human rights given in the NHRC Act is flawed. As discussed above, the definition is very thin, and it does not include all facets of human rights. It also does not cover the universal character of human rights because it includes only Constitutionally guaranteed human rights and recognized human rights embodied in international human rights instruments, which have been ratified by Bangladesh as well as enforceable by the existing laws.[94] It disregards the fundamental principles of state policies, as mentioned in the Constitution of Bangladesh, which are also critical human rights issues. It expressly focuses more on civil and political rights than social, economic, and cultural rights. "Human rights those are declared under different international human rights instruments ratified by Bangladesh and are enforceable by the laws of Bangladesh".[95] This part of the definition has imposed limitations on the international standard, and the Commission can only exercise its jurisdiction on those human rights, which are recognized and enforceable by the State, but not all internationally recognized rights.[96] Hence, the cardinal philosophy of human rights, as discussed earlier, has not been addressed adequately by this definition. It is settled that human rights do not require recognition or ratification of any country to be enforced and call for Constitutional recognition of those rights; instead, it covers all rights recognized by the international human rights instruments. The enforceability of those rights also does not depend on the domestic court as required by the NHRC Act.

10.2 Multifaceted Institutional Dependencies of the NHRC

Institutional independence is *sine qua non* to make any institution free and useful. It implies that an independent institution shall be free from all sorts of dependencies, pressures, or influences from other institutions of the government. As per the Paris Principles, for a NHRI to be truly independent, it must be financially solvent and able

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[93] ibid.
[94] NHRC Act 2009 (Bangladesh), s 2(f).
[95] ibid.
[96] NHRC, Rahmat Ullah and Bayazid Hossain, *'Study Report on JAMAKON: Critique'* p 13

to act independently concerning budget and expenditures.[97] NHRIs are often ineffective because they lack resources. Control over their funding should be independent of the government. Governments and legislatures should guarantee that NHRIs receive adequate funds to perform all the functions set out in their mandates.[98] However, the NHRC of Bangladesh for several purposes, including those of finances, is directly dependent on the government and other agencies.[99] The NHRC Act requires that the fund of the NHRC shall come from government grants and grants provided by the local authority.[100] The term local authority has not been defined in this Act. At present, the government's allocation is coming through the national budget. This should continue and needs to be guaranteed through law.[101] The report of the NHRC claims that "the NHRC gets budgetary allocation from the government, but insufficient. The exclusion of the NHRC's annual expenses from the national budget has been marked as negligence of the government to the Commission. It is meaningless to think over the independence of the NHRC without self-budgetary power. It cannot implement its plan due to shortage of funds and government dependency".[102] In exercise of power, execution of decision, technical assistance, and performance of obligations, the NHRC has to depend on foreign aid and government significantly. The dependency of the NHRC on the project has gone into such an interior that it has to hire international consultants for almost all its significant tasks, including essential functions like baseline survey of the human rights situation, formulating five years strategic plan, and other operational procedures.[103] Simultaneously, the government does not allocate the total contribution of the donors for the NHRC's activities. For example, in 2011, the NHRCCDP contributed USD 1,400,000, but the Government allocated a mere USD 196,250.[104] Thus seemingly, the NHRC does not enjoy full control over finance. One of the functions of the NHRC is to review the factors, including acts of terrorism that inhibit the safeguards of human rights and to make recommendations to the government for

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97 International Council on Human Rights Policy, *Assessing the Effectiveness of National Human Rights Institutions* (OHCHR 2005) 8. This report is co-published by the International Council on Human Rights Policy and the Office of the United Nations High Commissioner for Human Rights <https://www.ohchr.org/Documents/Publications/NHRIen.pdf> accessed 20 February 2020.

98 ibid.

99 NHRC Act 2009 (Bangladesh), s 24(4)(a).

100 ibid s 24(4).

101 Mizanur Rahman and others (eds), *Annual Report* (National Human Rights Commission Bangladesh 2010)<http://nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/cb8edec9_5aee_4b04_bf2a_229d9cd226a0/Annual%20report%202010.pdf> accessed 26 October 2019.

102 Ullah and Hossain (n 96).

103 NHRC conducted *a baseline survey* (2011) having supports form UNDP, Danish International Development Agency (DANIDA), Swiss for Development and Cooperation (SDC) and Swedish International Development Agency (SIDA). Cited in NHRC *Annual Report* (n 26) 55.

104 Ain o Salish Kendra (ASK) and Human Rights Forum, Bangladesh, *Bangladesh: National Human Rights Commission is in Critical Juncture of Hype versus Real Action* (ANNI Report-2012, Dhaka) 25. cited in NHRC Annual *Report'* (n 26) 56.

their appropriate remedial measures.[105] This provision implies that the NHRC has to rely on the government to take remedial measures against infringement of human rights. In case of violations of human rights by law enforcement agencies, the NHRC can only ask for a report from the government.[106] The government has no corresponding obligation to send the report in reply to the NHRC under the NHRC Act. The NHRC has delivered statements, given recommendations and investigated the violations of human rights for its prevention, despite that unlawful arrest, forced disappearance, extrajudicial killing, torture in police custody and other cases of violation of human rights are increasing alarmingly which is evident from the report made by the NHRC and UNDP.[107] Further, the NHRC has no separate secretariat. The Ministry of Law, Justice and Parliamentary Affairs acts as the secretariat of it, which is likely to hinder the NHRC from functioning independently. Thus, due to the lack of institutional independence, NHRC is powerless to execute its own decisions and mandates.

10.3 Inappropriate Appointment Procedure of Office Bearers

As discussed above, even a person who does not have any legal acumen as to human rights may be appointed as Chairman and member of the Commission under the NHRC Act.[108] Due to the flaws in the selection process, the Chairman and most members of the NHRC may be appointed from persons who have a direct or indirect connection with the government. The civil society does not have an opportunity to be involved in this process. A transparent appointment procedure is necessary to ensure the independence of the NHRC. Appointment processes are one of the most important ways to guarantee the freedom, diversity, and accessibility of NHRIs. A direct appointment by the executive branch of government is undesirable. The appointment procedure should be open and translucent.[109] Because of unfair appointment provision in the NHRC Act, the appointment procedure is swayed by the government. Apart from this, of the seven commissioners, only Chairman, and one commissioner are full-time members, and the rest of the commissioners are appointed on an honorary basis.[110] However, if all members were appointed as full-time members, they could spend more time participating more efficiently in the affairs of the NHRC and contribute their potentials to the development of the NHRC.

10.4 Limited Mandates without Power to Enforce

As discussed above, the NHRC can only inquire or investigate any violation of human rights. It has no power to take any obligatory actions or decisions based on its

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105 NHRC Act 2009, s 12(1)(e).
106 ibid. s 18.
107 National Rights Commission Bangladesh (n 26).
108 NHRC Act 2009 (Bangladesh), s 6(2).
109 National Rights Commission Bangladesh (n 26).
110 NHRC Act 2009 (Bangladesh), s 5(2).

investigation or inquiry report. There is also no provision in the NHRC Act which makes the government bound to take into account the inquiry or investigation report submitted by the NHRC. In praxis, acceptance of such a report depends on the will of the concerned agency of the State. It means that if the State does not accept such investigation report, it becomes factually pointless and, therefore, the situations it addressed or, the remedies it offered are more likely to remain dormant forever.

10.5 Lack of Compensatory Measures

The NHRC might have the legal authority to award compensation to the victim of abuses of human rights as interim relief. Both the commissions of Nepal and South Africa have such kind of jurisdiction. A right without a remedy is meaningless. The current human rights jurisprudence advocates that every victim of human rights violations shall have the enforceable right to have compensation. For example, the victim of arbitrary arrest is entitled to compensation.[111] Thus, lack of this power hinders the NHRC from ensuring justice for the victim who suffers pecuniary loss due to the violations of human rights.

10.6 Recommendatory Body

As discussed above the NHRC is, in effect, merely a recommendatory body. NHRIs should have the power to monitor the extent to which relevant authorities shall follow their advice and recommendations. Monitoring should become a consistent practice.[112] NHRIs usually have no direct authority to enforce their recommendations. To have such ability is generally regarded as being contrary to justice because NHRIs would combine both inquisitorial and quasi-judicial functions.[113] At the same time, relevant authorities should be required to respond within a specified time to recommendations or contrary findings that national institutions make.[114] Thus, to be an influential institution, the NHRC should have the authority to get report from the government after sending recommendations to it.

10.7 Segregation of Some Crucial Areas from Sphere of the NHRC

As discussed above, some authorities have been kept outside the jurisdiction of the NHRC. This kind of indemnity is a threat to the violations of human rights. NHRIs mandated to receive complaints should have broad powers to deal with them. As with their monitoring role, no relevant public body should be excluded from their jurisdiction.[115] Thus, no public body, including law enforcement agency and army, should be kept beyond the purview of the NHRC.

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111 ICCPR, art 9(5).
112 International Council on Human Rights Policy (n 97).
113 ibid, at 21-22.
114 ibid.
115 International Council on Human Rights Policy (n 97) 20.

10.8 Inability to File Case against Government

Another fundamental flaw that is innate in the NHRC Act is that the Commission has no authority to file any case against the government.[116] Whereas, in India and New Zealand, the commissions are empowered to file cases against the government taking prior permission from the Attorney General.[117] Theoretically, it is implausible to imagine a human rights violation without counting the government's involvement in it. Again, any redress or remedy for breach of human rights is possible only by the government (or, so to say, the State). The theoretical makeup urges that the State's onus is central for human rights. Thus, if the Commission is unable to file case against the government, it may frustrate the ultimate objectives of the Commission.

11. Impact of flaws on SDGs

There is a direct relationship between sustainable development and human rights. It is implausible to ensure sustainable development without enforcement and implementation of human rights.[118] Each goal of the SDGs is, directly and indirectly, connected and dependent on the implementation and enforcement of human rights. Amartya Sen, a former Nobel laureate of economics, emphasized on democracy and human rights as keys to sustainable development.[119] NHRIs are supposed to be independent State institutions that operate from a neutral and robust position among the State, civil society, and international institutions. Their monitoring mandates give them a unique position to act as both watchdog and advisor, to uphold the human rights embedded in the SDGs, particularly SDG 16.[120] NHRIs are crucial components of the good governance and institutional accountability architecture that is necessary to achieve the SDGs.[121] They are also essential elements of the accountability architecture necessary for ensuring peaceful and inclusive societies with access to justice for all.[122] In March 2019, the Human Rights Council (HRC) conducted an

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116 NHRC Act 2009 (Bangladesh), s 29.

117 ICC, 2014, '*Chart of the Status of National Institutions*'. [Online], <http://www.ohchr.org/ Documents/Countries/NHRI/Chart_Status_NIs.pdf> accessed 25 April 2020.

118 Declaration on the Right to Development, Adopted by General Assembly resolution 41/128 of 4 December 1986, preamble <https://www.ohchr.org/en/professionalinterest/pages/righttodevelopment.aspx> accessed 25 April 2020.

119 Joseph Stiglitz and Amartya Sen, 'the Sustainable Development Goals, a Special UN Summit' <https://www.wider.unu.edu/publication/joseph-stiglitz-and-amartya-sen-sustainable-development-goals> accessed 27 May 2020.

120 NHRIs and the Sustainable Development Goals, GANHRI <https://nhri.ohchr.org/EN/Themes/ Sust Dev Goals/Pages/default.aspx> accessed 21 April 2020.

121 Rachel Murray, Francesca Thornberry, and Gilford Kimathi, *'African National Human Rights Institutions and Sustainable Development: An Overview Of Good Practice'* This publication is a joint initiative of the Danish Institute for Human Rights and the Working Group on the 2030 Agenda for Sustainable Development and the African Agenda 2063 of the Network of African National Human Rights Institutions, p,9,<https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/human_rights_and_development/nhris_and_sdg_work_in_africa_report.pdf> accessed 25 May 2020.

122 ibid, at 9.

intersessional half-day consultation to swap experiences and practices on how NHRIs are working to support the establishment and maintenance of inclusive societies and the implementation of the 2030 Agenda. The meeting concluded that NHRIs use their unique mandate, role, and functions, which allow them to promote all human rights and serve as a bridge between national stakeholders, thereby contributing to the meaningful participation and cooperation of all actors, which is necessary for achieving the SDGs.[123] The core philosophy of the establishment of the NHRC in Bangladesh is to play a role as a watchdog for upholding human rights. In reality, all the reports of human rights violations reveal that this institution has to a large extent, failed to do so due to the inherent lacunae in the NHRC Act 2009. Despite the existence of the NHRC, unlawful arrest, forced disappearance, extrajudicial killing, torture in private and public custody, rape, child torture, violations of women rights, rights of marginalized communities, labor rights and other types of human rights abuses are increasing alarmingly which is evident from the discussed reports of human rights violations. Therefore, the ultimate object of the formation of the NHRC is being frustrated, and Bangladesh is deviating from the practice of human rights culture because of such flaws in the NHRC Act. Consequently, Bangladesh has failed to satisfy its obligations of protection, promotion, and enforcement of human rights under the UN Charter, ICCPR, ICESCR, CEDAW, CRC, CAT, Paris Principles, and other international human rights Conventions. Ultimately, it is failing to fulfill obligations under the SDGs as well. The SDGs are designed to "leave no one behind", and the agenda integrates cross-cutting human rights principles such as participation, accountability, and non-discrimination.[124] However, owing to violations of human rights and the ineffectual role of the NHRC in protecting, enforcing, and promoting human rights and development, some classes or groups of people are lagging behind day by day.

As discussed above, Bangladesh's position in the world rule of law index is continuous to be years after years. Bangladesh's NHRC holds 'B'[125] status, as accorded by the GANHRI (Global Alliance of National Human Rights Institutions) twice, once in 2011, and then in 2015. The Commission has been assessed on how compliant it is with the Paris Principles, the international benchmark for NHRIs. Both times, the NHRC of Bangladesh has been denied 'A'[126] status, which means it does not fully comply with the principles. However, neighboring countries Nepal and India have obtained 'A' status.[127] Thus, NHRC is losing its reputation in the international arena, which has a massive impact on international relations and economic development. For example, after the collapse of Rana Plaza (a building of garments

[123] Ibid, at 11.
[124] NHRIs and the Sustainable Development Goals, GANHRI (n 120).
[125] NHRC gets 'B' status when it complies with the Paris Principles partially.
[126] NHRC gets 'A' status when it complies with the Paris Principles entirely.
[127] Maliha Khan (n 70).

factory which collapsed due to breach of building code resulting in death and injuries of thousands of laborers therein), the international buyers decided that they would not buy garment's products from Bangladesh if labor rights are not ensured and protected in Bangladesh.[128] At the time of engaging in international relations and cooperations, many countries investigate the human rights condition and the world rule of law index. Goal 16 of SDGs requires that every State shall promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable, and inclusive institutions at all levels. It implies that a developed and strong institution is necessary to prevent violations of human rights. The reports of violations of human rights implies that lack of effective, accountable, and inclusive institutions, are responsible for breaches of human rights.

Consequently, Bangladesh is facing obstacles in fulfilling the goals of sustainable development. The NHRC of Bangladesh could play a crucial role in protecting and preventing violations of human rights if it would have been an accountable and influential institution. However, owing to inherent flaws in the NHRC Act, the NHRC of Bangladesh cannot act as a watchdog for the prevention of violations of human rights. The SDGs monitoring framework explicitly recognizes the existence of an independent NHRI that is compliant with the Paris Principles as an indicator for SDG 16 on peace, justice, and strong institutions (indicator 16.a.1).[129] Without instituting an effective, accountable, and inclusive institution to provide access to justice for all, it is impossible to attain sustainable development goals. NHRIs can make linkages between human rights and SDGs commitments and standards.[130] The UN Secretary-General urges countries to accelerate the pace of progress to put in place NHRIs compliant with the Paris Principles.[131]

The goals of SDGs will not be fully achieved by the State until fundamental human rights are realized, enforced, and protected. Therefore, to achieve the goals of SDGs, strengthening the NHRC is a dire necessity.

12. Recommendations

Glancing on the different flaws of the NHRC Act make it urgent to prescribe a feasible model. Therefore, it may be recommended that the NHRC requires an intelligent and efficient structure supported by well-drafted, pro-human rights, and

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[128] Charles Kenny, 'Why You should not stop buying from Bangladesh' (Bloomberg, May 6, 2013) <https://www.bloomberg.com/news/articles/2013-05-05/why-you-shouldnt-stop-buying-from-bangladesh> accessed 2 November 2019.

[129] NHRIs and the Sustainable Development Goals, GANHRI (n 120) 10.

[130] Ibid, at 11.

[131] 'Enabling The Implementation of the 2030 Agenda through SDG 16+, Anchoring peace, justice and inclusion'(*Global Alliance*, July 2019) <https://nhri.ohchr.org/EN/Themes/SustDevGoals/Documents/Global%20Alliance,%20SDG%2016+%20Global%20Report.pdf> accessed 20 May 2020.

comprehensive law. The present form of the NHRC Act provides mandates which are more cosmetic than substantive. It, therefore, is argued that the Act of 2009 requires a thorough revision to make the NHRC genuinely worthwhile. To that end, the following recommendations can be considered-

12.1 Amendment of Definition of Human Rights

The term 'Human rights' has not been appropriately addressed and defined in the NHRC Act. The Constitution of Nepal 2015 has not imposed any restriction on the definition of human rights; instead, it has mentioned the term human rights. Thus, the Commission of Nepal can protect and promote all human rights irrespective of whether the Constitution recognizes or whether those rights are enforceable by law or not. Therefore, the definition of human rights should be amended in such a way to include all human rights recognized by international human rights instruments.

12.2 Recognition of the NHRC as a Constitutional Body

Like Nepal and South Africa, if the NHRC of Bangladesh becomes an independent Constitutional body, it may perform its duties more efficiently and appropriately. Thus, the government should take a step to assimilate provisions in the Constitution of Bangladesh to recognize the NHRC as an independent Constitutional body. It may make the NHRC a more independent, efficient, and workable institution for the promotion, protection, and enforcement of human rights and human development.

12.3 Safeguard Institutional Independence

The government may include a provision in the NHRC Act that the NHRC shall be independent and free from the interference of all governmental institutions, political bias, and other bodies in discharging its functions. An effective national institution is one which is authorized to act outside the purview of political parties and all other entities and situations which may be in a position to affect its work.[132] It should also have the authority to make its own budget and take direct grants from any national or international donors without any kind of intervention and approval from the government. The government may insert provisions in the NHRC Act like the South African Commission that the Commission shall be subject only to the Constitution and other organs of the State will be obliged, through legislative and other measures to assist and protect the commission to ensure its independence, neutrality, dignity, and effectiveness.[133] These agencies shall also be barred from interfering with its functioning.[134] These provisions may be good enough to guarantee the independence of the NHRC both legally and theoretically.

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[132] Arun K. Palai, *National Human Rights Commission of India: Formation, Functioning and Future Prospects* (Atlantic Publishers 1998) 155.

[133] Final Constitution, s 181(3), cited in Susant Kumar Kanungo, *National Human Rights Commission in India and South Africa: A Comparative Analysis* (Manak Publication 2015) 289.

[134] Ibid, s 181(4).

12.4 Amendment of Appointment Procedure

There should be provisions in the NHRC Act that at least the Chairman and one member of the Commission must be appointed from persons having the legal experience in the field of human rights with other qualifications. Otherwise, because of the ignorance of human rights jurisprudence, they might end up making decisions that are inconsistent with established human rights norms and cultures. It is a dire necessity to include criteria that help to ensure independence. For example, civil servants or political party officials may be declared as disqualified to be appointed as the Chairman and members of the Commission.[135] Furthermore, it may also require legal expertise like India and so an appointee must be a person who is or has been a Judge or has been qualified to be a Judge of the Supreme Court.

12.5 Increase the Number of Members in the NHRC

It is exceedingly difficult to accomplish such varied and extensive functions of the NHRC by only one permanent Chairman and member. The Commission would be more effective if it were comprised of five or seven full-time members.[136] Thus, like India and to comply with the Paris Principle, it is necessary to appoint at least five permanent members in the NHRC.

12.6 Power to Enforce the Recommendations

The legislature may insert a provision that the NHRC shall have the authority to get explanations from the government when it ignores its recommendations. Alongside this, the NHRC must have mandates to collect reports on human rights situations or actions promoting human rights from different organs of the State like the South African's Commission. This may be an excellent provision to pave the way for the Commission to overview the functions of each department of the government to gear up human rights assessment based on that report. Consequently, each department of government will be more alert in the fulfillment of its human rights obligations and in developing human rights culture.

12.7 Widening the Scope of the NHRC Act

Every State agency bears the risk of violation of human rights in their day-to-day affairs. Hence, keeping some of them outside the purview of the NHRC fairly allows some violations to occur despite their innate illegality. This is clearly contradictory to the prevailing norms of law and human rights jurisprudence. Therefore, the Parliament may insert a provision in the NHRC Act that all the authorities shall fall within the jurisdiction of the NHRC.

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135 NHRC, '*Annual Report'* (n 101) 14.

136 David A. Johnson and Nizamuddin Al-Hussainy, (JAMAKON) 'Final Evaluation of the UNDP Capacity Development Project' (BHRC-CDP) May 2010 December 2014, <https://www.slideshare.net/drnizamalhussainy/final-evaluation-of-the-bnhrc-11-mar-2015> accessed 20 March 2020.

12.8 Special Court or Tribunal for Human Rights and Compass of Mediation

Like the Protection of Human Rights Act, 1993 of India, the NHRC of Bangladesh may include provision for the establishment of human rights courts to provide speedy trial of offenses arising out of violation of human rights.[137] It may also include in the Act that the Judges of the said court shall be appointed from the persons who have legal knowledge, acumen, experience, and strong commitment to human rights. Human rights law is a special branch of law. Therefore, in addition to the Human Rights Courts, the Commission may have its tribunal for the trial of the violations of human rights like other Commission of the country. Under the Bangladesh Energy Regulatory Commission Rules 2016, the Bangladesh Bar Council Order 1972, and the Customs Act 1969, those respective commissions have the authority to set up tribunals to resolve disputes arising out of their concerned issues.

12.9 Appointment of Special Prosecutor

Like the Protection of Human Rights Act, 1993 of India, the NHRC Act should have a provision that special public prosecutors shall be appointed for filing and representing cases before the Human Rights Court.[138] There may also be a provision in the NHRC Act that pro-people separate bodies of public prosecutors or advocates who have vast knowledge and an inviolable commitment to human rights, may be created to fight in other courts on behalf of the NHRC for the proper and adequate relief for victims of violations of human rights.

12.10 Power to File Case against the Government

As mentioned above that discounting the government's failure, it is theoretically or factually impossible to frame a case of human rights violation. Thus, to exclude the government from any charge, especially in case of human rights violations, is a serious threat to enforce human rights. Therefore, necessary provisions must be inserted in the NHRC Act to authorize the NHRC to file cases against the government.

12.11 Restriction to Reappointment of the Chairman of the NHRC in any Government Post after Retirement

The NHRC Act does not have any provision that the Chairman will be disqualified to be appointed in any government's office after his retirement from the NHRC. This may encourage him to act in favor of the government to get appointed in any other lucrative post of the government after his retirement. Thus, the NHRC Act may insert a provision that after the completion of tenure from NRHC, the Chairman shall be disqualified to be appointed in any other government's post.

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[137] Protection of Human Rights Act 1993 (India), s 30.
[138] ibid, s 31.

12.12 Power to Take Precautionary Measures

The NHRC cannot issue any preemptive order to restrain the possibility of violations of human rights. Inter-American Human Rights Commission (IAHRC) has jurisdiction to take or issue precautionary measures in severe or urgent situations of violations of human rights to prevent irreparable harm to any person.139 Like the IAHRC, provision may be inserted in the NHRC Act to authorize it to take or issue a preemptive action or order to restrain the prospective serious or urgent violations of human rights.

12.13 Power to protect violations of human rights by the business corporation

As business corporation and other corporate bodies has a dominant position in every State in the contemporary world, it may violate human rights in many ways. They may violate labor rights, have adverse effects on the environment and endanger the right to safe health as well. It is assumed that corporations maintain very close connection with the government. Thus, they may be exempted from the liability of violations of human rights by using their influence. Thus, this issue needs special attention.

For this reason, the UN has formulated guiding principles in this regard. The United Nations Guiding Principles on Business and Human Rights (UNGPs)140 consist of 31 principles and set out expectations of States and companies about how to prevent and address adverse impacts on human rights by business.141 They rest on three inter-related pillars, also jointly called the 'Protect, Respect, and Remedy' framework:

- The state duty to protect against abuses by third parties, including business, through effective policies, legislation, regulation, and adjudication.
- The corporate responsibility to respect and avoid infringing human rights of others and address adverse human rights impacts in which companies are involved.
- Ensure access to victims of corporate human rights abuses to effective remedies – judicial and non-judicial – provided by States and companies.[142]

NHRIs can play a key role in this regard. Professor John Ruggie commented that "The actual and potential importance of these institutions cannot be overstated. Where NHRIs are able to address grievances involving companies, they can provide a means to hold business accountable. NHRIs are particularly well-positioned to provide processes that are culturally appropriate, accessible, and expeditious [and] can provide information and advice on other avenues of recourse to those seeking

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139 Rules of Procedure of the IACHR, art 25, <https://www.oas.org/en/iachr/decisions/about-precautionary.asp> accessed 12 May 2020.

140 United Nations Guiding Principles on Business and Human Rights: <https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf> accessed 10 May 2020.

141 ibid.

142 ibid.

remedy".[143] Thus, the NHRC can play an essential role in protecting the violations of human rights in the business arena. If the NHRC is empowered to protect and prevent violations of human rights attached to the business, it can adequately protect those rights as an independent body. Thus, special provisions may be added in the NHRC Act that the NHRC will be authorized to take cognizance of the violations of human rights by the corporate bodies.

12.14 Authority to Award Interim Relief

NHRC should have powers to guarantee effective remedies, including interim measures to protect the life and safety of an individual and free medical treatment where necessary. Like the South African's Commission, the NHRC may also be given the power to award prompt compensation and to take the measure of redress and rehabilitation if it thinks appropriate by considering the circumstances of violations of human rights.

13. Conclusion

There is no doubt that the NHRC in Bangladesh has the potential to be a significant institution, but without the power to adjudicate and issue binding commands, they may be turned to be "glorified ciphers and promise of unreality" as rightly termed by Justice VR Krishna Iyer.[144] From the present structure of the NHRC Act, it is may be said that the victory of the Commission largely depends on the true political volition of the government because the NHRC has to rely on it to accomplish most of its mandates. Therefore, to give the mandate to the NHRC within the current legal framework for the promotion and protection of human rights and human development in Bangladesh is nothing but to fight without a weapon. Learning lessons from other countries, it may not be wise to make the NHRC dependent on the will of the government alone to perform its functions at this age. To make the Commission more active and effective, it is necessary to make reasonable and adequate amendments in the existing provisions of the NHRC Act, which may make the NHRC as independent pro-people Commission and not as an agent of the government. An independent pro-people Commission is part and parcel to achieve the goals of SDGs. If the aforesaid recommendations are brought into light by amending the provisions of the NHRC Act 2009 by the Parliament, the NHRC may be turned into the long-cherished independent and impartial institution out of the control of government for the respect, promotion, protection and enforcement of human rights and human development in Bangladesh and only then the objectives as laid down in the NHRC Act may come true.

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[143] ibid.

[144] Interview with Justice VR Krishna Iyer, 'Law and our Rights' *The Daily Star* (Dhaka, 1 June 1997) <http://www.hurights.or.jp/archives/focus/section2/1999/12/a-national-human-rights-commission-for-bangladesh.html> accessed 14 March 2020.

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Bunt v Tilley [2006] EWHC 407 (QB), [2006] 3

All ER 336 [1]-[37]

R v Leeds County Court, ex p Morris [1990] QB

523 (QB) 530-31

If citing a particular judge:

Arscott v The Coal Authority [2004] EWCA Civ 892, [2005] Env LR 6 [27] (Laws LJ)

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Act of Supremacy 1558

Human Rights Act 1998, s 15(1)(b)

Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004, SI 2004/3166

EU legislation and cases

Consolidated Version of the Treaty on European Union [2008] OJ C115/13

Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1, art 5

Case C-176/03 *Commission v Council* [2005] ECR I-7879, paras 47-48

European Court of Human Rights

Omojudi v UK (2009) 51 EHRR 10

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Contributions to edited books

Francis Rose, 'The Evolution of the Species' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006)

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Command papers and Law Commission Reports

Department for International Development, *Eliminating World Poverty: Building our Common Future* (White Paper, Cm 7656, 2009) ch 5

Law Commission, *Reforming Bribery* (Law Com No 313, 2008) paras 3.12-3.17

Websites and blogs

Sarah Cole, 'Virtual Friend Fires Employee' (*Naked Law*, 1 May 2009) <www.nakedlaw.om/2009/05/index.html> accessed 19 November 2009

Newspaper articles

Jane Croft, 'Supreme Court Warns on Quality' *Financial Times* (London, 1 July 2010) 3