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Note from the Editor

The year 2021 is significant for a number of reasons: to begin with, Bangladesh steps into its 50th year of independence; the country observes the 100th birth anniversary of the Father of the Nation Bangabandhu Sheikh Mujibur Rahman; the University of Dhaka celebrates 100 years of serving as the heart of academic excellence in higher education in the country; the Faculty of Law of the University of Dhaka also turns 100, a proud institution that has had the privilege of hosting many of the country's sterling personalities---scholars, statesmen, scientists, jurists, lawyers, academics, human rights activists, policy makers, lawmakers, economists, diplomats, media personalities artists and development practitioners. This journal celebrates these noteworthy milestones as Bangladesh graduates to LDC status, which, in itself, speaks volumes about the sacrifice and hard work of the people of this country, who, despite the challenges and setbacks at different junctures of its political history and economic development, never looked back since its independence in 1971.

The theme of the journal-"*Equality, Justice and Inclusive Societies for Sustainable Development: Past, Present and the Future*" was chosen for its potential to offer authors with a broad lens for expounding their thoughts and critical analysis. The fact that Bangladesh is a signatory to the Sustainable Development Goals (SDGs) supplements the need to study the various parameters of law and look at how they contribute to the achievement of the relevant Goals. 'Sustainable development', a widely-used expression these days, has been defined by the United Nations as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" (UN, *Our Common Future*, also known as the Brundtland Report, October 1987). While not necessarily definitive in the strict sense of the term, this definition is flexible enough to straddle various social, economic, cultural and legal aspects of development and the associated agendas that impinge on the daily lives of people across the globe.

It has long been established that law is an indispensable tool to ensure equality and justice. Although democratisation and the rule of law have been widely acknowledged as a major driving force for pro-poor development, poor people in relatively new democracies continue to experience powerlessness in diverse ways. While economists and development experts have tended to view this powerlessness as essentially stemming from the lack of economic opportunities, there is an increasing belief that people's powerlessness also derives from the state's failure to provide adequate protection to its citizens, particularly when they are poor and/or marginalised and are unable to reach the judicial and legal process for vindication of their rights. The relationship between States and their citizens has increasingly become subject of contentious debates within legal and governance paradigms. Citizens' encounters with the State are quite often limited to matters of law and order,

basic service delivery and economic development and that too, only when State action and/or inaction compromise citizens' rights and entitlements. Although people's perception of the State and understanding of governance are mediated by a wide array of socio-political, economic and cultural factors, they generally envision the State as a defender of law and order and a provider of resources and essential services. This perception unfortunately falters when people experience inefficiency and non-responsiveness of State institutions, compounded by an increasing concentration of political and economic power in the hands of an elite few, which in effect divests people, particularly when they are poor and disadvantaged, of the opportunity and power to claim rights, entitlements and to enjoy essential services.

It is now widely recognised that the lack of a reliable and expeditious justice system not only adversely impinges on the exercise of citizen's fundamental rights under the law and Constitution, but also retards growth and development when the poor are unable to protect their assets and livelihoods. Accordingly, issues of rule of law, due process of law, judicial independence, equality and non-discrimination have, in the past few years, transcended the confines of lawyers and courts and have become the focus of development discourse. Corruption, nepotism, and the lack of transparency and accountability among State actors are some of the recognised factors that have eroded legal and governance standards, structures, and institutions. The practice of back-door lobbying by influential and resourceful individuals essentially weakens regulatory and accounting controls over activities of public officials. While public officials indeed have a strong influence on policy making, direct acts of omission or commission like, suspended or undelivered services and rent seeking, demonstrate their lack of concern and commitment towards public good.

There is no denying that the Rule of Law lies at the very core of sustainable development in the sense that it places every person equally before the law, holds all accountable for wrongful omissions and/or commissions and paves the way for a just and egalitarian society. The Rule of Law reinforces and upholds human rights and fundamental freedoms, without which legal discourses cannot possibly advance far.Seen from a development perspective, the concept of the Rule of Law pervades the broader notions of justice, which are usually used to denote integrity, neutrality, objectivity, fulfillment of rights, and the pursuit of good governance.Sadly, the situation on the ground worldwide demonstrates an erosion in the Rule of Law manifest in inequality, discrimination, deprivation, exclusion, violence, conflicts, corruption, arbitrariness in governance—all that contribute to denial of rights and justice, which are integral aspects of sustainable development. It is time we paused to reflect on and reconsider the inherent challenges that confront us in achieving inclusivity, equality and justice at the desired level. An informed dialogue on human rights and democratic governance would indeed go a long way in creating the much needed level playing field for actors at different tiers in a given society.

Clearly, the study of law is simply not about knowing the laws and their application, court procedures and processes, but much, much more. Indeed, law or legal scholarship touches human life in ways that we often cannot even conceive, much less understand. Treating law as the business of only lawyers and judges and of

course, legal academics and law students at the preparatory phase, does not do justice (pun not intended!) to its true role, which in fact, contributes varyingly to business, politics, administration, governance, trade, economics, environment, and international relations—a whole gamut of human interfaces and experiences. Recognising the versatility of law, this journal, though an outcome of an initiative undertaken by the Faculty of Law to commemorate 100 years of the University of Dhaka and the Faculty of Law, has by no means restricted contributions from the legal fraternity alone but has strived to showcase the scholarly work of others outside of the legal arena. It brings together scholars who are noted for their contribution in their respective fields nationally, regionally and internationally.We have the pleasure of presenting here the reflections of academics and practitioners from Bangladesh, Australia, United Kingdom, Malaysia, Singapore and India.

The journal offers a kaleidoscope of erudite contemplations which are extensive enough to tease and satiate the appetite of an inquisitive reader in search of diversity in terms of thoughts and ideas that shape legal discourses. I draw on the authors' papers here, sometimes verbatim, to take you on a brief journey through the various deliberations that have been presented here for a clear understanding of the scope of this publication.

Several authors have written on constitutional matters, an area that has always occupied centre stage in legal studies. ***Shahdeen Malik*** revisits a series of constitutional amendments in Bangladesh and demonstrates how Bangladeshi law-makers have brought in these amendments from a "law as a command of the sovereign" perspective. Stemming from an Austinian viewpoint, this approach essentially emphasised on the 'command' interpretation of the law when legislating constitutional amendments, often to the detriment of the citizens. Malik argues that this practice not only jeopardises the rights of citizens, but also creates a substantial disconnect between law and morality in Bangladeshi laws; consequently, citizens tend to abide by laws more out of fear of sanctions, rather than moral considerations. The thought provoking analysis of this disjunction culminates with a suggestion to rely on "natural law" to better understand people's apparent reluctance to take legal obligations seriously.

Ridwanul Hoque describes how, despite the recognition of fundamental rights by the Constitution of Bangladesh and endorsement of the same by the higher judiciary in some cases, there is no evidence of the enforcement of fundamental rights against private actors. While the Court has generally demonstrated flexibility in allowing writs against public authorities under Article 102(2) of the Constitution in 'non-fundamental rights' matters and also implicating private entities within the ambit of the same constitutional provision, there is a tendency to adhere to vertical application of the fundamental rights. Hoque argues that this stance contradicts the intent of the original text of the Constitution and derogates from the public law standard of rights adjudication. This also circumscribes the wider principle of constitutionalism that obliges private persons and corporations to comply with constitutional rights. The author draws on the jurisprudence of horizontality of constitutional rights from India and Sri Lanka to substantiate his arguments.

Mohammad Shahabuddintakes us on a journey through the Indian Constituent Assembly Debates between 1946 and 1950 to help us acquire a critical understanding of the minority rights discourse that prevailed at the time. While conceding that the 'ideological function of the postcolonial state vis-à-vis minorities is almost universal and by no means unique to India', the author dwells on how the ideology of the postcolonial state actually legitimises and reinforces marginalisation on the pretext of 'national unity, territorial integrity, and liberal egalitarian principles of equality and non-discrimination'.

Reiterating the significance of governance reforms in statecraft targeting administrative performance, service delivery, ethics and integrity and the welfare of citizens,***Habib Zafarullah***takes us through the entire gamut of governance reforms that have taken place in Bangladesh since its independence. The author revisits the conceptual factors relevant to governance and examines and evaluates the various ramifications of the challenges and achievements in the reform process and how Bangladesh has aspired and innovated to address them.The author concludes by emphasing that irrespective of the governance approaches and models, 'building inclusive, effective, accountable and ethical institutions should be the definitive consideration for societal well-being and development', not to mention 'a truly representative parliament elected freely and fairly' for 'neutralising executive dominance' and 'maintaining a sound governance regimen in the country' , with civil society playing the role of a watchdog and external donors focusing on contextual needs.

Jon S.T. Quah ponders whether minimising corruption in Bangladesh is an impossible dream. Recalling how Bangladesh consistently ranked as the most corrupt country on Transparency International's celebrated Corruption Perception Index (CPI) from 2001-2005, with only marginal improvements in subsequent years, the author attributes the failure to effectively contain corruption to weak political will of successive governments in addressing the root causes of corruption and the constraints resulting from unfavourable policy contexts. He concludes that corruption in Bangladesh can only be minimised if the incumbent government demonstrates a strong political commitment to reduce corruption and to enhance the Anti-Corruption Commission's effectiveness by providing it with the necessary legal powers, autonomy and resources to execute its mandate objectively and without bias.

Werner Menksiuses, what he terms asthe 'pluri-legal kite model of law', to argue why, despite all odds, the dream of a 'Golden Bangladesh' may yet be a strong reality. His key argument is that, if all major stakeholders recognise the potential of development initiatives that allow plurality in all aspects of life and accordingly work together for a sustainable future, no government and political or politicised opinion of whatever orientation can realistically resist their drive. Indeed, the necessity of plurality-consciousness has become even more imperative in view of the grave impact of the COVID-19 pandemic in 2020/2021 on the socio-economic well-being of Bangladesh. The author highlights the role of lawyers in protecting the public interest of the nation state of Bangladesh as an independent, modern Muslim majority secular entity that has to find its own path.

The governance of The Covid-19 pandemic that shook the world since its advent in early 2020 presents new governance and legal challenges. ***Amita Singh's***deliberationssupplement emerging directions inscholarly debates and academic research on disaster law as she underscores how the Covid-19 pandemic has reinforced inherent societal inequities and injustices, thereby leading to erosion of human rights, civil liberties and labour laws.Critiquing the knee-jerk legal and executive measures introduced by governments of both developed and developing countries to contain the situation, she showcases how some of these measures have proved to be counter-productive evidenced by an escalation in social ostracisation based on race, caste, religion and class. These developments not only indicate deficiencies in governance but also a lack of proper understanding of biological emergencies and disaster management. Singh calls for collective action through research, information flow, informed legal frameworks and regional collaboration so that disasters such as the Covid-19 pandemic are better managed.

Alluding to the damage caused to by reckless disregard for health guidelines prescribed by the World Health Organisation (WHO) to restrict the spread of the Coronavirus**,** ***Jamila Chowdhury*** draws on the principles of mens rea to demonstrate how this could well amount to a public health offence as opposed to a mere public nuisance or negligence. Indeed, the dynamic nature of offences offers countries with a choice to penalise 'free riders' for their role in spreading highly contagious and life threatening virus, like the Coronavirus. The author highlights how some countries have enacted new laws or amended existing ones to address the offence of 'free riding' and recommends that stringent punishments should be in place to deter these wayward incidents.

A number of authors chose to look at the expansion of international law into new and emerging areas of common concern. ***Nazrul Islam*** dwells on the growing focus of international law on environmental obligations which are associated with the management and utilisation of transboundary watercourses. He analyses the progress made in this context, including the entry into force in 2014 of the 1997 United Nations (UN) Watercourse Convention, the global opening in 2016 of the 1992 United Nations Economic Commission for Europe (UNECE) Convention and their use and reflection in contemporary state practice and international judicial decisions. Comparing state practice of the above-mentioned global norms in the South Asia region, with particular reference to the 1996 Ganges Water Agreement, Islam suggests ways for developing a more efficient and sustainable regime for the benefit of the people of this region.

Shawkat Alam refers to the principle of intra-generational equity in sustainable development and showcases how asymmetry in access to and use of resources between the North and the South compromises the equitable application of this principle in international agreements, which in turn, impedes the achievement of sustainable development in the strict sense of the term.Reiterating that the 'principle of common but differentiated responsibilities (CBDR) places differential responsibilities upon States to address both environmental and socio-economic inequities according to the resources the States have and the pressures their societies

place on their environment', he assesses the practical invocation of the CBDR principle by appraising two key sustainable development mechanisms, namely, climate change adaptation finance and technology transfers.Alam contends that the implementation of CBDR through these two mechanisms are suffering largely due to a lack of commitment from developed countries.

Muhammad Ekramul Haque challenges the normative international human rights law discourse that relegates economic, social and cultural (ESC) rights to a lesser footing than the more celebrated civil and political (CP) rights, as ESC rights were historically not deemed to be judicially enforceable. However, subsequent developments in international law witnessed a paradigm shift, which has significantly narrowed the traditional gap between CP and ESC rights. Haque describes how, with ESC rights increasingly gaining prominence, the very foundation for justifiability and enforceability of these rights at the international and regional levels has become stronger. He also highlights the status of judicial enforceability of ESC rights in Bangladesh in line with recent developments of international human rights law.

That economic development is key to a sustainable future has been established by two authors in their contributions.While underpinning the significance of foreign direct investment (FDI) induced sustainable development in reducing poverty and inequality in developing countries, ***Rafiqul Islam*** critiques the global policy framework within which FDIs operate, for protecting corporate interests. He argues that demands for increased liberalisation and a 'blankly incentivised FDI policy' do not necessarily ensure development; rather, it is essential for liberalisation and the regulation of FDIs to co-exist in harmony if the competing interests of investors and host countries are to be balanced out. In other words, if host countries are to be 'FDI protection-friendly', 'FDI must be development-friendly' and promote liberalisation for investors and regulation for sustainable development in the interests of both stakeholders. Islam concludes by recommending a liberal, yet development-focused regulatory and policy approach for developing countries for achieving the goal of sustainable development.

Enamul Haqueexamines the Competition Act, which was passed by the Bangladesh government in 2012 in an attempt to ensure fair play, equity and justice for both consumers and producers in the market.This law has also been instrumental in establishing the Bangladesh Competition Commission in 2014. Recognising that competition in the market is essentially an economic concept which is normally viewed through the lens of economics, Haque critically analyses various provisions of the law from both an economic and legal perspective to better understand and interpret anti-competitive behavior in the market.He also offers ways forward in which competition law could be implemented without prejudice. This paper indeed paves the way for further legal scholarship in a relatively under-researched area.

Advances in technology and increased use of artificial intelligence necessitate that security controls are in place to prevent unauthorised access to sensitive information. ***Md. Ershadul Karim*** looks at the legal framework for cybersecurity in Bangladesh. While technological advancement, open internet and the use of computerised devices

and applications indeed offer numerous advantages to users, this transition is not without problems, as evidenced by a rise in cyber-crimes. Easy accessibility to technology and inadequacies in existing legal provisions, principles, and norms create scope for such crimes. The author believes that in the absence of binding international legal instruments in this context, the development of a cybersecurity culture in domestic jurisdictions, public awareness, cooperation, and mutual legal assistance, would potentially assist policymakers and relevant stakeholders to address the complexities in cyberspace regulation.

Law primarily functions toprevent undesirable behavior, provide relief to persons for harm caused to them by others, impose liability on those responsible for causing the harm and deter others from committing the same. Tort law is one such branch of law that has the scope of holding people accountable for the harm they cause by making them pay for it. ***Naima Haider*** underpins the significance of the application of tort law principles by the courts, which is not very common in Bangladesh, although tortious liability is recognised as a common law concept. Drawing on prominent case laws of the Appellate Division and the High Court Division of the Supreme Court of Bangladesh, she evaluates the attitude and role of the higher judiciary in helping to develop laws that accommodate tortious liability within the framework of the legal system of the country. Examining various concepts and doctrines which have evolved from these case laws from both academic and practical perspectives, the author suggests ways in which laws of tortious liability could be substantially developed by way of judicial activism based on forward-looking decisions of the Supreme Court.

I believe that the sum total of the contributions in this volume would go a long way to enhance our knowledge and understanding of law and rights and their implications for sustainable development. The reflections showcased in this journal demonstrate how law, in all its manifestations, contribute to sustainable living—locally, regionally and internationally—in normal times and during crises. I hope the readers find this volume interesting and useful.

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A.K. Enamul Haque PhDteaches at the Department of Economics of East West University, Dhaka, Bangladesh.He has been working in the field of Natural Resource and Environmental Economics for many years and has been training Economists and Researchers in South Asia on the subject. Recognising how economics and law were intertwined disciplines, he developed a course on Law and Economics for the East West University in 2006 and began teaching it. During 2008-2012, when the Government of Bangladesh was working on the draft Bangladesh Competition Act, he was part of the consultative body and trained civil servants, journalists, and professionals on the benefit of a Competition Law in Bangladesh.He also introduced a course on Economics of Competition Law at the East West University for the students. Professor Haque has published globally in scientific journals and has written edited books with the Cambridge University Press and Springer. He is a member of the Editorial Board of the Springer's Journal of Social and Economic Change, and the INSEE Journal called Ecology, Economy and Society.

Habib Zafarullah PhD retired from active teaching in 2016 after serving for over 40 years at the Universities of Dhaka and New England (UNE), Australia. He is currently an adjunct Professor of Sociology at UNE and is also affiliated with

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Jamila A. Chowdhury PhD is a Professor at the Department of Law, University of Dhaka, of which she is also an alumnus. She was awarded a "Gold Medal" for securing 1st Class 1st in her LLB (Hons) at the University of Dhaka; JDS-JICA Fellowship in 2002; a UNESCO Fellowship in 2005; Australia Day Award in 2009 by the National Council of Women of NSW, Australia; and UGC Award 2005 and 2012 for her creative abilities in academic and research work. She has authored different national and international publications on alternative dispute resolution and women's rights. In 2019, as an invited foreign delegate, she attended the 6th Istanbul Mediation Conference presided by the UN Secretary-General and hosted by the Ministry of Foreign Affairs, Turkey. Currently, she is serving as a UNICEF-UGC research fellow – the first of its kind in Bangladesh.

Jon S.T. Quah PhD is a retired Professor of Political Science at the National University of Singapore and an anti-corruption consultant based in Singapore. He has conducted research on corruption in Asian countries since 1977. His recent books include: *Combating Asian Corruption: Enhancing the Effectiveness of Anti-Corruption Agencies* (2017); *The Role of the Public Bureaucracy in Policy Implementation in Five ASEAN Countries* (2016); *Hunting the Corrupt "Tigers" and "Flies" in China: An Evaluation of Xi Jinping's Anti-Corruption Campaign (November 2012 to March 2015)* (2015); *Different Paths to Curbing Corruption: Lessons from Denmark, Finland, Hong Kong, New Zealand and Singapore* (2013); and *Curbing Corruption in Asian Countries: An Impossible Dream?* (2011).

Md.Nazrul Islam PhD,popularlyknown as Asif Nazrul, is a law professor, researcher, writer and civil society activist.An alumnus of the Department of Law, University of Dhaka, he worked as a journalist before joining the University of Dhaka in 1991 as faculty. He is now a leading columnist and opinion maker in the country.He worked as a Fellow at the IUCN-ELC in Germany in 2001 and later at the School of Oriental and African Studies in London in 2007. He published research papers in leading journals and wrote chapters in books published by the Kluwer Academic publishers and IUCN Environmental Law Center.He also reviewed an academic book for *Journal of Environmental Law* published by Oxford University

Press. He worked as Consultant to European Union Delegation, UNDP, ADB and is involved with ILA and GWP, among other reputed think-tanks. He was an elected bureau member of the South Asian for Human Rights from 2013-2017. In addition to his academic work, he has published 12 fictions and 6 non-fiction books.

Md. Ershadul Karim PhD is passionate about analysing the interplay between law and emerging technologies. An alumnus of the Department of Law, University of Dhaka, he is now the Co-Director of Centre for Law and Ethics in Science and Technology, and a Research Fellow at University of Malaya Malaysian Centre of Regulatory Studies, Faculty of Law, University of Malaya, Malaysia (UM). An enthusiast tech-geek, Dr. Karim managed the web applications for and edited the first ever Bangladeshi online case law database, Chancery Law Chronicles for six years. He is the author of *Cyber Law in Bangladesh*, Kluwer Law International, 2020 and co-author of *Personal Data Protection Law in Asia* (second edition), Thomson and Reuters, 2018. He has contributed chapters in books published by the United Kingdom's Royal Society of Chemistry, Elsevier Inc. and SpringerNature analysing the relationship between nanomaterials and international environmental law, various legal and regulatory issues in polymer nanocomposite, functionalised nanomaterials and biosensors. Dr. Karim co-authored the 'Malaysian Blockchain Regulatory Report', assisted Malaysian Government in developing National Human Rights Action Plan, and was consulted by Ministry of Justice, United Arab Emirates.

Mohammad Shahabuddin PhD is Professor of International Law & Human Rights at the Birmingham Law School, University of Birmingham, UK. He is an alumnus of the Department of Law, University of Dhaka. He is the author of *Ethnicity and International Law: Histories, Politics and Practices* (Cambridge: Cambridge University Press, 2016) and *Minorities and the Making of Postcolonial States in International Law* (Cambridge: Cambridge University Press, 2021), and the editor of *Bangladesh and International Law* (London: Routledge, 2021).

Muhammad Ekramul Haque PhD is a Professor of Constitutional Law and Comparative Constitutional Law at the Department of Law, University of Dhaka, of which he is also an alumnus. He earned a Gold Medal for his academic achievements at the University. He did his PhD in Constitutional Law and International Law from Monash University, Australia. He is the Coordinator of the Clinical Legal Education Programme and an executive member of the Centre for Advanced Legal Studiesin the Faculty of Law. He also acts as a resource person for the training of Judges and Government Officials in Bangladesh. He has published research articles on Constitutional Law, Human Rights and different issues of Muslim Family law in peer-reviewed law journals. He is the author of three books: *Law of Contract, Muslim Family Law and Islamic Law of Inheritance*. He is a member of the Research Group on "Cross-Judicial Fertilization: The Use of Foreign precedents by Constitutional Judges", International Association of Constitutional Law (IACL) and the International Society of Public Law ICON•S. His most recent work is: State Volume Editor, *Bangladesh*, in the *Encyclopedia of Public International Law in Asia*(BRILL NIJHOFF, 2021). He is the co-editor of*The Constitutional Law of Bangladesh: Progression and Transformation at its 50th Anniversary* (Springer, 2022) and Section

Editor of *International Handbook of Disaster Research* (Springer-Nature, forthcoming).

Naima Haider PhD,analumnus of the Department of Law, University of Dhaka, is a Judge of the High Court Division of the Supreme Court of Bangladesh. After a brief teaching stint at the Department of Law, Universities of Rajshahi and Dhaka respectively, she joined the Bar in 1989 and was soon enrolled in the Appellate Division of Supreme Court of Bangladesh. Justice Haider joined the Office of the Attorney General where she served as an Assistant Attorney General and Deputy Attorney General for Bangladesh respectively. She was elevated to the Bench as an Additional Judge of the High Court Division in 2009 and was appointed Judge of the same Division in 2011. She was awarded the Chevening Scholarship by the British Council in 1995 and received the Javier Perez De Cuellar Award for academic excellence in 1992 while she was at the Columbia Law School, New York, USA. Justice Haider is a member of several Committees of the Supreme Court of Bangladesh including the Supreme Court Special Committee on Child Rights, the Annual Report Committee and the committee for the preservation of heritage of the Museum of the Supreme Court of Bangladesh. She is also a member of the International Association of Women Judges and Chairperson of the Advisory Committee on Women in Justice. She has written several articles published in different law journals and newspapers.

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The Banglar Ghuri as a Metaphor for Inclusive Sustainable Development

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I. INTRODUCTION

Law cannot decree that kites shall fly high,[1] or that a nation's future shall be golden. All of this requires complex efforts and is actually hard work. Following on from earlier articles assessing the progress of Bangladesh, particularly discussing the law-related difficulties of agreeing sustainable balances of competing visions and interests for national development,[2] this article continues to use the image of the kite of law and life. In Bangladesh, significantly, this relates to the romantic, film-inspired image of a wish-kite, the *iccher ghuri*, as I learnt from Professor Taslima Monsoor and her late husband during a memorable trip in Bangladesh. The kite has become a useful metaphor to provide updated accounts on the always contested law-related precarities of a nation's developments. The *iccher ghuri* also supports a deeply interdisciplinary analysis of the enormous law-related challenges faced by Bangladesh, for law by itself would not make any kite fly and stay in the air safely.

The use of metaphors in the rapidly developing, highly complex field of comparative law is now widely recognised.[3] What is also increasingly becoming clear in global legal scholarship is that '*all* modern legal traditions are both mixed and mixing' (italics in the original).[4] Hence, scholars trying to understand the ubiquitous liquidity,[5] another prominent and quite pertinent metaphor, of a complex entity such as Bangladeshi law, have their work cut out to follow the rapidly progressing recent advances in developments of legal pluralism studies.[6] Whether the focus of analysis

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1 A national law may of course ban kite flying, as notably happened in Pakistan, where kite flying was a popular game. See Werner Menski, 'Flying Kites in Pakistan: Turbulences in Theory and Practice' (2009-10) 1(1) Journal of Law and Social Research (Multan) 41-57.

2 Werner Menski, 'Flying Kites: *Banglar Ghuri – Iccher Ghuri:* Managing Family Laws and Gender Issues in Bangladesh' (2014) 25(2) *Law Faculty Journal of Dhaka University* 1- 20; Werner Menski, 'Bangladesh in 2015: Challenges of the *Iccher Ghuri* for Learning to Live Together' (2015) 1(1) Journal of Law and Politics, University of Asia-Pacific, Dhaka 9-32.

3 Seán Patrick Donlan and Jane Mair (eds.) *Comparative Law. Mixes, Movements, and Metaphors* (Routledge 2020).

4 Seán Patrick Donlan and Jane Mair, 'Of Mixes, Movements, and Metaphors' in Seán Patrick Donlan and Jane Mair (eds.) *Comparative Law. Mixes, Movements, and Metaphors* (Routledge 2020) 1, 3.

5 Werner Menski, 'The Liquidity of Law as a Challenge to Global Theorising' [2014] *Jura Gentium* XI: *Pluralismo Giuridico*. Annuale 19-42 [ISSN 1826-8269] [http://www.juragentium.org].

6 Werner Menski, 'On Kites and Ships: Climate Changes in Comparative Law and Judicial Navigation' in Seán Patrick Donlan and Jane Mair (eds.) *Comparative Law. Mixes, Movements, and Metaphors* (Routledge 2020) 67-86 comments also on Bangladesh; Roger Cotterrell, 'Still Afraid of Legal Pluralism? Encountering Santi Romano. Review Symposium: Law and Society Meets

falls on Italy, Turkey, or indeed Bangladesh, of major interest and importance is everywhere how any particular country manages its ongoing processes of identity formation, which nowhere, and certainly not in Bangladesh, is simply a finished product.[7]

Since this article is part of the celebrations of the Centenary of the Faculty of Law of the University of Dhaka in 2021, the present analysis is constructed in light of earlier historical developments affecting the territory now comprising the nation state of Bangladesh. Obviously, in 1921, when Dacca University was established, together with a Law School, there had already been an aborted effort to operate a divided Bengal between 1905 and 1911. However, in the volatile colonial environment of that time, there was as yet no clear vision of an independent nation state called Bangladesh. Indeed, the troubling division of Bengal along religious lines was abandoned within 6 years. Much later, even in the run-up to the brutal Partition of the subcontinent at midnight on 14/15 August 1947,[8] there was no political will on the part of the British colonisers as well as the majoritarian Muslim and Hindu politicians at that time to agree to an independent Muslim-dominated Bengali state in the Eastern part of South Asia. Hence, a period marked by subjugation of East Pakistan by a Punjabi-dominated West Pakistan between 1947 and 1971 that pushed for Urdu as a compulsory national language had to be suffered, until the complications and pressures became so strong and intolerably violent that a traumatic divorce became inevitable. However, the national independence of Bangladesh still had to be fought for on what became Bangladeshi territory in a blood-drenched war, with reverberations reaching well into the twenty-first century. Apart from periodic disasters imposed on the country by stormy winds, cyclones and the ubiquitous water, from numerous rivers and from the sea,[9] man-made terror and multiple strenuous efforts to abuse every possible manifestation of law were to make a Golden Bangladesh a kind of 'distant mirage'.[10]

For, meanwhile the journey of independent Bangladesh since 1971 has given rise to enormous complications and turbulences for the kite of law and life. The moment they were left to themselves after having secured independence, the people of Bangladesh and their leaders realised that they were in fact a highly plural collection of people with various socio-cultural characteristics, many regional differences, and

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Jurisprudence' (2020) 45(2) Law & Social Enquiry 539-558, 539 highlights lawyers' fears of legal insecurity and chaos.

7 Md Maidul Islam, ''Secularism in Bangladesh: an Unfinished Revolution' (2018) 38(1) South Asia Research 20-39.

8 Vazira Fazila-Yacoobali Zamindar, *The Long Partition and the Making of Modern South Asia. Refugees, Boundaries, Histories* (Columbia University Press 2007).

9 James J. Novak, *Bangladesh. Reflections on the Water* (second impression, The University Press Limited 2008).

10 This phrase was used by Antony Allott, *The Limits of Law* (Butterworths 1980) 216 with specific reference to the Uniform Civil Code project of India, a contested legal issue that has also caused unnecessary troubles in Bangladesh. Such a unification project is, not just in my view, a completely misguided remedy for achieving a Golden Bangladesh, since more respect for plurality, rather than enforced uniformity, is the need of the hour.

different religious beliefs within the new nation. Here we see at once that Professor Roger Cotterrell, in a recent analysis of concerns about legal pluralism, hits the nail on the head when he observes that, '[t]oday, these issues of legal pluralism are never seen as purely juristic but always sociolegal in a broad sense – inseparable from social scientific perspectives'.[11]

As a socio-legal scholar from the start, and someone who never endorsed state-centric legalism on its own as a viable tool for holistic development, I have been privileged to accompany this potentially empowering, yet difficult journey since 1980. I learnt a lot in and through this process about how easily various legal powers may become abused by specific stakeholders. My first publication on Bangladesh focused on Hindu law and religious minorities,[12] but very soon I delved deeper into the intricacies of Bangladeshi constitutional arrangements and their complex relationships with developmental trajectories.

As a farmer's son, I was delighted to encounter a well-known Bangla saying on the importance of making the best butter out of milk. Bangladesh, however, not only suffers irritations in the processes of making butterbut has experienced massive stealing and misappropriation of precious public and private resources, to an extent that impunity, corruption, and lack of transparency have become prominent concerns in most analyses of legal developments in Bangladesh. This has multiple negative impacts on empowerment.[13] Deliberate infringements of the country's welfare and the people's best interests, and thus violations of public interest, remain unfortunately a major fact of postcolonial Bangladeshi legal and political life. The judiciary, which should ideally maintain whatever the principles of 'rule of law' are deemed to mean, have for many reasons not been as activist as one might hope and argue for.[14] Sadly, these complications have become so convoluted that presently there seems to be no agreement about whom to blame, with completely contradictory accusations flying in all directions and dominating the various, now globalised and multilingual, media spaces that all kinds of 'activists' may - and vigorously do – use to critique law-related developments in Bangladesh. As editor of *South Asia Research*, I see much questionable writing coming from Bangladeshi authors who seem to have been seeking refuge abroad. Frequently in aggressive language, this seeks to influence developments in Bangladesh by some kind of remote control, demanding change without offering constructive advice on how to balance competing expectations. This disproportionate external intervention is somewhat dangerous because we hear comparatively little about the voices and actual concerns of people living in Bangladesh itself, who are often simply struggling to survive and thus have no time

[11] Roger Cotterrell, 'Still Afraid of Legal Pluralism? Encountering Santi Romano. Review Symposium: Law and Society Meets Jurisprudence' (2020) 45(2) Law & Social Enquiry 539, 553.

[12] Werner Menski and Tahmina Rahman, 'Hindus and the Law in Bangladesh' (1988) 8(2) South Asia Research 111-131.

[13] Sumaiya Khair, *Legal Empowerment for the Poor and the Disadvantaged: Strategies, Achievements and Challenges. Experiences from Bangladesh* (Author 2008) 33-34.

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

for internet politics and law-related discourses. They may also simply not be connected to these new media,[15] indicating further asymmetries of power which need to be openly acknowledged. It may be safer to focus on business development issues in this field,[16] but there can be no doubt that this specific development discourse does not cover the entire law-related wider context.

The legal and political history of now postcolonial Bangladesh is therefore, it may be argued, a tragic case study of malfunctioning. It depicts a troubled trajectory, not once but repeatedly, of how authoritarian state structures, even after being overthrown in some form, have a habit of coming back in revised forms of excessive authoritarianism and defective forms of rule of law, despite the formal framework of a democratic structure.[17]

Presently, it remains a huge challenge for different aggressively competing stakeholders to work together constructively to promote the sustainable development of Bangladesh, indeed a massive, multi-dimensional challenge. Presently, there are worrying signs that the country's encouraging economic performance, with its partly empowering effects also for women,[18] is now endangered by COVID-induced harm, which has hit garment exports, in particular.

Despite such huge challenges, this article offers a hopeful vision for a safe national journey. Yet let there be no doubt: This will require that, advised and led by the country's law-related intellectuals and professionals, all the various diverse people of Bangladesh have to learn to live and work together as members of a huge, internally plural nation. In this context, although by itself this is not enough, plurality-conscious legal education is set to become a key component to equip the next generation of citizens and their leaders at all levels with appropriate tools. Bangladesh is not some small city state or a kind of Switzerland. As a demographically large country, which is often dismissed as unimportant, it is both physically and in terms of governmentality much closer in its characteristics to India than many stakeholders are willing to accept. Yet Bangladesh – its people, but especially its lawyers and politicians - ought to learn lessons from wherever they may be found to identify an appropriate, sustainable path for the future, given that law is everywhere culture-specific.[19] The article proceeds to first discuss the *Banglar Ghuri* image and its contested journey in light of multiple failures of responsible governance. It then argues that the synergies of private and public interest, inspired by the country's foundational vision, ought to energise the kite journey to promote a sustainable future even in post-COVID Bangladesh.

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[15] Mohammad Sahid Ullah, 'Empowerment, Asymmetrical Power Relations and Impacts of Information Technology in Rural Bangladesh' (2017) 37(3) South Asia Research 315-334.

[16] Ahmed Tareq Rashid and Ahmed Khaled Rashid, 'Rural ICT Business in Bangladesh: A Credible Development Agent?' (2020) 40(1) South Asia Research 58-74.

[17] Sonia Z. Khan, *The Politics and Law of Democratic Transition: Caretaker Government in Bangladesh* (Routledge 2018).

[18] Mohammad Rafiqul Islam, 'Economic Growth Rates and Exports of Bangladesh: The Bengal Tiger? (2019) 39(3) South Asia Research 285-303.

[19] Werner Menski, *Comparative Law in a Global Context. The Legal Systems of Asia and Africa* (2nd edn, Cambridge University Press 2006) 26-37.

II. THE *BANGLAR GHURI* AS A METAPHOR FOR HOPE AND GOOD GOVERNANCE

As individual scholars, and also as law teachers, we can only hope to be effective, often in quite limited ways. People who read our work and also our students are not a *tabula rasa*, but already have their own views and preferences, which may be deeply entrenched. In the polarised environment of Bangladesh, whether someone supports the Awami League (AL) or the Bangladesh Nationalist Party (BNP) far too often seems to be all that counts. The challenge of teaching South Asian laws at SOAS in the University of London between 1980 and 2014, including Bangladeshi law, impressed on me that being able to listen to others and their concerns is a key skill. This can indeed be learnt 'on the job', whether as a teacher or a student, and at any time. Yet sadly, one constantly encounters much myopic prejudice, huge half-baked knowledge and many evidently misguided opinions. To assess what is right or wrong is of course a fundamental human predicament in any situation. But how does one counter blind prejudice and unwillingness to appreciate the perspective of 'the other' in so many difficult situations? For socio-legal scholars this predicament becomes akin to steering a kite safely through turbulent winds. Balancing and nimble navigation are key skills required also in conducting intensive seminars which challenge students to think, express their thoughts, and listen to others. In that complex learning and balancing process, either by practising those skills 10,000 times, or by silent osmosis over time, one turns into a pluri-legal scholar; at least that has been my experience. Looking back, I am happy to have nurtured many young skilled professionals, including numerous Bangladeshis, who are now active in many fields of life and work all over the globe.

If all legal orders are both mixed and mixing,[20] there is no other way if one wants to keep law and life in productive synergy or harmony, while continuing to face the challenges of never-ending competing claims and expectations of the multiple roles that all humans play. There is then of course also never-ending scope for social and other normativities to conflict.[21] Consequently, conflict management, another core skill closely connected to kite flying, and a key skill for lawyers, too, takes centre stage in legal education, in our thought processes, and in everything one may or may not do. Yet, how should one react if any 'other' self-righteously insists on pursuing conflict, rather than trying to find an agreeable solution and/or searching for plurality-conscious compromise of any issue that may arise?

To take a simple example often encountered as a teacher of South Asian laws, how could one uncritically accept the common claims of highly trained doctrinal lawyers that South Asian laws are simply inferior manifestations of English common law, rather than hybrid constructs arising from South Asian colonial legal history?[22] Such

[20] Seán Patrick Donlan and Jane Mair, 'Of Mixes, Movements, and Metaphors' in Seán Patrick Donlan and Jane Mair (eds.) *Comparative Law. Mixes, Movements, and Metaphors* (Routledge 2020) 1, 3.

[21] Kyriaki Topidi (ed.) *Normative Pluralism and Human Rights. Social Normativities in Conflict* (Routledge 2018).

[22] For a sophisticated account of how this worked out for Bangladesh, see Naim Ahmed, *Public Interest Litigation. Constitutional Issues and Remedies* (Bangladesh Legal Aid and Services Trust

conflicting perceptions, which also downplay the important position of South Asia's various personal law systems, seem to become more acrimonious when religion and law are the subject, often specifically when Islam is involved.[23] That important recent writing has clarified such contested boundaries between law, culture and religion,[24] and also between supposedly liberal modernity and allegedly traditional Islam,[25] has apparently bypassed many Bangladeshis, including lawyers and lawyer-politicians who should know better. Instead, there is a depressing set of literature that reflects how such conflicts over law and religion have sparked globally unnoticed 9/11 moments for Bangladesh, constantly stirring up further aggressive confrontations,[26] even risking at times a crashing of the wish kite of Bangladesh. Evidence of youth protests further complicates the turbulences experienced in recent times.[27]

Against this, we find the liberating thought that clearly also in terms of Qur'an and Sunna, a good Muslim is of necessity a pluralist.[28] This is a perspective which empowers individual Muslims to find their own path, but it has been overlaid by various global and local attempts, some of them explicitly gendered, to dictate to believers how to live their lives. That these anti-pluralist attempts of enforcing an artificial uniformity of Islamic law for the sake of Political Islam do not reflect lived realities has long been known, also among lawyers who specialise in matters of Islamic law,[29] and who are aware that deciding on the right path is everywhere a matter of conscience, conflicts and tensions.[30] Examined through a global, comparative law lens, law is everywhere culture-specific, and thus manifests as diversified and highly mixed glocalisation, rather than simply uniformised globalisation.[31] That this is now also recognised by development specialists,[32] given the huge input of development activism in Bangladesh, bears importance also for legal education in Bangladesh.

[BLAST] 1999) 20.

23 Richard L Benkin (ed.) *What Is Moderate Islam?* (Lexington Books 2017) covers conflicts in Pakistan and in Bangladesh.

24 Shahab Ahmed, *What is Islam? The Importance of Being Islamic* (Princeton University Press 2016), emphasing the constant interaction of text, pre-text and context.

25 Arif A. Jamal, *Islam, Law and the Modern State. (Re)Imagining Liberal Theory in Muslim Contexts* (Routledge 2018), arguing that there is no necessarily irreconcilable conflict between liberal theory and Islam.

26 Mubashar Hasan, 'Democracy and Political Islam in Bangladesh' (2011) 31(2) South Asia Research97-117; Md Maidul Islam, ''Secularism in Bangladesh: an Unfinished Revolution' (2018) 38(1) South Asia Research 20-39.

27 Anupam Debasish Roy, 'Shahbag Stolen? Third Force Dynamics and Electoral Politics in Bangladesh' (2018) 38(3S) South Asia Research 1S-25S.

28 Werner Menski, *Comparative Law in a Global Context. The Legal Systems of Asia and Africa* (2nd edn, Cambridge University Press 2006) 281.

29 David Pearl and Werner Menski, *Muslim Family Law* (3rd edn, Sweet & Maxwell 1998).

30 The most instructive text on this remains, in my view, the brilliant and concise set of early lectures by Noel J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (University of Chicago Press 1969).

31 William Twining, *Globalisation & Legal Theory* (Butterworths 2000).

32 Brian Z. Tamanaha, Caroline Sage and Michael Woolcock (eds.) *Legal Pluralism and Development. Scholars and Practitioners in Dialogue* (Cambridge University Press 2012).

Teaching about law as an interdisciplinary field of expertise is not just a matter of theory and courses on jurisprudence, however. I always told my students that a good theory must work in real life, otherwise it is simply ideology, which may be harmful for basic rights protection at grassroots level. From that perspective, too, there is no reason to be scared about discussing legal pluralism.[33] Whether in terms of social normativities, economic status, or regarding politics and law, plurality is manifestly everywhere part of life. This was also recognised quite some time agoby John Rawls, who proceeded to construct his famous phrase of the 'overlapping consensus', and wrote about 'reasonable pluralism'.[34] Enormous consequences flow from such basic realisations, which remain incompletely reflected in how law is taught or practised in most countries, including Bangladesh. The intensive connections of theory and practice with regard to recognising social normativities require further analysis, also in terms of the conflicts caused. Conflicts, too, are ubiquitous and exist in numerous manifestations. Initially, as holistic perspectives suggest, conflicts may be analysed as doubts in an individual's mind about which option or path to choose. While this is not normally included in legal analysis, it may be prudent to accept that legal psychology informs socio-legal enquiries. Thus, it seems not just advisable, but appears essential to consider individual agency in socio-legal analysis.

For this interdisciplinary task, the kite of law with its four competing corners, none of which may be ignored and rendered voiceless without risking a backlash of resentful violence, has by now proved its crucial relevance. It is not just a metaphor, but a heuristic tool that inspires action in a spirit of connectedness and compromise, rather than trying to score victory over others.[35] The doubts of the individual law-related actor as an interconnected legal agent are probably encompassed and located within or close to corner 1 of the kite, the individual sphere, focused on ethics, values and beliefs. Such challenges of the deeply dynamic nature of all law, identified in a fascinating new book on Islamic law by one of the best South Asian law teachers I ever encountered, through the metaphor of a flowing stream,[36] must be faced everywhere in legal education these days. Yet such efforts to update, pluralise and sensitise legal education are still constantly undermined by complacent laziness and lack of activism among law teachers.

There is much more to this, though, than laxity or inefficiency in legal education. There appears to be a tendency among Muslims, quite akin to the concerns and fears among doctrinal lawyers about pluralist challenges to legal certainty,[37] to deny the scope and possibility of doubt in the human mind. For many Muslims, this element of doubt seems to risk insecurity of belief, which is feared in a global context dominated today by secular predilections and principles. In the lived experience of Muslims,

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[33] Roger Cotterrell, 'Still Afraid of Legal Pluralism? Encountering Santi Romano. Review Symposium: Law and Society Meets Jurisprudence' [2020 (45.2)] *Law & Social Enquiry* 539, 553.

[34] John Rawls, *Political Liberalism* (Columbia University Press 1993) 144-172.

[35] Werner Menski, 'Introduction: Conflicts over Justice and Hybrid Social Actors as Legal Agents' In Kyriaki Topidi (ed.)*Normative Pluralism and Human Rights: Social Normativities in Conflict* (Routledge 2018) 1-36.

[36] Shaheen Sardar Ali, *Modern Challenges to Islamic Law* (Cambridge University Press 2016) 11.

[37] Roger Cotterrell, 'Still Afraid of Legal Pluralism? Encountering Santi Romano. Review Symposium: Law and Society Meets Jurisprudence' (2020) 45(2) Law & Social Enquiry 539, 553.

though, the realisation of one's agency as an individual believer, as someone who is expected to reaffirm that belief constantly through prayer, signifies a latent position, something that is 'in-between' the human sphere and the universe. As a thought process, conceivable also in a spatial sense, this is a necessarily hybrid, plural status. Identifying exactly this predicament, a recent sophisticated study on the modern challenges to Islamic law presents a discussion of the subtle concept of *dihliz*, the threshold, a metaphor of in-betweenness that signifies the status of being connected, through consciousness, belief and appropriate action.[38] This also represents the moment of decision-making or, putting it differently, the constant challenge of having to make decisions of all kinds, at any moment of our lives.

In more traditional legal scholarship on Islamic law, a more doctrinal position has been taken about this specific crucial element of decision-making. For example, we read first that 'Islam means total submission and surrender to Allāh', but then also find that 'while law in Islam may be God-given, it is man who must apply the law. God proposes: man disposes'.[39] Notably thus, plurality-sensitive analyses of how Muslims balance their submission to the divine will and individual agency tend to be presented in traditional literature on Islamic law as an exercise of jurisprudential skills and discretion. This obviously plays down the role and agency of the individual believer.

Yet, also in this jurist-focused context, scholarly writing cannot really avoid or bypass discussion of Islamic notions of plurality, found in the juristic technique of *ikhtilaf* ('unity in diversity'), which is supported by a well-known *hadith* to the effect that difference among Muslims is 'a sign of the bounty of God'.[40] However, in the highly plural practice of Islam as a way of life, the reduction of decision-making to jurisprudential analysis avoids addressing the intensely private and individual dimensions and predicaments for the Muslim believer. At that individual level, Muslims are fully justified to claim a context-specific right to live as Muslims, manifested in quite different actual practices among Muslims between the Balkans and Bengal.[41] However, the more critical private as well as public challenge, also in Bangladesh, is (i) the extent of toleration for the presence of non-Muslims, (ii) the extent of acceptance of diversity among Muslims and (iii) and very important in lived experience, the degree of discretion allowed to individuals by other individuals. With regard to the first and second challenges, whether Muslims are a demographic minority or a majority should not make a difference in their approach to any 'others', leading us back to the already stated position that '[a] good Muslim is, therefore, of necessity, a pluralist'.[42] In a more recent formulation of this pluralist scenario, the conclusion is therefore obvious:[43]

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[38] Shaheen Sardar Ali, *Modern Challenges to Islamic Law* (Cambridge University Press 2016) 1-3.

[39] Noel J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (University of Chicago Press 1969) 1.

[40] Shaheen Sardar Ali, *Modern Challenges to Islamic Law* (Cambridge University Press 2016) 25.

[41] Shahab Ahmed, *What is Islam? The Importance of Being Islamic* (Princeton University Press 2016).

[42] Werner Menski, *Comparative Law in a Global Context. The Legal Systems of Asia and Africa* (2nd edn, Cambridge University Press 2006) 281.

[43] Shaheen Sardar Ali, *Modern Challenges to Islamic Law* (Cambridge University Press 2016) 26.

> Even to the casual observer of Islamic law, then, it should be clear that the manner in which law is generated within the Islamic legal traditions is most definitely pluralist, with the inherent capacity for alternative legitimate conceptions of what constitutes law and permissible action.

The challenge for Bangladesh as a Muslim majority nation is thus also quite clear. But the above analysis must also account for the all-too-frequent phenomenon of self-righteously seeking to dictate to others, whether fellow Muslims or non-Muslims, how they should lead their lives and make decisions. Though this predicament and the related conflicts and tensions fall squarely within the private sphere, at first sight, when violence arises because a 'good Muslim' objects to what others are doing, we are only a few steps away from the terrible aberrations of blasphemy laws, which have been causing such havoc in Pakistani law.[44] Significantly, there have been strenuous efforts to push for the introduction of such laws in Bangladesh in 2013 and thereafter.[45]

It is painful to remind Bangladeshis that the ferocity of violence during the War of Independence in 1971 was evidently more or less directly linked to such terrible mental struggles over self-righteousness, affecting the minds and actions of perpetrators. If this was not difficult enough, unfortunately we know in 2020/21 that proper balancing of such competing expectations about right belief and right conduct remain aggravated and partly overshadowed by petty partisan politics and by multiple further interventions in the kite journey of Bangladesh on the part of those who neither wish to accept socio-legal pluralism nor any form of religious diversity.

In the law classrooms of the global law school at SOAS, which were over time increasingly dominated by Muslim students from all over the world, including many local and overseas Bangladeshis, such issues had to be debated and clarified upfront, an essential part of the global comparative law education that students had enrolled for, explicitly related to the basic definition of law.[46] Raising such issues in classroom debates required courage and respect for otherness, as it at once raised the question to what extent Islamic law was 'law'. This essential process of educating lawyers in the twenty-first century cannot be focused only on secular human rights protection, while treating religion as something extra-legal. I am well aware that such discussions in South Asian law classrooms may elicit protests by those who do not want students to think for themselves and acquire a holistic education. Opposition to creating educated law students who function as emotionally intelligent human beings rather than legal automatons is still supported, despite frequent assertions to the contrary, by the convenient view among doctrinal law teachers that state-centric law

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[44] The best analysis on this, in my view, is a massive intercultural study of the relevant criminal law, written in German, but with a detailed bibliography of pertinent sources, which are mostly in English (pp. 869-917). See Benedikt Naarmann, *Der Schutz von Religionen und Religionsgemeinschaften in Deutschland, England, Indian und Pakistan* (Mohr Siebeck 2015).

[45] Md Maidul Islam, ''Secularism in Bangladesh: an Unfinished Revolution' (2018) 38(1) South Asia Research 20, 28-29.

[46] Werner Menski, *Comparative Law in a Global Context. The Legal Systems of Asia and Africa* (2nd edn, Cambridge University Press 2006) 173-190.

teaching is more important than all this 'fuzzy' talk about legal pluralism. It is significant that even in 2020, scholars who argue for and practise legal pluralist education have to defend such approaches against reductionist politicised law-centric scholarship.[47]

Not just in Bangladesh, rigid application of such law-centric ideologies and strategies does not help to create the best possible lawyers. Probably even more dangerously, though, too narrow instrumentalist legal education generates and endorses a self-centred fascination with one's own powers, derived from believed-in supreme powers of 'the law', in complete opposition to what is now called 'social science legal pluralism'.[48] Remarkably akin to the deliberate silences in Islamic jurisprudence about the agency of the individual, this empowers those who claim knowledge of the 'official law', which of course is never the only law, to impose their will on others, in classic stereotypical Austinian style. This malign development is rather unhealthily cultivated among politicians all over the world. Presently in the UK, the crashing kites of BREXIT at the start of 2021 indicate a disastrous path to self-harm through irresponsible leadership. In the USA, utterly undemocratic efforts by a sitting President to challenge an election that he lost, following hundreds of years of democratic practice, tell us that democracy remains potentially at risk everywhere, not just in South Asia.

III. SYNERGIES OF PRIVATE AND PUBLIC INTEREST AND THE NEED TO PROMOTE A SUSTAINABLE FUTURE EVEN IN POST-COVID BANGLADESH

Notwithstanding reservations about the abuse of political power by leaders who often studied law earlier in life, it remains a fact that somebody has to bear the responsibility of holding the strings of the nation's kite of law. In Bangladesh, that privileged stakeholder may at times appear confused over whether this function is a pious obligation and an onerous duty, or a privilege that may be exploited. One often wonders whether Bangladeshi leaders really think they could just govern like kings or queens in less democratic times.

Law-related teaching about leadership, which is part of my academic portfolio, suggests criteria for what makes a good leader. I was fascinated to hear in that context, when interviewing prospective students and asking about applicants' views on who is their role model as a leader, that the Prophet Mohammad came up very often. In fact, before receiving such responses, I had studied and discussed the key role of the Prophet in the early development of Islamic law.[49] As leader, judge and guide of the emerging community of Muslims, the *dihliz* of the Prophet, to use the

[47] Werner Menski, 'On Kites and Ships: Climate Changes in Comparative Law and Judicial Navigation' in Seán Patrick Donlan and Jane Mair (eds.) *Comparative Law. Mixes, Movements, and Metaphors* (Routledge 2020) 67, 68.

[48] Roger Cotterrell, 'Still Afraid of Legal Pluralism? Encountering Santi Romano. Review Symposium: Law and Society Meets Jurisprudence' (2020) 45(2) Law & Social Enquiry 539, 547.

[49] Werner Menski, *Comparative Law in a Global Context. The Legal Systems of Asia and Africa* (2nd edn, Cambridge University Press 2006) 294-298.

metaphor employed by Professor Shaheen Sardar Ali,[50] was clearly completely unique. In fact, it is a well-known part of Islamic doctrine that nobody is allowed to claim that same position ever again. Quite rightly so, for the *dihliz* of any other claimant to prophethood could indeed never be the same.

I raise this here, and in this way, because the highly contested politics and legal structures of Bangladesh are partly so aggressively handled that evidently it has not sunk in, fully enough, that nobody could ever be the same as the Prophet in his times. This is deliberately misused, it appears, as the challenges of governance and of operating the legal system in the Muslim-dominated nation of Bangladesh should by now have reached a state of maturity, where petty politicking to serve inflated egos and private interests is replaced by a supervening focus on the public interest of the entire nation. Instead, the unhealthily dualistic exaggerated claims to power, mixed with religious argumentations, continue to cause havoc.

In that context, reliance on Islamic arguments is not going to serve as a kind of cultural defence for those who argue that Bangladesh is a Muslim majority country and thus must put Islam in pole position. In the Covid-ravaged Bangladesh of 2020, it ought to be taken for granted that the majoritarian position of Islam and thus of Muslims in Bangladesh is simply a demographic and cultural fact, and there is an urgent need to move on from such old, tired conflicts. Constructive action to make the *iccher ghuri* of Bangladesh fly well must ensue, no longer held back by religious politics. The nation's legal system and rule of law may be fine-tuned in accordance with that realisation of a particular majoritarian demographic, with its evident mirror image in Hindu-dominated India, where similarly agitated debates rage over the role of Hindu identity and its relation to the nation state. In both countries, minority rights must not just be guaranteed on paper, but also in daily practice. As both major political parties in Bangladesh are run by Muslims, it is entirely disingenuous to claim that one of these parties seeks to damage Islam as the state religion of Bangladesh, while the other party protects it. Yet this also means that those who claim that acknowledging the pole position of a majoritarian religion in a plural nation is an infringement of international norms are wrong. First of all, religious demographics are a matter of fact. Secondly, there is no binding international norm decreeing that law and religion must be separated. The separatist approach is simply one possible theoretical option, which does not even work well in practice in the country that pushes for it most actively, France. If in today's postmodern conditions, where religion has 'come back' rather than receding into irrelevance, everything is to be treated as diversely connected, the politics of law and religion in Bangladesh are merely a devious device to stir up trouble, prevent sustainable progress, and trick the people into believing that one particular party is damaging the best interests of Islam. After all, as we know quite well from the misuses of blasphemy laws, discussed above, it is really simple to mislead 'normal' peaceful Muslims, because the rhetoric of present-day Islamic militants has somehow become 'music to the ears of pious

[50] Shaheen Sardar Ali, *Modern Challenges to Islamic Law* (Cambridge University Press 2016) 1-3.

Muslims'.[51] Cries of 'Islam in danger', however, seek to hide the fact that the law-related business of governance is multi-dimensional, extending far beyond 'law and religion'.

In this context, the four basic pillars of the national vision of Bangladesh remain the conceptual framework within which any discussion of the country's future development needs to be conducted. In 2015, I discussed this as the challenge of learning to live together,[52] arguing that failure to manage this process risked crashing the wish kite of Bangladesh. I also suggested that the four elements of this national vision broadly match the four corners of the kite of law: Firstly, matching kite corner 4, nationalism as freedom from intervention by others, secondly democracy as full participation by all the people of Bangladesh as part of kite corner 3, thirdly secularism, reflecting the socio-religious and sectarian pluralities among the diverse people of the country and their values, thus matching corner 1 of the kite, and fourthly socialism, a basic principle which suggests that private interest and public interest have to be always, as much as possible, seen and operated together is social and economic domains, which match kite corner 2. This aspect of the vision also suggests that capitalist structures, which rely and insist on the freedom of contract, only empower a privileged elite, leaving common citizens completely behind, as various historical experiences of colonialism have shown. Whether postcolonial Bangladesh could lift itself out of such predicaments thus became a major litmus test of empowerment and development.

All four elements in this nation-building process of Bangladesh remain, in 2020, work in progress, not only due to continued basic disagreements over the country's visions, but more fundamentally, because the *dihliz* of Bangladesh, of course, keeps changing all the time, posing new challenges of appropriate decision-making, including the fine-tuning of the national identity. If legal scholars need any more proof that law is everywhere situation-specific, Bangladesh offers abundant evidence to verify this axiom. Regarding nationalism, which in the 1970s was a big emotional issue given the then recent divorce from Pakistan, today the struggle is much more whether to align more closely to India or to China, in various respects,[53] while retaining national sovereignty and control over the nation, its assets and its borders. Significant progress has been made regarding earlier border disputes with India, especially the exchange of numerous enclaves.[54]Compared to prominent earlier litigation challenging such steps,[55] the present position reflects a remarkable maturity, combined with realism on both sides about clearing up such messy borders left by colonial haphazardness. Challenges remain for keeping the nation as free as

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51 Naseer Dashti, 'Is there a Non-Radical Islam?' in Richard L. Benkin (ed.) *What Is Moderate Islam?*(Lexington Books 2017) 73, 93.

52 Werner Menski, 'Bangladesh in 2015: Challenges of the *Iccher Ghuri* for Learning to Live Together' (2015) 1(1) *Journal of Law and Politics*, University of Asia-Pacific, Dhaka 9-32.

53 Pravakar Sahoo, 'Economic Relations with Bangladesh: China's Ascent and India's Decline' (2013) 33(2) South Asia Research 123-139.

54 Amit Ranjan, *India-Bangladesh Border Disputes. History and Post-LBA Dynamics* (Springer 2018).

55 Naim Ahmed, *Public Interest Litigation. Constitutional Issues and Remedies* (Bangladesh Legal Aid and Services Trust (BLAST 1999) 21-22.

possible from international intervention. Yet as a country which became recently heavily dependent on exports of ready-made garments to bolster economic progress,[56] Bangladesh must also accept international laws and agreements in order to conduct such trade. It is too early to speculate what far-reaching implications the crashing export market for Bangladeshi garments will bring with it. Since the big neighbours, both India and China, are also suffering similarly disastrous economic consequences, it remains to be seen how strongly certain patterns of regional and international solidarity are going to impact on bilateral and multilateral relations. Kite corner 4, the international recognition of Bangladesh as a nation, is by now a soundly secured component of the *iccher ghuri*,but faces risks from ongoing precarities that are affecting the other kite corners and components of the national vision.

Democracy as a core concept of a modern nation state concerns mainly corner 3 of the kite of law, but pertinent elements of this vision are also woven into the other three corners. A prominent example is the contested place of different religions in the pluralist legal order of Bangladesh, in view of Article 2A of the Constitution and its interaction with the provisions of Parts II and III. If by 2015 historical lessons had not been learnt about how to operate a functioning plurality-sensitive democratic system,[57] in 2020 it is not possible to be entirely optimistic, either. It remains true to restate the view of a major observer of Bangladeshi developments, to the effect that '[d]emocratic governance has proved to be a particularly difficult project for the leadership'.[58] Finding the right balances in governance structures at various levels, including management of democratic elections is a huge task. It seems fair to say that in the current adversarial political climate, the credibility and soundness of democratic structures will remain a matter of concern. The casualties in this ongoing battle appear to be the common people and the public interest, as well as hopes for securing fully accountable governance structures, an independent judiciary, and a press that enjoys freedom of speech. In all of these sub-domains, significant bottlenecks of positive development appear to persist. Additionally, the country now faces urgent emergencies regarding public health and the economy-related aspects of the national vision. Whether this massive set of challenges will generate new cross-party solidarities in a spirit of protecting the public interest can only be hoped for.

On secularism, much has been said above, and this remains a bone of contention, with no end in sight of aggressive posturing by various stakeholders, with the state struggling to respond.[59] Continuous population movement from Bangladesh to India remains a concern.[60] On socialism, which the kite model connects to corner 2 as a

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[56] Mohammad Rafiqul Islam, 'Economic Growth Rates and Exports of Bangladesh: The Bengal Tiger?' (2019) 39(3) South Asia Research 285-303.

[57] Werner Menski, 'Bangladesh in 2015: Challenges of the *Iccher Ghuri* for Learning to Live Together' (2015) 1(1) Journal of Law and Politics, University of Asia-Pacific, Dhaka 9, 23.

[58] Rounaq Jahan (ed.) *Bangladesh. Promise and Performance* (Zed Books and University Press Limited 2000) 27.

[59] Matthew J. Nelson and Seth Oldmixon, *Bangladesh on the Brink: Mapping the Evolving Social Geography of Political Violence* (Resolve Network, US Institute of Peace 2017) 7.

[60] Amit Ranjan, *India-Bangladesh Border Disputes. History and Post-LBA Dynamics* (Springer 2018), 90-110.

socio-economic aspect, while Bangladesh was beginning to do really well economically,[61] multiple COVID-19 impacts are presently spelling disaster for the many positive achievements of the past few years. These involved significant female empowerment through high female labour force participation in this really hard-working nation. Those gains will now be lost to a very large extent, as it is likely that a major reorganisation of export policies will be necessary. Maybe this will provide some positive impacts for more export-oriented aquaculture and seafood processing. But overall, it is difficult to be hopeful that the highly asymmetric social structures of Bangladeshi society, with their many disadvantaged sub-sections,[62] will be able to avoid further suffering rather than partaking on equitable terms in the joyful making of butter.

IV. CONCLUSIONS

The vision of a golden Bangladesh, this article suggests, remains meaningful and alive, but has also stayed largely unfulfilled. 20 years ago, Rounaq Jahan summed this up in words which are still reflected in current observations:[63]

> Implicit in the idea of *sonar Bangla* was the vision of a society economically prosperous, free of exploitation, democratically governed, tolerant of pluralism, and respectful of people's rights. This vision mobilized the nation behind the liberation war and is still alive in the minds of average citizens as evidenced by people's movements for democracy and human rights and their initiatives for economic well being.

My own conclusions in 2015 observed that while managing the diversity of Bangladesh will never be easy, 'the key challenge for legal professionals, law teachers and their students, the present and future legal actors of this country',[64] would be to understand that times are changing and there are new expectations that need addressing for protecting the nation and its ideals. Rounaq Jahan's analysis of the performance of Bangladesh proceeded with a detailed critique of the many shortcomings in governance in particular,[65] but ended by expressing hope that the activism of new actors would add some shine to *sonar Bangla*. While my observations focused on diversity management and the role of lawyers, who clearly play a central role in Bangladesh,[66] Jahan's main hope rested on the increasing role

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61 Mohammad Rafiqul Islam, 'Economic Growth Rates and Exports of Bangladesh: The Bengal Tiger?' [2019, 39.3] *South Asia Research* 285-303.

62 Mohammad Hamiduzzaman, Anita de Bellis, Wendy Abigail and Evdokia Kalatzidis, 'Elderly Women in Rural Bangladesh: Healthcare Access and Ageing Trends' [2018 (38.2)] *South Asia Research* 113-129.

63 Rounaq Jahan (ed.) *Bangladesh. Promise and Performance* (Zed Books and University Press Limited 2000) 26.

64 Werner Menski, 'Bangladesh in 2015: Challenges of the *Iccher Ghuri* for Learning to Live Together' [2015, 1(1)] *Journal of Law and Politics*, University of Asia-Pacific, Dacca 9, 30.

65 Rounaq Jahan (ed.) *Bangladesh. Promise and Performance* (Zed Books and University Press Limited 2000) 26-30.

66 Sonia Z. Khan, *The Politics and Law of Democratic Transition: Caretaker Government in Bangladesh* (Routledge 2018).

of women as 'new actors in Bangladesh polity'.[67] However, despite considerable achievements made by such new agents of change,[68] the *iccher ghuri* of Bangladesh, in greatly uncertain times, continues to experience frightful turbulences on its path through the skies over Bangladesh.

Overall, any analysis of Bangladeshi developments from a particular perspective is bound to come up only with particular aspects or nuances in suggested recommendations for improvements. Taking inspiration again from the dynamic threshold metaphor of the *dihliz*, it is absolutely clear now that many new challenging moments will continue to arise in and for Bangladesh, the current COVID-19 repercussions being a particularly brutal example. We can forever talk and lecture about sustainability, but when such disasters arise, there will probably be much chaos. Apart from that, inspiration may be drawn from old concepts like the Rawlsian 'overlapping consensus' and new writing on legal pluralist approaches that pays more attention to local justice in South Asia,[69] closely related to what has been labelled as 'genuine legal pluralism', which of course needs coordination.[70]

As current evidence from Bangladesh confirms, it remains tempting and easy to criticise and advise, but terribly difficult to coordinate a sustainable path for the *iccher ghuri* of sonar Bangla. As a key component of governance, law remains subject to the never-ending dynamisms and challenges identified in this article. My hope is, above all, that the Faculty of Law of the University of Dhaka and the many other law faculties in the country, recognising the public interest element of the need for constructive coordination rather than adversarial games, will train and empower the next generations of lawyers to work assiduously for the inclusive sustainable development of genuine pluralism in Bangladesh. Let the kites of Bangladesh fly high!

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[67] Rounaq Jahan (ed.) *Bangladesh. Promise and Performance* (Zed Books and University Press Limited 2000) 30.

[68] Fardaus Ara and Jeremy Northcote, 'Women's Participation in Bangladesh Politics, the Gender Wall and Quotas', [2020 (40.2)] *South Asia Research* 266-281.

[69] Tobias Berger, *Global Norms and Local Courts. Translating 'the Rule of Law'* in Bangladesh (Oxford University Press 2017); Kalindi Kokal, *State Law, Dispute Processing, and Legal Pluralism. Unspoken Dialogues from Rural India* (Routledge 2020).

[70] Roger Cotterrell, 'Still Afraid of Legal Pluralism? Encountering Santi Romano. Review Symposium: Law and Society Meets Jurisprudence' [2020 (45.2)] *Law & Social Enquiry* 539, 554.

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The Neglected Cornerstone of Sustainable Development: Differential Treatment and Equity in The Climate Change Regime

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I. INTRODUCTION

Sustainable development is neither coherent in its definition, nor in its status as a principle of international law.However, it has a well-established foundation in equity, which in this context refers to the equal distribution of resources amongst States. The principle of equity in sustainable development ensures that the three pillars of sustainable development are progressed. These are social, economic and environmental development. The Brundtland Report titled 'Our Common Future', places intergenerational and intragenerational equity at the forefront of sustainable development in its definition of: 'development that meets the needs of the present, without compromising the ability of future generations to meet their own needs'. However, the serious socio-economic asymmetry in resource access and use between the North and the South demonstrates that intragenerational equity, being fairness in the utilisation of resources among human members of present generations, is not adequately applied in international agreements, and has in fact been neglected. Notwithstanding the fact that intragenerational equity is integral to achieving sustainable development, it is merely implied in existing instruments and consequently there is little guidance on how it should be applied and the resultant obligations that it imposes on States. This has subsequently led to antipathy by the North in rigorously applying intragenerational equity to sustainable development. As a result, despite the many concluded international instruments, the goal of sustainable development is far from being achieved.

Sustainable development is a responsibility that is shared, albeit to a varying degree, between the North and the South. This is consistent with the principle of common but differentiated responsibilities (CBDR). This principle is essential in the realisation of sustainable development as it places differential responsibilities upon States to address both environmental and socio-economic inequities. More specifically, CBDR dictates that responsibility should be shared according to the resources States command and the pressures their societies place on the environment.Agreements such as the United Nations Convention on the Law of the Sea (UNCLOS), Convention on Biological Diversity (CBD), and the United Nations Framework Convention on Climate Change (UNFCCC) which provide for technology transfer from the North to the South are underutilised and in practice, less favourable for developing country parties. Consequently, there appears to be a dynamic of all take and no give between the North and the South, and a clear demonstration of the operation of reverse CBDR

at the expense of the common goal of sustainable development.

International law and policy-making bodies may have embraced principles of sustainable development, however it is often argued that the newly emerging laws are lacking sufficient procedural detail about how to manage the implementation, development and enforcement of laws, regulations and international agreements, as they conceptually emerge relating to sustainable development.

Sustainable development principles are on the agenda in the UN legal system, in the minds of the Courts and form part of the claims brought before the legal system by state and individual claimants in conjunction with broader legal claims under human rights, trade and other legal banners.Indeed, sustainable development is not a stand-alone concept requiring its own special regime for enforcement or compliance monitoring.The appropriate systems are already in place, and it should be considered how this system can be fully exploited for the achievement of sustainable development goals.

Against this setting, this article firstly conducts an analysis of the relationship between sustainable development and the principle of CBDR. This article analyses the status of the CBDR principle in international law, followed by an examination ofthe ongoing tension between developed and developing countries regarding the meaning and operation of the CBDR principle. In the subsequent parts, this article then examines the extent to which the CBDR principle is reflected within provisions for adaptation finance and technology transfer and addresses the implications the operation of such provisions have on the achievement of sustainable development. It will be concluded that while sustainable development is a well-established concept in international law, the neglect of intragenerational equity and CBDR due to a lack of will from developed countries has resulted in a significant failure of sustainable development implementation.

II. SUSTAINABLE DEVELOPMENT AND THE UNDERPINNINGS OF CBDR

A. CBDR and Sustainable Development

The inception of sustainable development is considered to have occurred at the UN Stockholm Conference on the Human Environment. At Stockholm, the conflicts between the environment and development were first acknowledged. Further, in the 1980 World Conservation Strategy of the IUCN, which argued for conservation as a means to assist development and specifically for the sustainable development of species, ecosystems and resources.[1]

Nonetheless, the term sustainable development rose to the fore internationally in

[1] Kates Robert, Thomas Parris and Anthony Leiserowitz, 'What is Sustainable Development? Goals, Indicators, Values, and Practice' (2005) 47(3) Environment: Science and Policy for Sustainable Development 8; Tom Edwards, 'Sustainable Development' (2009) Briefing Paper No 4/09, Parliamentary Library, New South Wales, 3.

1987 with the release of the World Commission on Environment and Development's *Our Common Future* report,[2] also commonly referred to at the 'Brundtland Report' attributed to the fact it was authored by the committee chair, Gro Harlem Brundtland.

The Brundtland Report is acknowledged as providing the first official statement on sustainable development, although similar concepts had been propounded by various others in the decades prior. The Report articulated the core goals and principles associated with the early conception of sustainable development and sought to mandate that the world respond to the pervasive economic, social and environmental challenges that were apparent at the time the report was released. Critically, the Brundtland Report is credited with articulating the most widely accepted definition of sustainable development, which is:

> 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[3]

This definition aligns with the view propounded in the Brundtland Report that 'humanity has the ability to make development sustainable; to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs'.[4] The view of the World Commission on Environment and Development was that the world could no longer feign ignorance in regard to the detrimental impacts of unsustainability on the environment and society. For this reason, the WCED sought to ensure that sustainable development remain a prominent element of economic dialogue into the future.

The concept of sustainable development was endorsed by various governments and political leaders around the world, subsequent to the WCED. This followed the WCED's identification of political commitment as critical to the sustainable development enterprise; indeed, as the report stated, 'in the final analysis, sustainable development must rest on political will', since the 'bodies whose policy actions degrade the environment' need to be made 'responsible… to prevent that degradation'.[5] As a meta-policy, sustainable development provided the overarching normative and political architecture of sustainability, the responsibility was left with the respective global governments to facilitate it.[6]

The concept of sustainable development was elaborated upon through various documents and legal instruments agreed to at the 1992 Earth Summit held in Rio de Janeiro, Brazil (the United Nations Conference on the Environment and Development or UNCED). Five key documents were signed at the Earth Summit; the Rio Declaration on Environment and Development, Agenda 21, the Convention on

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2 Giorel Curran and Robyn Hollander, '25 Years of Ecological Sustainable Development in Australia: Paradigm Shift or Business as Usual?' (2015) 22(1) Australian Journal of Environmental Management 2, 2.

3 World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1990) 392.

4 Ibid.

5 Ibid 17.

6 Giorel Curran and Robyn Hollander (n 2) 2.

Biological Diversity, the United Nations Framework Convention on Climate Change and the Statement of Forest Principles. As instruments of international law, state sovereignty precludes these documents from being legally binding. Nonetheless, the principles they espoused are highly relevant to the concept of sustainable development as it currently exists. In particular, the Rio Declaration enunciated the key principles of sustainability, including the principle of integration, the precautionary principle, the principle of intergenerational equity and the polluter pays principle.

B. CBDR and its Convergence with Intragenerational Equity

The CBDR principle is regarded as a principle of sustainable development.[7] In essence, the dimensions of sustainable development are very much present in the concept of CBDR and vice versa. For instance, both the concept of sustainable development and CBDR prioritises needs among the economic, social and environmental spheres. CBDR assists States to proceed towards sustainable development that comprises all three aspects of economic, social and environmental sustainability.[8] The CBDR principle shares an important feature of sustainable development where its constituent elements are very much interdependent as the relationship between poverty, environmental degradation and economic development.[9]

The crucial point of the definition of sustainable development established by the Brundtland Report is its focus on 'equity'. In this context it refers to meeting the needs of all people whether rich or poor and whether living present or in the future. On equity between generations, the Brundtland Report emphasises both intergenerational and intragenerational equity. According to the *Declaration on the Responsibilities of the Present Generations towards Future Generations* (UNESCO, 1997), present generations ought to be careful to utilize natural resources fairly and have a responsibility to leave future generations an earth which is not irrevocably damaged by human activity (Article 4).Apart from human activity, economic activities of countries to meet existing needs should not exhaust the environment so much that people will not be capable of meeting their needs in the future.

Intragenerational equity, on the other hand, refers to fairness in utilisation of resources among human members of present generations, both domestically and globally.[10]Intragenerational equity is intimately related to the developing-developed

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7 The International Law Association's New Delhi Declaration of Principles of International Law Relating to Sustainable Development has included CBDR as one of the leading principles of sustainable development law: 'ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development' UN World Summit on Sustainable Development (Johannesburg 26 August – 4 September 2002) (6 April 2002) UN Doc A/CONF.199/8.

8 Tuula Kolari, 'The Principle of Common but Differentiates Responsibilities as Contributing to Sustainable Development through Multilateral Environmental Agreements' in Hans Christian Bugge and Christina Voigt (eds), *Sustainable Development in International and National Law* (Europa Law Publishing 2008) 251, 259

9 Ibid.

10 G F Maggio, 'Inter/intra-generational Equity: Current Applications under International Law for

State controversy. Intragenerational equity dictates that developed countries, having ownership over the bulk of the resources and technology, and wealth accrued through exploitation of those resources, bears the burden of ensuring that equitable distribution occurs. The principle of intragenerational equity takes more concrete shape in the CBDR principle which states that responsibility should be shared according to the resources States command and the pressures their societies place on the environment.[11]

Intragenerational equity is far from being an enforceable right in law. As such, vulnerable countries which have the greatest need to enforce the right to intragenerational equity have no reprieve for the inequalities faced. The Brundtland Report explicitly contextualises environmental sustainability as an issue of, not only intergenerational but also intragenerational equity (WCED, 6, 11, 43, 52).[12] The Brundtland Report emphasised that intergenerational equity is logically extendible to equity within each generation.[13] John Ntambirweki argues:

> It is presumptuous to speak of intergenerational equity when there is no intragenerational equity. There could be no greater disservice to the human species than the passing of present intragenerational inequities to future generations. This disservice lies not in the morality of the deed, but rather in the fact that the earth's single environment is crucial to the survival of humanity as a whole. Without righting the wrongs of today, and extinguishing present inequalities, there will remain nothing to bequeath to the future.[14]

Okereke pertinently observed that 'the struggle to secure intragenerational equity in the context of global environmental regimes can be conceived as a counter hegemonic project driven mainly by developing countries'.[15]

III. SITUATING CBDR AS A BRIDGE ACROSS THE NORTH-SOUTH DIVIDE

A. Whose Law? The North-South Divide

There has been increasing recognition of the CBDR principle in international environmental law. It apprehends the notion of differential treatment towards developing countries,[16] and has developed from the recognition that the 'special

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Promoting the Sustainable Development of Natural Resources' (1997) 4 Buffalo Environmental Law Journal161, 162.

11 'Report of the United Nations Conference on Environment and Development' (12 August 1992)UN Doc A/CONF.151/26, vol 1 annex I ('The Rio Declaration on Environment and Development') principle 7.

12 Chukwumerije Okereke, 'Global Environmental Sustainability: Intragenerational Equity and Conceptions of Justice in Multilateral Environmental Regimes' (2006) 37 Geoforum 725, 726.

13 Lavanya Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press 2006) 153.

14 John Ntambirweki, 'The Developing Countries in the Evolution of an International Environmental Law' (1995) 14 Hastings International and Comparative Law Review905, 924.

15 Chukwumerije Okereke (n 12) 735.

16 Lavanya Rajamani (n 13) 129.

needs of developing countries must be taken into account in the development, application and interpretation of rules of international environmental law'.[17]Principle 7 of the *Rio Declaration* states that:

> In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

It is unequivocally accepted that two predominant thoughts emanate from Principle 7 of the *Rio Declaration*: the existence of a 'common responsibility' of States for the protection of environment and the more contentious aspect of 'differentiated responsibility' of States according to their contribution to environmental harm and the capacity to address it.[18] The notion of 'common responsibility' derives from the notions of 'common concerns', 'common heritage of humankind' and the 'province of humankind'.[19] The common responsibility in the CBDR principle signifies the principle of cooperation among States to prevent and respond to transboundary pollution.[20]Yamin and Depledge emphasise the common concern aspect underlying CBDR as opposed to differential treatment more generally.[21] Yamin and Depledge state that the principle of CBDR, 'in essence refers to the fact that certain problems affect and are affected by all nations in common… and that the resulting 'responsibilities' ought to be differentiated because not all nations should contribute equally to alleviate the problem.'[22] In addition to recognising the broad distinctions between states on the basis of their responsibility for causing environmental harm, this fundamental distinction between the North and South acknowledges that people are affected by environmental degradation to varying degrees; the poor most severely. There is, therefore, a need to strengthen the capacity of the poor and their representatives to defend their environmental rights to ensure weaker sections of society are not harshly prejudiced by environmental degradation and instead enjoy their right to live in a social and physical environment that respects and promotes their dignity.

The *Rio Declaration* was a key moment in the history of sustainable development as it constituted a universal acceptance by states of their rights and responsibilities in achieving sustainable development.It is a document that reflects the North-South

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17 Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (4th edn, Cambridge University Press 2018) 244.

18 Philippe Sands and Jacqueline Peel (n 17) 244; Lavanya Rajamani (n 13) 133; Christopher D. Stone, 'Common but Differentiates Responsibilities in International Law' (2004) 98(2) American Journal of International Law 276, 276-7.

19 Lavanya Rajamani (n 13) 134.

20 Ibid.

21 Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge University Press 2004)69.

22 Ibid.

interests more distinctly and even-handedly than has been seen before, or, indeed, since. Principle 3 of the *Rio Declaration* recognises the "right to development" of states as sovereign.However, sustainable development poses a limit on this sovereignty by requiring that the right to development be subjected to the caveat that developmental and environmental needs of present and future generations are not compromised, though developing countries insist that their rights to development should not be sacrificed for the protection of the environment. The argument is that developed countries are developed precisely because of their earlier unsustainable practices of natural resource exploitation prior to the genesis of modern environmental consciousness and the growth of supra-governmentalregulation coming into being, attendant upon this new awareness.It is argued that it is only fair that developing countries should not be required to suffer restrictions to their right to development to the same extent as those countries have already enjoyed the fruits of uninhibited development without environmental regulation.

In this way, Principle 7 is important in providing that States have a common but differentiated responsibility to pursue sustainable development. This is a key concession for developed states, acknowledging their responsibility in the pursuit of sustainable development, considering the impacts of their societies on the global environment, the technologies they employ and the financial resources they have to spend.By making this concession, developed countries accepted in Principle 7 the obligation to share knowledge, transfer technologies and financially assist developing countries to achieve the sustainable development goals.What was essentially agreed to in this Principle was the need for cooperation in capacity building so that sustainable development goals could be delivered.Similarly, the Johannesburg Summit (2002) witnessed high level and diverse participation. The 'holistic approach' taken, through investments and capacity building, was a step forward to enable effective implementation of sustainable development.The Millennium Declaration consolidated previous international agreements and ushered the way forward.

In practical terms, the application of the CBDR principle has certain essential consequences.[23] First, it requires all concerned states to take part in international response measures aimed at tackling environmental problems. Second, it leads to the adoption and implementation of environmental standards which impose different commitments for different states. Overall, this principle is intended to promote fairness and equity.Although the CBDR principle has remained at the centre of the sustainable development agenda,[24] the true nature of its application remains uncertain and sometimes controversial. Promises of aid and technology transfer are unfulfilled or regressive. Soft laws and consensus-based statements are difficult to enforce when

[23] Ashfaq Khalfan, 'The Principle of Common but Differentiated Responsibilities: Origins and Scope' (Paper presented to the World Summit on Sustainable Development Johannesburg, South Africa, 26 August 2002) <http://cisdl.org/public/docs/news/brief_common.pdf> accessed 29 January 2021.

[24] UNGA 'The Future We Want' UNGA Res 66/288 (27 July 2012) UN Doc A/RES/66/288; UNGA 'Transforming our World: The 2030 Agenda for Sustainable Development', UNGA Res 70/1 (25 September 2015) UN Doc A/RES/70/1.

international institutions fail to offer clear direction on sustainable development. Without embracing equity as the central tenant of sustainable development, there can be no wholesale adoption of the SDGs across the North and the South. At the same time, there are diverse opinions and priorities not only between the Global South and the Global North but also within the Global South.

B. Markers of Differentiation: Contribution, Capacity and Needs

There are a number of approaches to the operation of differential treatment. The arguments fall under three different headings. contribution, capacity and needs.[25] With regard to contribution there is a 'striking asymmetry' between developed and developing countries concerning resource exploitation and related environmental damage.[26] The capacity criterion justifies differential treatment on the grounds that developed states have a greater current ability to absorb the consequences of environmental degradation and should therefore shoulder a greater burden in terms of obligations. As with 'contribution', this idea is upheld in legal instruments in the context of discussing the general commitments of nations. The United Nations Environment Programme (UNEP) has underlined the central importance of 'development', stating that the emphasis on respective capabilities is related to different levels of development.[27] Differentiation with regard to capacity does not simply translate into greater expenditure on environmental protection measures. Generally, developed countries enjoy more mature economies that can absorb such expenditure and do not have to balance dual and often conflicting goals such as environmental protection and poverty eradication. The preoccupation amongst developing countries to alleviating poverty can be viewed as impacting upon the capacity to ameliorate environmental degradation but this resonates more strongly with the third justification for differential treatment – 'needs.' Differentiation in this way would ensure that those deserving of assistance receive it and those not deserving do not. Differentiation on the basis of needs is particularly relevant to this article and is explicitly endorsed in the preamble to the UNFCCC that recognizes that 'sustainable growth' and the 'eradication of growth' are the legitimate priorities of developing countries.[28]

Rajamani identifies three ways in which differential treatment operates in the context of international environmental legal instruments:

- Provisions that differentiate between developed and developing countries with regard to the central commitments of the particular agreement;
- Provisions that differentiate between developed and developing countries

[25] Lavanya Rajamani (n 13).

[26] Andrew Hurrell and Benedict Kingsbury, 'An Introduction' in Andrew Hurrell and Benedict Kingsbury (eds), *The International Politics of the Environment* (Clarendon Press 1992) 39.

[27] United Nations Environment Programme, *Final Report of the Expert Group Workshop on International Environmental Law aiming at Sustainable Development* (UNEP, 1996) para 43(a).

[28] United Nations Framework Convention on Climate Change(adopted 9 May 1992, entered into force 24 March 1994) 1771UNTS 107 (UNFCCC) Preamble.

with respect to implementation, for example delayed compliance and reporting schedules, permission to adopt subsequent base years and soft approaches to non-compliance; and

- Provisions that grant assistance, *inter alia*, financial and technological.[29]

In practice, most international environmental instruments contain provisions that assist developing countries to fulfil their obligations in recognition of the fact that they face significant economic and technical capacity constraints that enhance their existing vulnerabilities to the impacts of climate change. The provision of financial resources is often described as being 'new and additional in order to meet 'full incremental costs' of compliance.[30] Similarly, numerous treaties and soft law agreements have recognised that the provision of technology transfer to developing countries is necessary for climate change mitigation and adaptation, and in turn sustainable development.[31]

Yet this raises a central dilemma that plagues the operation of CBDR. As Rajamani outlines:

> Both at the negotiations, and in the scholarly literature, there are at least two incompatible views on its [CBDR] content. One, that the CBDR principle is 'based on the differences that exist with regard to the level of economic development.' And the other, that the CBDR principle is based on 'differing contributions to global environmental degradation and not in different levels of development.[32]

C. Historical Contribution to Climate Change

Developed countries' excessive use of environmental resources has rendered the condition of the global environment deplorable. Small Island States and the African dry regions that have emitted the least Greenhouse Gases (GHGs) are the most vulnerable to the adverse impacts of climate change. Some of these countries and regions are likely to lose their territories to climate change, though their contribution in bringing on this state of play is meagre. This presents a clear case of historical injustice from which a valid claim for recognition, compensation, and correction could arise.[33] Indeed, such obligations have been reflected in the Beijing Ministerial Declaration on Environment and Development, which declared that:

> While the protection of the environment is in the common interests of the

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29 Lavanya Rajamani (n 13) 93.

30 Ibid 108.

31 Intergovernmental Panel on Climate Change,*Methodological and Technological Issues in Technology Transfer* (Special Report of IPCC Working Group III, 2000) 16, 87. See, eg, Kyoto Protocol to the United Nations Framework Convention on Climate Change(adopted 11 December 1997) 2303 UNTS 162 (Kyoto Protocol) 3.14; Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016)UNTS No 54113 (Paris Agreement) art 10.2.

32 Lavanya Rajamani, 'From Berlin to Bali and Beyond: *Killing Kyoto Softly?*' (2008) 57 International and Comparative Law Quarterly 909, 911.

33 Lavanya Rajamani (n 13) 139.

> international community, the developed countries bear the main responsibility for the degradation of the global environment. Ever since the industrial revolution, the developed countries have over-exploited the world's natural resources through unsustainable patterns of production and consumption, causing damage to the global environment, to the detriment of the developing countries.[34]

Since the appearance of climate change on the international political agenda, developing countries strongly argued for turning CBDR into practice through the concept of historical responsibility.[35] The Group of 77 (G-77) expressed at the onset of the UNFCCC negotiations:

> Since developed countries account for the bulk of the production and consumption of environmentally damaging substances, they should bear the main responsibility in the search for long-term remedies for global environment protection and should make the major contribution to international efforts to reduce the consumption of such substances.[36]

Historical responsibility was prioritised in the submission by Brazil (known as the 'Brazilian Proposal') prior to the Kyoto Protocol suggesting that Annex 1 burdens should be based on the relative levels of past emissions and their effects as manifested in the present climate.[37] On the other hand, most developed countries, particularly the United States, take position against recognising any kind of historical responsibility and emphasise that the leadership role of developed countries is based on their wealth, technical expertise and capabilities.[38] Also, it has been argued, drawing upon the absence of a clear provision on historical responsibility in Article 3 of the UNFCCC, that UNFCCC does not recognise historical responsibilities of developed countries. However, as noted above, Article 3 must be read along with the Preamble of the UNFCCC, which does show a recognition of the historical contribution of developed countries.

Insofar as the present generations of developed countries are benefitting from the actions of the past generations in borrowing from the earth's assimilative capacity, they must be held morally responsible for the consequential liabilities.[39] Rajamani argues to hold developed countries legally responsible for their historical wrongs by

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[34] UNCED, Beijing Ministerial Declaration on Environment and Development (19 June 1991) UN Doc A/CONF.151.PC/85 annex, para 7.

[35] Mathias Friman and Bjorn-Ola Linner, 'Technology Obscuring Equity: Historical Responsibility in UNFCCC Negotiations' (2009) 8(4) Climate Policy 339, 340

[36] G-77, 'Caracas Declaration of the Ministers of Foreign Affairs of the Group of 77 on the Occasion of the twenty-Fifth Anniversary of the Group' (1989) <https://www.g77.org/doc/Caracas%20Declaration.html> accessed 28 January 2021.

[37] UNFCCC, 'Proposed Elements of a Protocol to UNFCCC, presented by brazil in Response to the Berlin Mandate' (1997) FCCC/AGBM/1997/MISC.1/Add.3.

[38] Duncan French, 'Developing States and International Environmental Law: The Importance of Differentiated Responsibilities' (2000) 49 International and Comparative Law Quarterly 35, 37.

[39] Lavanya Rajamani (n 13) 140; Henry Shue, 'Global Environment and International Inequality' (1999) 75(3) International Affairs531, 536.

applying the principle of respect for the sovereignty of other States. She argues

> If the international community has any sympathy with Australia's claim that its sovereignty was adversely affected by the radioactive fallout from French nuclear tests in the Pacific,[40] surely it must also recognise the legitimacy of claims from Tuvalu and other small island states that their sovereignty is fundamentally breached by GHG emissions from industrial countries. … in so far as it constitutes a historical wrong it could give rise to a valid claim for historical responsibility.[41]

Rajamani strongly critiqued the dubious actions of developed countries whereby they deny any historical responsibility but argue for recognition of entitlements based on historical GHG emissions.[42] This prevails in the current structure of the UNFCCC which accepts historical patterns of emissions as the basis for allocating mitigation commitments between developed countries.[43]Rajamani argued that '[i]f we are to accept historical entitlements… then surely we must also accept the inevitable truckle with historical wrongs'.[44]

The key underlying justification for a strong, legally mandated, international framework of adaptation is that developed countries are directly responsible for the impacts of climate change. Hence, logically, developed countries must bear responsibility for funding the costs of adaptation. Any commitments made by developed countries must also be built on an acceptance of this legal responsibility rather than assuming adaptation as a charity to the poor and vulnerable.[45] The aim of future negotiations should aim at building on this legal foundation in order to strengthen the funding and technological support that is available to vulnerable countries.[46]

Furthermore, the Commission on Sustainable Development affirms that developed countries bear a special responsibility in the context of CBDR, because the major cause of the continued deterioration of the global environment is the unsustainable pattern of consumption and production in industrialised countries.[47]Evidence of developed nations' disproportionate environmental impacts was assessed by the New Economics Foundation in their report titled 'Growth Isn't Working'. The report found that:

> For everyone on Earth to live at the current European average level of

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40 *Application by Australia Instituting Proceedings, Nuclear Tests (Australia v France)* (1973) ICJ Proceedings, Nuclear Tests, Vol I, 14.

41 Lavanya Rajamani (n 13) 142.

42 Ibid.

43 Benito Muller, *Justice in Global Warming Negotiation: How to Obtain a Procedurally Fair Compromise* (Oxford Institute for Energy Studies 1998) 7.

44 Lavanya Rajamani (n 13) 143-4.

45 Will McGoldrick, 'Financing Adaptation in Pacific Island Countries: Prospects for the Post-2012 Climate Change Regime' (2007) 14 Australian International Law Journal 45, 63.

46 Ibid.

47 ECOSOC, 'Commission on Sustainable Development Report of the Third Session' (11-28 April 1995) E/1995/32-E/CN.17/1995/36, para 31.

> consumption, we would need more than double the bio capacity actually available – the equivalent of 2.1 planet Earths – to sustain us. If everyone consumed at the US rate, we would require nearly 5…Europe's levels of consumption amount to more than double its own domestic bio capacity, meaning that European lifestyles can only be sustained by depending on the natural resources and environmental services of other nations.[48]

Accordingly, the consumption levels of developed countries would not be sustainable if such levels were evident across the globe; thus development must be sustainable and pursued in light of the principle of CBDR. The report further noted that:

> …the benefits of economic growth accrue only very weakly to the poorest members of the global community.The costs of growth, however, for example in the consequences of global warming, fall disproportionately on the poorest.[49]

These findings provide clear evidence that the majority of the burden to ensure sustainable development and differentiated responsibilities should fall on the developed states. The Hague Declaration 1989, the General Assembly Resolution 44/228, 1989, and the Beijing Declaration 1991 highlight the fact that industrialised countries have a disproportionate impact on the environment and therefore special obligations to take response measures. GA Resolution 44/228 drew attention to the fact that 'the major cause of the continuing deterioration of the global environment is the unsustainable pattern of production and consumption, particularly in industrialised countries' and noted that 'the responsibility for continuing, reducing and eliminating global environmental damage must be borne by the countries causing such damage, must be in relation to the damage caused and must be in accordance with their respective capabilities and responsibilities'.[50]

As Rajamani argues, States have a customary international law obligation to 'ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control'.[51] The ICJ in *Legality of the Threat or Use of Nuclear Weapons*, holds that this notion is 'part of the corpus of international law relating to the environment'.[52]The ICJ also noted in the *Corfu Channel Case* that it is a general and well-recognised principle that every State has an 'obligation not to allow knowingly its territory to be used contrary to the rights of other States'.[53]Drawing on these principles, Rajamani argues that international law recognises and holds States responsible for current contributions to environmental degradation.[54]

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48 New Economics Foundation, *Growth Isn't Working; The unbalanced distribution of benefits and costs from economic growth* (2006) 3 <http://www.neweconomics.org/gen/uploads/hrfu5w555mzd3f55m2vqwty502022006112929.pdf> accessed 27 January 2021.

49 Ibid.

50 UNGA Res 44/228 (22 December 1989) UN Doc A/RES/44/228; Lavanya Rajamani (n 13) 131.

51 Lavanya Rajamani (n 13) 143-4,

52 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion)[1996] ICJ Rep 226, 241-2.

53 *Corfu Channel Case (UK v Albania)* [1949] ICJ Rep 3, 22.

54 Lavanya Rajamani (n 13) 144.

D. Capacity to Take Remedial Measures

Of particular interest is the debate regarding the second limb of CBDR; differentiated responsibility due to economic and technological capacity. Differentiation as a result of economic and technological capacity is not a new concept in international law. Differential demands appeared in the Treaty of Versailles (1919) in which the International Labour Organisation (ILO) recognised that 'differences of climate, habits and customs, of economic opportunity and industrial tradition, make strict uniformity in the conditions of labour difficult of immediate attainment'.[55] In 1965, the Contracting Parties of the General Agreement on Tariffs and Trade (GATT) added provisions to encourage non-reciprocal trade concessions in favour of developing countries and even, in 1979, expressly enable 'differential and more favourable' tariff treatment.[56] Simultaneously, in the late 1960s and the early 1970s developing countries called for the New International Economic Order (NIEO) to establish a legal regime of positive discrimination in favour of developing countries.[57] Though the attempt failed in strong opposition from developed countries, this principle of differentiated responsibility is enshrined in international environmental instruments since the Stockholm Declaration[58] and also found its place in many treaties.[59]

The United States has interpreted Principle 7 of the Rio Declaration to 'acknowledge "the special leadership role of developed countries" due to their "wealth, technical expertise and capabilities"'.[60] The United States' interpretative statement also emphasized that Principle 7, 'does not imply a recognition…of any international obligations…or any diminution in the responsibility of developing countries'[61] thus departing from the Principle 7's text, which clearly states the existence of common

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55 Constitution of the International Labour Organisation, June 28, 1919, art 427, 49 Stat. 2712, 2733-34, 225 Consol. T. S. 188, 385.

56 *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries – Decision of 28 November 1979 L/4903* <https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm> accessed 27 January 2021.

57 Lavanya Rajamani (n 13) 17.

58 Principle 12 of the Stockholm Declaration endorsed 'taking into account the circumstances and particular requirements of developing countries and any costs which may emanate from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose'. Principle 6 of the Rio Declaration states: 'The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given priority'. Principle 7 of the Rio Declaration states that the CBDR principle also upholds the principle of differentiated responsibility.

59 See, eg, United Nations Convention on the Law of the Sea, (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 207; Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 2; UNFCCC (n 28) art 3(2).

60 Duncan French (n 38) 37.

61 Ibid.

but differentiated responsibilities – including different roles for developing nations. During the negotiations of the UNFCCC, developed countries opposed any language pertaining to contribution to environmental degradation.[62]

The question of capacity has varying views. As Weiss notes, the positive correlation of capacity and environmental degradation is questionable, as India, Brazil and China may be major contributors to environmental damage, but their capacity for remedying the problem may not be able to match their contribution.[63] It has also been criticised by Biniaz, who argues that the application of CBDR leads to laziness in the negotiating process of international agreements as developing countries assume its application and refuse to comply.[64]It is argued that capacity should not be viewed as separate from the other limbs of CBDR and should be rigorously applied to all states, including developing states as their capacity increases. In the environmental regime, the CBDR principle is implemented through redistribution of resources. It is a significant means of differentiating between countries within international environmental agreements. Resource redistribution can mainly be realised by allocation of financial assistance, transfer of technology and capacity building.[65] This article investigates financial assistance and at technology transfer in the following parts as examples of the application of the CBDR principle and its implications for sustainable development.

IV. OPERATION OF CBDR THROUGH CLIMATE CHANGE ADAPTATION FINANCE

A. Defining Adaptation Finance and its Emergence through the UNFCCC

The IPCC defines climate change adaptation as an 'adjustment of natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities'.[66] A report of the LDC Expert Group states that adaptation involves reducing the impacts of climate change that are happening now and increasing resilience to future impacts, taking into account the urgent and immediate needs of developing countries that are particularly vulnerable.[67]

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62 Lavanya Rajamani (n 13) 137. Christopher D. Stone justified the action of the US in his observation: 'the sense of the Senate does not appear to oppose CBDR in principle … many senators are agreeable to subjecting developing countries to less restrictive constraints … as long as they make some commitments on paper': Christopher D. Stone (n 18) 280.

63 Edith Brown Weiss, 'The Rise and Fall of International Law' (2000) 69 Fordham Law Review 345, 368.

64 Susan Biniaz, 'Common But Differentiated Responsibilities inPerspective' (2002) 96 American Society of International Law Proceedings 359, 363.

65 Tuula Honkonen, 'The Principle of Common but Differentiated Responsibility in Post-2012 Climate Negotiations' (2009) 18(3) Review of European, Comparative and International Environmental Law 257, 258.

66 Intergovernmental Panel on Climate Change (IPCC), *Working Group 1 Contribution to the Fourth Assessment Report of the IPCC: The Physical Science Basis, Summary for Policy Makers* (Cambridge University Press 2007) 869 < https://www.ipcc.ch/site/assets/uploads/2018/02/ar4-wg1-spm-1.pdf> accessed 28 January 2021.

67 LDC Expert Group, 'Best Practices and Lessons Learned in Addressing Adaptation in the Least Developed Countries through the National Adaptation Programme of Action Process' vol 1

Adaptation can take the form of activities designed to enhance the adaptive capacity of the respective system, or actions that modify socio-economic and environmental systems to avoid or minimize the damage caused by climate change. Methods for achieving these include implementing new activities that are exclusively in response to climate change, or the modification of existing activities to make them more resilient to future climate change risks (i.e. 'climate-proofing').[68] Further, adaptive capacity refers to the potential or ability of a system (social, ecological, economic, or an integrated system such as a region or community) to minimize the effects or impacts of climate change, or to maximize the benefit from the positive effects of climate change.[69] Such broad definitions to help visualise climate change adaptation allow some degree of flexibility as our understanding of adaptation develops, however it can also lead to different expectations with funding implications.[70]

Adaptation finance is critical as many of the most vulnerable communities and individuals are among the world's poorest.[71] Vulnerable countries must secure financial support in order to be able to anticipate and react to the adverse effects of climate change.[72] As Article 8 of the Copenhagen Accord recognises:

> Funding for adaptation will be prioritized for the most vulnerable developing countries, such as the least developed countries, small island developing States and Africa.

Adaptation finance has been operationalised through various international instruments. UNFCCC Article 3(1) places a duty to assist on the basis of the capability and provides a correspondence right to assistance for those with limited capability to deal with climate change. Furthermore, article 2 creates responsibilities to pursue the natural adaptation of ecosystems, thus implying that negative outcomes resulting from climate change can be avoided if stabilisation of GHG concentrations enables natural adaptation of ecosystems, food production and sustainable development.[73]

Under Article 4(1)(b) of the UNFCCC, all Parties are required to 'formulateimplement, publish and regularly update ... measures to facilitate adequate adaptation to climate change'. Article 4(1)(e)–(f) commits the Parties to cooperate in adaptation planning and to incorporate climate change considerations into their

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(UNFCCC 2011) 10 <https://unfccc.int/resource/docs/publications/ldc_publication_bbll_2011.pdf> accessed 28 January 2021.

68 Ibid.

69 LDC Expert Group, 'Step-by-Step Guide for Implementing National Adaptation Programmes of Action' (UNFCCC 2009) 3 <https://unfccc.int/resource/docs/publications/ldc_napa2009.pdf> accessed 28 January 2021.

70 Rosalind Cook, 'Legal Responses for Adaptation to Climate Change: The Role of the Principles of Equity and Common but Differentiated Responsibility' (MA Thesis, University of Utrecht, May 2010).

71 Intergovernmental Panel on Climate Change (IPCC) (n 66).

72 Nicola Peart, 'Dispute in Climate Change Adaptation Finance - Towards a Convergent Outcome for the COP-15' (2009) European Energy and Environmental Law Review 307, 308.

73 Jouni Paavola and W. Neil Adger, 'Fair Adaptation to Climate Change' (2006) 56 Ecological Economics 594, 598.

economic, social and environmental policies so as to minimise adverse effects on public health, environmental quality and on mitigation and adaptation measures. In line with the principle of differentiated responsibilities and adaptive capabilities, Article 4(3) of the Convention also requires that developed countries provide 'the agreed full incremental costs' incurred by developing countries in complying with their reporting obligations. Article 4(4) commits developed countries 'to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects'. Article 4(8) requires that all countries 'give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concern of developing country Parties arising from the adverse effects of climate change'.

To support these important commitments, Article 11 of the UNFCCC establishes a financial mechanism by setting forth it general characteristics and governance. Article 11 is to be read in conjunction with Article 21(3) which entrusts the Global Environment Facility (GEF) with the operation of the financial mechanism. The GEF is guided by COP decisions that decide upon programme priorities and eligibility requirements for funding – in conjunction with advice from the Subsidiary Body for Implementation (SBI) under the UNFCCC. This was further strengthened at COP 16 where the Green Climate Fund (GCF) was established and designated an operating entity of the financial mechanism under Article 11 of the Convention.[74]

Parties to the Convention also established specific funds, namely the Least Developed Country Fund (LDCF) and the Special Climate Change Fund (SCCF). The GEF Trust Fund historically lacked a formal operational procedure within its climate change focal area. The GEF is subject to certain criteria including securing global environmental benefits. Satisfying this criterion has proven to be a significant challenge as most adaptation projects generally only carry local benefits.

The SCCF and LDC Funds were created following COP 7, 2001 and continue to serve the Paris Agreement. These funds are supported through discretionary pledges from donors only. Further, funding hinges upon approval of the adaptation project from the donor nation and the preferences of developed countries might not accord with adaptation needs. Both the LDCF and SCCF are operated by the GEF. Additionally, the Adaptation Fund (AF) is a self-standing fund established under the Kyoto Protocol to finance concrete climate change adaptation projects and programs based on the needs, views and priorities of developing countries. This fund has also served the Paris Agreement since 1 January 2019 in accordance with decisions 13/CMA.1 and 1/CMP.14.

However, the central provision of the UNFCCC, article 4(4), remains ambiguous and provides no clear objective guidance on how developed countries can fulfil their obligations, or whether compliance is achieved at 'full incremental costs' or merely

[74] UNFCCC, 'Report of the Conference of the Parties' (15 March 2012) FCCC/CP/2011/9/Add.1, annex ('Governing Instrument for the Green Climate Fund')

costs as agreed.[75] Given the lack of clear guidance to achieve compliance, the climate change adaptation finance provisions of the UNFCCC fails to achieve the principles and objectives of CBDR and obligations that ensure that developed countries – which have the capacity to provide assistance -provide equitable relief given the context of historical contributions that developed countries have made to the existing climate crisis.

B. The Paris Agreement

The Paris Agreement is distinct from the UNFCCC and its Kyoto Protocol by emphasising the importance of climate change adaptation.[76] This goal is intended to contribute to sustainable development by 'enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change'.[77] Further, while the Paris Agreement notes that 'Parties should strengthen their cooperation on enhancing action on adaptation',[78] it also emphasises 'the importance of taking into account the needs of developing country Parties'.[79] This recognition of the need for differential treatment for developing countries on the basis of their particular vulnerabilities to the adverse effects of climate change and need for support on adaptation efforts, is reminiscent of the capacity limb of CBDR.

Despite this, the Paris Agreement's provisions for climate change adaptation finance are limited, inhibiting the potential benefits of CBDR for achieving sustainable development. While Article 9 of the Agreement requires developed countries to 'provide financial resources to assist developing country Parties with respect to both mitigation and adaptation',[80] it only imposes a general obligation for the provision of 'continuous and enhanced international support' to developing countries.[81] Developed countries continue to enjoy a large degree of autonomy when determining their adaptation finance commitments, undermining the principle of CBDR. For this reason, the Paris Agreement has failed to address the continuing disagreements between the North and the South, further entrenching the 'dividing lines between developing and developed countries'.[82]

V. OPERATION OF CBDR THROUGH TECHNOLOGY TRANSFER PROVISIONS

As similar to adaptation finance, access to technology remains one of the most significant roadblocks for developing countries to fulfil their ecological sustainable development aspirations. The lack of technology provides an impediment for

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75 Lavanya Rajamani (n 13).
76 Paris Agreement (n 31) art 7(1).
77 Ibid.
78 Ibid, art 7(7).
79 Ibid, art 7(6).
80 Ibid, art 9(1).
81 Ibid, art 7(13).
82 Yulia Yamineva, 'Climate Finance in the Paris Outcome – Why Do Today What You Can Put off Until Tomorrow?' (2016) 25(2) Review of European, Comparative and International Environmental Law174, 185.

developing countries' economies from innovating their way towards lower carbon emissions. Furthermore, given their smaller economies of scale compared to developed countries, developing countries remain locked in and rely on advanced economies to continue to develop new technological solutions to mitigate and adapt to a changing climate.

A. UNFCCC and the Kyoto Protocol

Technology transfer provisions feature prominently within the international legal framework and reflect the important role that environmentally sound technologies ('ESTs') have in combating climate change and promoting sustainable development.[83] Since its inception in 1992, technology transfer has featured as 'one of the main pillars of the UNFCCC'.[84] The UNFCCC has developed a broad framework for technology transfer that requires all Parties to, inter alia, '[p]romote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases'.[85]

The UNFCCC aims to facilitate technology transfer to developing countries through articles 4.5 and 4.7 which recognise technology transfer as an essential tool for assisting developing countries to reduce their GHG emissions.[86] Article 4.5 of the UNFCCC aims to uphold the CBDR principle, which sheds light on the UNFCCC's objective of achieving 'substantive equity, international solidarity and assistance'.[87] Whereas other multilateral environmental agreements (MEAs) use language such as 'encouraging' and 'facilitating' the transfer of ESTs as a form of 'mere diplomatic cosmetics',[88] the UNFCCC utilises the term 'shall', indicating the intention of the Parties to create binding legal obligations on developed country Parties.[89] Nevertheless, the Article's use of the term 'as appropriate' appears to suggest that the obligation imposed by Article 4.5 should be implemented in accordance with developed countries' 'international obligations and national legislation'.[90]

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83 John H. Barton, *Mitigating Climate Change through Technology Transfer: Addressing the Needs of Developing Countries, Energy, Environment and Development Programme* (Programme Paper 08/02, Chatham House 2008) 2.

84 Ahmed Abdel-Latif, 'Intellectual Property Rights and the Transfer of Climate Change Technologies: Issues, Challenges, A way Forward' (2015) 15(1) Climate Policy103, 104.

85 UNFCCC (n 28) art 4(1)(c).

86 Chen Zhou, 'Can intellectual property rights within climate technology transfer work for the UNFCCC and the Paris Agreement?' (2019) 19(1) International Environmental Agreements: Politics, Law and Economics107, 109.

87 Ibid.

88 Gaetan Verhoosel, 'Beyond the Unsustainable Rhetoric of Sustainable Development: Transferring Environmentally Sound Technologies' (1998) 11(1) Georgetown International Environmental Law Review 66.

89 Wei Zhuang, *Intellectual Property and Climate Change: Interpreting the TRIPS Agreement for Environmentally Sound Technologies* (Cambridge University Press 2017) 83.

90 Ibid 85.

The technology transfer commitments within the Convention are further strengthened by Article 4.7. This article has been described as the 'conditionality clause' as it makes implementation of the UNFCCC's commitments from developing countries contingent 'on the effective implementation by developed country parties of their commitments' to transfer technology.[91] The provision demonstrates the 'political reality' for developing countries in their hesitance to be bound by commitments under the Convention without being provided with the adequate technological support required to facilitate their sustainable development.[92] In this vein, failure to transfer technology in accordance with the Convention may result in a material breach,[93] as the provision can be said to be 'essential to the accomplishment of the object or purpose of the treaty'.[94] However, material breach is unlikely to result in sanctions being imposed on developed country Parties, and the provision can therefore be said to 'lack teeth'.[95]

Supplementary protocols and agreements are important instruments that operationalise the UNFCCC and assist Parties to implement the Convention.[96]For example, Articles 3.14 and 10(c) of the Kyoto Protocol reinforce the importance of technology transfer by committing all Parties to '[c]ooperate in the promotion of effective modalities for the development and diffusion of…environmentally sound technologies'.[97] Article 11 further highlights the burden sharing nature of technology transfer provisions and in this way reflects that technology transfer forms part of the common but differentiated responsibility of developed country Parties. Overall, the Protocol 'clarifies, strengthens and expands' the scope of the Convention's commitments for the transfer of ESTs.[98] In an attempt to enhance the implementation of technology transfer, the Protocol also requires 'enabling environments' for the private sector to be created in order to promote and enhance the transfer to ESTs.[99]

B. Paris Agreement

The Paris Agreement was developed with the primary objective of limiting the rise of global temperature to well below 2 degrees above pre-industrial levels.[100] In achieving this aim, the Agreement reaffirmed the importance of technology development and transfer in enhancing climate change mitigation and adaptation through the reduction of GHG emissions.[101] The Parties recognised 'the urgent need to enhance the provision of finance, technology and capacity-building support by

91 Chen Zhou (n 86) 109; UNFCCC (n 28) art 4.7.
92 Wei Zhuang (n 89) 86.
93 VCLT (n 59) art 60.
94 VCLT (n 59) art 60 para 3(b).
95 Wei Zhuang (n 89) 86.
96 Ibid 87.
97 Kyoto Protocol (n 31) art 10(c).
98 Yamin and Joanna Depledge (n 21) 306.
99 Kyoto Protocol (n 31), art 10(c).
100 Kyoto Protocol (n 31) art 2.
101 Kyoto Protocol (n 31) art 10(1).

developed country Parties'.[102]In acknowledgement of this, Article 10 calls for the strengthening of cooperation between countries with regard to technology development and transfer. Additionally, the Agreement established the 'technology framework' in order to further this goal and provide guidance to the Technology Mechanism established under the UNFCCC.[103] The technology framework is intended to strengthen the implementation of technology transfer commitments by, inter alia, 'addressing the barriers to the development and transfer of socially and environmentally sound technologies'.[104]The Paris Agreement signifies a strengthening and reaffirming of the significant role technology transfer plays in facilitating development, sustainable practices and equitable approaches to tackling global environmental issues such as climate change.

Despite the reaffirmation of technology transfers in the Paris Agreement, effective implementation of technology transfer provisions, and in turn CBDR, remains a challenge.[105] Rather than relying on designating countries into different tiers both in terms of their capacity to address climate change and their historical contributions, the Paris Agreement relies on Nationally Determined Contributions (NDCs) to outline what steps that countries are taking to address climate change mitigation and adaptation. However, many developing countries are outlining implementation plans which are contingent on external funding from developed countries. With developed countries failing to outline their financial contributions and technology transfers under the Technology Mechanism, there remains no accountability when NDCs are assessed.[106] As identified by Pauw, developed countries must indicate their financial and technology transfer commitments within their NDCs so that they remain accountable for the commitments that are made towards CBDR.

Effective technology transfer is further impeded by the fact that the actual ownership of the technology, including the "know how" in the production process is in the hands of private ownership and subject to trade secrecy and intellectual property rights,[107] and therefore also their use is subject to the payment of royalties and user licensing fees, when such technology is diffused on commercial market terms.[108] It can be seen

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[102] UNFCCC, 'Report of the Conference of the Parties at its Twenty-first Session' (29 January 2016) UN Doc, FCCC/CP/2015/10/Add.1, ('Decision 1/CP.21, Adoption of the Paris Agreement') 2.

[103] Kyoto Protocol (n 31) art 10(4).

[104] UNFCCC (n 102) para 67.

[105] Wei Zhuang (n 89) 79.

[106] Pieter Pauw, 'Subtle Differentiation of Countries' Responsibilities' under the Paris Agreement' (2019) 5(86) Palgrave Communications <https://www.nature.com/articles/s41599-019-0298-6#citeas> accessed 28 January 2021.

[107] Zainal Abidin Sanusi, 'Technology Transfer Under Multilateral Environmental Agreements: Analyzing The Synergies', (Unu-Ias Working Paper No 134, 2005) 2 <http://bei.jcu.cz/Bioeconomy%20folders/documents/economy/unu-ias-working-paper-no-134-technology-transfer-under-multilateral-environmental-agreements-analyzing-the-synergies> Accessed 28 January 2021.

[108] Ulrich Hoffmann, 'An Analysis of Effective Operationalization of Provisions on Transfer of Environmentally Sound Technologies to Developing Countries in Multilateral Environmental Agreements' (Paper presented at the 2nd Workshop of the Project on Strengthening Research and

that whilst technology transfer provisions have been developed in recognition of the CBDR principle and its philosophical bases such as intragenerational equity, the operation of such provisions in practice is impacted by a number of factors that limit treaty implementation and, in turn, hinder the achievement of sustainable development.

Finally, technology transfer in other related international agreements remain ambiguous and provide no clear pathway for realisation. As noted by Neumeyer, 'with such ambiguity built into the system of treaty making, developed countries could on the whole get away without making any specific or substantial commitments' to provide positive measures in support of compliance and enforcement.[109] As a result of this ambiguity, developed countries have abrogated their responsibility to build capacity of developing countries and LDC partners. To date, technology transfer provisions within international environmental law more broadly have remained largely underutilised, and there has been no clear action to translate obligations into tangible outcomes for developing countries.

VI. CONCLUSION

Sustainable development is a vital part of the current international approach to addressing climate change. However, those countries most vulnerable to the effects of climate changes are also those with the least adaptive capacity. These vulnerable countries are also historically the least responsible for climate change. The CBDR principle is therefore intended to promote fairness and equity in its recognition that while all states bear a responsibility to prevent future environmental harm, developed countries should bear the brunt of this responsibility in consideration of its relative technological and economic strength and historic contributions to environmental degradation.[110] In this way, climate change adaptation finance and the transfer of ESTs are seen as 'important mechanism[s] giving effect to' the CBDR principle.[111] However, the effective implementation of this principle is undermined by the tensions that persist between the global North and South as to the responsibility for mitigating environmental harm.[112] The recognition of responsibility continues to be resisted by some Northern countries that have agreed to compromise and accept differential responsibility obligations on the basis of their 'greater financial and

Policy-making Capacity on Trade and Environment in Developing Countries, LosBaños, Philippines, 11-13 November 1999) 5.

109 Eric Neumayer, 'Multilateral Environmental Agreements, Trade and Development: Issues and Policy Options Concerning Compliance and Enforcement' (London School of Economics and Political Science 2002) 35 <www.lse.ac.uk/collections/geographyAndEnvironment/whosWho/profiles/neumayer/pdf/CUTS.pdf> accessed 28 January 2021.

110 Shawkat Alam, 'Sustainable Development versus Green Economy: The Way Forward?' in Shawkat Alam, Sumudu Atapattu, Carmen Gonzalez and Jona Razzaque (eds), *International Environmental Law and the Global South* (Cambridge University Press 2015) 609, 618.

111 Philippe Sands and Jacqueline Peel (n 17); Rio Declaration on Environment and Development (n 11) principle 7; UNFCCC (n 28) art 3(1).

112 Shawkat Alam (n 110) 617.

technical capabilities' alone.[113] This is seen through both the large degree of autonomy that developed countries enjoy in deciding their financial commitments towards climate change adaptation, as well as failing to indicate their technology transfer commitments under the new regime of NDCs under the Paris Agreement.

Although the Paris Agreement hails a new age of identifying specific steps to mitigate and adapt against climate change, in practice CBDR places the onus on developed countries to 'take the lead' in terms of climate change action. While the links between intragenerational equity and sustainable development can be clearly shown, approaches to adaptation finance and technology transfer continually fail to reflect this spirit within which international agreements were made.Thereforeto remedy this, re-evaluating the rubric of CBDR presents the opportunity for a much-needed link between developed and developing countries in the pursuit of intragenerational equity and sustainable development.

[113] Ibid 618; Wei Zhuang (n 89) 81.

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Justiciability of Economic, Social and Cultural Rights under International Human Rights Law

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I. INTRODUCTION

Human rights emerged at the international level as an indivisible concept. The Universal Declaration of Human Rights (UDHR)[1] included civil and political (CP) and economic, social and cultural (ESC) rights in a single document. The two covenants, the International Covenant on Civil and Political Rights (ICCPR)[2] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[3] recognized in particular, the interdependent character of civil and political (CP) rights and economic, social and cultural (ESC) rights. The indivisible character of all human rights has been further endorsed by various international documents.[4]

However, in spite of repeated declarations of the equal importance of both groups of human rights, much less attention had been paid to the development of enforcement mechanisms for ESC rights than for CP rights. The ICESCR did not contain an adjudicatory enforcement mechanism like the Optional Protocol to the ICCPR.This reflected the notion that ESC rights could not or should not be made justiciable. This approach towards ESC rights created a 'gap' between CP rights and ESC rights in terms of enforcement, which was arguably created 'for political and not for legal reasons'.[5] However, developments regarding ESC rights and their enforcement since the adoption of the ICESCR in 1966 have operated to bring both sets of human rights to a closer if not equal footing. In particular, developments during the last two decades have improved the status of ESC rights significantly, and have notably closed the 'gaps' between CP rights and ESC rights in terms of their enforcement. These developments have created a strong foundation for justiciability of the ICESCR rights. The objective of this article is to determine the present status of the enforceability and especially justiciability of ICESCR rights under international human rights law at international and regional levels.

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1 UNGA Res 217A (III) (10 December 1948) UN Doc A/810 ('*UDHR*').

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

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

4 See, for example, Vienna Declaration and Programme of Action, UN GAOR (12 July 1993) UN Doc. A/CONF.157/23.

5 Christian Courtis, International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (International Commission of Jurists 2008) 1 ('*ICJ Book*').

II. JUSTICIABILITY IN PRACTICE:INTERNATIONAL LEVEL

A. ESC rights and the CESCR

There is no formal judicial body established at the international level to deal with enforcement of the ESC rights. However, the Committee on economic, Social and Cultural Rights (CESCR) has been enjoying the power to monitor the performance of States Parties through the reporting system under the ICESCR. The CESCR after receiving reports from and conducting dialogues with States Parties, issues 'concluding observations.' The CESCR makes a general evaluation of a State's performance of its ICESCR obligations. Moreover, the CESCR has simultaneously been developing the content of rights and obligations regarding the ESC rights. The views and observations of the CESCR are not binding upon the parties in a strictly concrete legal sense, but they have not been patently disregarded by states. No State Party has for example expressly denied the authority of the CESCR. Thus, the CESCR has occupied, by long practice, a tangible place in the enforcement of the ESC rights at the international level through the reporting system.[6] In its concluding observations, the CESCR has identified violations, expressed its concern, and has made suggestions and recommendations for appropriate reforms. For example, in concluding observations on the United Kingdom, the CESCR concluded that 'failure to incorporate the right to strike into domestic law constitute[d] a breach of article 8 of the Covenant.'[7] In the concluding observations on the Hong Kong Special Administrative Region (China), the CESCR said that 'the failure by HKSAR [Hong Kong Special Administrative Region] to prohibit race discrimination in the private sector constitute[d] a breach of its obligations under article 2 of the Covenant.'[8] The CESCR identified certain laws as being in 'flagrant violation' of the ICESCR,the committee was deeply concerned that the Government of Cameroon had not yet initiated legal reforms in regard to the repealing of laws regarding the unequal status quo of women, notably in the aspects of the Civil Code and the Commercial Code, where, among other sections, the right to own property and legislations which govern credit and bankruptcy, which in essence restrict women's access to the means of production.[9] These laws are, in the opinion of the committee, in deep violation of the

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6 Allan Rosas & Martin Scheinin, 'Implementation Mechanisms and Remedies' in A. Eide et al. (eds), *Economic, Social and CulturalRights* (Kluwer Law International, 2nd ed, 2001) 425, 427. Scheinin and Rosas commented: 'In fact, the Committee on Economic, Social and Cultural Rights has, in the absence of an official complaint procedure, developed its functions under the reporting procedure to something which is more and more resembling a quasi-judicial complaint procedure.'

7 Committee on Economic, Social and Cultural Rights (CESCR), *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland* (5 June 2002) 28th sess, 25th mtg, UN Doc E/C.12/1/Add.79, para 16.

8 Committee on Economic, Social and Cultural Rights (CESCR), *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: China: Honk Kong Special Administrative Region* (21 May 2001) 29th mtg, UN Doc E/C.12/1/Add.58, para 30.

9 Committee on Economic, Social and Cultural Rights (CESCR), *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the*

non-discrimination and unequal treatment provisions of the Covenant and do not in any way align with the recently amended Constitution of Cameroon which upholds the equal rights of each and every Cameroon citizen.[10] A particular act of Cyprus was condemned by the CESCR as a 'serious violation' of certain ICESCR provisions, as it said:

> The Committee is alarmed by the allegations of inhuman or degrading treatment of mentally ill patients in some health institutions. It stresses that such a situation constitutes a serious violation of the State Party's obligations under articles 2 and 12.[11]

Thus, the CESCR not only expressed its concerns, but also identified breaches of the ICESCR. It is true that the activities of the CESCR do not prove the justiciability of the ESC rights in a strictly legal sense. However, it undoubtedly has created building blocks for justiciability of the ESC rights at the international level, which will lead towards the justiciability in a strictly legal sense. Shany has argued that '[t]he normative and institutional post-1966 developments … underlie the claim that [Economic and Social Rights] are nowadays internationally justiciable as a matter of legal methodology, in the sense that there exist reasonably clear legal criteria for their implementation, which entail politically acceptable consequences.'[12]

B. Optional protocol to the ICESCR

Recently, an Optional Protocol to the ICESCR[13] has been adopted by consensus[14] in the UN General Assembly on 10 December 2008, a landmark step on the way of making ESC rights enforceable. The Protocol 'shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.'[15] The Optional Protocol, once it comes into force, will allow persons to make complaints regarding violations of ESC rights contained in the ICESCR to the CESCR.[16] It gives a new quasi-judicial adjudicatory

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Committee on Economic, Social and Cultural Rights: Cameroon (8 December 1999) 54th mtg, UN Doc E/C.12/1/Add.40, para 13.

10 Ibid.

11 Committee on Economic, Social and Cultural Rights (CESCR), *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Cyprus* (4 December 1998) 34th, 35th and 36th mtg, UN Doc E/C.12/1/Add.28, para 16.

12 Yuval Shany, 'Stuck in a Moment in Time: The International Justiciability of Economic, Social and Cultural Rights' in Daphne Barak-Erez and Aeyal M Gross (eds), *Exploring Social Rights* (Hart Publishing 2007) 77, 81.

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

14 Catarina de Albuquerque, 'Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights—The Missing Piece of the International Bill of Human Rights' (2010) 32 Human Rights Quarterly 144, 177.

15 Optional Protocol to the ICESCR art 18(1).

16 The CESCR will be entitled to receive individual communications, group communications and inter-

function to the CESCR.[17] The Optional Protocol, adopted in the long 'road towards an international complaints mechanism for ESC rights,'[18] will 'dispel claims that ESC rights under the ICESCR were not intended to be justiciable.'[19] 'It will enable victims to seek justice for violations of their economic, social and cultural rights at the international level for the first time.'[20] It closes a yawning gap between the ICCPR and the ICESCR,[21] which 'will break down the walls of division that history built and will unite once again what the Universal Declaration of Human Rights proclaimed as a sole body of human rights sixty years ago.'[22]

C. Indivisibility of human rights: Enforcement of the ESC rights through the Human Rights Committee (HRC)

The indivisible nature of all human rights has led to the enforcement of some ESC rights by way of the enforcement of related CP rights. ESC rights have been the subject of some quasi-judicial enforcement in certain cases before the Human Rights Committee (HRC), the body which monitors implementation of the ICCPR. For example, in *Broeks v Netherlands*,[23] Mrs Broeks lodged a complaint on the ground of alleged violation of article 26 of the ICCPR, which guarantees equality before the law, the equal protection of the law, and also prohibits discrimination on any ground.Her complaint concerned the Dutch law regarding eligibility for unemployment benefits. She contended that a provision of the said law was discriminatory on the ground of sex and status: a married woman was deprived of continued unemployment benefits unless she could prove she was the family "breadwinner", while a man in her position received the benefits irrespective of his marital or breadwinner status. The Netherlands argued that the complainant's right in question was related to social security rights and therefore fell under the ICESCR rather than the ICCPR. Thus, the Government argued that the complaint was inadmissible, as the ICESCR had its own distinct mechanism of monitoring state

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state communications. (Ibid arts 1, 2 and 10).

[17] Claire Mahon, 'Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2008) 8 Human Rights Law Review 617, 617.

[18] Arne Vandenbogaerde and Wouter Vandenhole, 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An Ex-Ante Assessment of its Effectiveness in Light of the Drafting Process' (2010) 10 Human Rights Law Review 207, 237.

[19] Manisuli Ssenyonjo, 'Economic, social and cultural rights: an examination of state obligations' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2010) 36, 36.

[20] Navanethem Pillay, *Statement at the Signing Ceremony for the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (*UNHCR*, 24 September 2009) <http://www.unhchr.ch/huricane/huricane.nsf/view01/5EE2E0E5168886FCC125763B00589EF3?opendocument> accessed 04 March 2021.

[21] Malcolm Langford, 'Closing the Gap? An Introduction to the Optional Protocol to the International Covenant on Economic. Social, and Cultural Rights' (2009) 27 Nordic Journal on Human Rights1, 2.

[22] *Statement made by Miguel d'Escoto Brockmann, President of the 63rd session of the United Nations General Assembly, in adopting the Optional Protocol to the ICESCR* (10 December 2008) UN GAOR, 63rd Session, 66th plen mtg, Agenda item 58 (continued) UN Doc A/63/PV.66.

[23] Human Rights Committee (HRC), *Views: Communication No. 172/1984*, 29th sess, UN Doc CCPR/C/OP/2 at 196 (1990)('*Broeks*').

obligations which did not contain any complaint procedure.

The HRC decided the complaint in favour of the complainant taking a stand in support of application of article 26, in spite of the overlapping of the provisions of the ICCPR and ICESCR:

> The State party contends that there is considerable overlapping of the provisions of article 26 with the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights. The Committee is of the view that the International Covenant on Civil and Political Rights would still apply even if a particular subject-matter is referred to or covered in other international instruments, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, or, as in the present case, the International Covenant on Economic, Social and Cultural Rights.[24]

While the *Broeks* decision was controversial, it was supported subsequently by the HRC in the General Comment 18.[25] The HRC commented:

> While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.[26]

Thus, it appears that the non-discrimination guarantee in article 26 of the ICCPR is wide enough in its scope so as to include rights incorporated in the ICESCR. To the extent that it does, it resembles Article 2(2) of the ICESCR.
In interpreting the right to life, the HRC said:

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[24] Ibid [12.1].

[25] Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant of Civil and Political Rights: Cases, Material and Commentary* (2nd edn, Oxford University Press 2004) 686.

[26] Human Rights Committee (HRC), *CCPRGeneral Comment No. 18: Non-discrimination,* 37thsess, (10 November 1989) paragraphs 7-8 ('General Comment 18 of the HRC') in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 (2004) 146.

> Moreover, the Committee has noted that the right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectance, especially in adopting measures to eliminate malnutrition and epidemics.[27]

In *E.H.P. v Canada*,[28] the HRC recognized the ESC rights dimension of article 6 of the ICCPR which recognises the right to life. The author of the communication argued that the dumping of nuclear waste within the confines of a town of 10,000 inhabitants caused 'a threat to the life of present and future generations.' While the HRC rejected the admissibility of the communication on the ground of a failure to exhaust domestic remedies, it explicitly recognized the socio-economic aspects of article 6 of the ICCPR by admitting that the said communication raised 'serious issues, with regard to the obligation of States parties to protect human life.'[29]

Again, HRC has also addressed ESC aspects of article 6 in its Concluding Observations. For example, in its Concluding Observation on Canada, the HRC observed:[30]

> The Committee is concerned that homelessness has led to serious health problems and even to death. The Committee recommends that the State party take positive measures required by article 6 to address this serious problem.

Article 24 of the ICCPR is another instance which has been interpreted to have significant ESC rights aspects. Article 24(1) of the ICCPR provides rights of protection and non-discrimination for children.The HRC in its General Comment 17 recognized that the requisite measures of protection for children included steps to ensure certain ESC rights for children: 'For example, every possible economic and social measure should be taken to reduce infant mortality and to eradicate malnutrition among children and to prevent them from being subjected to acts of violence and cruel and inhuman treatment or from being exploited by means of forced labour or prostitution, or by their use in the illicit trafficking of narcotic drugs, or by any other means.'[31]

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[27] Human Rights Committee (HRC), *CCPRGeneral Comment No. 6: Right to Life*, 16th sess, (1982) ('General Comment 6 of the HRC') in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 (2004) 128.

[28] Human Rights Committee (HRC), *Views: Communication No. 67/1980*, 17th sess, not previously published in the annual report of the Human Rights Committee ('*E.H.P. v Canada*') <http://www.bayefsky.com/pdf/114_canada67_1980.pdf >.

[29] Ibid para 8.

[30] Human Rights Committee (HRC), *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding observations on Canada* (7 April 1999) 65th sess, 1747th mtg, UN Doc CCPR/C/79/Add.105, para 12.

[31] Human Rights Committee (HRC), *CCPRGeneral Comment No. 17: Article 24 (Rights of the child)*, 35th sess, (1989) ('General Comment 17 of the HRC') in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 (2004) 144).

The HRC in General Comment 17 also emphasized on taking all possible measures to provide the children 'with a level of education that will enable them to enjoy the rights recognized in the Covenant.'[32] Thus, while the right to education is a right of ESC nature, 'it is essential to ensure the capacity to exercise civil and political rights, and is therefore an important component of article 24 protection.'[33] The Concluding Observations regarding Zambia reflected this stand of the HRC, where the HRC said that it was 'concerned that no measures [were] taken to ensure that pregnancy or parenthood do not affect the continuous education of children.'[34]

Thus, it appears from the above discussion that while the HRC is tasked with enforcing CP rights under the ICCPR, it has addressed ESC aspects of certain ICCPR provisions such as those in articles 6, 24 and 26. The indivisible character of human rights has led the HRC to necessarily address some ESC rights in enforcing certain CP rights.

It appears that ESC rights have already become justiciable in different forms at the international level. The rights have been subject to quasi-judicial proceedings of the CESCR or have been enforced by the HRC as all human rights are indivisible. Moreover, once the Optional Protocol to the ICESCR comes into force, there will clearly be a quasi-judicial enforcement mechanism to enforce the ICESCR rights.This discussion reveals that there is now no legal or normative barrier to enforce the ESC rights.

III. JUSTICIABILITY OF ESC RIGHTS IN REGIONAL HUMAN RIGHTS SYSTEMS

ESC rights have been judicially enforced in different regional human rights systems. For example, in Europe, ESC rights have been judicially enforced by the European Court of Human Rights (ECHR). The European Convention of Human Rights[35] does not have a set of direct provisions on ESC rights, but the ECHR has enforced certain ESC rights relying on the indications to them found in the related provisions of the Convention. For example, Article 8 gives protection to one's own home, though it does not specifically lay down a housing right. Nevertheless, the ECHR enforced the right to housing based on Article 8 of the European Convention in *Moldovan v Romania*.[36] In this case, the houses of some Romanian inhabitants were destroyed by police action.[37] The applicants submitted that 'after the destruction of their houses, they could no longer enjoy the use of their homes and had to live in very poor,

[32]Ibid para 3.

[33] Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant of Civil and Political Rights: Cases, Material and Commentary* (2nded, Oxford University Press 2004) 686.

[34] Human Rights Committee (HRC), *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding observations on Zambia* (3 April 1996) 56th sess, 1498th mtg, UN Doc CCPR/C/79/Add.62, para 17.

[35]*Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS No 5 (entered into force on 3 September 1953) ('*European Convention*').

[36]*Moldovan v Romania* [2005] VII Eur Court HR 167 *('Moldovan v Romania'*).

[37]Ibid [89].

cramped conditions,'[38] in violation of, inter alia, article 8 of the European Convention.In assessing the complaint, the Court said:

> In the present case, there is no doubt that the question of the applicants' living conditions falls within the scope of their right to respect for family and private life, as well as their homes. Article 8 is thus clearly applicable to these complaints.[39]

The Court noted that some houses were not rebuilt at the date of the judgment, and that some houses were rebuilt, but were 'uninhabitable'.[40] Adding that most of the applicants could not return to their village till the date of the judgment, who were living 'scattered throughout Romania and Europe,'[41] the Court concluded that 'the repeated failure of the authorities to put a stop to breaches of the applicants' rights, amount[ed] to a serious violation of Article 8 of the Convention of a continuing nature.'[42] The Court unanimously held that there were violations of different articles of the European Convention of Human Rights including Article 8, and the State had to pay sums of different amount, fixed by the Court, to the applicants.[43]

Despite the absence of a clear set of provisions regarding ESC rights in the Convention, the attitude of the Court towards them was positive, as Luke concluded:

> In relation to complaints that disclose gross failures of the most basic socio-economic support, the Court's starting point is now an unequivocal acceptance of the view that the Convention protects a core irreducible set of such rights.[44]

The European Social Charter[45] is the main treaty on ESC rights in Europe. However, the Charter has neither an individual complaint system nor any court with jurisdiction to deal with violations unlike the European Convention of Human Rights. The two mechanisms provided by the European Social Charter are the reporting procedure[46] and the collective complaint system.[47] The European Committee of Social Rights (ECSR) is the body which regulates both the mechanisms of the Charter. Although the ECSR is a body subordinate to the Council of Ministers, it is 'the only body that

[38]Ibid [88].
[39] Ibid [105].
[40] Ibid [107(g)].
[41] Ibid [107(h)].
[42] Ibid [109].
[43] Ibid 197.
[44] Luke Clements and Alan Simmons, 'European Court of Human Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008) 409, 426.
[45] *European Social Charter (revised)*, opened for signature 3 May 1996, ETS No 163 (entered into force on 1 July 1999) ('*European Charter*').
[46] It was introduced when the Charter was first adopted in 1961. It is compulsory.
[47] It was added only in 1995 by an Optional Protocol to the Charter. However, this is an optional mechanism for the State Parties.

is competent to give an authoritative interpretation of the Charter.'[48] In interpreting the provisions of the European Charter, the ECSR considers the Charter to be a 'living instrument' and has adopted a liberal approach to interpreting Charter provisions in the light of developments in domestic and international laws.[49] The ECSR has concretised the different broadly drafted provisions, and has emphasized the need for appropriate legislative protection for Charter rights rather than protection via mere administrative practices.[50]

The collective complaint system 'established an "increasingly judicial" procedure, and gave the ECSR the status of a "quasi-judicial body".'[51] For example, in *The International Federation of Human Rights Leagues (FIDH) v. France*,[52] the ECSR enforced article 17 of the European Charter which deals with the right to social, legal and economic protection of children and young persons.[53] The government had curtailed the medical benefits of illegal immigrants, which was challenged by the complainant on the ground, *inter alia*, of a violation of article 17 of the European Charter. The ECSR found that the new law limited medical assistance to the children and young persons of illegal immigrants in France to situations that involved an immediate threat to life.[54] It also found that the children of illegal immigrants could only be admitted to the medical assistance scheme after a certain time.[55] A majority of the ECSR held that there was a violation of article 17. This was a case of direct enforcement of a right guaranteed under the European Social Charter. The ECSR did not rely on or make its decision in reliance upon any right of CP nature such as the right to non-discrimination.

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48 Urfan Khaliq and Robin Churchill, 'The European Committee of Social Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008) 428, 428.

49 Ibid 433.

50 Ibid 434.

51 Virginia Mantouvalou and Panayotis Voyatzis, 'The Council of Europe and the protection human rights: a system in need of reform' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2010) 326, 339.

52 *The International Federation of Human Rights Leagues (FIDH) v France* [2005] 40 EHRR SE 25, 231 ('*FIDH v France*').

53 Article 17 of the European Social Charter states:
'With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:
1.
a. to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;
b. to protect children and young persons against negligence, violence or exploitation;
c. to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support;
2. to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools. '

54 *FIDH v France* [2005] 40 EHRR SE 25, 231, 238-39 [36].

55 Ibid.

Despite some lingering questions[56] regarding the effectiveness of the collective complaint system, it has been identified as 'a promising development, as it reflects a belief that socio-economic entitlements are justiciable.'[57]

In the American region, the Organization of American States (OAS) first established the Inter-American Commission on Human Rights (Commission) to deal with complaints regarding violations of human rights contained in different human rights instruments including the American Declaration of the Rights and Duties of Man (American Declaration),[58] the American Convention on Human Rights (American Convention)[59] and the Addition Protocol to the American Convention in the Area of Economic, Social, Cultural Rights (Protocol of San Salvador).[60] These instruments contain, inter alia, different ESC rights. The Commission does not have any jurisdictional bar to enforce ESC rights; rather it has the equal power to enforce all types of human rights recognized therein. Thus, the Commission in dealing with complaints regarding violations of different ESC rights has enforced them without any hesitation. For example, in the case of *Coulter et al. Case v. Brazil*,[61] the Commission enforced the right to health contained in Article XI of the American Declaration. In this case, the construction of a new highway in a remote area resulted into spread of serious new diseases among the people of that area. Due to the failure of the Brazilian Government to protect the people from the injury to their health, 'the Commission found the government internationally responsible under Declaration Article XI for violating the right to health.'[62]

The OAS subsequently established the Inter-American Court of Human Rights (IACHR), an 'autonomous judicial institution',[63] in 1979. The IACHR has jurisdiction to deal with cases of human rights violations under different human rights treaties including the American Convention and the Protocol of San Salvador, which deals with ESC rights extensively. There was nothing in the Convention or the

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[56] For example, an individual petition system would arguably be more effective rather than the collective complaint system. For criticism of this system, see P Alston, 'Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System' in G de Burca and B de Witte (eds) *Social Rights in Europe* (Oxford University Press 2005) 45; R Churchill and U Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' (2004) 15 European Journal of International Law 417.

[57] Mantouvalou and Voyatzis (n 51) 341.

[58] OAS. Res. XXX, International Conference of American States, 9th Conf., O.A.S. Doc. OEA/Ser. L.V/I.4 Rev. XX (1948).

[59] American Convention on Human Rights, opened for signature 22 November 1969, Text: OAS, Treaty Series No. 69 (entered into force 18 July 1978).

[60] Addition Protocol to the American Convention in the Area of Economic, Social, and Cultural Rights, opened for signature 17 November 1988, Text: OAS, Treaty Series No. 69 (entered into force 16 November 1999).

[61] Inter-American Commission on Human Rights, Case 7615, Inter Am. Comm. H.R. (1985) OEA/Ser.L/V/II.66, doc. 10 rev. 1.

[62] Tara J. Melish, 'The Inter-American Commission on Human Rights: Defending Social Rights Through Case-Based Petitions' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008) 339, 352.

[63] Statute of the IACHR, art 1.

Protocol which prevented judicial enforcement.The Court's jurisdiction was also not differentiated on the basis of any division of human rights into CP rights and ESC rights. Thus, different ESC rights have been judicially enforced by this Court in the American region.

The right to a pension was judicially enforced by the IACHR in *Five Pensioners v Peru.*[64] The issue in the case was 'whether the parameters used by the State to reduce or recalculate the amounts of the pensions of the alleged victims as of 1992 represented a violation'[65] of the Convention. Though the Court had the choice of addressing the claim 'in terms of Article 26, which guarantees the right to social security, or Article 21, which protects the right to property',[66] it decided the case on the basis of Article 21 by treating the right to a pension as a part of the right to property.[67] The Court found that:

> by arbitrarily changing the amount of the pensions that the alleged victims had been receiving and by failing to comply with the judicial ruling arising from their applications for protective measures [provided by the Peruvian Court earlier], the State violated the right to property embodied in Article 21 of the Convention.[68]

The Court finally decided that the State violated 'the right to property embodied in Article 21 of the American Convention on Human Rights.'[69] Thus, while the Court did not provide the remedy under Article 26, it granted actual relief[70] to the victims with regard to their right to a pension, a right which is predominantly related to the right to social security contained in Article 26 of the Convention.

The recent case of *Acevedo Buendia v Peru*[71] had some similarities to the *Five Pensioners* case.The applicants,

> who were all members of an Association for Discharged and Retired Employees of the Comptroller of Peru, complained that two judgments rendered by the Constitutional Court ... had not been complied with. The two decisions were crucial to the members of the Association as they ordered the Comptroller to reimburse the amounts of pensions owed after the Peruvian Government had arbitrarily reduced them through the adoption of various decree laws.[72]

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64 Inter-American Court of Human Rights, Series C No. 98 (2003) IACHR 1 (28 February 2003) ('*Five Pensioners* ').

65 Ibid [94].

66 Tara J. Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008) 372, 399.

67 *Five Pensioners*, Inter-American Court of Human Rights, Series C No. 98 (2003) IACHR 1 (28 February 2003) [102].

68 Ibid [121].

69 Ibid [187].

70 Ibid [187].

71 Inter-American Court of Human Rights, Series C No. 98 (1 July 2009) ('*Acevedo Buendia').*

72 Laurence Burgorgue-Larsen, 'Economic and Social Rights' in Laurence Burgorgue-Larsen and

Thus, the said non-compliance affected the applicants' rights to social security embodied in article 26 of the Convention. But the violation of article 26 was not argued by the Commission following the trend in *Five Pensioners* case: 'The strategy used to present the arguments was no different to what had gone before.'[73] The IACHR determined that violations of the right to property and the right to judicial protection contained in, respectively, articles 21 and 25 of the American Convention, had been breached. Although the IACHR did not decide the case on the basis of article 26, the eventual effect of the decision of the IACHR was to protect the right to social security embodied in article 26. Furthermore, the IACHR made some important observations regarding article 26 and the justiciability of ESC rights in the case. The IACHR clarified the obligations regarding ESC rights:

> Furthermore, it is pertinent to note that even though Article 26 is embodied in chapter III of the Convention, entitled "Economic, Social and Cultural Rights", it is also positioned in Part I of said instrument, entitled "State Obligations and Rights Protected" and, therefore, is subject to the general obligations contained in Articles 1(1) and 2 mentioned in chapter I (entitled "General Obligations"), as well as Articles 3 to 25 mentioned in chapter II (entitled "Civil and Political Rights").[74]

The IACHR then added that it is appropriate to recall the interdependence that exists between civil and political rights and economic, social and cultural rights, since they should be fully understood as human rights, without any rank and enforceable in all the cases before competent authorities.[75]

With reference to General Comment No. 3 of the CESCR, the IACHR in the same line clearly declared that the 'regression is actionable when economic, social and cultural rights are involved.'[76] One commentator has since said that the '*Acevedo Buendia* ruling comes at the right time, when many misunderstandings and myths about economic and social rights are biting the dust.'[77] It is argued that the IACHR 'is at the forefront of progress, as the first international court to recognize that the obligation of non-regression of the part of States is actionable.'[78] In this case, the issue was not one of enforcement of article 26 but of the non-compliance of the judgments of the Constitutional Court, which mainly affected the right to judicial protection incorporated in article 25. Nevertheless, the decision of the IACHR, which included the observations on article 26, 'is a quantum leap which should satisfy the demands of those tireless advocates of the justiciability of economic and social rights.'[79]

Amaya Ubeda De Torres, *TheInter-American Court of Human Rights* (Oxford University Press 2011) 613, 632.

73 Ibid.

74 *Acevedo Buendia*, Inter-American Court of Human Rights, Series C No. 98 (1 July 2009) [100].

75 Ibid [101].

76 Ibid [103].

77 Larsen (n 72) 634.

78 Ibid 635.

79 Ibid 632-33.

In whatever way the courts enforced ESC rights, one thing that is clear is that they have been judicially enforced. The regional bodies have either relied on an indication given in a provision, as has happened in the case of ECHR, or have enforced ESC rights on the basis of an extended interpretation of CP provisions, as has happened in case of IACHR. The ECSR on the other hand, directly enforces provisions of the European Social Charter.Indeed, the IACHR is also empowered to do so; it just has not done so yet.All of these regional developments support the simple conclusion that ESC rights are justiciable.

IV. JUSTICIABILITY OF ESC RIGHTS IN BANGLADESH

A society, in which, fundamental human rights shall be secured for each and every citizen, such is a constitutional pledge taken by the Constitution of the People's Republic of Bangladesh. A part of the preamble of the Constitution entails, "*Further pledging that it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens."* Civil and political human rights have been vested in Part 3 of the Constitution as per international law and international human rights law norms, these rights seem to be the most shielded out of all the rights reserved in the Constitution. The power of the Constitution to not be contradicted through is vested in Article 7(2), which entails that no law can be made which violates any provision of the Constitution. The principle, that fundamental rights cannot be violated through making any legislation, is made known in Article 26. The fortified strength of both articles 7(2) and 26 provide the provisions of this part with multi-layered protection. And again, in article 44(1), it is said that in case of any violation of any fundamental guaranteed in Part 3 of the Constitution will lead to the emergence of the right to seek judicial remedy. Along the same lines, Article 102(1) entails a special constitutional power to the High Court Division of the Supreme Court of Bangladesh to give any order or direction required for the enforcement of the fundamental rights, "*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*."

Economic, social and cultural (ESC) rights, on the other hand, are marked to be judicially unenforceable fundamental principles of state policy (FPSP) in Part 2 of the Constitution of the People's Republic of Bangladesh. The state has some positive obligations towards all FPSP, as incorporated by Article 8(2), "*The 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."* Very contrastingly however, it also incorporated that these principles *'shall not be judicially enforceable.'* Parallel to ideas set down in 1966 by the International Covenant of Economic, Social and Cultural Rights (ICESCR), in regards of it containing no complaint mechanism.

In accordance to article 8(2), the rights remain judicially unenforceable, however, the very article has envisioned the implementation of the principles in ways other than judicial. Ways such as, them being fundamentally pivotal in the governance of Bangladesh, their paramount presence when legislating, and their ubiety when interpreting all laws and the Constitution. It is to be noted that, even though there is an express notion that ESC rights are judicially unenforceable, there is need the scope for there to be indirect enforcement. The Supreme Court of Bangladesh has laid out a series of interpretations of the right to life vested in article 32 to include ESC rights, as the right to life is judicially enforceable. A prime example of the right to life being used to judicially enforce ESC rights is *Chairman, National Board of Revenue (NBR) Vs. Advocate Zulhas Uddin Ahmed and others*.[80] This case portrayed the right to medical care to be judicially enforceable, in the consideration that it too is a part of the right to life.

The door to negative enforcement of ESC rights is opened by Article 7(2), which says, *'This Constitution is, 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.'* An example of the aforementioned negative enforcement is seen in *Kudrat-E-Elahi Panir v Bangladesh*,[81] where the judge Naimuddin Ahmed J develops the scope of negative enforcement of FPSP. Article 7(2) opens up the pathway for there to be negative enforcement of FPSP, as it entails that no law can violate the principles laid out in the Constitution, therefore, as FPSP are part of the Constitution, there opens the door to negative enforcement. It can be agreed upon that this type of negative enforcement is viable, even though the positive enforcement has been taped off by article 8(2). In interpreting both article 7(2) and article 8(2), this very interpretation is key, as it strengthens their harmony by helping them come together, reduces possibilities of possible conflict between them and last but not least opens the door for the negative enforcement of ESC rights by regarding them as FPSP. It appears that the current spectrum of judicial trends in Bangladesh play to the tune of judicial enforceability of economic, social and cultural rights.

V. CONCLUSION

The contemporary legal dimensions regarding enforceability of the ESC rights indicate clearly that they are justiciable at the international and regional levels. Most importantly, many ESC rights have already become justiciable in different regional and international levels. The CESCR also plays a quasi-judicial role regarding the enforcement of the ESC rights through the reporting system and will soon play an adjudicatory role under the Optional Protocol. The HRC has also enforced certain ESC rights when enforcing certain provisions of the ICCPR as they were found to be interrelated to and interdependent on some ESC rights.

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[80] *Chairman, National Board of Revenue (NBR) v Advocate Zulhas Uddin Ahmed and others* (2010) 15 MLR (AD) 457.

[81] *Kudrat-E-Elahi Panir v Bangladesh* (1992) 44 DLR (AD) 319.

The position on enforceability of ESC rights has changed since the adoption of the ICESCR in 1966. The post 1966 developments indicate that the justiciability of ESC rights now has become an established concept. Shany supports the view that ESC rights 'are internationally justiciable and can be meaningfully enforced by international courts and tribunals.'[82] It is clear from the above discussion that justiciability of ESC rights is not only possible but is now essential in order to fulfil ICESCR obligations. Furthermore, the above discussion reveals that the current judicial trend of constitutional interpretation in Bangladesh is also in favour of judicial enforceability though in an indirect way.

[82] Shany (n 12) 78.

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Horizontality of Fundamental Rights in Bangladesh*

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> *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 [The Constitution of Bangladesh, art. 102(1)].*

I. INTRODUCTION[1]

Since the advent of 21st century, the scope of the constitutional guarantees of rights so as to reach into the private sphere ("horizontal" impact) has been one of the 'the most fundamental issues in constitutional law'.[2] The issue also emerged and continues to be 'one of the most important and hotly debated in comparative constitutional law',[3] with some leading global jurisdictions adopting the theory of horizontal applicability of constitutional rights.[4]

In Bangladesh, the public-law-style adjudication has still a long way to go. 'Public law' refers to a system of law that aims at the greater public good, piercing the narrow public–private divide when the enforcement of public responsibilities and constitutional values is in question. A modern function of public law is to exercise control over private power, especially when private entities deal with the citizens' rights and entitlements in a way that transcends the nature of private transactions.[5] When constitutional values such as the primacy of human rights are at stake, it is important to extend the clutch of constitutionalism over private entities. In this

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* This paper is an extended and adapted version of a paper earlier presented at a BILIA seminar on constitutional law. See Ridwanul Hoque, 'Horizontality of Fundamental Rights in Bangladesh: A Tale of Discordance between the Text and the Judicial Say', paper read at the Bangladesh Institute of Law and International Affairs (BILIA), Dhaka, 8 December 2012. I sincerely thank Dr. Shahdeen Malik, Dr. Naim Ahmed, and the participants of the seminar for their insights and suggestions. I would like specially to thank Lokman Bin Nur at the University of Asia Pacific Law School for his kind and able research assistance for this paper.

1 For this section, I have heavily relied on my following previous work: Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* (Cambridge Scholars Publishing 2011).

2 See Stephen Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' *(2003) 102(3) Michigan Law Rev* 387.

3 Ibid, 387.

4 Among these countries are Ireland, Canada, Germany, South Africa, the United Kingdom (after some initial hesitation) and India from South Asia. It should be noted that the USA considers constitutional rights enforceable only against "state actions".

5 See, for example, Paul Craig, 'Public Law and Control Over Private Power' in M Taggart (ed), *The Province of Administrative Law* (Hart Publishing 1997) 196.

context, three issues come to the fore. Firstly, whether private entities discharging functions of public nature, such as a private school imparting education to children, can be forced to bear the human rights-responsibilities or 'public' duties under the Constitution. Secondly, when fundamental rights are directly breached by private entities or persons, can constitutional remedies be issued against such a body or person? Thirdly, away from the enforcement consideration, can a private person or a corporation be expected to respect the fundamental rights of the people? The latter issue is related to the concept of constitutional morality in that one is expected, by moral standards, to obey the constitutional norms, although there is no remedy for the person wronged when that expectation (the moral urge) is broken. This paper does not deal with this concept.

This paper is concerned with the second consideration above, and it investigates the question of (direct and indirect) horizontality of fundamental rights, which essentially is the question of whether constitutional rights can be enforced against non-state actors or private entities. Generally, 'the horizontal application of human rights to non-state actors […] is an evolving and contested legal area both comparatively and at the international level'.[6] However, as noted, the horizontality of fundamental rights in Bangladesh is constitutionally envisaged. Nevertheless, although the Court in Bangladesh extended the meaning of public authority to include relatively new public agencies as subjects of judicial review on the ground of principle of legality under art. 102(2),[7] a matter that falls within the first consideration above, it has so far virtually refused to enforce fundamental rights against private actors including those exercising functions of public nature. The horizontal application of judicial review on the principle of legality under art.102(2), based on a liberalinterpretation of 'public' or 'statutory' authorities, is what is known as the statutory horizontality (of human rights) in the UK.[8] For our purpose, this phenomenon can be termed as interpretive horizontality. Unlike in the UK, interpretive horizontality under art. 102(2) is distinct from horizontal judicial review on the ground of breaches of fundamental rights under art. 102(1).

In *Mainul Hosein v Anwar Hossain* (2006),[9] the High Court Division quite clearly acknowledged that fundamental rights can be enforced against private individuals and other private juristic persons.[10] Unfortunately, however, the Appellate Division

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6 Aoife Nolan, 'Holding Non-state Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland' (2014) 12(1) International Journal of Constitutional Law61, 61.

7 See e.g. *Mrs. Farzana Muazzem v Securities and Exchange Commission* [2002] 54 DLR 66 (HCD); *Conforce Ltd v Titas Gas Co. Ltd* [1992] 42 DLR 33 (HCD) (a company of a public corporation or one working in the affairs of a statutory local body is a public authority). A definition of statutory public authority has been provided in article 152 of the Constitution.

8 'Statutory' horizontal effect arises 'as a result of the courts' interpretive obligation under s 3 HRA': Phillipson and Williams, note 13 below, at 878. Section 3 of HRA provides that laws should be interpreted in a way that is compatible with the "Convention rights" incorporated by the Act. This happens basically by way of interpreting what a 'public authority' is under s 6 of the HRA. See, e.g., *X v Y* [2004] EWCA Civ 662; *YL v Birmingham City Council* [2007] UKHL 27 (taking a narrow approach to "public authority").

9 [2006] 58 DLR 117 & 157 (HCD).

10 [2006] 58 DLR 157 (HCD) [161] (Aziz J, the third judge, endorsing Mamun J who disagreed with

overruled this rights-enhancive decision in *Anwar Hossain v Mainul Hosein* (2006),[11] by invoking the old reasoning that the concerned private person charged for rights-violation (here, the right to freedom of press) was not connected with the affairs of the Republic. Although the Appellate Division took a technical stance of not saying enough on the issue of consequences of violation of fundamental rights, its decision seems to have avoided both the letter and the spirit of art. 102(1) vis-à-vis the horizontal application of fundamental rights.

Several years after the Appellate Division's decision in the above case, the High Court Division in two cases of judicial review against private bodies forcefully observed that in appropriate cases private actions breaching constitutional rights are judicially reviewable. Despite the High Court Division's recognition in at least three cases of the horizontal impact of fundamental rights under the Constitution, an absence of a precedent from the Appellate Division operates as a setback.

There has recently been an interesting development in the area of public law compensation – the Court issuing compensation directives against private entities such as bus companies or private health clinics or hospitals. This remedy is certainly covered within the ambit of art. 102(1) of the Constitution which enables the Court to issue any "order" in the enforcement of fundamental rights. As such, issuing compensation orders against private persons can probably be considered a form of horizontality of fundamental rights. In none of these compensatory decisions, however, had the Court ever penned down any reasoning revealing that they were enforcing fundamental rights. In fact, the Court issued constitutional remedies in claims of common law tort nature. Therefore, the Court's compensatory jurisprudence, some scholars argue, remains unprincipled.[12] It is not within the scope of this paper to discuss this development.

Below, the paper first provides a brief introduction to the concept of horizontality. Thereafter, some court cases under the rubric of 'indirect horizontality' are analysed,to briefly portray the judicial discourse of horizontality. Next, this paper analyses the decision in which the question of direct horizontality of fundamental rights received a judicial treatment at the High Court Division. It then seeks to draw comparative insights from India and Sri Lanka, and the concluding part concludes the paper.

II. THE CONCEPT OF HORIZONTALITY AND THE CONSTITUTION

At the outset, the important distinction between the two ideas of horizontality, the direct and the indirect horizontality, should be made clear. As Gardbaum observed,

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Abedin J in the earlier split decision).

[11] [2006] 58 DLR 229 (AD), [2007] 15 BLT 144 (AD).

[12] Ridwanul Hoque and Sharowat Shamin, 'Bangladesh: State of Liberal Democracy' in Richard Albert et al. (eds), *2017 Global Review of Constitutional Law* (I-CONnect and the Clough Center for the Study of Constitutional Democracy 2018) 28, 31-21. For a critique of public law model of ordinary torts in South Asia generally, see Rehan Abeyratne,'Ordinary Wrongs as Constitutional Rights: The Public Law Model of Torts in South Asia' (2018) 54(1) Texas International Law Journal1.

human rights take a "direct"horizontal effect 'if they are vindicated by a cause of action vested against privatepersons', whereas their "indirect" horizontal effect takes place when those rights apply 'not to private persons but only to*existing law'*.[13]

The concept of direct horizontality signifies that any constitution being the embodiment of the value of basic human rights should be applicable against not only state authorities (vertically) but also against private juristic and natural persons. On the other hand, "indirect horizontality" refers to the use of human rights to develop common law[14] or the wider principles of constitutionalism. Here the idea is that, irrespective of whether human rights can be applied against any private person or not, every person should take into consideration seriously the mandates of human rights in making decisions. This can be explicated by referring to the idea, for example, that all private companies in Bangladesh must abide by the constitutional principle of non-discrimination while hiring or firing people for their organization. The most notable reflection of indirect horizontality is the enforcement of fundamental rights against private persons through the medium of the state by requiring it to take actions to protect the citizens against violations in the private sphere.

I now turn to the provisions of the Constitution to look into the status of the doctrine of horizontal application of fundamental rights. Article 102, clause (1), of the Constitution, reads as follows:

> 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.

The above text makes it clear that the Constitution envisaged the judicial enforcement of fundamental rights against "any person or authority", including one in the affairs of the Republic. This the Court can do by issuing any "appropriate" directions or including an appropriate writ-order as mentioned in art. 102(2). However, whether a particular right can be horizontally applied depends on whether any private person is charged with an obligation to comply with that right. In this respect, it should be noted that the phrases of rights clauses in the Constitution are differently couched, making some rights either directly horizontal or indirectly horizontal while leaving some rights as not horizontal.[15] Some rights are phrased in such a way that omits to mention who the persons the 'order/prohibition' in those rights seeks to cover.

Article 28(1) reads as follows: 'State shall not discriminate against any citizen [...]',

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[13] G Phillipson and A Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74(6) MLR 878, 881, citing S Gardbaum, 'Where the (State) Action Is' (2006) International Journal of Constitutional Law 760, 764.

[14] On this, see Murray Hunt, 'The Horizontal Effect of the HRA' [1998] Public Law 423.

[15] For a further analysis, made in the Indian context, see Sudhir Krishnaswamy, 'Horizontal Application of Fundamental Rights and State Action in India' in C R Kumar and K Chockalingam (eds), *Human Rights, Justice, and Constitutional Empowerment* (Oxford University Press 2007) 47-73.

while article 27 says that, 'all citizens are [...] entitled to equal protection of law'. The equality right, thus, seems to be indirectly horizontal as there is no mention of the State in art. 27. So do articles 32 (the right to life and liberty) and 35(5) ('no person shall be subjected to torture'). On the other hand, article 34 that prohibits forced labour seems to have an effect of direct horizontality as the offence/wrong of forced labour is more likely to be committed by private persons. In *People's Union for Democratic Rights v Union of India* (1982)[16]involving the breach of article 23 of the Indian Constitution (prohibiting human trafficking), which is equivalent to article 34 of the Bangladeshi Constitution, the Indian Supreme Court held that article 23 of their Constitution was applicable against private persons.

In Bangladesh, there almost is an absence of a discourse of the horizontality of constitutional rights and norms. By contrast, some seem to refute the idea of constitutional horizontality in Bangladesh. The eminent constitutional lawyer, Mahmudul Islamwrote that'the Constitution seeks to delineate the powers and functions of the important branches of the government, the relationship between those branches and the relationship of the government with the individuals and the Constitution *does not in the remotest way* seek to define the relationship between individuals so that the question of an individual seeking to enforce a fundamental right against another individual does not arise' (emphasis supplied).[17]

This is a rigid position, somewhat akin to the American argument that the Constitution is enforceable against state actions only, and the view does not come in terms with the idea of the Constitution as a living organism. Islam reasons that, although the expression –'give such direction or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic' – in art. 102(1) may create an impression that fundamental rights are enforceable against any private person or body, that is not the case. His contention is that art. 102(1) should not be interpreted in isolation, and that each and every expression in the Constitution should be interpreted with regard being paid to the context. He borrows support for his argument from art. 26, which speaks of the possibility of violation of fundamental rights by a law in that the clause provided that parliament shall make no law in derogation of fundamental rights. Islam's contention is that an individual cannot be adversely affected without the means of law, so any such person can challenge the legality of the law itself under article 102(2).

This, again, is a restricted view of the value of fundamental rights.[18] While article 26 refers to law while thinking of the possibility of rights-violation, article 44 contemplates any action (and not 'the law' alone) that may also be a tool with which to interfere with fundamental rights. In a recent case discussed below, Mr. Islam as an amicus curia submitted that "it is a given that judicial review of an act of a private

[16] *People's Union for Democratic Rights v Union of India* [1982] AIR 1473 (SC).
[17] Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers 2012) 608.
[18] Islam, ibid, has not commented on the SCAD's decision in *Anwar Hossain v Mainul Hosein* [2006] 58 DLR (AD) 229, nor on the HCD's decision in *Mainul Hosein.*

entity which is neither a statutory nor a local authority is not permissible under the Constitution".[19] Another lawyer in that case, however, took an opposite view supporting horizontal judicial review of private body actions, with whose approach the Court agreed.[20]

III. INDIRECT HORIZONTALITY IN BANGLADESH

It seems that human rights in Bangladesh are given an indirect horizontality effect. However, the jurisprudence that clearly recognizes the applicability of fundamental rights against private actors is absent in Bangladesh. Judicial conservatism in expanding remedies in cases involving actions of private parties was reflected in *Sultana Nahar v Bangladesh* (1998).[21] In this case, certain sex-workers were evicted by the locals and a lawyer filed a writ petition seeking directions in the protection of this unfortunate group of people. The Court not only refused standing to a lawyer but also held that constitutional remedies were unavailable against the illegality committed by private parties.

Intriguingly, the *Sultana Nahar* Court let a legal wrong go un-redressed only because private parties were involved, although the petitioner in fact sought remedies against the government's failure to protect the citizens whose rights were infringed by private actors. Moreover, a narrow constitutional construction in *Sultana Nahar* led to a failure in appreciating that horizontality of fundamental rights was clearly envisioned in article 102(1) read with article 44 of the Constitution. The Court's reasoning is akin to a 1956 Indian Supreme Court case in which it was held that, 'as a rule[,] constitutional safeguards are directed against the state and its organs and that protection against violation of rights by the individuals must be sought in the ordinary law.'[22]

This is, however, not to discredit certain remedial innovations that were sought to be issued against private persons. In *ASK v Government of Bangladesh* (2003),[23] involving deaths from fire-accidents in some garments factories, the HCD instructed the commercial banks not to advance loans to any garments industry if it could not show, to its credit, a safety fitness certificate. In *Md. Kamal Hossain, BLAST & Others v Bangladesh* (2005),[24] involving deaths and injuries of many workers from the collapse of a garments factory building in Savar, the HCD sought to increase the victims' chance of compensation by issuing an injunction against responsible company's attempt to dispose of its property. In these cases, however, the court did

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19 *Hakim v Bangladesh*, noted below in note 35 (quoted from Ahmed J's opinion at 132, [4]).

20 Mr. Rokanuddin Mahmud's view. Ibid.

21 [1998] 18 BLD 361 (HCD), a decision by a third judge, Rahman J, agreeing with Ameen J. The other judge of the split-court, M Hoque J, beautifully rebutted objections to the public interest standing of the petitioner and allowed her to stand for those 'poor, neglected, wretched, unfortunate, downtrodden, hated, homeless and helpless'.

22 *Vidya Verma v Dr Shiv Narain Verma* [1956] AIR 108 (SC).

23 [2003] 4 CHRLD 147 (CHRLD = Commonwealth Human Rights Law Digest).

24 [2005] WP No. 3566 (High Court Division).

not explain the legal basis of its action against private persons including banks.

In addition to this kind of judicial orders against private persons, which is tantamount to recognizing indirect horizontality, there are certain examples of judicial review petitions (writs) against non-state actors. *Khondaker Modarresh Elahi v Bangladesh* (2001)[25] is a case in point. Although it refused the remedy that was asked, the Court went very close to establishing the horizontality of constitutional rights when it issued a *rule nisi* against political parties calling for an explanation as to why *hartal* should not be declared unconstitutional.[26] Earlier, in 1995, another *hartal*-challenging writ was filed against a private person, Ms. Sheikh Hasina, the then Chief of the Oppositions. The court, however, did not accept the petition.[27] In India, the Kerala High Court, and later the Supreme Court of India, ruled that calling for and holding of a *bundh* (*hartal*) is unconstitutional as it violates the constitutional fundamental rights of the citizens.[28] The Court, on the application of two citizens belonging to the Kerala Chambers of Commerce, applied fundamental rights against a private entity, a political party.

In an interesting development in 2003, the High Court Division in *Zakir Hossain Munshi v Grameen Phone* (2003)[29]allowed a judicial review, based on the principle of legality under article 102(2), against the Bangladeshi leading private cellular phones provider, Grameen Phone, to prevent it from unlawfully levying extra charges on subscribers. The case did not involve the violation of fundamental rights, but rather the question of legality or the due process of law. The long-standing principle that a writ does not lie against a private person was somewhat relaxed here on the ground that the company was a "licensee of the government". Perhaps the court wanted to extend the meaning of 'public function', but its reasoning was based on inadequate doctrinal analyses and lacked articulation of fundamental rights and public law elements involved therein. For example, it is still a puzzling question whether the Grameen Phone or any other private company is a licensee of government functions within the meaning of article 102(2).[30] And, even if it was, the Court did not come to any finding as to whether any fundamental right was breached by the company. The case, thus, seems to be not a case that would squire with article 102(1).

In a 2010 decision in *Rokeya Akhtar Begum v Bangladesh*, the HCD observed that fundamental rights can be enforced against private bodies and that judicial review is maintainable against a private body if it performs the functions in connection with the

[25] [2001] 21 BLD 352 (HCD).

[26] In refusing to deliver the remedy, the Court reasoned that 'this political issue should in all fairness be decided by the politicians'. Ibid, [375] (Aziz J).

[27] *Abu Bakar Siddique v Sheikh Hasina* [1995] WP No. 2057 (High Court Division).

[28] *Bharat Kumar K Palicha v State of Kerala* [1997] AIR 291(Kerala); *Communist Party of India (Marxist) v Bharat Kumar* [1998] AIR184 (SC).

[29] [2003] 55 DLR 130 (HCD) (Abedin J).

[30] It is interesting that, the judge of this liberal decision was in *Mainul Hosein* against the view that fundamental rights can be enforced against private companies.

affairs of the Republic or a 1ocal authority.[31] It also held that the source of power is not the sole test to identify whether a body is subject to judicial review. Rather, it is the functional test that may bring a private action within the purview of constitutional judicial review. The Court did not find any violation of fundamental rights by the relevant respondent or a performance of any function in connection with the affairs of the republic.

In *Begum*, an acting principal of the Viqarunnisa Noon School and College sought to stop the appointment of a regular principal by challenging the legality of publishing an advertisement by the College governing body. The core issue was whether the College authorities were a public authority to be amenable to judicial review under art. 102(2) based on the principle of legality. It was not a case of judicial review under art. 102(1) on the ground of breach of fundamental rights. The Court, however, observed that 'when fundamental rights are relied on, the question of the status of the impugned person or authority loses [its] relevance because [of] the phrase[] "any person or authority" [in art. 102(1)]'.[32] At another place, the Court commented in passing that 'in appropriate cases' a body like Diabetic Association, for example, may be very well found to be 'in breach of fundamental rights so as to render it prone to [judicial] review under Article 102(2) and (1) respectively'.[33]

Begum probably shows that the Court was otherwise ready to direct horizontal application of fundamental rights if it were a fit case. Apparently, by applying that 'function-based test', the Court could not give relief exclusively under article 102(2) if fundamental rights were violated by a private entity.[34] The remedies would then have to be issued under art. 102(1) combined with remedies under art. 102(2).

In a 2013 decision in which judicial review was successfully extended over an impugned action of a public nature by a private entity, the High Court Division in a forceful obiter emphatically held that breaches of fundamental rights by private entities are subject to judicial review under art. 102(1). In *Moulana Md. Abdul Hakim v Bangladesh*,[35] the principal of a private educational institute (*madrasa*) successfully challenged his dismissal by the management committee.[36] In the Court's view, a

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[31] *Rokeya Akhtar Begum v Bangladesh* [2018] 6 CLR 206 (HCD) (decision of 8 June 2010, per A H M Shamsuddin Chowdhury J).

[32] Ibid, [71].

[33] Ibid, [93].

[34] *Abdur Rashid Khanv Government of Bangladesh* [2001] 6 MLR (AD) 8.

[35] [2014] 34 BLD 129 (HCD) (judgment 3 October 2013).

[36] *Abdul Hakim* is arguably the first decision to clearly hold that private body actions may qualify as public functions for the purposes of judicial review based on the principle of illegality under art. 102(2). It is different from *Begum* in that the *Abdul Hakim* Court not only assessed whether the functions of the concerned private entity were of a public nature, it also applied judicial review horizontally and provided detailed reasoning. The Court applied the function-test, and observed that certain private actors such as education and health-sector institutes do perform functions that may essentially belong to 'the public domain' (per Syed Refaat Ahmed J). For an analysis of this case, see Ridwanul Hoque, 'The "Datafin" Turn in Bangladesh: Opening Up Judicial Review of Private Bodies' (*Administrative Law in the Common Law World*, 25 October 2017) <https://adminlawblog.org/2017/10/25/ridwanul-hoque-the-datafin-turn-in-bangladesh-opening-up-judicial-review-of-private-bodies/> accessed 24 November 2021.

claimant can seek judicial review under article 102(1) or/and article 102(2) 'depending on the nature of the grievance'. In its own words,

> Article 102(l) sets itself apart from article 102(2)(a)(ii) [writ of certiorari] by bringing within its purview a wider group of individuals and authorities on whom the Court may on judicial review hold sway. When issues of fundamental rights are raised, the sanction under article 102(1) is clearly of availability of redress against "anyone," or "any authority", inclusive of "any person performing any function in connection with the affairs of the Republic". The reference to government functionaries [in art. 102(2)] must, accordingly, be seen as an appendage made to the broader category of "anyone" or "any authority" [in art. 102(1)] by way of abundant caution.[37]

The novelty in *Abdul Hakim* is that the Court considered article 102(1) "relevant" for "the purpose" of the case, although it was on an ultimate analysis a challenge on the basis of the principle of legality/illegality *per* art. 102(2). The decision also suggests that when acting under art. 102(1), the writs under art. 102(2) would be of help. *Abdul Hakim* along with *Begum* thus helpfully open the most needed discourse of blending horizontal enforcement of fundamental rights with the Court's writ-jurisdiction and horizontal enforcement of judicial review on grounds of 'illegality' of actions.

IV. DIRECT HORIZONTALITY: A FAILED CASE

In *Abdul Hakim* and *Begum*, the horizontality of fundamental rights was not vindicated by the petitioners. A remedy of direct horizontality was successfully sought in *Mainul Hosein v Anwar Hossain* at the HCDlevel. On appeal, the Appellate Division avoided making any decision on direct horizontality.

The facts of the case that involved decisions of both Divisions of the Supreme Court are that Mr. Anwar Hossain, who became a Minister in 1996 under the consensus government of the Awami League, continued as the second executive director and also the printer, publisher, and editor of *the Daily Ittefaq*. Mr. Hossain, by exercising the power of his public office, later terminated the services of two employees and appointed an editor in-charge of the Daily. In such circumstances, the petitioner, Mr. Mainul Hosein challenged the legality of the Minister's holding a public post and taking part in the management of a private company (the Daily Ittefaq) and also the legality of the measures taken by him against the employees of the company. Two arguments advanced were that article 147(3) of the Constitution, which sought to avoid conflict of Ministers' public duty and private interest, was breached and the actions by the respondent, while he was a minister, resulted in the breach of the fundamental right of freedom of press (depriving the petitioner and the members of the public of an opportunity to read objective and fair news). Here, we are concerned solely with the second contention.

A. Mainul Hosein v Anwar Hossain (2006)[38]

[37] [2014] 34 BLD 129 (HCD) 133 [12].
[38] [2006] 58 DLR 117 (HCD).

Interestingly, until the decision in this case the remedial potential of article 102(1) of the Constitution remained beyond the judicial gaze. Rather, as noted above, the Court was rather oblivious of the impact of art. 102(1).

In *Mainul Hosein*, the High Court Division delivered a split-decision. Justice Abedin discharged the *rule* while Justice Mamun made it absolute and held that fundamental rights can be enforced against private persons. Upon hearing, the third judge, Justice Aziz, concurred with Justice Mamun.

No matter how the arguments of the counsels were couched, but it seems that this case invoked a fundamental rights claim against a private person, since the actions challenged were actions not by a Minister *per se*. But a significant issue of the exercise of public power in disguise was at stake. It was claimed that a Minister in the first place cannot hold a post of profit in a company. Second, the Minister decided as a private person but by exerting his public position. The case nevertheless appears to be a difficult one for the purposes of analysis in that the court's main concern was not the enforcement of fundamental rights. In the two writ petitions that were filed against the respondent,[39] no prayer was indeed made seeking to enforce fundamental rights. It was only during the hearing of the cases that the petitioners' lawyers adopted a strategy to increase the possibility of winning by mounting a claim that the petitions 'should be taken to have been filed under Article 102(1)'.

Abedin J, the senior judge of the Bench handing down the split decision, did not consider that the fundamental right of freedom of press was indeed implicated in this case. The other judge, Mamun J, did not in fact comment on this point with reasoning, but he appreciably held that article 102(1) speaks of any private person against whom an order can be issued.

Abedin J considered the claim of violation of fundamental rights as frivolous, and quoted the Appellate Division's observation in *Mujibur Rahman v Bangladesh* that the Court should always remain alert to the possibility of misusing the instrumentality of article 102(1) to litigate ordinary legal violations. In *Mujibur Rahman*, the SCAD held that '[t]he Court is […] to be on guard so that the great value of the right givenunder Article 102(1) is not frittered away or misused as a substitute for more appropriate remedy available for an unlawful action involving no infringement of any fundamental right.'[40] This observation of the SCAD may be interpreted as an indication of judicial readiness to enforce fundamental rights against private persons (although the case where this observation was made was filed against the Republic).

On the other hand, Mamun J took the view that the facts of the writ petitions combined issues of fundamental rights and the constitutional mandate as to public offices and found the petitions to be maintainable. As he reasoned, article 102(1) is a continuation of article 44 that guarantees for every citizen a right to enforce fundamental rights. By interpreting the words 'any person or authority including any

[39] There were 3 petitions, each in 1996, 1997 and 1999, of which 2 were directly against Mr. Anwar Hossain.

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

person performing any function in connection with the affairs of the Republic' in art. 102(1) and by putting emphasis on the word 'including', he held that there are two categories of people against whom the Court may issue directions or orders. In the 1st category are people who are 'any person or authority'. Second, there are people who are "persons" 'performing any function in connection with the affairs of the Republic'.[41] The limitation of this holding, however, is that it lacked doctrinal analyses including, for example, an analysis of the intention of the framers of the Constitution or of the global developments on this matter.

The third judge, Aziz J, by relying on comparable Indian decisions accepted the argument that, Mr. Hossain cannot but be a person interfering with the press freedom as guaranteed under article 39(2)(b).[42] As he held, '[i]t cannot be said in absolute terms that, the writ petitions are not maintainable against a private individual and no declaration or direction can be given by this Court in exercise of jurisdiction under Article 102'.[43] He further found that Mr. Hossain's activities as a private person combined with his position as a minister vis-à-vis the newspaper invariably affects the freedom of the petitioner and the members of the public to read impartial and fair news. He, therefore, thought that 'there is no bar' in exercising the power of judicial review 'under article 102'.[44]

It is interesting that the judge did not cite clause (1) of art. 102, but rather cited art. 102 as a whole. He was probably interpreting the function of a private person who was a minister at the same time as having come under the mischief of "public duties", although there is an absence of reasoning in this regard. The fact remains that, this judge too did not unambiguously hold that fundamental rights are enforceable against private persons. His reticence on direct horizontality can be read out from his reliance on an Indian case, *Shri Anadi Trust v VR Rudani*,[45] in which the Indian Supreme Court favoured the expansion of constitutional remedies in order to extend 'judicial control over the fast-expanding maze of bodies affecting the rights of the people'[46] and that a positive direction ("mandamus") should be available to remedy any injustice whenever found. Aziz J did not rely on any Indian case in which fundamental rights were directly applied or where the Court held them to be horizontally applicable.

B. Anwar Hossain v Mainul Hosein (2006)[47]

Upon appeal, the Appellate Division overruled the High Court Division's decision in *Mainul Hosein*. The Appellate Division, it seems, took a very technical stance. It

41 [2006] 58 DLR 117 (HCD) [141].
42 In all the three opinions, the judges cited 9 Indian cases and 1 Pakistani case.
43 [2006] 58 DLR 157 (HCD) [162].
44 Ibid, [167].
45 [1989] AIR 1607 (SC).
46 Ibid. The quotation appears at 161. The Court also referred to D Basu's book on Indian constitutional law in which Basu made the claim that Indian Constitution's phrase 'any person or authority' in article 226 (equivalent to art 102(1) of the Bangladeshi Constitution) covers 'any person or body performing public duties even though such duties may not be imposed by law'.
47 [2006] 58 DLR 229 (AD).

simply held that a writ petition against a person in his capacity of Executive Director and publisher of a private publication company is not maintainable. The Appellate Division mainly remained confined to the issues of the breach of art. 147(3) and whether a writ could issue against a private person under art. 102(2).

The Appellate Division did not in effect take up the issue of judicial enforcement of fundamental rights against a private entity under article 102(1) that mentions 'any person'. On the maintainability of the writ petitions due to a breach of article 39 (freedom of expression), the Appellate Division made the following reticent comment: 'taking into consideration the arguments put forward by the learned Counsels for both [..] parties and the decisions cited above, we are of the opinion that [the writ petitions] are not maintainable on this count also'.[48] Only one of the cases the Court cited involved the invocation of the ground of breach of fundamental rights, which cautioned against the misuse of art. 102(1) as a substitute for a remedy against 'an unlawful action involving no infringement of any fundamental right'.[49] Moreover, the Court left it unclear whether art. 39 was found to be violated at all and held that the writ petitions turned infructuous in the wake of the appellant's end of ministerial tenure.

The Appellate Division seems to have taken the stance that abstract theoretical questions are of only academic importance and are not to be decided by any court.[50] But the issue was not simply an academic one. In the HCD, three judges differed from each another on the point of horizontal impact of fundamental rights under art. 102(1). The Appellate Division's silence as regards the distinctness and horizontality of art. 102(1), therefore, arguably operates against constitutional originalism, especially in view of an express intention of the framers that the constitutional fundamental rights would be enforceable not only against *state actions* but also against private functions. A restrictive interpretation of art. 102(1) would run counter to a liberal or purposive interpretation of the text[51] as well as the principles of *human dignity* and *respect for human rights* as enshrined in the preamble of the Constitution.

V. COMPARATIVE SCENARIO

It is encouraging that the expansion of constitutional remedies against private entities is indeed a growing tendency at the global level including in South Asia, although judicial approaches to the rights-horizontality are not uniform.[52] In this section, we focus on the horizontality of human rights in India and Sri Lanka, but it would be useful to briefly capture the developments from the UK and Germany that are,

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48 Ibid, [236].

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

50 This is an observation made in *Kudrat E Elahi Panir v Bangladesh* [1992] 44 DLR 319 (AD). In the High Court Division, the counsels of the respondent urged the Court to adopt this position, which Mamun J refused to take.

51 On this, see, among others, Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005).

52 For comparative insights into rights-horizontality, see Mark Tushent, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' [2003] 1 International Journal of Constitutional Law 79; Andrew Clapham, *Human Rights Obligations of Non-state Actors* (OUP 2006).

respectively, of common law and civil law traditions.

A notable development tied with the expansion of remedies is the horizontal extension of judicial review over private agencies/individuals whose activities generate public-law consequences, or which violate fundamental rights. In the UK, where direct horizontality has not been mandated, some scholars support direct horizontality of human rights in accordance with the Human Rights Act 1998 (HRA).[53] Until recently, however, the UK judiciary, remained relatively reluctant in enforcing rights horizontally under the HRA.[54] One reason for this reluctance was the absence of an express mandate for the horizontality of human rights. Another reason is the common law approaches to remedies that can be had against private entities and public bodies. Traditionally, in the UK, 'ultra vires' has always been considered a foundational ground of judicial review. After the enactment of HRA, the UK judiciary and scholars are increasingly speaking of a 'constitutional foundation' (rather than common law foundation) of judicial review.[55] As such, they are now more open to the enforcement of fundamental rights against private persons. Yet, there is no consensus 'on the nature and extent of the courts' duty to give horizontal effect' to human rights incorporated in the HRA 1998.[56]

Human rights are enforced horizontally also by the European Court of Human Rights, which offers significant evidence that at the international plane human rights are no more seen as exclusively applicable against the state actions.[57] Regarding the question of whether a constitution should extend protection of individual rights against non-state actors, Germany has lately adopted an interesting solution. In Germany, constitutional protection of fundamental rights extends generally to transactions among private parties but in an indirect way and on a case-by-case basis, a practice of "indirect direct" applicability that, however, blurs the divide between vertical and horizontal legal relationships.[58] Germany initially was in favour of strictly "indirect" effect of constitutional rules. In a 1958 case (*theLüth case*), the German Federal Constitutional Court held that constitutional rules do not control, but merely 'influence the development of the private law'.[59] The indirect applicability

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53 An early work on this issue is W Wade, 'Horizons of Horizontality' (2000) 116 LQR, 217. See also Ian Leigh, 'Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth' (1999) 48 ICLQ 57; G Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: Bang or a Whimper?' (1999) 62(6) *MLR* 824.

54 See *Jones v University of Warwick* [2003] 1 WLR 954; *Campbell v MGN Ltd* [2004] UKHL 22.

55 Mark Elliott, *Constitutional Foundations of Judicial Review* (Hart Publishing 2006).

56 Phillipson and Williams, above note 13, at 878 (advocating a 'constitutional constraint model' that supports the Court's incremental implementation of horizontality of human rights).

57 I Ziemelle, *Human Rights Violations by Private Persons and Entities: The Case Law of International Human Rights Courts and Monitoring Bodies* (EUI Working Paper No. AEL 2009/8).

58 See Norman Dorsen et al., *Comparative Constitutionalism: Cases and Materials* (2d edn, West Academic Publishing 2010) 896 (discussing German Basic Law "third-party effect" or "*Drittwirkung*"); Jud Mathews, *Extending Rights' Reach: Constitutions, Private Law, and Judicial Power* (OUP 2018) (discussing how courts make choices about whether, when, and how to give rights horizontal effect in three case studies of Germany, the United States, and Canada).

59 Greg Taylor, 'The Horizontal Effect of Human Rights Provisions, The German Model and Its Applicability to Common-Law Jurisdictions' (2002) 13(2) King's LJ187, 188.

approach has been greatly reshaped by the recently developed concept of 'protective duties' of the State.[60] According to this concept, developed by the Federal Constitutional Court in a 1975 case involving the rights of a fetus,[61] 'the basic rights impose upon the state not merely a negative duty to avoid certain actions, but a positive duty to take action so that the citizen does in fact enjoy the basic rights promised in the Constitution'.[62] The consequential effect of this approach is that constitutional rules/rights can be horizontally applied against and between private persons and entities in certain circumstances. This position is something that is more liberal than the strictly indirect approach to the impact of constitutional rights or norms. In two recent decisions which involved 'stadium ban' and 'hotel ban' by private parties, for example, the German Federal Constitutional Court held that although fundamental rights do not establish directly binding obligations between private actors, according to the doctrine of indirect horizontality they nevertheless 'constitute an objective order of constitutional values (*objektive Wertordnung*) which must be respected in all areas of law'.[63] The Court reiterated, writes Schultz, that 'in certain circumstances, the right to equality will indeed take effect between private parties: for instance, where an event is open to a large audience and where the exclusion from such event significantly affects the ability of the excluded person to participate in social life, the party organising the event has a special legal responsibility under Art. 3(1) [of the German Basic Law]'.[64]

A. Horizontality of fundamental rights in India

In South Asia, rights-horizontality has occurred in India, Sri Lanka, and Nepal as a public law expansion of constitutional remedies. The lead is taken by the Indian courts which have 'travelled a great deal from the limited notion that fundamental rights are available only against the state.'[65] Indian top courts have enforced, not infrequently, the fundamental values of human rights against both recalcitrant corporations and private individuals.[66]They have provided 'fundamental rights' with both direct and indirect horizontal effect by imposing a wider range of constitutional duties on state actors and by accommodating private actors as respondents to writ petitions.[67]

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60 On this, see R Brinktrine, 'The Horizontal Effect of Human Rights in German Constitutional Law: The British Debate on Horizontality and the Possible Role Model of the German Doctrine of *mittelbare Drittwirkung der Grundrechte*', [2001] 4 Eur H Rts LR421.

61 BVerfGE 39,1(BVerfGE = *Bundesverfassungsgericht* = Federal Constitutional Court) (noted in Taylor (n 59) 205.

62 Taylor (n 59) 205.

63 Alix Schulz, 'Horizontality and the Constitutional Right to Equality– Recent Developments in the Jurisprudence of the German Federal Constitutional Court' (OxHRH Blog, November 2019), <http://ohrh.law.ox.ac.uk/horizontality-and-the-constitutional-right-to-equality-recent-developments-in-the-jurisprudence-of-the-german-federal-constitutional-court> accessed 24 November 2021.

64 Ibid.

65 Jeewan Reddy and Rajeev Dhavan, 'The Jurisprudence of Human Rights' in D M Beatty (ed), *Human Rights and Judicial Review: A Comparative Perspective* (Martinus Nijhoff 1994) 175, 194.

66 See, e.g., *Kapila Hingorani v State of Bihar* [2003] SCCL 472 (Com).

67 Krishnaswamy (n 15).

The trajectory of rights-horizontality can be shown by citing an old case. In 1996, the Indian Supreme Court in *Bodhisattwa GautamvSubhra Chakraborty*[68] ordered an accused person, who was facing a criminal trial in the court below, to pay compensation to a rape-victim for violating her right to life. After 30 years into this decision, the Court in *Vishaka v State of Rajasthan*,[69] emphatically held that all citizens are amendable to a constitutional obligation under article 51A of the Indian Constitution not to engage in sexually discriminatory behavior in the workplace. By this, the Court meant that private persons are subject to an obligation not to breach fundamental rights.

The Indian Supreme Court has since enforced fundamental rights against corporations and private individuals in several cases, without providing any deeper reasoning though. In cases involving the prohibition of non-discrimination (art. 15) and the abolition of untouchability (art. 17), it was held that fundamental rights are enforceable against private persons violating those rights. In a 1995 case, the Court allowed a writ petition for the protection of the right to life of workers against the employer, and observed as follows:

> in an appropriate case, the Court would give appropriate directions to the employer, be it the State or its undertaking or-private employer to make the right to life meaningful; to prevent pollution of work place; protection of the environment; protection of the health of the workman or to preserve free and unpolluted water for the safety and health of the people. The authorities or even private persons or industry are bound by the directions issued by this Court under Article 32 and Article 142 of the Constitution.[70]

In another famous case, the Indian Supreme Court horizontally enforced the right to education against private schools.[71] The majority court held that private schools can be made bound to apply a 25% quota to be reserved for disadvantaged students. The constitutional validity of the Right of Children to Free and Compulsory Education Act 2009 was challenged by an association of unaided private schools on the ground of violation of the (enforceable) right to profession and business. The Court held that the Act's fundamental aim was to realize the fundamental right to education and, thus, it was applicable to 'an unaided non-minority school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority'. It, however, made a reservation for non-application of the quota requirement for minority private schools, as it would otherwise violate article 30 of the Indian Constitution.[72]

Analysing the judgement entirely on technical grounds, especially in light of the dissenting opinions, one could probably say that the Court in this case did not actually deal with the horizontal effect of fundamental rights, but rather decided the

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68 [1996] 1 SCC 490.

69 [1997] AIR 3011 (SC).

70 *Consumer Education & Research v Union of India* [1995] AIR 922 (SC) [30] (Ramaswamy J).

71 *Society for Un-aided Private Schools of Rajasthan v Union of India* [2010] Writ Petition No. 95.

72 On this, see, e.g., Stephen Gardbaum, 'The Indian Constitution and Horizontal Effect' (conference on the Oxford Handbook of the Indian Constitution, New Delhi, 2014) <http://ssrn.com/abstract=2601155>.

question of whether or not the impugned Act was constitutional. Such a line of argument would, however, ignore the spirit of the relevant constitutional provisions. Eventually, it cannot be gainsaid that in all constitutional cases a court indeed decides the constitutionality of any law or the action/inaction that is challenged.

B. Horizontality of fundamental rights in Sri Lanka

In the late 1970s, the Sri Lankan judiciary viewed fundamental rights as being in operation 'only between individuals and the State', and thereby suggesting an inability to enforce human against private persons.[73] This approach began to change gradually, and the change came through expansion of public law's control over private entities that are closed tied with 'state actions'.[74]

At the outset, it should be noted that the Sri Lankan Constitution 1978 only recognizes that fundamental rights can be infringed only by an executive or administrative action, and not by a private action. Article 126(1) gives the Supreme Court an exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right recognized by the Constitution.

In *Ariyapala Gunaratne v The People's Bank* (1986), the Supreme Court of Sri Lanka recognized that 'the ambit of the fundamental rights has a much wider range.'[75] It emphasised that article 12(3) of the Sri Lankan Constitution – the principle of non-discrimination based on race, religion, and so on – 'contemplates possible violations of fundamental rights even by private individuals.' Thus, 'fundamental rights are not infringed only by executive or administrative action[s,] but go beyond the provisions of Article 126'.[76] The Court applied the fundamental right to join trade unions against a private bank that barred its employees from participating in any union or union activities.[77]

In the year following *Ariyapala Gunaratne*, the Sri Lankan Supreme Court lifted the corporate veil of a private company to test whether the action of the Air Lanka Ltd. was an administrative action or not. In a two-to-one majority decision, the Court applied the 'function'-test and found the activities of the company as a public function.[78] It then extended the doctrine of 'state action'/'administrative action' to enforce the fundamental right to form or join associations against a corporation. In its own words,

> The juristic veil of corporate personality donned by the company' for certain purposes cannot, for the purposes of the application and enforcement of

[73] *Rienzie Perera v University Grants Commission* [1978-80] 1 Sri LR 128.
[74] See, for an analysis, Mario Gomez, 'The Modern Benchmarks of Sri Lankan Public Law' (2001) 118 *South African Law Journal* 581.
[75] [1986] SLSC, LEX/SLSC/0008/1986.
[76] Ibid, [42].
[77] A district court had granted the same right, but the court of appeal reversed the judgement. Later, the Supreme Court restored the judgment of the district court.
[78] *Rajaratne v Air Lanka Ltd and Others* [1987] SLSC, LEX/SLSC/0018/1987.

> fundamental rights enshrined in Part III of the Constitution; be permitted to conceal the reality behind it which is the government.[79]

It seems that the Sri Lankan Supreme Court in this case applied the theory of indirect horizontality by progressively interpreting the scope of "state power" or "state action".[80] The development has mainly taken place through a broadening of the meaning of administrative action based on the function-based test. The approach is essentially the act of 'blending rights with writs',[81] through the mechanism of direct horizontality of judicial review based on the principle of legality when a breach of fundamental rights is alleged.[82] An innovative approach was, for example, taken in a 2016 case in which an action by a private company owned by the Sri Lankan Ports Authority was held to be accountable for the breach of fundamental rights of its employees.[83]

VI. CONCLUSION

This paper has shown that the discourse of horizontal impact of fundamental rights has emerged in Bangladesh only recently, despite the fact that the Constitution quite innovatively envisaged the concept as long back as 1972. Although the High Court Division has recognised the horizontality of fundamental rights under art. 102(1), there is not a single case in which rights have directly been enforced against private entities. As seen in some cases above, there is a limited practice of indirect horizontality of fundamental rights, but the Court offered no reasoning for imposing duties on private entities.

The paper reveals that the adjudication of constitutional rights in Bangladesh is still deficient in globality consciousness. Horizontality of human rights has turned out to be a progressive trend in global practices of constitutionalism. In India, as seen above, the Court is applying constitutional rights against private individuals and entities although the Indian Constitution lacks express recognition of such horizontality. And, in Sri Lanka, where the Constitution rather limits the enforcement of constitutional rights only against state actions, the Court devised the remedial tool of indirect horizontality of rights.

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79 Ibid, [19].

80 Some years earlier, in *Velmurugu v the Attorney-General and Another* [1981] SLSC, LEX/SLSC/0030/1981 [89] two judges in the minority commented that 'trampling underfoot the fundamental freedoms' by law-enforcement officers should not be tolerated, but the judges did not suggest any private person's obligation to respect fundamental rights. This was a case against a law-enforcement officer for violation of fundamental rights, which failed for what the court said the lack of proof.

81 Mario Gomez, 'Blending Rights with Writs: Sri Lankan Public Law's New Brew' (2006) 45 Acta Juridica 451.

82 See *Harjani v Indian Overseas Bank* [2005] 1 Sri LR 167 where the court held private bodies exercising public functions amenable to the writ of certiorari. See also *Lanka Viduli Podu Sevaka Sangamaya v Ceylon Electricity Board* [2019] SLCA, LEX/SLCA/0259/2019.

83 *Captain Channa Abeygunewardena v Sri Lanka Ports Authority* [2017] SLSC, LEX/SLSC/0014/2017 (rejecting an objection on the ground of contractual nature of the respondent's employment).

It seems that the decision of the Appellate Division in *Anwar Hossain* will likely have negative consequences for human rights jurisprudence for some years. By resorting to the theory of judicial economy or restraint, the SCAD in *Mainul Hosein* took an unnecessarily reticent position which by implication undervalues the words and spirit of arts. 44 and 102(1) of the Constitution. Admittedly, *Mainul Hosein* was not a fit litigation on the question of horizontal application of fundamental rights. It can nevertheless be argued that the SCAD took the concept of horizontality of fundamental rights quite wrong. By relying on a conservative decision on this point by the Indian Supreme Court, the Appellate Division seems to have downplayed the very constitutional text in art. 102(1) on direct horizontality of constitutional rights.

Adjudication of human rights should be seen in the context and through the lens of the legal culture of any given society. In Bangladesh, we often ignore and forget the primacy of 'duty' in the legal system/culture and the adjudicative framework.[84] Bangladesh's legal system is basically duty-based and 'clearly posited on societal duties and public obligations',[85] an aspect that is not often appreciated in the literature and judicial discourses. It is embedded in society that the violator of rights, be it a private person or the government, must be held to account.

In today's globalized world, many private entities are dealing with the lives and rights of citizens in a substantive way, which was unthought-of even a decade ago. Constitutionalism demands that fundamental rights should in principle be enforceable against the fast-growing private sphere that tends increasingly to intrude into the rights of the citizenry. The theory of effective remedy, which is an obligation under the international human rights instruments, also demands horizontality of human rights. In adjudicating fundamental rights, the Court should therefore adhere to the principles of *respect for human rights or civil liberties, legality,* and *human dignity*.[86]

[84] See, for details, Hoque, *Judicial Activism in Bangladesh* (n 1) 99–100.

[85] Ibid, 99 (by referring to art. 21 of the Constitution that imposes a duty on every citizen to observe the law and the Constitution and to fundamental state policy principles that impose a duty on the state to establish social justice).

[86] Borrowed from Conor Gearty, *Principles of Human Rights Adjudication* (OUP 2004).

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Command Theory of Law and Perils of Citizens[*]

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> "… for I shall desire to talk with you on all subjects which engage me"—so wrote John Austin to Sarah Taylor and provided her, during their five-year long engagement, with an extensive reading list of books by Bentham. After their marriage in 1819, Austin took up residence near Bentham, and the Mill family also lived nearby.[1]

Austin was ".. an austere, reserved, gloomy, bookish yet highly ambitious member of Benthamite inner circle."[2]

Irrespective of whether our law-makers fit the above description or not, the primary narrative of this article is to suggest that our law-makers are, perhaps unwittingly, Austinian in their outlook as our laws stem from their (law-makers') perception of law as a 'command of the sovereign'. And, hence, they 'command'. Whether, as a result, we citizens are at peril or not is the second part of this article. The third and last part delves into "natural law" as an explanatory variable to indicate our reluctance to take legal obligations seriously – a reluctance which, perhaps, is rooted in the disjunction between law and morality in our laws. This disjunction has originated in our overt-emphasis on the 'command' understanding of law. Other malaises of the legal system can be located, albeit often indirectly, in such 'Command' ideas about laws as well as the goals and purposes of the legal system stemming from such ideas.

It is well-known that around one-third of the period (1975-1990) since liberation, we were ruled by 'commanders', i.e., by chiefs of our armed forces. Their notions of laws cannot but be 'command'. Whether 'law-making' of that period still shapes our understanding of law is an issue which is left outside the scope of this article.

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[*] Some of the ideas discussed in this article were first presented a decade ago in Professor Mahfuza Khanam and Barrister Shafique Ahmed Trust Fund Lecture 2010 at the Asiatic Society of Bangladesh, Dhaka, on 24th July, 2010. I briefly revisited some of those ideas in another public lecture in 2018, which was subsequently included in a collection of constitutional law lectures as 'Culture of Constitutional Amendments: (Contentious) Reflections' in Ahmed Javed (eds), *Bangladesh er Shongbidhan: Nana Proshongo* (Dhaka: Onno Prokash 2020) 143-156. An invitation to contribute to a special issue on the occasion of the centennial celebrations of the University of Dhaka and its Law Department appeared to present an opportunity to revisit and refine those legal ideas that we as a nation continue to struggle with.

[1] Kenneth I Winston, 'Book Review of W.I. Morrison's John Austin, Stanford University Press, 1982' (1984) 3 Law and Philosophy 154, 156.

[2] Ibid. Winston goes on – "… a lean grey headed painful-looking man, with large earnest timid eyes and clanging metallic voice … a very worthy sort of limited man and professor of law", quoting from Morrison's biography. John Austin was appointed to the Chair of Jurisprudence at the University of London in 1827 but had a chequered academic career.

However, this article recognizes that a more comprehensive account of our legal system in terms of the command understanding would also need some scrutiny of the influence of law-making by the literal-commanders, i.e., chiefs of the armed forces, but that exercise is left for some leisurely future.[3]

I propose to proceed by way of offering a brief outline of the Austinian command theory, and then provide some examples which epitomize this Austinian understanding of law. In choosing these examples, I have focused on constitutional amendments since these amending acts are an important legislative action requiring the support of two-thirds of the Parliament. Constitutional amendments also have the most far-reaching impact on the overall legal system and encapsulate extensive policy changes formulated by the ruling parties. Not all of the 17 amendments to the Constitution neatly fit the Austinian understanding of law, but it may suffice if most of them do. These examples lead to my second proposition that these amendments have created a perilous situation for citizens. My understanding of "peril" originates in a rights-based notion of law. If laws do not facilitate rights, citizens are at peril. Finally, the disjunction between law and morality, i.e., Austinian law and natural law, is posed, at the end. It suggests that perhaps overt and simplistic positivist understanding of law in law-making exercises and judicial interpretation by the highest court may do well to look to notions of natural law.

Now, a number of caveats are in order. First, every depiction of Austinian theory of law or his positivism has found more than one defender in jurisprudential discourse. Understandably, theoretical expositions of laws are not an everyday affair and, hence, literature in this area is not as profuse as our very popular pastime of offering recommendations for enactment of new laws and changes to the existing laws. In recent times, Dworkin had been one of the most important critics of Austin[4] but then again Austin has several defenders to question Dworkin's depiction of Austin.[5]

As is well known, H.L.A. Hart is credited with reviving positivism by blunting some of the sharper edges of Bentham and Austin.[6]In many ways, English jurisprudence is largely woven around positivism and its ramifications. Unlike many other

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[3] Here one is not oblivious of the pedantic fact that there were "parliaments" during some of the years under the rule of army generals, but no one will seriously dispute the proposition that these parliaments were "para-military-parliaments" as they never acquired the legitimacy of the post-1990 parliaments.

[4] Most notably, Ronald Dworkins, *Taking Rights Seriously* (Cambridge: Harvard University Press 1977). Needless to say, Dworkins tackles not Austin per se, but positivism generally. Austinian are, nevertheless, riled and have rebuked Dworkin. Assessment of Dworkin or his detractors is beyond the scope of this article.

[5] Lloyd L. Weinreb, 'Law and Order' (1978) 91(5) Harvard Law Review 909-959.

[6] "Within a few years of his death it was clear that his works had established the study of jurisprudence in England. And it is now clear that Austin's influence on the development of in England of the subject has been greater than any other writer", as characterized in H.L.A. Hart, 'Introduction' in John Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld & Nicolson 1954) quoted from Wayne Morrison, *Jurisprudence: From the Greeks to Post Modernism* (New Delhi: The Lawman (India) Private Ltd, 1997) 218, footnote 10.

jurisdictions, newer expositions of legal theory are yet to find a place of prominence in English legal theory.[7] In sum, I only touch upon a crude version of Austinian understanding of law without delving into its defense or refutation or considering subsequent refinements. Hence, this article is not about Austinian notions and concepts of law. Secondly, my examples and characterizations of some laws as reflective of the command theory is eclectic. These examples, almost by definition, cannot be beyond disagreement or criticism as one can always read a different meaning into the goal, purpose, or structure of any law.[8] The most this article strives to achieve is to point towards the possibilities of our lopsided understanding of law, at least in some instances.

This article is divided into three parts. Part I briefly outlines the Austinian Command Theory of Law and sets the central theoretical background for the remainder of the article; Part II examines a series of amendments to the Constitution of Bangladesh as examples that variously epitomize the Austinian understanding of law. The final part of this article concludes with an invitation to move beyond such Austinian approaches in making, interpreting, and understanding law in Bangladesh.

I.

Austin is sometimes difficult to grasp. This article, as already indicated, is not about Austin's jurisprudence, nor a scrutiny of his definition of law. Plenty has been written about it. Neither is this paper about the actual reflection of Austin in our law, law-making and, to a certain extent, our legal system. Instead, this paper engages in certain reflections of a somewhat crude variety of the Austinian notions and conceptions of law in our legal system.

Salmond on Jurisprudence is certain to qualify as the most familiar textbook title to law students for at least last half a century or so.[9] The sub-title on Austin's theory in Salmond's book is – "Law as the Command of the Sovereign" and goes on to elaborate that Austin had sought to define law:

> "… not by reference to its content but according to the formal criteria which differentiate legal rules from other rules such as those of morals, etiquette, and so on. ……. According to Austin, whose version of the theory will be considered here, positive law has three characteristic features. It is a type of command; it is laid down by a political sovereign and it is enforceable by a sanction.[10]

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[7] Most notably, the Critical Legal Studies which dominated theorizing about law in the USA during the last quarter century or so has largely remained ignored or on the margin in England. Similarly, the "discourse" (following Foucault) and "Orientalism" (following Edward Said) are yet to be taken up seriously in English jurisprudential studies. Few jurists are sympathetic to these theories in England, but their proponents are, largely, on the margins of academic discourse. Needless to say, theorizing about law is practically unknown to our legal system.

[8] After facts are settled, lawyers of the opposite sides put a meaning into the legal provision which suits his/her case/client and hence until the meaning is settled by a precedent, lawyers continue to argue about the meaning, import, purpose, goal and so on of legal provisions.

[9] P J Fitzgerald, *Salmond on Jurisprudence* (Bombay: Tripathi 1985), the first edition was published in 1902.

[10] Ibid, 25-26.

As for the background to Austin's new approach to law (his lectures on Jurisprudence were originally written in 1820-21), Cotterrell has clarified:

> " …. The basis of his reputation in legal philosophy, are full of vitriolic comments on the absurdities of common law thought and the irrationality of a legal system, if system it could be called, developed primarily by piecemeal judicial interventions. Bentham viewed judge-made law as like waiting for one's dog to do something wrong and then beating it. Austin, however, was not opposed to judicial law-making. What offended him was the total lack of systematic organization or of a structure of clearly definable rational principles in common law. In his lectures he was determined to map out a rational, scientific approach to legal understanding: a modern view of law that would replace archaic, confused, tradition-bound common law thought and encompass both legislation and judge-made law.[11]

It is understandable that the study of law, against the backdrop of perceived chaotic state of common law, needed to be streamlined and new methods had to be devised to separate law proper from all other rules. In many ways, a somewhat similar scenario can also be depicted for the state of law in late eighteenth century Bengal, after the East India Company assumed the power to dispense criminal justice from 1765. For the next half a century or more, laws of Bengal were a curious mix of expositions of Muslim law in Company Courts administered by Kazis and a stream of Regulations promulgated by the East India Company. Dispensation of justice through a curious mix of laws expounded by Kazis, mediated by these Regulations,[12] and further supplanted by the English Judges' own notion of "justice, equity and good conscience" had created a complex legal system which was difficult to understand.[13]

The systematization of laws in our country may be seen to have started with the Penal Code, 1860 to indicate and consolidate the notion that law emanates only from the sovereign and no one else. The mediating influence of Kazis, who until then had acted as interpreters of local and customary laws were done away with by a Regulation of 1862. The nomenclature of "code" of the Penal Code and two other major laws of the British period (Code of Criminal Procedure, 1898 and the Code of Civil Procedure, 1908) had led to an interesting use of the term "codification" of our laws though "code of law", which is a concept of civil law jurisdiction and not of common law jurisdictions.

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[11] R Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (London: LexisNexis UK 2003) Chapter 3.

[12] See A Beaufort, *A Digest of the Criminal Laws of the Presidency of Fort William and Guide to all Criminal Authorities therein, vol. 2* (Calcutta 1850); R Clark, *The Regulations of the Government of Fort William in Bengal, in Force at the End of 1853, vol. 2* (London 1854); R Clarke, *Digest or Consolidated Arrangement of the Regulations and Acts of the Bengal Government, from 1793 to 1854* (London 1855); also Shahdeen Malik, 'Perceiving Crimes and Criminals: Erratic Law in the Early 19th Century Bengal' (2002) 6(1&2) Bangladesh Journal of Law 59; Shahdeen Malik, 'Law of Homicide in Early Nineteenth Century Bengal: Changed Laws and Unchanged Applications' (1998) 2(1) Bangladesh Journal of Law 85.

[13] J. Duncan M. Derrett, *Essays in Classical and Modern Hindu Law: Current Problems and the Legacy of the Past: Justice, Equity and Good Conscience in India* (Brill 1978) 8-27.

The fixation of the authority (by Austin) to enact law with the sovereign and characterization of law as the command of the sovereign certainly served the useful purpose of systemization of our understanding of laws and the legal system. More importantly, this is a simple definition which, perhaps because of its simplicity, was widely accepted.

Natural law, that is the definition of law based on moral concepts and "inherent" notions about right and wrong, are more complex. Any discussion, of law or valid law or proper law which attempts to validate laws from the standpoint of morality or right or wrong inevitably leads to debates and disagreements about 'whose morality, which idea about right or wrong' and so forth, should be reflected in these laws. These debates and uncertainties about morality provided the main thrust for the acceptance of a sanitized version of law as command, which was primarily concerned with whether the command was issued from/by the political sovereign. Austin's definition avoided the pitfall of being bogged down into debates about the morality of the command. The issue has been simply put in the following words:

> "Positivists deny that law and morals are connected to one another in any essential or necessary way; defenders of natural law theories assert that there is such a connection."[14]

H.L.A. Hart, has described legal positivism as "the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."[15] A.P. d'Entrèves, an eminent spokesman for natural law, has observed that "its most constant feature all through the ages [is] the assertion of the possibility of testing the validity of all laws by referring them to an ultimate measure, to an ideal law which can be known and appraised with an even greater measure of certainty than all existing legislation."[16] He has also said:

> [T]he very assertion of natural law is an assertion that law is a part of ethics, [and] its essential function can appear only as that of mediating between the moral sphere and the sphere of law proper. The notion of natural law partakes at the same time of a legal and of a moral character. Perhaps the best description of natural law is that it provides a name for the point of intersection between law and morals.[17]

More simply, if a person ignorant in law, nevertheless, does something which he thinks is right or refrains from doing something which he thinks is wrong, such actions will most probably stem from his own understanding of right and wrong.

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[14] Lloyd L. Weinreb, 'Law and Order' (1978) 91(5) Harvard Law Review 909- 959, 909.

[15] H.L.A. Hart, *The Concept of Law* (London: Oxford Clarendon Press 1961) 181-82, as quoted by Weinreb above.

[16] A.P. d'Entrèves, *Natural Law* (Hutchinsons University Library 1951) 93, as quoted by Weinreb above.

[17] Ibid, 95, as quoted by Weinreb above.

Such action or refrain may coincide with legal provisions on that issue. What he has done or refrained from doing was that which law had exactly commanded. It is immaterial for this person that the law which he is unknowingly abiding was the command of the sovereign. These legal provisions (doing or refraining from doing) is not dictated by a sovereign under the threat of sanction or punishment but by the person's own morality. To facilitate adherence or compliance with law, the law must be based on or reflect moral values.

This central position of natural law is submerged under the Austinian understanding of the "sovereign."For Austin, the command to be obeyed as law must satisfy a second condition; that it is issued by a determinate or determinable sovereign.

During the colonial times of Austin, political independence of the sovereign was posed in terms of whether the sovereign was under obligation of any other body/person or not, and not whether the ultimate sovereign was local or unlocal. In other words, it did not matter even if the ultimate sovereign was located in a foreign soil (the so-called metropolis). British law-making in nineteenth century British-India, initially as Regulations and then as Codes and Acts were all "commands" of the sovereign, though the sovereign was located far away from India. For Austin, the issue of sovereignty had been formulated in the following terms by Dewey:

> "The question raised, then, by Austin's conception of sovereignty is precisely whether it resides in a specific numerical portion of the body politic. The question raised (by Austin's conception of sovereignty) is of special interest in the country; for if Austin's theory is correct, the theory of popular sovereignty is obviously wrong, not only in the crude form in which it is ordinarily stated, but in any possible development of it."[18]

These tensions between popular sovereignty and command, in almost a perverse way, seem to dominate our law-making and law-interpreting exercises and I turn to such exercises in the following part of this article.

II.

I shall proceed to locate, in this part, the defining influence of Austinian notion of law as a command of the sovereign by suggesting (a) that the legislature seems to take the law literally as a command, which I show to be the case through an analysis of the content of the constitutional amendments; and (b) the fact that the content of many of our constitutional amendments is positive in nature, i.e., often devoid of moral contents. This, in turn, stems from the perception that since the legislature has the required political authority (sovereignty to enact law), it need not concern itself with the moral content of laws. It is difficult to single out the primary driving force for the state of our "positivistic" law other than the fact that it is the product of historically understood and often path-dependent notions of the commands of a sovereign.

[18] Susan Minot Woody, 'The Theory of Sovereignty: Dewey versus Austin' (1968) 78(4) Ethics 313-318; see also, John Dewey, 'Austin's Theory of Sovereignty' (1894) 9(1) Political Science Quarterly 31-52.

Our legislature has been rather prolific in law-making. The ninth (2009-2013) and tenth (2014-2018) Parliaments had enacted 262 and 193 laws, respectively.[19] During the periods of "Martial laws", martial law regulations and ordinances were promulgated with much more haste and without, virtually, much serious consideration. The sum total of bills enacted into laws by the Parliament since 1973 will run into more than two thousand (though many of these are "amending" laws and not primary or parent laws). Understandably, a scrutiny of such a huge body of laws is both impractical and unnecessary for our present purposes. Instead, to indicate the influence of the "command" understanding of law of our law-makers, I shall confine myself to our constitutional amendments.

A. The Constitution and Natural Law

Our Constitution, like most other contemporary constitutions, is concerned with constraining power i.e., to ensure democratic governance through laws and not by the whims of persons. Secondly, and more importantly, the Constitution limits the ambit of power of all constitutional functionaries (e.g., the term of office is for a maximum of 5 years). These limits are also enshrined in the fundamental rights part of the constitution. Any exercise of official power, subject to certain conditions laid down by law, cannot encroach upon these fundamental rights.These limits on power are realized by framing certain fundamental rights, such as those in Article 35 in absolute terms. Certain fundamental rights can be limited but only by enacted laws which must be fair, reasonable, and not inconsistent with the constitution. Furthermore, procedural safeguards also limit executive power by delineating the manner in which such power may be exercised.

The moral content or the natural law part of the Constitution, to my mind, is contained in the Preamble and the Fundamental Principles of State Policy (Part II of the Constitution). The Preamble proclaims "…. the high ideals of nationalism, secularism, democracy, and socialism…..shall be the fundamental principles of the Constitution……. [and] the fundamental aim of the State would be to realize a socialist society free from exploitation and a society in which "equality and justice, political, economic and social will be secured for all…."[20]

Article 8 of Part II (the moral contents or natural law part of the Constitution) provides that these principles are not enforceable in a court of law. However, these would be fundamental in governance, in interpretation of the Constitution and "shall form the basis of the work of the State." So far, because of the provision that this Part II is not enforceable in a court of law, our courts have consistently taken a strict view that nothing in Part II concerns a court of law. In a number of cases, parties have sought to rely on some of the Fundamental Principles of State Policy in support of

[19] 'Acts of the 9th Parliament' (*Bangladesh Parliament*) <http://www.parliament.gov.bd/index.php/en/parliamentary-business/business-of-the-house/bill-and-legislation/acts-of-parliament/acts-of-9th-parliament> accessed 14 April 2021; 'Acts of the 10th Parliament' (*Bangladesh Parliament*) <http://www.parliament.gov.bd/index.php/en/parliamentary-business/business-of-the-house/bill-and-legislation/acts-of-parliament/acts-of-10th-parliament> accessed 14 April 2021.

[20] The Constitution of Bangladesh, preamble.

their respective position. However, invocation of the Fundamental Principles has not, generally, found much favour with the Courts. Courts have almost consistently relied on the proposition that these policies are not enforceable as a right. It is not contended that the Fundamental Principles would be enforceable, but only that a more sympathetic – natural law based – approach would have at least offered some legal mooring to these principles. A rights-based understanding of law, which often stems from a natural law perspective, would have shaped the place of these Principles in our legal system differently. Instead, since these Fundamental Principles are not "command per se", these are largely ignored, even after almost five decades of understanding and interpreting the Constitution.[21]

B. Constitutional Amendments and "Command"

As indicated earlier, instead of a massive scrutiny of laws from different areas, our focus on the Constitution can best indicate the place of "command" in our legal system. The "command" approach to law is most glaringly evident in our constitutional amendments. So far, the Constitution has been amended 17 times, of which the 5th through the 10th, i.e., 6 out of the 17 constitutional amendments were introduced under Martial Law and quasi-Martial Law regimes and we exclude those from our scrutiny. Of these 6 amendments, 2 of them, that is 5th and 7th amendments were not single legislative acts in the conventional sense. Various martial law regulations during 1975-1979 amended several provisions of the constitution. These regulations were made part of the constitution by one sweeping article of the 5th Amendment. Similarly, other martial law regulations during 1982-1986 were all incorporated into the Constitution by the 7th Amendment. The other 4 out of the 6 amendments during military-led governments were technical in nature. For example, some of these increased the number of women reserved seats in the Parliament and limited presidents to two terms only. Hence, these are excluded from our discussion.

[21] A number of reported cases have referred to the Fundamental Principles. *Dr. Ahmed Hossain v Bangladesh and others* (1992) 44 DLR (AD) 109 (Art 8), *Farida Akhter v Bangladesh* (2006) 11 BLC (AD) 156 (Art 8, 9); *Ejahar Miah alias Ezharul Haque v Bangladesh and others* (2000) 6 BLC (HCD) 644 (Art 9); *Ruhul Mannan Helali v Bangladesh* (2003) 8 BLC (HCD) 349 (Art 10); *Sameema Sultana Seema & 9 others v Bangladesh* (2005) 57 DLR (HCD) 201 (Art 10); *Sheikh Abdus Sabur v Returning Officer, District Education Officer-in Charge, Gopalgonj and others* (1989) 41 DLR (AD) 30 (Art 11); *ProfessorNurul Islam and others v the People's Republic of Bangladesh and others* (2000) 52 DLR (HCD) 413 (Art 11 and 18); *Motiar Rahman and 18 others v Bangladesh* (2005) 57 DLR (HCD) 327 (Art 11); *Hussain Mohammad Ershad v Bangladesh and others* (2001) 6 MLR (AD) 33 (Art 13); *Hyundai Corporation v Sumikim Bussan Corporation and others* (2002) 54 DLR (AD) 88 (Art 14); *Rabiya Bhuiyan v Ministry of LGRD* (2007) 59 DLR (AD) 176 (Art 15); *Mozahidul Islam v Ministry of Education* (2016) 68 DLR 234 (Art 15); *Bangladesh v M. R. Khan* (1976) 28 DLR (HCD) 215 (Art 16); *Faizul Islam (Md) v Bangladesh* (2017) 22 BLC 246 (Art. 15, 17, 19); *Chairman, National Board of revenue (NBR) v Advocate Zulhas Uddin Ahmed* (2013) 18 BLC (AD) 52 (Art 18); *Government of People's Republic of Bangladesh v Md. Mushfaqur Rahman* (2020) 72 DLR (AD) 211 (Art 18A); *Iqbal Hossain Mollah v Director Plant Protection Wing*(2007) 59 DLR (HCD) 458 (Art 21).The above is by no means an exhaustive list of all the reported cases that touch on some aspects or other of the Fundamental Principles of State Policy. These and other cases on the Fundamental Principles of State Policy almost invariably provide passing mentions of the Articles involved and often with the observation that these principles are not enforceable. However, some of these cases do emphasize the positive obligation of the State to realize these principles.

At the risk of slight exaggeration, it may be asserted that almost all the other 11 constitutional amendments have consolidated and strengthened the power of the Executive, at the cost and perils of citizens.[22] The following is a short account of these amendments, but with a view to indicate how most of these Amendments have 'periled' citizens. It needs to be pointed out that the primacy of the state over citizens have been a key driving force behind these amendments, i.e., state needs to be preserved and protected and its primacy over citizens emanates from a 'command of the sovereign' understanding of law; consequently, placing citizens at peril.

1. First Amendment[23]

The First Amendment created an exception for laws providing for punishment of crimes against humanity, genocide, war crimes and other such crimes in so far as any law for these crimes cannot be challenged on the ground of being violative of fundamental rights by adding sub-Article (3) to Article 47; and also, by adding a new Article 47A to ensure that any such law is immune from challenge on constitutional grounds.

Prosecution of persons accused of crimes against humanity, genocide, war crimes and other such heinous crimes had long been recognized as a universal imperative which over-rides procedural safeguards associated with ordinary criminal trial. Arguably, this Amendment can qualify as a reflection of the emerging post-Second World War global morality of total and unconditional abhorrence of crimes against humanity.

2. Second Amendment[24]

The Second Amendment diluted the constitutional protection of the right to liberty (provided in Article 33 of the founding Constitution) by amending Article 33. The Constitution did not provide for arrest or detention under any preventive detention law, i.e., curtailment of the right to liberty without allegations of having already committed a crime; but preventive detention is arrest before the commission of a criminal act, on the suspicion that a person may commit a 'prejudicial act', i.e., an act detrimental to the interest of the state, state's economy, its relationship with other countries. To enable the State to restrain a person or preventing him from committing a prejudicial act, sub-Article (3), (4), (5) and (6) of Article 33 were added by this Amendment to facilitate the enactment of preventive detention laws. Retaining the earlier "heading" of Article 33 – 'Safeguards as to arrest and detention'—sub-Article (3) now provided that: "Nothing in clause (1) and (2) shall apply to any person – (b) who is arrested and detained under any law providing for preventive detention". Following this Amendment, the Special Powers Act, 1974 was enacted to provide for preventive detention.[25]

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[22] I have elaborated specifically on the perils of citizens and constitutional amendments from a rights-based perspective in Shahdeen Malik, 'Culture of Constitutional Amendments: (Contentious) Reflections' in Ahmed Javed (eds), *Bangladesh er Shongbidhan: Nana Proshongo* (Dhaka: Onno Prokash 2020) 143-156.

[23] The Constitution (First Amendment) Act 1973 (Act No. XV of 1973) [15 July 1973].

[24] The Constitution (Second Amendment) Act 1974 (Act No. XXIV of 1973) [22 September 1973].

[25] The Special Powers Act 1974. (Act No. XIV of 1974) [9 February 1974].

It is well-known that under the Special Powers Act, 1974, tens of thousands of people had been detained during the first three decades of its operation, but now (from the early part of this century) the Supreme Court of Bangladesh has made it almost impossible for the Government to detain someone under this Special Powers Act, 1974. In other words, through a series of Judgements from the early 1980s, the Supreme Court tried to limit the power of detention by embarking on the path of declaring most detentions illegal and, hence, ordered the release of detained persons. Gradually these detentions came to be routinely declared illegal. Sometimes the detaining officials of the Government were even rebuked and censured by the Court with the result that preventive detention under the Special Powers Act, 1974 is now hardly applied.

This Amendment, the consequent law and its treatment by the courts reflected an important constitutional tension. On the one hand, this amendment epitomized the command theory as it drastically curtailed the basic and fundamental right of liberty. On the other hand, the courts had taken a firm stand in favour of this fundamental right by virtually abolishing the power of the government to detain a person under the Special Powers Act, 1974. This withering away of the power of the government to preventively detain was not done through a single or even a few judgments. The chipping away of this power was done through hundreds of judgements over roughly a period of a quarter of a century , from early 1980s to the middle of the first decade of this century.[26] In a remarkable detention case in which leaders (such as Dr. Khondker Mossarraf Hossain, Mirza Abbas and others) of the main opposition political party (the Bangladesh Nationalist Party) were detained in 1997, the High Court Division not only ordered their release by declaring their detention illegal; but also ordered the government to pay compensation of Taka one lac to the detainees.[27] Nevertheless, the fact remains that this Amendment, under which tens of thousands of citizens were detained over a period of three decades, was a very perilous 'command' for citizens.

The other part of this Second Amendment introduced detailed provisions for the proclamation of emergency. Provisions relating to the proclamation of emergency were contained in Article 63 of the Constitution, which had provided that "in case of actual war or imminent invasion of Bangladesh by land, sea or air the President may take whatever measure he considers necessary for the protection and defense of Bangladesh….".[28] Furthermore, sub-Article (3) of this Article 63 had provided that "nothing in this Constitution shall invalidate any law enacted by Parliament which is expressed to be for the purpose of securing the public safety and preservation of the State *in time of war, invasion or armed rebellion*." (italicized)

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[26] For an earlier discussion on the Special Powers Act and judicial review concerning this Act, *see* Shahdeen Malik, "Chapter 3: Bangladesh" in Andrew Harding & John Hatchard (eds) *Preventive Detentionand Security Law: A Comparative Survey* (Netherlands: Martinus Nijhoff Publishers 1993); *see also*, Quazi Reza-Ul Hoque, *Preventive Detention Legislation and Judicial Intervention in Bangladesh* (Dhaka: Bishwa Shahittya Bhavan 1999).

[27] *Bilkis Akhter Hossain vs Bangladesh* (1997) 17 BLD (HCD) 395; the Appellate Division, however, had stayed the part regarding compensation. The petitioners do not seem to have pursued their claim for compensation in the Appellate Division.

[28] The Constitution of Bangladesh, Art. 63.

Clearly, emergency in terms of taking steps by the President and enactment of laws in derogation of the Constitution was permitted only "in time of war, invasion or armed rebellion". Instead of these two very restricted sub-Articles, a whole new Part IXA was inserted which provided for the proclamation of emergency in a wide variety of situations ("… in which …. economic life of … any part … is threatened") and such emergency may be proclaimed even before the actual occurrence of the dire situation.[29]

A Proclamation of Emergency empowers the Government to enact laws in derogation of six Articles of the Constitution (namely Articles 36, 37, 38, 39, 40 and 42) and suspend the enforcement of these six Articles. However, the Appellate Division of the Supreme Court of Bangladesh has taken the sweeping position that no fundamental rights can be enforced during emergency:

> "The President in terms of Article 141C (1) is empowered to suspend the enforcement of any of the fundamental rights conferred by Part III during the period when a Proclamation of Emergency is in operation. It is for the President to decide the enforcement of which of the fundamental rights should be suspended during the operation of the Proclamation of Emergency. This power is not liable to be circumscribed or limited by any other provision in the Constitution including Article 26. Once a Proclamation of Emergency has been made the security of Bangladesh or any part thereof invest in the President all out power to suspend the enforcement of any of the fundamental rights conferred by Part III of the Constitution. This is necessary to keep up and maintaining the welfare of State. As a matter of fact, there is no scope for enquiry into the question whether the fundamental rights the enforcement of which the President has suspended under Article 141C (1) has anything to do with the security of Bangladesh which is threatened whether by war or external aggression or internal disturbance. If the President considered the suspension of the fundamental rights to be necessary during the subsistence of the Proclamation of Emergency, it should be taken to have been made in the interest of security of Bangladesh and no further proof of the security is necessary. We therefore find no force in the argument advanced by Mr. Islam. The learned Judges of the High Court Division have therefore erred in disposing of the rule in the writ petition under reference making the same absolute by enforcing the aforesaid fundamental rights while the proclamation of emergency was operative in the country"[30]

Clearly, the emergency provisions of Article 141A to 141C of Part IXA cannot envisage a situation in which citizens of this country will be without any fundamental right whatsoever. Any scenario in which the Supreme Court is debarred from enforcing any fundamental right is, in my mind, identical to a situation in which the country is without a Constitution or where the Constitution has been abrogated. In other words, an understanding of the Constitution that it merely provides for posts

[29] The Constitution of Bangladesh, Part IXA.

[30] *Ataur Rahman and others v B.M. Mohibur Rahman and others* (2009) 14 MLR (AD) 138, 147.

and positions and institutions, but no right of citizens is an idea which can emanate only from a very crude and mechanical understanding of the 'command theory of law'.

Provisions of emergency read through the lens of natural law or mediated by ideas of natural law will lead to the reading of these provisions to mean that only the specified 6 Articles can be suspended (all of which relate to 'political' rights of freedom of movement, assembly, association, speech, profession, and property), and not any of the other freedoms such as life, liberty, non-discrimination, or prohibitions against retrospective law, double jeopardy, torture and so forth. A blanket reading of the emergency provisions of Articles 141B and 141C, as the Appellate Division seems to have done in the above case, would also imply negation of the freedom of religion, which is an absurd proposition.[31]

3. Third Amendment[32]

This is the most innocuous amendment in the sense that it embodied a treaty between Bangladesh and India regarding the mutual exchange of some border-enclave. This treaty had to be incorporated into the constitution through the Third Amendment after it was challenged in *Kazi Mukhlesur Rahman vs. Bangladesh*.[33] The Supreme Court ruled that the Government could not change the land borders or landmass of the country without incorporating those changes in the Constitution. Hence, the Parliament duly enacted the India-Bangladesh treaty as part of the Constitution in the Third Amendment. This was an instance of positivism insofar as this amendment was enacted to overcome procedural impropriety as pointed out by the Supreme Court. This Amendment, therefore, was a *post facto* validation of an ostensibly improper executive action and thus, constituted positivist law-making.

4. Fourth Amendment[34]

The Fourth Amendment to the Constitution, as is well known, was substantially repealed by the Fifth Amendment.[35] Though the Fourth Amendment was repealed, it also very clearly stemmed from the notion of the primacy of sovereign command as law, in derogation of almost all notions of democracy, rights and freedom—principles, some of which were fundamental to the founding of the country and enumerated in the Preamble of the Constitution. A couple of provisions of the Fourth Amendment would suffice to illustrate the command notion of law embedded in it.

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31 One cannot but wonder whether our Appellate Division in 2009 considered governance and constitution to only relate to laws relating to functions of governance in the sense that its only function was 'to rule'. The constitutional document of the colonial era, i.e., the Government of India Act, 1935 is a case in point that encapsulates such notions. It did not contain any chapter or part on any fundamental or human rights. The 1935 Act was primarily about powers and functions of institutions with a view 'to rule'.

32 The Constitution (Third Amendment) Act 1974 (Act No. LXXIV of 1974) [28 November 1974].

33 *Kazi Mukhlesur Rahman v Bangladesh* (1974) 26 DLR (SC) 44.

34 The Constitution (Fourth Amendment) Act 1975 (Act No. II of 1975) [25 January 1975].

35 The Constitution (Fifth Amendment) Act 1979 (Act No. I of 1979) [6 April 1979].

Article 44 of the Constitution had provided that the right to enforce fundamental right is itself a fundamental right. However, the Fourth Amendment replaced Article 44 with the following Article 44:

> "Parliament may by law establish a constitutional court, tribunal or commission for the enforcement of rights conferred by this Part;"[36]

and deleted Article 102(1) which had given the High Court Division the power and authority to enforce fundamental rights.[37]

A host of other provisions of the Fourth Amendment banned most political parties, curtailed freedom of expression and association, made the Supreme Court subservient to the dictates of the President and so forth – in effect, obliterating most of both procedural and natural law contents of the Constitution.

Clearly, the primacy of state over citizens, which is justifiable under a strict command theory of law as the Amendment was duly enacted by the Parliament (the law-making sovereign) and there is no question that it was a law in terms of the command theory. Any criticism and opposition to the provisions of the Fourth Amendment can only stem from natural law concepts of rights, justice, and orderly society. To my mind, the fact that there are not too many defenders of the Fourth Amendment now is a tacit recognition that it was contrary to natural law.

As indicated earlier, we shall not indulge in any scrutiny of the Amendments of the Constitution brought about by the Martial or quasi Martial Law regime and skipping these amendments, we shall proceed to the Eleventh Amendment of the Constitution.

5. Eleventh Amendment[38]

The Eleventh Amendment is a curious one and difficult to neatly fit into either positive or natural law compartments. This Amendment was enacted to retrospectively validate continuity in the government as President General H.M. Ershad was ousted from office through a popular movement in December 1990. Consequently, a legal mechanism had to be invented to replace the ousted president with a person who was acceptable to the Main Political Alliances (while general elections were pending). There was general consensus at the time that the incumbent Chief Justice, Shahabuddin Ahmed was acceptable to all political parties. Therefore, the transition of power under a caretaker government was overseen under the leadership of Shahabuddin Ahmed who subsequently returned to his post as Chief Justice. This mechanism for a single election and democratic transition was subsequently validated by the Eleventh Constitutional Amendment.

The preamble to this amendment acknowledged the struggles of the people and "the Main Political Alliances", regardless of their beliefs and ideas, to establish a neutral caretaker government to oversee a credible general election. Thus, the Preamble

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[36] The Constitution (Fourth Amendment) Act 1975, s 3.
[37] The Constitution (Fourth Amendment) Act 1975, s 17.
[38] The Constitution (Eleventh Amendment) Act 1991 (Act No. XXIV of 1991) [10 August 1991].

referred to the popular sovereignty of the people, as opposed to the sovereign power wielded by a select group or persons.

The preamble to the Amendment stated that "upon a positive assurance of the Main Political Alliances and parties …..he [Shahabuddin Ahmed] would be eligible to return to the post of Chief Justice of Bangladesh …".[39] This provision validated the taking of the office of Vice President by Chief Justice Shahabuddin Ahmed and his subsequent return to the office of the Chief Justice of Bangladesh.

From the standpoint of positive law, there is hardly any difference between the Fifth and Seventh Amendments, which are *post facto* validation of taking over the highest offices. The EleventhAmendment, on the other hand validated Shahabuddin Ahmed's entering into the office of the Vice President and then going back to the office of the Chief Justice of Bangladesh.[40] If one were to look into these two different sets of amendments through the prism of positive law only, then all three Amendments were properly and validly enacted by the Parliament in terms of the requirement of enacting constitutional amendments. The difference, however, between the Fifth and Seventh Amendments, on the one hand, and the Eleventh Amendment, on the other hand, is in terms of natural law. The threshold of the moral content and justification of the EleventhAmendment is completely different from the two earlier Amendments which validated Martial Law regimes. The Eleventh Amendment, can be justified because it stands not only the procedural correctness of law-making and law-amendment but also because it was *a priori* based on moral acceptance of the people (represented by the Main Political Alliances and other parties of differing ideologies).[41]

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[39] *Id.*, Preamble.

[40] On a different note, Shahabuddin Ahmed retired as the Chief Justice in 1994. In 1996, when the Awami League won the parliamentary elections, the parliament elected Shahabuddin Ahmed as the president of the Republic. This assumption of office of the President of the Republic by Shahabuddin Ahmed was challenged in *Abu Bakkar Siddique v Justice Shahabuddin Ahmedand another* (1997) 49 DLR (HCD) 1, on several grounds, including Article 99. Interestingly, the Eleventh Amendment was not cited in this case and the Rule was discharged, i.e., the claim of the petitioner that Mr. Shahabuddin Ahmed assumed office of the President in violation of the constitution was dismissed. After *Ruhul Quddus v Justice M.A. Aziz* (2008) 60 DLR (HCD) 511, the law on the assumption of offices by the judges of the Supreme Court has changed and the earlier case of Justice Shahabuddin Ahmed would probably be decided differently now. It was ruled in the *Ruhul Quddus* case that a judge of the Appellate Division could not enter into another office of profit in the service of the Republic—which includes office of the president.

[41] The Eleventh Amendment to the constitution was not inserted in the text of the constitution. Instead, it was inserted as clause 21 of the Fourth Schedule to the Constitution. The Fourth Schedule was titled "transitional and temporary provisions". The constitution in 1972 included 17 clauses in this Fourth Schedule. Over the years, 6 more clauses were added to this Schedule including the Eleventh Amendment which was inserted as clause 21 to the Fourth Schedule. However, the Fifteenth amendment to the constitution in 2011 omitted these six clauses 18-23. As a result, Eleventh Amendment is now not included in the text of the constitution. Hence, the constitutional validity of the Caretaker Government headed by Shahabuddin Ahmed has disappeared from the Constitution.

6. Twelfth Amendment[42]

The Twelfth Amendment restored parliamentary form of government in Bangladesh, which was previously changed to the Presidential form by the Fourth Amendment in 1975. The Thirteenth Amendment to the Constitution provided for the Caretaker Government. The Fourteenth Amendmentincreased the retirement age of the judges of the Supreme Court to 67 years and increased the number of reserved seats for women from 30 to 45.

The Twelfth Amendment can be seen as resulting in the dispersal of executive power of the Republic from President to a Cabinet. However, Article 55 now provides that the executive power of the Republic shall "be exercised by or on the authority of the Prime Minster", making the Prime Minister almost as powerful as the earlier President under the presidential form of government.[43] Additionally, Article 48 of the Constitution reduces the post of the President to a titular head only and without any meaningful executive power.[44] The overwhelming executive authority of the Prime Minister, coupled with the restriction put on the Members of Parliament under Article 70 are, again, moored in the exclusivity of sovereign power understood as powers only of the ultimate sovereign authority and not of the people.[45]

7. Thirteenth Amendment[46]

The Caretaker Government introduced by the Thirteenth Amendment is positive law *par excellence*, devoid of any moral content. A failure to hold free and fair election has led, through this amendment, to the denial of all democratic norms and principles as the State clearly ceases to be a People's Republic for at least three months. Such a cessation of the Republican form, as the experience of the last Caretaker Government (2007-2008) has shown, can be extended for a frighteningly long period of time. As indicated earlier, the blanket understanding of the Emergency powers both by the Executive and the Judiciary, and the duration of the unrepresentative Caretaker Government can be unnecessarily prolonged. A positivistic approach to law will fail to see this as problematic because this situation would be technically 'legally' valid. This technical justification for the two-year long caretaker government was also upheld in *Masood R Sobhan v. Bangladesh*.[47] Thus, the Thirteenth Amendment and its subsequent interpretation by the Court reflect the predominance of positivism illustrating the instrumental uses of the law—an approach which may serve the sovereign well.

The ThirteenthAmendment was challenged in the HCD of the Supreme Court in *Saleem Ullah.*[48] The HCD rejected the arguments of the petitioners by a 2-1 majority and upheld the Thirteenth Amendment. On appeal, the Appellate Division by a 4-3

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42 The Constitution (Twelfth Amendment) Act 1991 (Act No. XXVIII of 1991) [18 September 1991].
43 The Constitution of Bangladesh, Art. 55.
44 The Constitution of Bangladesh, Art. 48.
45 The Constitution of Bangladesh, Art. 70.
46 The Constitution (Thirteenth Amendment) Act 1996 (Act No. I of 1996) [28 March 1996].
47 *Masood R. Sobhan* v *The Election Commission & ors* (2008)28 BLD (HCD) 317.
48 *M. Saleem Ullah* v *Bangladesh* (2005)57 DLR (HCD) 171.

majority declared the Thirteenth Amendment unconstitutional.[49] Interestingly, the petitioner's main grounds—which were upheld in the judgment—for challenging this amendment can be characterized as arguments stemming from a natural law understanding of right and wrong. The petitioners had argued that the non-elected neutral Caretaker Government violated the principle of democracy and the basic structure of the Constitution. The other main argument of the petitioner was that the prospect of becoming the Chief Advisor i.e., head of the neutral nonparty Caretaker Government influenced the choice of chief justices by the government to ensure that those candidates who were favorable to the government would be appointed as the head of the Non-party Caretaker Government during the crucial task of holding national elections. This, it was argued, was detrimental to the independence and neutrality of the judiciary. The Appellate Division had invited 8 of the most prominent lawyers as *amici curiae* including Dr. Kamal Hossain, the chair of the Constitution Drafting Committee of 1972. All of them, save two, supported the Thirteenth Amendment, arguing that the temporary non-elected caretaker government served the greater democratic goal of ensuring free and fair elections. However, their arguments were rejected by the majority of judges.

There was, thus, an interesting juxtaposition of the views of *amici curiae* on the one hand, and majority judges on the other. The lawyers adopted a natural law understanding on the logic that temporary loss of democratic governance in accordance with law i.e., the Thirteenth Amendment consolidated democracy by ensuring fair elections. The majority judgment, on the other hand, took the purest positive law position that the country cannot deviate from elected democratic governance even for a day as that would be contrary to democratic principles. The majority position was that governance of the country ought to maintain popular representation at all times since Bangladesh is a "People's Republic".[50]

8. Fifteenth Amendment[51]

After the pronouncement of the "order" portion of the judgment in May 2011 but prior to the publication of the full judgment which declared the Thirteenth Amendment unconstitutional, the Parliament promptly enacted the FifteenthAmendment in July 2011. This amendment omitted the Caretaker Government chapter of the Constitution. Elections held since then, that is to say, the general elections of 2014 and 2018 have resulted in landslide victories for the ruling party, the Awami League.

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[49] *Abdul Mannan Khan v Bangladesh* (2012) 64 DLR (AD) 169. Saleem Ullah, the petitioner in the High Court Division case mentioned earlier passed away before the appeal was heard in the Appellate Division. Saleem Ullah was substituted by Abdul Mannan Khan as the appellant. Interestingly, the Thirteenth Amendment was earlier challenged on different technical grounds in *Syed Muhammad Mashiur Rahman v Bangladesh* (1997) 17 BLD 55 and the petition was summarily rejected.

[50] For contrasting scholarly opinions on this judgment, *see*M. Jashim Ali Chowdhury, 'Elections in 'Democratic' Bangladesh' (for an appreciative account) and Ridwanul Hoque, 'The Judicialization of Politics in Bangladesh' (for a critical) in Mark Tushnet and Madhav Khosla, *Unstable Constitutionalism—Law and Politics in South Asia* (Cambridge University Press 2015).

[51] The Constitution (Fifteenth Amendment) Act 2011 (Act No. 14 of 2011) [3 July 2011].

9. Fourteenth Amendment[52]

The Fourteenth Amendment was enacted in May 2004. It primarily changed the retirement age of judges of the Supreme Court from 65 to 67 years. The amendment also increased the number of reserved seats in the Parliament for women to 45 and some other changes. The enhancement of the retirement age of judges immediately led to protests from various quarters. This enactment was promptly followed by public protests against the Fourteenth amendment to purportedly install a particular person as the head of the next Caretaker Government.

As I have been arguing in this article, the extreme version of the command understanding of law can lead to a legal regime without any moral foundation as starkly posed (more than the caretaker government) by the increase of the retirement age of the Judges to enable one particular person to become the head of the next Caretaker Government. Such positive law, though impeccable in procedural terms (law only as the command of the political sovereign), does not create any moral obligation to obey the law. The fact that we frequently characterize ourselves as a nation which is deficient in qualities for abiding by or adhering to laws, perhaps stems not so much from some traits of our character but from the laws which we do not feel morally obliged to follow—because it does not reflect the aspirations of the people. The Fourteenth Amendment, as mentioned above was widely perceived as a piece of legislation to facilitate the re-election of the then-incumbent government i.e., a piece of self-serving legislation by the government. The Nonparty Caretaker Government was ushered in by the ThirteenthAmendment to ensure free and fair election, but the Fourteenth Amendment diluted the non-partisan character of the caretaker government. The Fourteenth Amendment—a positive law to achieve certain perceived dubious purposes—undermined the moral legitimacy of a nonparty caretaker government by turning such government into a quasi-partisan one.

10. Sixteenth Amendment[53]

The instrumental use of law as demonstrated by other amendments discussed earlier continued with the Sixteenth Amendment to the Constitution, enacted by the Parliament in September 2014.

In 1972, the constitution had provided for parliamentary impeachment procedures for removal of judges of the Supreme Court, Election Commissioners and two other constitutional offices of technocratic nature. They were to be removed by votes of at least two-third majority in the Parliament after an investigation found them guilty of gross misconduct. This procedure for removal was first changed by the Fourth Amendment in January 1975 under which the President could unilaterally remove judges among other posts.

The one-party state with quasi dictatorial power for the president created by the Fourth amendment was dismantled through a number of Martial Law proclamations

[52] The Constitution (Fourteenth Amendment) Act 2004 (Act No. 14 of 2004) [17 May 2004].
[53] The Constitution (Sixteenth Amendment) Act 2014 (Act No. 13 of 2014) [22 September 2014].

and regulations during the latter half of 1975, 1976 and 1977. One of these martial law proclamations amended Article 96 of the Constitution to introduce a Supreme Judicial Council (SJC) consisting of the Chief Justice of Bangladesh and the next two senior-most judges of the Appellate Division to investigate allegations of physical or mental incapacity of, or gross misconduct by any judge of the Supreme Court. The SJC was authorised to recommend to the president the removal of the said judge in question if found guilty of the allegations—and its findings would be final.

Although the Supreme Court reviewed various Martial Law proclamations and regulations over time, it did not declare the SJC unconstitutional. The SJC was retained in its original form until the Sixteenth Amendment was enacted. With hindsight, it appears that the Parliament, without any ostensible and acceptable legal or political justification, had suddenly decided to enact the Sixteenth Amendment. One may speculate, however, based on several media reports that public spats between a judge of the Supreme Court and members of Parliament may have led to the enactment of this Amendment.[54] To reiterate, this Amendment had allowed the Parliament to remove judges.

This Amendment is clearly a unilateral assertion of power of the Parliament over the judiciary. Impeachment procedure for the Judiciary through the Parliament is not uncommon in South Asia. However, this sudden assertion of the power of impeachment clearly manifests the positive understanding of law i.e., 'command of the sovereign' to do as it pleases as well as an instrumentalist understanding of law as a means to achieve certation goals. Concerns about whether or not this assertion of parliamentary power over the judiciary had support among lawyers, judges and several other segments of the society did not figure prominently in the enactment process.

Like several previous constitutional amendments, the Sixteenth Amendment was also rushed through the parliament and made into a law within a very short period of time. The general discontent and opposition to this amendment was reflected in the prompt filing of a judicial review petition by a Supreme Court lawyer, challenging its constitutional validity.[55] Unlike the Thirteenth Amendment judgment (*Abdul Mannan Khan v Bangladesh*) in which the bench was divided 4-3,all the 7 judges of the Appellate Division unanimously declared the Sixteenth amendment unconstitutional.

The Court found that the procedure for removal of judges by the Parliament was detrimental to the independence of judiciary. Therefore, the Sixteenth Amendment violated the basic structure of the Constitution. Furthermore, Article 70 of the Constitution prohibits any member of parliament to vote against the party in the Parliament.[56] Hence, the leading judgment (by the Chief Justice) held that in an

[54] 'Constitution 'violated' by Justice Manik' *The Daily Star* (Dhaka, 6 June 2012) <https://www.thedailystar.net/news-detail-237159> accessed 14 April 2021.

[55] *Advocate Asaduzzaman Siddiqui v Bangladesh* (2016) 24 BLT (Special Issue) (HCD) 1 and on appeal *Government of Bangladesh & Others v Advocate Asaduzzaman Siddiqui and others* (2017) 25 BLT (Special Issue) (AD) 1.

[56] The Constitution of Bangladesh, Art. 70.

impeachment proceeding, no member of parliament will be able to exercise her independent judgment about the judge who is being impeached as she will have to follow the dictates of the head of the political party. As such, whether a judge should be removed or not will depend on the decision of the political party, if not only its leader.

Somewhat similar to the Thirteenth Amendment judgment, the judges in the Sixteenth Amendment case were swayed by a natural law understanding of independence of the judiciary. Any derogation from this concept was sufficient to render the impugned constitutional amendment unconstitutional.

The above narrative, thus, sustains the view that almost all the constitutional amendments clearly reflected a command understanding of law. Those amendments were addressed to the people and the addressees are to obey without question. Another interesting feature of most of these amendments is that almost all of them were rushed through the Parliament within less than a week. In other words, there were hardly any deliberation on these amendments in the Parliament. This process of enactment of constitutional amendments fortifies the notion that the 'sovereign' perceived these as command and did not feel the necessity to consult those that were to obey them.

III.

Socrates is famously credited with the idea that laws, what may come, must be followed and from his obligation to obey the law, he took poison and died.

This total and unconditional obligation to obey the law is usually traced from, among others, Hobbes[57], to Kant and then to Austin. In this view, sanction or threatened sanction is the backbone for obedience to law. Natural law has posited that the obligation to obey law stems not only from the positive considerations that it is so dictated by law itself and that disobedience will result in pain (or loss of utility and sufferance pain, in Bentham's understanding); but because "my obedience to law is also based on my concerns and considerations for the well-being or rights of others. I obey law, not only because it is prudent for me to do so (otherwise I shall be punished), but also because I must find some moral reason to obey law".[58]

Without delving into these issues of the origin of the obligation to obey law, it is clear to me that the very Austinian understanding of laws and enactment of such "command" have, over the years, eroded our moral obligation to obey the law. The perception that we are not a law-abiding nation, continuously reinforced by the popular media, insistently lead to demands for more stringent laws to ensure that laws

[57] Though Hobbes is often taken to be the initiator of positivism in law, many have argued that his views about laws were also tinkered with moral considerations – see David Dyzenhaus, 'Hobbs and the Legitimacy of Laws' (2001) 20(5) Law and Philosophy 461-498.

[58] Philip Soper, 'Moral Value of Law' (1985) 84(1) Michigan Law Review 63, 66.

are obeyed for the fear of sanction only. Hence, we find it almost impossible to enact laws without draconian sanctions.[59] Our law-making needs to get away from this Austinian rut.

Before concluding, it needs to be reiterated that intricacies, subtleties, debates, evaluation and assessment of 'command' and natural law theories are not the purpose of this article. Furthermore, this article also did not delve into more recent academic writings on these two schools of thought. The history of the debates in the field about these theories, however, are quite interesting and instructive. For example, it is well established that Hans Kelsen was not sufficiently aware of Austin's *Magnum Opus*[60]when Kelsen wrote his Pure Theory of Law.[61]

Kelsen's criticism of Austin has been very pointedly surmised by Lars Vinx in the following words:

> "Since the Pure Theory of Law limits itself to cognition of positive law and excludes from this cognition the philosophy of justice as well as the sociology of law, its orientation is much the same as that of so-called analytical jurisprudence, which found its classical Anglo-American presentation in the work of John Austin. Each seeks to attain its results exclusively by analysis of positive law. While the Pure Theory of Law arose independently of Austin's famous Lectures on General Jurisprudence, it corresponds in important points with Austin's doctrine. It is submitted that where they differ, the Pure Theory of Law has carried out the method of analytical jurisprudence more consistently than Austin and his followers have succeeded in doing.[62]

In Lars Vinx's depiction of Austinian theory of law that:

> "According to Austin, a command is the imperative expression of a will on the part of one person that another person behave in a certain way. What makes a command binding is the fact that the person to whom it is addressed is liable to be subjected to a sanction in the case of non-compliance."[63]

And in criticising Austin, Kelsen's view that (again quoting Lars Vinx):

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59 I had attempted some elaboration on this score in Shahdeen Malik, 'Laws of Bangladesh' in A.M. Chowdhury and Fakrul Alam (eds), *Bangladesh: On the Threshold of the Twenty First Century* (Dhaka: Asiatic Society of Bangladesh, Dhaka 2002) 433-483.

60 John Austin, The Province of Jurisprudence Determined, first published (1832) followed by several editions and reprints including John Austin, The Province of Jurisprudence Determined, ed by Wilfrid E Rumble (Cambridge: Cambridge University Press 1995). Needless to say, the best-known criticism as well as appreciation of Austin's jurisprudence had been offered by H.L.A Hart, *Concept of Law* (Oxford: Oxford University Press 1961).

61 Hens Kelsen, *Pure Theory of Law* (The Lawbook Exchange 2009).

62 Lars Vinx, 'Austin, Kelsen, and the Model of Sovereignty' (2011) 24(2) Canadian Journal of Law and Jurisprudence 473, 474.

63 Ibid, 475.

> According to Kelsen, every complete legal norm determines that if a person engages in a certain kind of behaviour (the 'delict'), then a sanction ought to be applied. So understood, legal norms do not, like commands, directly address themselves to those who are to be guided bythe law. Rather, legal norms are addressed to those who are to execute the sanction that the law determines ought to follow the delict. In other words, legal norms authorize the application of a sanction on the condition that a delict has been committed."[64]

These intricacies and refinements of the command theory including those by H.L.A Hart briefly touched upon earlier are, however, not important for our present discussion in the paper. As elaborated above, constitutional amendments have been increasingly formulated as commands addressed to the people who have to obey under threat or sanction. These commands are often devoid of any concerns about notions of justice, sociology of law, and other societal construct. This is perhaps best reflected by Article 7A inserted by the Fifteenth amendment to the constitution in 2011:

> "7A. (1) If any person, by show of force or use of force or by any other unconstitutional means-
>
> (a) abrogates, repeals, or suspends or attempts or conspires to abrogate, repeal, or suspend this Constitution or any of its article; or
>
> (b) subverts or attempts or conspires to subvert the confidence, belief, or reliance of the citizens to this Constitution or any of its article, his such act shall be sedition and such person shall be guilty of sedition.
>
> (2) If any person-
>
> (a) abets or instigates any act mentioned in clause (1); or
>
> (b) approves, condones, supports, or ratifies such act, his such act shall also be the same offence.
>
> (3) Any person alleged to have committed the offence mentioned in this article shall be sentenced with the highest punishment prescribed for other offences by the existing laws."[65]

Article 7A above can be seen to reflect even Kelsenian pure theory of law, in so far as it provides a behaviour which must be observed and details the sanction (albeit in vague, uncertain, and clumsy terms) which will follow if there is a violation. This is important against the backdrop of the fact that until the insertion of this Article 7A, the Constitution could be seen more as a guideline or almost a moral framework as it did not contain any sanction for violation of any of its mandates.[66] The general remedial provision in the Constitution is contained in Article 102 which authorises

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[64] Ibid, 477.

[65] The Constitution of Bangladesh, Art. 7A.

[66] The only exception is Article 69 which had provided for a fine of taka one thousand for everyday for a person, who not being a member of parliament, sits and participates in the proceedings of the Parliament.

the High Court Division to issue any order to enforce rights and remedial measures against different types of unauthorised or illegal actions of, generally, public authorities.

One of the recent refutations of Austin and Kelsen's command understanding of law stems from the recognition that in the wake of the European Union (EU) or the United Nations (UN) Conventions which have become part of national laws, 'the sovereign has become dispersed among EU or UN member countries.[67]

The above and other nuances of the command theory aside, I view the Bangladeshi Constitution as an embodiment of natural law par excellence. The Preamble and Part II (Fundamental Principles Of State Policy) clearly distinguish the Constitution from a positive/command law in that at least these two do not contain normative prescriptions with sanctions for the *delict*. The Preamble and Part II of the Constitution reflects aspiration, notions of collective justice and visions of a prosperous and just future.The Preamble declares:

> "Further pledging that it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation, a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens."[68]

Similarly, one article from Part II would suffice to reiterate the natural law mooring of the Constitution:

> "Article 15. It shall be a fundamental responsibility of the State to attain, through planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people, with a view to securing to its citizens –
>
> a) the provision of the basic necessities of life, including food, clothing, shelter, education, and medical care.
> b) the right to work, that is the right to guaranteed employment at a reasonable wage having regard to the quantity and quality of work.
> c) the right to reasonable rest, recreation, and leisure; and
> d) the right to social security, that is to say, to public assistance in cases of undeserved want arising from unemployment, illness or disablement, or suffered by widows or orphans or in old age, or in other such cases."[69]

Several similar examples can easily be located in the Constitution. The crux of this article, however, has been that nearly all the amendments to the Constitution were propelled, shaped, or fashioned by almost a singular understanding of law as command of the sovereign with the parliament being, as it were, under the grandiose illusion that it was the 'Austinian Sovereign' which could amend the constitution as it pleased. For a just and equitable society, natural law values and morals now need to be ploughed back into the Constitution. It may be farfetched to suggest further amendments to the Constitution to achieve this. However, the judiciary may have a key role to play by invoking natural law notions into the interpretation of these constitutional amendments.

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[67] Paraphrasing Joseph Raz's critic of Austin and Kelsen inBrian H. Bix, 'John Austin and Constructing Theories of Law' (2011) 24(2) Canadian Journal of Law and Jurisprudence 441, 442.

[68] The Constitution of Bangladesh, preamble.

[69] The Constitution of Bangladesh, Art. 15.

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Minimising Corruption in Bangladesh: Is this an Impossible Dream?

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I. INTRODUCTION

In 1996, Bangladesh was ranked 51st among the 54 countries included in Transparency International's Corruption Perceptions Index (CPI) with a score of 2.29. It was perceived five years later to be the most corrupt country on the CPI in 2001 and retained that position until 2005. Even though Bangladesh's CPI rankings and scores have improved in recent years, corruption remains a serious problem today as Bangladesh was ranked 146th among 180 countries on the 2020 CPI with a score of 26.[1] Even though the CPI has several limitations,[2] it is viewed as a robust indicator because of the combination of several measures of corruption for each country.[3] Why is corruption a serious problem in Bangladesh? Why is the Anti-Corruption Commission (ACC) in Bangladesh ineffective in curbing corruption? Will Bangladesh be able to overcome its contextual constraints and chronic lack of political will to minimise corruption?

This article addresses these questions by contending that the various governments in Bangladesh fail to curb corruption effectively because of their weak political will to address the causes of corruption and its unfavourable policy context. It concludes that corruption in Bangladesh can only be minimised if the government has the strong political will to address the causes of corruption and to enhance the ACC's effectiveness as an independent watchdog by providing it with the necessary legal powers, budget, personnel and autonomy to enforce the anti-corruption laws impartially.

II. BANGLADESH'S UNFAVOURABLE POLICY CONTEXT

The policy context refers to the geographical, historical, economic, demographic and political aspects of a country's environment that influence the nature and style of the formulation and implementation of public policies. This factor is important because it

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1 Transparency International, *Corruption Perceptions Index 2020*.From 1995-2011, the CPI scores range from 0 (highly corrupt) to 10 (very clean). However, from 2012, the CPI scores vary from 0 (highly corrupt) to 100 (very clean).

2 See Fredrik Galtung, 'Measuring the Immeasurable: Boundaries and Functions of (Macro) Corruption Indices' in Charles Sampford, Fredrik Galtung, Arthur Shacklock and Carmel Connors (eds), *Measuring Corruption* (Ashgate 2006) 101-130 and Kilkon Ko and Ananya Samajdar, 'Evaluation of International Corruption Indexes: Should We Believe Them or Not?' (2010) 47 Social Science Journal 508-540.

3 Thomas D. Lancaster and Gabriella R. Montinola, 'Toward a Methodology for the Comparative Study of Political Corruption' (1997) 27 Crime, Law and Social Change 185-206.

promotes or hinders the incumbent government's anti-corruption efforts, depending on whether the contextual factors are conducive or hostile to the implementation of the anti-corruption measures.[4]

Bangladesh is an "impaired" state because "wayward politics, poor governance and the vulnerability of the economy have produced a state that is feeble and fragmented."[5] It is ranked 39th among 178 countries on the Fragile States Index in 2020 with a "high warning" score of 85.7.[6] Bangladesh's poor governance is also reflected in its performance on the World Bank's six governance indicators from 2004 to 2019. Table 1 shows that its low level of governance has increased from a total percentile rank of 87.84 in 2004 to 134.46 in 2011 but declined again to 125.5 in 2019. Voice and accountability has remained at the same level (27.59 to 27.09) in Bangladesh but the percentile ranks for the other five indicators have improved with the most significant improvements for the control of corruption (+14.89) and rule of law (+12.09), followed by moderate increases for political stability and absence of violence (+5.05), government effectiveness (+3.36) and regulatory quality (+3.06). Bangladesh's weakest score on political stability and absence of violence is manifested in the several changes in government between the Bangladesh Nationalist Party (BNP) led by Khaleda Zia and the Awami League (AL) led by Sheikh Hasina since 1991. The Anti-Corruption Evidence Research Consortium concluded in October 2017 that Bangladesh's "overall political context remains vulnerable" because "changes in the overall political settlement constitute risk factors" which hinder the implementation of anti-corruption efforts.[7]

Table 1: Bangladesh's Low Levels of Governance (2004-2019)[8]

World Bank's governance indicators [a]	**2004**		**2011**		**2019**	
	Score[b]	**Percentile rank**	**Score**	**Percentile rank**	**Score**	**Percentile rank**
Voice and accountability	-0.67	27.88	-0.32	36.15	-0.72	27.09
Political stability and absence ofviolence	-1.36	10.19	-1.40	9.00	-0.92	15.24
Government Effectiveness	-0.82	20.20	-0.76	24.64	-0.74	23.56
Regulatory quality	-1.13	12.32	-0.81	22.75	-0.93	15.38
Rule of law	-1.02	15.79	-0.73	27.70	-0.64	27.88
Control of corruption	-1.50	1.46	-1.09	14.22	-0.99	16.35
Total percentile rank [c]	NA	87.84	NA	134.46	NA	125.5

[4] Jon S.T. Quah, *Curbing Corruption in Asian Countries: An Impossible Dream?* (Emerald Group Publishing 2011) 30.

[5] Habib Zafarullah and Redwanur Rahman, 'The Impaired State: Assessing State Capacity and Governance in Bangladesh' (2008) 21 International Journal of Public Sector Management749.

[6] Fund for Peace, *Fragile States Index Annual Report 2020* (2020) 7.

[7] Anti-Corruption Evidence Research Consortium, 'Anti-Corruption in Bangladesh: Towards Feasible Governance Improvements' (2017) School of Oriental and African Studies, University of London Briefing Paper 003, 4.

[8] World Bank 'Worldwide Governance Indicators, 2004-2019' (2020) <https://info.worldbank.org/governance/wgi/Home/Reports> accessed 4 November 2020.

Notes:[a] For the definitions of these indicators, see Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi, 'Governance Matters VIII: Aggregate and Individual Governance Indicators 1996-2008' (2009) World Bank Policy Research Working Paper 4978, 6.

[b] The governance score ranges from -2.5 to +2.5.

[c] The total percentile rank ranges from 0 to 600 for the six indicators.

Apart from its poor governance, four aspects of Bangladesh's policy context also hinder its government's effectiveness in combating corruption. First, Bangladesh has a land area of 130,170 sq. km and its population of 163,046,160 persons is the eighth largest in the world with a population density of 1,252 persons per sq. km.[9] This means that the ACC faces the tremendous challenge of enforcing the anti-corruption laws across a vast territory and investigating the 70,464 corruption complaints it received from the population from 2014-2018.[10]

As Bangladesh was a British colony as part of India until August 1947 and before it attained independence from Pakistan in March 1971, the origins of the Public Service Commission (PSC) established in 1972 can be traced to the PSC formed by the British in India in 1926.[11] The PSC is the adapted version of the Civil Service Commission in Britain that introduced meritocracy to India and other British colonies, including Singapore and Hong Kong, by recruiting and promoting civil servants on the basis of merit instead of patronage.[12] The bureaucracy in Bangladesh has retained many features of British colonial administration but it is now afflicted by "increasing politicization."[13] More importantly, unlike Singapore and Hong Kong, the PSC in Bangladesh has failed to institutionalise the tradition of meritocracy as a World Bank survey of 821 senior Bangladeshi officials conducted in 1999 found that one-third of the respondents believed that recruitment to the civil service was based on patronage instead of merit and half of them indicated that these patronage appointments were influenced by personal and family connections.[14] As will be shown in the next section, the importance of kinship ties and *tadbir* has enhanced the influence of nepotism in the recruitment of civil servants. In other words, the absence of meritocracy in the recruitment and promotion of civil servants in Bangladesh has hindered the ACC's efforts in combating corruption.

The third aspect of the policy context that influences the ACC's ability to curb corruption is that Bangladesh remains a lower-middle income country with a GDP

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9 World Bank, 'Land area (sq. km)' (2019) <https://data.worldbank.org/indicator/AG.LND.TOTL.K2> accessed 1 September 2020 and World Bank, 'Population, total' (2020) <https://data.world bank.org/indicator/SP.POP.TOTL> accessed 1 September 2020.

10 Bangladesh ACC, *Annual Report 2018* (2019)21.

11 Syed Giasuddin Ahmed, *Bangladesh Public Service Commission* (University of Dhaka 1990) 28.

12 A.P. Sinker, 'What are Public Service Commissions for? (1953) 31 Public Administration 206.

13 Ahmed Shafiqul Huque, 'Traditions and Bureaucracy in Bangladesh' in Martin Painter and B. Guy Peters (eds), *Tradition and Public Administration* (Palgrave Macmillan 2010) 60.

14 World Bank, *Bangladesh: The Experience and Perceptions of Public Officials* (2000) 15.

per capita of US$1,855.70 in 2019 even though its poverty rate has been reduced from 48.9 per cent to 24.5 per cent from 2000 to 2016.[15] As combating corruption is expensive because the government has to provide the ACC with an adequate budget and sufficient personnel, it cannot afford to allocate the resources needed without foreign financial and technical assistance or to pay adequate salaries to civil servants to prevent petty corruption.

Finally, Bangladesh's low percentile ranks for government effectiveness and regulatory quality from 2004-2019 (see Table 1) are reflected in the high incidence of red tape in the public bureaucracy. As will be shown below, Bangladesh's 176th ranking among 190 countries on the World Bank's ease of doing business rank in 2019 confirms that red tape is a serious problem that increases the opportunities for bureaucratic corruption.[16]

III. CAUSES OF CORRUPTION IN BANGLADESH

To combat corruption effectively, policy-makers in Bangladesh must introduce appropriate reforms to address its causes instead of its symptoms.[17]In his pioneering comparative study of anti-corruption measures in Hong Kong, India and Indonesia, Leslie Palmier identified three important causes of corruption: low salaries of civil servants; ample opportunities for corruption provided by excessive regulations and red tape; and the low probability of detecting and punishing corruption offenders. His hypothesis was: "At one extreme, with few opportunities, good salaries, and effective policing, corruption will be minimal; at the other, with many opportunities, poor salaries, and weak policing, it will be considerable."[18] Apart from Palmier's three causes, this section also analyses the impact of cultural values and practices on corruption in Bangladesh.

A. Low salaries of civil servants

Low salaries contribute to corruption because "when civil service pay is too low, civil servants may be obliged to use their positions to collect bribes as a way of making ends meet, particularly when the expected cost of being caught is low."[19] A comparative study of civil service compensation in South Asian countries found that corruption was "an unsavoury response" to the "falling or low real salary scales" and became widespread and viewed as "inevitable and incurable by the public." For example, the salaries of Bangladeshi civil servants decreased by 87 per cent for

[15] World Bank, 'GDP per capita (current US$)' (2019) <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD> accessed 1 September 2020 and World Bank, *Bangladesh Poverty Assessment: Facing Old and New Frontiers in Poverty Reduction* (2019) 22.

[16] World Bank, *Doing Business 2019: Training for Reform* (2019) 4.

[17] For a comprehensive analysis of the causes of corruption, see Daniel Triesman, 'What have we learned about the Causes of Corruption from ten years of Cross-National Empirical Research?' (2007) 10 Annual Review of Political Science 211-244.

[18] Leslie Palmier, *The Control of Bureaucratic Corruption: Case Studies in Asia* (Allied Publishers 1985) 271-272.

[19] Paolo Mauro, *Why Worry about Corruption?* (International Monetary Fund 1997) 5.

senior positions to 43 per cent for the lowest positions since 1971.[20]The salaries of public officials in Bangladesh are still low even though they have increased from 2009 to 2019. Table 2 shows that the basic monthly salaries in 2019 range from Tk 8,250 (US$97) for Grade 20 to Tk 78,000 (US$920) for Grade 1. The basic monthly salaries of political office holders vary from Tk 92,000 (US$1,086) for a StateMinister to Tk 120,000 (US$1,416) for the President.

Table 2: Bangladesh Government Salary Scale 2019[21]

National Grade	Basic Salary	Entry and Position
20	Tk 8,250	Class 5 to Class 8
19	Tk 8,500	
18	Tk 8,800	SSC/HSC Equivalent
17	Tk 9,000	
16	Tk 9,300	Office Assistant
15	Tk 9,700	Assistant Teacher
14	Tk 10,200	
13	Tk 11,000	
12	Tk 11,300	
11	Tk 12,000	
10	Tk 16,000	
9	Tk 22,000	BCS Officer, Assistant Secretary
8	Tk 23,000	
7	Tk 29,000	Senior Assistant Secretary
6	Tk 35,500	Deputy Secretary
5	Tk 43,000	Joint Secretary
4	Tk 50,000	Additional Secretary
3	Tk 56,000	Member of Parliament
2	Tk 66,000	
1	Tk 78,000	Secretary, Major General
	Tk 82,000	Senior Secretary, Lt. General
	Tk 86,000	Chiefs of Armed Forces Principal Secretary Cabinet Division Secretary
	Tk 92,000	State Minister

[20] David C.E. Chew, *Civil Service Pay in South Asia* (International Labour Organisation 1992) 2, 101.

[21] "Bangladesh Government Pay Scale 2019" <https://bangla.bdnewsnet.com/bd/jobnews/bangladesh-government-pay-scale-bd-2019/> accessed 4 November 2020. I would like to thank Professor Sumaiya Khair for providing me with this salary scale.

	Tk 105,000	Leader of the Opposition
	Tk 105,000	Minister
	Tk 110,000	Chief Minister
	Tk 112,000	Speaker of Parliament
	Tk 115,000	Prime Minister
	Tk 120,000	President

Note: The exchange rate was US$1 = Tk 84.75 on 4 November 2020.

B. Red tape enhances opportunities for corruption

Red tape refers to those "bureaucratic procedures characterised by mechanical adherence to regulations, excessive formality, and attention to routine, and the compilation of large amounts of extraneous information resulting in prolonged delay or inaction."[22] Civil servants are tempted by the "opportunities to sell their official discretion and information" and the "opportunities to extort payments" as "permits can be delayed, licences held up, deliberations protracted, proceedings prolonged, unless rewards are offered."[23] Red tape increases the opportunities for corruption by providing civil servants with an excuse to extort bribes from citizens who are willing to pay "speed money" to cut red tape and reduce delay by expediting their applications for licences or permits.

The World Bank's annual survey on the ease of doing business in 190 countries is a measure of the extent of red tape as it is easier to conduct business in countries with little or no red tape. Table 3 shows that Bangladesh has the most serious problem of red tape among the eight South Asian countries because it is ranked 176th among 190 countries for the ease of doing business in 2019. For example, it takes 273.5 days to obtain a construction permit in Bangladesh compared to 87 days in Sri Lanka. Even Bhutan, which has a higher CPI score than Bangladesh, suffers from red tape because it requires 150 days to get a construction permit.

Table 3: Red Tape and Corruption in South Asian Countries 2019[24]

Country	Ease of doing business rank	Dealing with construction permits		CPI rank and score
		No. of procedures	No. of days	
India	77th	17.9	94.8	80th (41)
Bhutan	81st	21	150	25th (68)
Sri Lanka	100th	13	87	93rd (38)
Nepal	110th	12	117	113th (34)
Pakistan	136th	18.7	262.8	120th (32)

[22] Ralph C. Chandler and Jack C. Plano, *The Public Administration Dictionary* (2nd ed., ABC-Clio 1988) 233.

[23] Herbert Kaufman, *Red Tape: Its Origins, Uses, and Abuses* (Brookings Institution 1977) 51-53.

[24] World Bank, Doing Business 2019 (2019) and Transparency International, Corruption Perceptions Index 2019 (2020).

Maldives	139th	10	140	130th (29)
Afghanistan	167th	13	199	173rd (16)
Bangladesh	176th	15.8	273.5	146th (26)

C. Low probability of detection and punishment

Individuals found guilty of corruption offences should be punished according to the law. However, in reality, the probability of detecting and punishing corrupt offenders varies in Asian countries. Corruption is not a serious problem in Singapore or Hong Kong where it is perceived as a "high risk, low reward" activity as those involved in corruption are likely to be caught and severely punished. On the other hand, corruption thrives in Bangladesh and the Philippines, where the public perceives corruption as a "low risk, high reward" activity because corrupt offenders are unlikely to be detected and punished.[25]

A comparative study of three South Asian countries found that "official punitive action has seldom been taken against corrupt officials" in spite of the large number of corruption reports. An analysis of corruption reports in the *Bangladesh Observer* in Dhaka, the *Times of India* in Mumbai, and the *Daily News* in Colombo, from November to December 1996, identified 119 cases in India, 91 cases in Sri Lanka, and 77 cases in Bangladesh. However, only 18 cases (15 per cent) in India resulted in official punitive action, followed by eight cases (10 per cent) in Bangladesh, and four cases (4 per cent) in Sri Lanka. Ahmad and Brookins concluded that the lenient punishment of corrupt offenders in the three countries had contributed to the spread of corruption into new areas and could not be curbed unless corrupt individuals were held accountable for their misconduct.[26]

Table 4: Disposal of Corruption Cases by the ACC (2012-2018)[27]

Year	No. of cases of on-going trials	Pending cases in higher courts	Total no. of cases under trial	No. of convictions	No. of acquittals	Total no. of cases disposed
2012	1,605	411	2,016	42 (31.8%)	90 (68.2%)	132 (6.5%)
2013	2,030	350	2,380	67 (36.6%)	116 (63.4%)	183 (7.7%)
2014	2,310	414	2,724	73 (45.9%)	86 (54.1%)	159 (5.8%)
2015	2,660	437	3,097	69 (36.7%)	119 (63.3%)	188 (6.1%)
2016	2,240	400	2,640	116 (54.2%)	98 (45.8%)	214 (8.1%)

[25]Quah (n 4) 18.

[26]Naved Ahmad and Oscar T. Brookins, 'On Corruption and Countervailing Actions in three South Asian Nations' (2004) 7 Journal of Economic Policy Reform24, 29.

[27]Salahuddin Aminuzzaman, Shahzada M. Akram and Shammi Laila Islam, *Anti-Corruption Agency Strengthening Initiative: Assessment of Bangladesh Anti-Corruption Agency 2016* (Transparency International Bangladesh 2016) 36; Bangladesh ACC, *Annual Report 2016* (2017) 32; Bangladesh ACC, *Annual Report 2017* (2018) 37; and Bangladesh ACC, *Annual Report 2018* (2019) 34.

2017	2,446	357	2,803	161 (67.9%)	76 (32.1%)	237 (8.5%)
2018	2,494	306	2,800	131 (62.7%)	78 (37.3%)	209 (7.5%)
Total	15,785	2,675	18,460	659 (49.8%)	663(50.2%)	1,322 (7.2%)

Table 4 confirms that corruption is perceived as a low risk, high reward activity in Bangladesh because only 1,322 cases (7.2 per cent) of the 18,460 cases under trial were disposed by the ACC during 2012-2018. More importantly, only 659 (49.8 per cent) of the disposed cases resulted in convictions and 663 cases (50.2 per cent) were acquitted. It should also be noted that the ACC's conviction rate has increased from 46 per cent in 2014 to 63 per cent in 2018, with an average conviction rate of 54 per cent during this period.[28]

D. Cultural values and practices

Culture seemingly contributes to corruption in Bangladesh when cultural practices like gift-giving influence individuals to give and receive bribes.[29] Apart from promoting reciprocity in social relations, gift-giving in Bangladesh encourages bribery among civil servants to accept gifts by businessmen wishing to cut red tape to expedite the issuance of licences. The social tradition of gift-giving in Asian countries, including Bangladesh, enables poorly paid civil servants to solicit bribes directly or indirectly. The culture of corruption in the form of money, gifts and privileges is "deeply-rooted in the inherited administrative culture" of Bangladesh.[30]

The important cultural practice of *tadbir* or the process of personal lobbying has been attributed to Bangladesh's hierarchical and kinship-based social structure. *Tadbir* is "a pathological peculiarity of Bangladeshi administrative culture" and promotes corruption by breaking or bending existing rules, norms and practices.[31] Indeed, *tadbir* is the preferred method employed by businessmen in Bangladesh to obtain a personal exemption from an existing policy. Access to the bureaucracy is achieved by means of "school ties, kinship, social contact, job offers, and the payment of small gifts, cash, or goods and supplies." Consequently, public policies in Bangladesh are "riddled with a large number of exceptions and exemptions" and policies are frequently modified to accommodate the needs and interests of a prominent person's relatives. This means that "every policy can be manipulated to suit the needs of any individual who has the appropriate contacts and can pay the allotted fee."[32]

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[28] Bangladesh ACC, *Annual Report 2017* (2018) 38 and Bangladesh ACC, *Annual Report 2018* (2019) 34.

[29] For two excellent analyses of the impact of culture on corruption, see Gerald E. Caiden, 'Culture and Corruption' (2012) 15 *Public Administration and Policy,* 93-128 and Peter Larmour, *Interpreting Corruption: Culture and Politics in the Pacific Islands* (University of Hawai'i Press 2012).

[30] Sk. Tawfique M. Haque and Sheikh Noor Mohammad, 'Administrative Culture and Incidence of Corruption in Bangladesh: A Search for the Potential Linkage' (2013) 36 International Journal of Public Administration998.

[31] Ibid, 1000.

[32] Stanley A. Kochanek, *Patron-Client Politics and Business in Bangladesh* (Sage Publications 1993) 251-268.

Tadbir is a common practice in Bangladeshi administrative culture because those civil servants who are *tadbir*-friendly are viewed positively while their colleagues who refuse to entertain *tadbir* requests are despised by friends, relatives, senior bureaucrats and ministers. For example, officers on special duty who are waiting for a placement are not posted without *tadbir* because civil servants only take action by moving files or declaring files to be missing with *tadbir*.[33]Bangladesh's collectivist society with its emphasis on family loyalty, kinship ties and nepotism, encourages corruption because the "immediate and extended families of the political leaders and senior civil servants are involved in the *tadbir* game, rule-breaking, and shady wheeling and dealing." Furthermore, the high degree of uncertainty avoidance among Bangladeshi civil servants results in the production of "voluminous rules, regulations, and procedures" that encourages corruption, favouritism and nepotism among them.[34]

IV. COMBATING CORRUPTION BANGLADESHI-STYLE

An anti-corruption agency (ACA) is a specialised organisation created by a government as a mechanism for ensuring horizontal accountability[35] by minimising corruption in the country. There are two types of ACAs in Asian countries, depending on the scope of their functions: Type A ACAs that focus exclusively on the performance of anti-corruption functions; and Type B ACAs that perform both anti-corruption and non-corruption-related functions.[36] When a government decides to establish an ACA, it has to make three decisions. First, it should learn from the adverse experiences of Afghanistan, China, India, Pakistan, Philippines, Taiwan and Vietnam and avoid relying on multiple ACAs. The second decision that the government should make is to follow the examples of Singapore and Hong Kong and establish a Type A ACA rather than a Type B ACA. Thirdly, the government has to decide what role the Type A ACA that it has created should play. Should the Type A ACA be an independent watchdog, attack dog or paper tiger?

As a former British colony which was part of India until 1947 and Pakistan until 1971, Bangladesh inherited the anti-corruption measures introduced by the British colonial government. Corruption was made an offence in the Indian Penal Code in 1860 as section 161 specified that the punishment for corruption was imprisonment for three years and/or a fine.[37] The Prevention of Corruption Act (PCA) became the first anti-corruption law in India in March 1947 by incorporating relevant sections of

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33 Haque and Mohammad (n 30) 1000-1001.

34 Ibid, 1005.

35 Guillermo O'Donnell defines horizontal accountability as "the existence of state agencies that are legally enabled and empowered, and factually willing and able, to take actions that span from routine oversight to criminal sanctions or impeachment in relation to actions or omissions by other agents or agencies of the state that may be qualified as unlawful." See Guillermo O'Donnell, 'Horizontal Accountability in New Democracies' in Andreas Schedler, Larry Diamond and Marc F. Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner 1999) 38.

36 Jon S.T. Quah, *Combating Asian Corruption: Enhancing the Effectiveness of Anti-Corruption Agencies* (Carey School of Law, University of Maryland 2017) 7.

37 L. Michael Hager, 'Bureaucratic Corruption in India: Legal Control of Maladministration' (1973) 6 Comparative Political Studies204-205.

the Indian Penal Code and increasing the penalty for corruption offences from one to seven years and/or a fine.[38]

In 1944, the Enforcement Branch was formed in the Police Department to combat corruption. With the enactment of the PCA in 1947, the police were responsible for investigating corruption offences. As the Police Department was ineffective in curbing corruption, it was replaced by the Bureau of Anti-Corruption (BAC), which was established as the first Type A ACA in Bangladesh with the enactment of the Anti-Corruption Act in 1957.[39] However, the BAC was also ineffective because it was "a toothless organisation lacking adequate authority" to perform its anti-corruption functions effectively.[40] The BAC's weak capacity resulted from its inefficiency, political patronage, inefficient public prosecutors, dearth of witnesses, and political interference in its work.[41] The BAC's failure to curb corruption led to its replacement by the ACC, which was established on 21 November 2004 with the enactment of the Anti-Commission Act of 2004 (Act No. V of 2004).

Bangladesh has followed the examples of Singapore and Hong Kong and established the ACC as a Type A ACA to enforce the ACC Act of 2004.[42] Article 17 of this Act identifies these functions of the ACC:

1. Investigating corruption complaints received or initiated by itself;
2. Approving the lodging of first information reports (FIRs) and sanctioning the submission of charge sheets or final reports on the basis of enquiry and investigation;
3. Investigating cases of money laundering according to the Money Laundering Prevention Act of 2012;
4. Making recommendations to the President on: (a) reviewing systems to prevent corruption; (b) preparing research studies for enhancing corruption prevention; (c) preparing a priority list based on the research findings; and (d) identifying the sources of corruption in Bangladesh and initiating appropriate measures;
5. Organising seminars, symposia and workshops to enhance public awareness of the consequences of corruption; and
6. Performing other duties imposed on it under the law to curb corruption.

The ACC's current establishment has 2,146 positions but its actual strength in 2018 is

[38] Quah (n 4) 93.

[39] Golam Shahriar Chowdhury, 'Country Report: Bangladesh' *Resource Material Series* No. 71 (UNAFEI 2007) 103.

[40] Mohammad Ehsan, 'When Implementation Fails: The Case of Anti-Corruption Commission (ACC) in Bangladesh' (2006) 28 Asian Affairs50.

[41] A.M.M. Shawkat Ali, *Bangladesh Civil Service: A Political-Administrative Perspective* (Dhaka University Press 2004) 202.

[42] The text of the ACC Act of 2004 is available at <https://www.oecd.org/site/adboecdanti-corruptioninitiative/46812498.pdf> accessed 1 September 2020.

871 personnel because it has 1,275 vacancies (59.4 per cent).[43] This means that the ACC's ability to staff only 40.6 per cent of its established positions constitutes a serious constraint on its effectiveness. The annual budget that the ACC receives from the government has increased by more than three times from Tk 298.194 million (US$3.5 million) in 2010 to Tk 944.767 million (US$11.3 million) in 2017.[44]

V. EXPLAINING THE ACC'S INEFFECTIVENESS

A. Lack of political will

However, after the ACC's establishment as a Type A ACA in Bangladesh, it has not performed the role of an independent watchdog like Singapore's Corrupt Practices Investigation Bureau (CPIB) or Hong Kong's Independent Commission Against Corruption (ICAC) because of the lack of political will of the governments during the past 16 years. Political will refers to the sustained commitment of political leaders to implement anti-corruption policies and programmes to address the causes of corruption in the country.[45]

Table 5: Per Capita Expenditures and Staff-Population Ratios of Four Asian Anti-Corruption Agencies in 2016

Anti-Corruption Agency	Budget (in millions)	Personnel	Per capita expenditure	Staff-popula-tion ratio
Hong Kong ICAC	US$130.50	1,369	US$17.77	1:5,366
Singapore CPIB	US$28.68	232	US$5.12	1:24,169
Bhutan ACC	US$1.37	85	US$1.71	1:9,385
Bangladesh ACC	US$10.40	960	US$0.64	1:169,741

Source: Compiled and calculated by the author from the data on the budgets and personnel in 2016 of the four ACAs from their annual reports and national budgets.

As combating corruption is expensive, the ACC needs sufficient budget and personnel to enforce the anti-corruption laws impartially. A World Bank study of the effectiveness of 50 ACAs found that as "political will and commitment are the cornerstone of every successful anti-corruption effort" their governments' "allocation of limited resources for ACA activities" signals their lack of "genuine commitment to the ACA's mission."[46] The weak political will of the Bangladeshi government to

[43] Bangladesh ACC, *Annual Report 2018* (2019) 81.

[44] Salahuddin Aminuzzaman and Sumaiya Khair, *National Integrity System Assessment Bangladesh 2014* (Transparency International Bangladesh 2014) 176; Bangladesh ACC, *Annual Report 2017* (2018) 84; and Bangladesh ACC, *Annual Report 2018* (2019) 84.

[45] Quah (n 36) 64.

[46] Francesca Recanatini, 'Anti-Corruption Authorities: An Effective Tool to Curb Corruption?' in Susan Rose-Ackerman and Tina Soreide (eds), *International Handbook on the Economics of Corruption* Vol. 2 (Edward Elgar 2011) 549, 565.

combat corruption is reflected in the ACC's low per capita expenditure and its unfavourable staff-population ratio.[47] Table 5 confirms that the per capita expenditures of Hong Kong's ICAC, Singapore's CPIB and Bhutan's ACC are much higher than the Bangladesh ACC's per capita expenditure of US$0.64 and unfavourable staff-population ratio of 1:169,741. Indeed, the ACC's low per capita expenditure, its highly unfavourable staff-population ratio and its 59.4 per cent vacancies confirm that it is a paper tiger because it lacks the necessary resources to function effectively as an independent watchdog.

B. Inheriting the BAC's role as an attack dog

The BAC was highly politicised and used by the various governments as "a political tool to harass the opposition." Almost 200 corruption charges were filed against political leaders and members of parliament (MPs) during 1991-2004. After assuming power in 2001, the BNP government withdrew the 69 corruption cases filed by the BAC against its ministers, MPs and leaders during the AL administration of 1996-2001. In December 2001, the BAC filed corruption charges against former prime minister Sheik Hasina and six officials for misappropriating US$120.69 million in the purchase of eight MIG-29 jet fighter planes from Russia.[48]This means that the "standard practice" of the ruling party, whether AL or BNP, is to use the BAC to lodge complaints against the previous government, which means that the ruling party is "always immune from prosecution as long as they remain in power."[49] In the same vein, another observer has accused the BAC of engaging in "political witch-hunts" because it only investigated corruption cases after getting approval from the prime minister's office.[50]

Regrettably, the ACC has failed to learn from the BAC's weaknesses for two reasons. First, the ACC was not formed because of the incumbent government's commitment to combating corruption in Bangladesh but in response to the pressure from foreign donors and civil society representatives. According to Zaman, Rahman and Alim, the ACC was created in 2004 by the government "reluctantly, rather than out of genuine political will" in response to "a combination of civil society demands and pressure from international donors."[51]

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47 The ACC's per capita expenditure refers to its budget for a year divided by Bangladesh's population for the same year. The ACC's staff-population ratio refers to Bangladesh's population divided by the number of its personnel for the same year. See Jon S.T. Quah, 'Benchmarking for Excellence: A Comparative Analysis of Seven Asian Anti-Corruption Agencies' (2009) 31 Asia Pacific Journal of Public Administration 182.

48 Basir Ahmed, 'Combating Corruption: The Role of the Bureau of Anti-Corruption (BAC) in Bangladesh' (Masters Programme in Asian Studies, Centre for East and Southeast Asian Studies, Lund University 2006) 27.

49 Ibid, 28.

50 Aqil Shah, 'South Asia' in Robin Hodess (ed), *Global Corruption Report 2001* (Transparency International 2001) 44.

51 Iftekhar Zaman, Sydur Rahman and Abdul Alim, 'Bangladesh' in Jana Kotalik and Diana Rodriguez (eds), *Global Corruption Report 2006* (Pluto Press 2006) 127.

The second reason was that the ACC had unwisely decided to rehire many of the BAC's ineffective personnel, including those officers who were accused of corruption. According to M. Hafuzuddin Khan, a member of the screening committee responsible for reviewing the profile of former BAC officers, many BAC personnel were absorbed into the ACC even though their reputation and efficiency were "highly questionable."[52] Consequently, the ACC inherited the BAC's onerous baggage "when it sweepingly absorbed its staff without due scrutiny, and therefore sowed the seeds of [the] ACC's deficit of efficiency and integrity"[53] and also 20,000 unsolved corruption cases.[54]

In sum, the ACC has inherited and continued the BAC's role as an attack dog against the incumbent government's political opponents instead of performing the desired role as an independent watchdog.[55]

C. ACC's lack of expertise in investigation and prosecution

Bangladesh's national integrity system was evaluated in 2003 and an important finding was that the standard of the BAC's investigation officers and their work methods were "not up to the mark."[56] A key informant interviewed by Shadhan Kumar Das has attributed the ACC's weak legal and prosecution capacity to the lack of specialised training: "There are many staff [members] aged more than 50 [years old] assigned in the investigation. They do not have energy, skill, courage and patience to handle such cases."[57] In its June 2011 evaluation of Bangladesh's anti-corruption efforts, the Norwegian Agency for Development Cooperation (NORAD) found that the ACC "showed a serious lack of capacity in its execution of the challenge to investigate and to prosecute" and its "expansion of activities was over-ambitious" and "unsupported by the necessary capacity to channel the work with complete competence."[58]

Similarly, the 2014 assessment of Bangladesh's national integrity system has indicated that the ACC lacked officers with credibility and expertise at the field level and those officers recruited were inadequately trained. The ACC's legal and prosecution capacity was also weak and needed improvement.[59] A more recent

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52 Aminuzzaman and Khair (n 44) 176-177.

53 Iftekharuzzaman, 'Anti-Corruption Commission: How can it be truly effective?' *The Daily Star* (Dhaka, 15 February 2019).

54 Tarana Begum and Nurul Huda Sakib, 'Combating Corruption in Bangladesh: Role of the Anti-Corruption Commission' in Al Masud Hasanuzzaman and Shamsul Alam (eds), *Political Management in Bangladesh* (A.H. Development Publishing House 2010) 254.

55 Jon S.T. Quah, 'Combating Corruption in Asian Countries: Learning from Success and Failure' (2018) 147 Daedalus212-213.

56 M. Farid, Shamila Mahbub and Muhammad Anwarul Amin, *National Integrity Systems Country Study Report Bangladesh 2003* (Transparency International 2003) 41.

57 Shadhan Kumar Das, 'Anti-Corruption Commission of Bangladesh: Diagnosis of a Fading Hope' (Research paper prepared in partial fulfilment of the Master of Development Studies, International Institute of Social Sciences 2013) 26-27.

58 Norwegian Agency for Development Cooperation, *Joint Evaluation of Support to Anti-Corruption Efforts: Bangladesh Country Report* (2011) 31.

59 Aminuzzaman and Khair (n 44) 177.

evaluation revealed that the ACC officers lacked expertise in investigating corruption cases and they usually took three years to complete an investigation.[60]

The 2018 assessment found that the ACC had the lowest average score of 44 per cent for the nine indicators on detection, investigation and prosecution.[61]More specifically, a low score was given for the ACC's investigation and prosecution expertise because its investigation officers (IOs) did not have the necessary expertise to deal with the issues of converting property, banking sector corruption, and detention of property. Newly recruited IOs who were not familiar with the procedure for filing corruption cases made procedural mistakes. On the other hand, older ACC officers lack the knowledge and skills to investigate money laundering cases.[62]

In view of the above criticisms of the ACC's lack of expertise in investigating and prosecuting corruption cases, it is not surprising that Transparency International Bangladesh has described the ACC as "the most unenviable institution" in Bangladesh because "it has been ridiculed in the parliament and outside" and the "degree of professional excellence, integrity and credibility of its staff has been criticised."The ACC has also failed to address the "integrity, transparency and capacity of its staff" and has not adopted a code of conduct and manual for internal governance for its personnel.[63]

Governments usually rely on codes of conduct to guide and control the behaviour of public officials by providing them with an indication of the desired ethical values, guidelines for their behaviour as well as the punishment for violating these principles.[64]While codes of conduct are not "a cure-all for all violations of the public trust," they "provide preventive medicine against the malady of unethical conduct and a distasteful dose of medicine for an employee who contracts the disease."[65] A code of conduct provides new recruits to the civil service with a guide for evaluating the propriety of their own actions and the actions of other individuals. Hence, it is troubling and puzzling why the Bangladesh ACC has operated for the past 16 years without a code of conduct for its personnel, especially when its function is to curb corruption in both the public and private sectors. This means that the ACC's personnel have been performing their duties since November 2004 without the benefit of having a code of conduct to prevent them from behaving unethically. Indeed, the absence of a code of conduct for the ACC's personnel should be rectified because it sends the wrong signal not only to them but also to other public officials and citizens in Bangladesh.

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60 Aminuzzaman, Akram and Islam (n 27) 36-37.

61 Shammi Laila Islam and Shahzada M. Akram, *Anti-Corruption Agency Strengthening Initiative Assessment of Bangladesh Anti-Corruption Commission 2018* (Transparency International Bangladesh 2020) 68.

62 Ibid, 52.

63 Iftekharuzzaman, 'The most unenviable institution' *The Daily Star* (Dhaka, 18 March 2013).

64 Alan Lawton, Julie Rayner and Karin Lasthuizen, *Ethics and Management in the Public Sector* (Routledge 2013) 98.

65 Kenneth Kernaghan, *Ethical Conduct Guidelines for Government Employees* (Institute of Public Administration of Canada 1975) 4-5.

An analysis of the 70,464 corruption complaints received by the ACC during 2014-2018 in Table 6 shows that only 6,138 complaints (8.7 per cent) were screened by it for enquiry, 2,771 complaints (3.9 per cent) were referred to other ministries for action, and no action was taken for 61,555 complaints (87.4 per cent), which were filed. With the ACC's heavier workload and increased number of vacancies, its output has decreased with the total number of investigations reduced from 3,428 in 2016 to 1,519 in 2017, and the number of investigations completed also decreased from 2,271 to 489 during the same period.[66]

Table 6: Corruption Complaints Received and Dealt by the ACC, 2014-2018

Year	No. of complaints received	No. of complaints screened for enquiry	No. of complaints sent tominist ries	No. of complaints filed
2014	12,500	1,689 (13.5%)	237 (1.9%)	10,574 (84.6%)
2015	10,415	1,240 (11.9%)	165 (1.6%)	9,010 (86.5%)
2016	12,990	1,007 (7.8%)	588 (4.5%)	11,395 (87.7%)
2017	17,953	937 (5.2%)	377 (2.1%)	16,639 (92.7%)
2018	16,606	1,265 (7.6%)	1,404(8.5%)	13,937 (83.9%)
Total	70,464	6,138 (8.7%)	2,771(3.9%)	61,555 (87.4%)

Sources: Bangladesh ACC, *Annual Report 2017* (2018) 22 and Bangladesh ACC, *Annual Report 2018* (2019) 21.

The clearest manifestation of the ACC's limited expertise in prosecution is the absence of its own prosecution unit 16 years after its formation. Section 33 of the ACC Act of 2004 has stipulated that the ACC should establish:

1. Its own prosecution unit consisting of the number of prosecutors required to conduct the cases to be investigated by the commission under this law and to be tried before the special judge.
2. The conditions of appointment and service of the prosecutors shall be determined by rules.
3. Until the appointment of its own prosecutors under this law, lawyers *temporarily appointed* by the commission shall conduct its cases.
4. Prosecutors appointed under this section shall be deemed to be public prosecutors (emphasis added).

The ACC has not explained in its annual reports why it has not established its own prosecution unit as required by section 33 during the past 16 years and continues to rely on the "temporary appointment" of lawyers on contract to serve as public

[66] Bangladesh ACC, *Annual Report 2016* (2017) 26 and Bangladesh ACC, *Annual Report 2018* (2019) 26.

prosecutors instead of filling the 10 sanctioned positions of prosecutors.[67] The ACC employed 28 lawyers to handle its prosecution cases in 2018.[68] The 2018 assessment of the ACC mentioned above also found that the lawyers hired by the ACC were not qualified and lacked the necessary skills and competence to be public prosecutors.[69]Consequently, it is not surprising that the ACC's conviction rate has varied from 37 per cent in 2015 to 68 per cent in 2017.[70]

VI. CONCLUSION

The preceding analysis shows that Bangladesh has established the ACC as a Type A ACA in 2004 to emulate the formation of the CPIB in Singapore in 1952 and the ICAC in Hong Kong in 1974. However, unlike the CPIB and ICAC, the ACC has to date failed to perform the desired role of an independent watchdog because of the lack of political will of both the AL and BNP governments which have used the ACC as an attack dog against their political opponents when they are in power. Furthermore, the ACC is also a paper tiger because both governments have not provided it with the necessary budget and personnel to enforce the anti-corruption laws impartially without political interference.

Table 7 confirms that the ACC is ineffective in minimising corruption because Bangladesh has performed poorly on the CPI from 2012-2019 with its CPI scores varying from 25 in 2014 and 2015 to 28 in 2017. Similarly, Table 7 also shows that Bangladesh's percentile rank on the World Bank's control of corruption indicator has declined from 21.33 in 2012 to 16.35 in 2019. Does Bangladesh's consistently weak performance on both the CPI and the control of corruption indicator during 2012-2019 mean that minimising corruption in Bangladesh is an impossible dream?

Learning from the successes of Singapore and Hong Kong in combating corruption,[71] policy-makers in Bangladesh will only succeed in combating corruption if both the AL and BNP political leaders have sufficient political will to relinquish their reliance on the ACC as an attack dog against each other when they are in power. However, if these political leaders persist in using the ACC as an attack dog, the only alternative avenue for change is for concerned Bangladeshi citizens to elect other competent and honest persons to political office who are accountable for their actions.[72]

Table 7: Bangladesh's Performance on the CPI and Control of Corruption, 2012-2019

[67] Bangladesh ACC, *Annual Report 2016* (2017) 31.
[68] Bangladesh ACC, *Annual Report 2018* (2019) 38.
[69] Islam and Akram (n 61) 52.
[70] Bangladesh ACC, *Annual Report 2018* (2019) 34.
[71] For details of Singapore's and Hong Kong's effective anti-corruption strategies, see Jon S.T. Quah, 'Singapore's Effective Anti-Corruption Recipe: Lessons for Other Countries' in Adam Graycar (ed), *Handbook on Corruption, Ethics and Integrity in Public Administration* (Edward Elgar 2020) 360-376 and Ian Scott and Ting Gong, *Corruption Prevention and Governance in Hong Kong* (Routledge 2019).
[72] Jon S.T. Quah, 'The Critical Importance of Political Will in Combating Corruption in Asian Countries' (2015) 18 Public Administration and Policy15-17.

Year	Corruption Perceptions Index		Control of Corruption	
	Rank	Score	Score	Percentile rank
2012	144th/176	26	-0.85	21.33
2013	136th /177	27	-0.89	20.85
2014	145th/175	25	-0.89	19.23
2015	139th/168	25	-0.81	22.12
2016	145th/176	26	-0.86	18.75
2017	143rd/180	28	-0.83	19.23
2018	149th/180	26	-0.91	16.83
2019	146th/180	26	-0.99	16.35

Sources: Transparency International, *Corruption Perceptions Index 2019* (2020) and World Bank 'Worldwide Governance Indicators, 2012-2019' (2020) <http://info.worldbank.org/governance/wgi/Home/Reports> accessed 4 November 2020.

Apart from not relying on the ACC as an attack dog against their political opponents, Bangladeshi political leaders must also enhance the ACC's capacity by improving its officers' expertise in investigating corruption cases and avoid delaying further the formation of its own prosecution unit as required by section 33 of the ACC Act of 2004. The refusal of the AL and BNP governments since 2004 to establish a prosecution unit within the ACC is an indictment of their weak political will in combating corruption in Bangladesh. The public image of the ACC as a paper tiger can only be rectified if the incumbent government increases its low per capita expenditure of US$0.64 and improves its unfavourable staff-population ratio of 1:169,741 in 2016 (see Table 5) by providing the ACC with the necessary budget and personnel.

Finally, minimising corruption in Bangladesh will remain an impossible dream unless its policy-makers also address the causes of corruption by introducing reforms to improve the low salaries of civil servants, to reduce red tape and the opportunities for corruption, to increase the probability of detecting and punishing those persons found guilty of corruption offences, and to reduce the widespread influence of gift-giving and *tadbir* among civil servants and the public.

In short, corruption in Bangladesh can only be minimised if its political leaders initiate reforms to address the causes of corruption and replace their penchant for using the ACC as an attack dog against their political opponents with the reliance instead on the ACC as an independent watchdog to enforce the anti-corruption laws impartially, regardless of the position, status or political affiliation of those persons being investigated for corruption offences.

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Trapped in a Cul-de-sac? The Orbit of Governance Reform in Bangladesh

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I. INTRODUCTION

In the aftermath of a revolutionary struggle against despotic rule, Bangladesh, experienced an initial enthusiasm for reform and change among politicians and attentive citizens. They aspired for a society endowed with democratic traits for people's welfare, social justice and ethical mores and a governmental system that would deliver efficient services equitably and without discrimination. Thus, since the incipient phase, intermittent attempts to reconstruct the structures and functions of government were made, some with limited consequences, others with circumscribed amplitude, and many more left undone. Contextual (social, economic, administrative) reasons may have been compelling, but undue political manoeuvres got the better of the imperatives for transformation.[1] Fifty years down the line, the country remains in the quest for an effective governance system in keeping with the demands of time and sensitive to best practices in currency around the world.

Like other developing countries, Bangladesh has been induced and obligated to endure with continuous variations caused by domestic social, economic and political imperatives and, since the 1980s, by the ramifications of globalisation and the burden of meeting conditions set by international organisations and external donors. Under external compulsion, the country has had to embrace unfamiliar ways of managing the state and the public sector based on recommended practices in delivering services using new approaches and techniques, in creating an ethical and normative culture, and in employing new technology in connecting with people, institutions and the external world.[2] These have often been challenging, being contrary to traditions and conventions.

The primary purpose of this paper is to focus on the universal directions of governance reforms from the standpoint of the several elements that interweave to make governance work in a democratic ambience, notably in administrative performance, delivery of service, ethics and, most notably, the pursuit for citizen wellbeing. It follows the trajectory of governance reforms in Bangladesh during the

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1 Ahmed Shafiqul Huque, 'Explaining the Myth of Public Sector Reform in South Asia: De-linking Cause and Effect' (2005) 24(3) Policy and Society 97-121; Habib Mohammad Zafarullah, 'Reflections on Civil Service Reform in Bangladesh' in Rohit Mathur, *Glimpses of Civil Service Reform* (ICFAI University Press 2008) 54-79.

2 See Yusuf Bangura and George Larbi, *Public Sector Reform in Developing Countries* (Palgrave Macmillan 2006); Victor Ayeni, *Public Sector Reform in Developing Countries: A Handbook of Commonwealth Experiences* (Commonwealth Secretariat 2002); Zafarullah (n 1).

past 50 years of its nationhood, the ramifications of any achievements and the complications reform efforts encountered. The paper, to situate the Bangladesh case in the broader governance landscape will first briefly look at the conceptual factors relevant to governance, followed by ideas and innovations and how Bangladesh has fared in employing appropriate practices and encountered the complexities and challenges.

II. THE PLACE OF GOVERNANCE REFORM IN STATECRAFT

Governance, along with its more normative rider--'good governance', relates to goal-oriented activities in government, quasi-government and non-government bodies. It is "a mode of allocating values" that is accomplished by state agencies alone or in partnership with informal entities in civil society, the private sector or the market.[3] Both from ideational and practical standpoints, governance is inclusive in its scope and covers almost every strand of activity the government undertakes with relevance for the whole of society. It conveys new interpretations from structural, procedural, mechanistic and strategic angles.[4]

From a reform perspective, the agenda for change is fairly elaborate and intricate. With the participation of a variety of stakeholders including social groups working within networks, governance implies persuasion rather than compulsion or direct control within a framework built on coordination, collaboration and synergies between the public and private sectors.[5] A conspicuous interdependency between the state and society makes for governing quality and effective policy framing and implementation.[6]

The approach to governance reform may take several strands as countries need to tailor their strategies to get the desired outcomes. There is no absolute right way or a set roadmap to achieving the goals of governance. Each country's needs are unique and precise and, thus, seeking to implant reform designs from another setting will be futile unless prudently tweaked. Nevertheless, there are lessons to be learned from the success stories of other countries, especially those close to Bangladesh's level of political and economic advancement.

Each of the principal targets of governance reforms—relational, institutional, operational, behavioural, ethical, legal, and technological—require a specific approach or a combination of two or more depending on priorities, contingencies, vicissitudes, capacities and resources. *Relational reforms* redefine the nexus between the political domain and the bureaucratic. In many ways and at many levels, the two

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[3] James Rosenau, 'Governance, Order and Change in World Politics' in James Rosenau and Ernst-Otto Czempiel (eds), *Governance without Government: Order and Change in World Politics* (Cambridge University Press 1992) 7.

[4] David Levi-Faur, 'From "Big Government" to "Big Governance"?' in David Levi-Faur (ed), *The Oxford Handbook of Governance* (Oxford University Press 2018).

[5] Rod Hague, Martin Harrop and John McCormack, *Comparative Government and Politics: An Introduction* (10th edn, Red Globe Press 2019).

[6] Francis Fukuyama, *State Building: Governance and World Order in the Twenty-First Century* (Profile Books 2004).

domains overlap, and their specific distinctive operational boundaries remain eclipsed.[7] *Institutional reforms* focus on the rearrangement of public organisations and capacity building for better performance and efficient service delivery. It attends to procedures and norms that condition the operations of public organisations.[8] *Operational reforms* enhance organisational procedures and consolidate internal rules for civil service management for employee efficiency and career incentives and effectively control budgeting, expenditure, financial and public procurement processes. The focus is also on strategies of policy implementation and the techniques of delivering public services.[9] *Behavioural reform* is about changes in individual attitudes and behaviour in public organisations. However, this is hard to materialise because of deep-rooted conservatism, bureaucratic self-interest, overly demanding deportment and resistance from within.[10] Related to this is *ethical reform*that focuses on normative and ethical values in governance systems. The task of combining compliance-based and integrity-premised ethics arrangements, however, can be complicated.[11] *Legal reform* is about embedding new laws appropriate to the demands of the time and the imperatives of moral conduct to institutionalise ethics in governance.[12] To realise public ends by digital design, *technological reform* is now an essential item on the governance agenda. Information and communications technology (ICT) can serve as an agent in building a knowledgeable public service and an efficient public management system capable of performing to desired standards and quickly responding to societal demands.

In obtaining optimum results, all these diverse but interrelated types of reform need to be holistically approached. Disjointed or procrastinated strategies may provide short-term effects in particular areas but will generate minimal sustainable gains in the longerrun. More importantly, the uniqueness of the context in which reforms take place determines their effects.[13] The nature of the state, the prevailing political order

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7 Joel Aberbach, Robert Putnam and Bert Rockman, *Bureaucrats and Politicians in Western Democracies* (Harvard University Press 2009); B. Guy Peters, 'Globalisation, Institutions and Governance' in B. Guy Peters and Donald Savoie, *Governance in the Twenty-First Century: Revitalising the Public Service* (McGill-Queens University Press 2000) 29-57.

8 World Bank, *Reforming Public Institutions and Strengthening Governance* (World Bank 2000); World Bank, *The State in a Changing World – World Development Report 1997* (Oxford University Press 1997); Bonnie Campbell, 'Governance, Institutional Reform and the State: International Financial Institutions and Political Transition in Africa' (2001) 28(88) Review of African Political Economy 155-176.

9 Vando Borghi and Rik van Berkel, 'New Modes of Governance in Italy and the Netherlands: The Case for Activation Policies' (2007) 85(1) Public Administration 83-101.

10 Gordon Tullock, 'Dynamic Hypothesis on Bureaucracy' (1974) 19 Public Choice127-131.

11 UNDP, 'Case Evidence on Ethics and Values on Civil Service Reform' in UNDP, *Capacity Development Action Briefs* (No 2, May 2007) <https://www.undp.org/content/dam/aplaws/publication/en/publications/capacity-development/case-evidence-on-ethics-and-values-in-civil-service-reforms/Ethics-Values.pdf.> Accessed 26 January 2021.

12 World Bank, *World Development Report 2017: Governance and the Law* (Washington DC: World Bank 2017); See Fukuyama (n 6).

13 Merilee Grindle, 'Good Governance: The Inflation of an Idea' in Bishwapriya Sanyal, Lawrence Vale and Christina Rosan, *Planning Ideas that Matter: Liveability, Territoriality, Governance and Reflective Practice* (MIT Press 2012) 259-92.

and administrative arrangements, the capacity of implementers, and the role of relevant institutions and stakeholders are critical determinants in the outcome of reforms that promote "new values and practices".[14]

III. VARIATIONS IN GOVERNANCE REFORM THEORIES AND MODELS

The movement for reform in government began in the post-World War II era when the inefficiency and ineffectiveness of the traditional form of governmental administration in managing large infrastructure projects began to be felt the world over.[15] By the 1980s, with the rise of neo-liberalism, the intrusion of market forces and the growth of the private sector, the role of the government lessened, or public agencies were corporatised.[16] However, despite the state rolling back, its role has not been retracted; rather the engagement of the state has been widened in social and economic spheres, especially in providing social protection to the disadvantaged, in partnering with the private sector in building infrastructure projects and in contracting out for service production and delivery.[17]

The orthodox way of managing government operations or *Traditional Public Administration* (TPA) gave way to more refined and expanded approaches that went beyond static bureaucratised and centralised structures, rule-bound procedures, and an inward-looking compass. In its place emerged a modern, open, dynamic system that focused on efficiency, performance, innovation and participation and an external-oriented perspective.[18] However, several paradigmatic changes over the past decades influenced the development of different, though often overlapping, shades of governance that is more inclusive of diverse interests at societal, regional and global levels and ramifying all that matters in the life of nations and peoples.[19] Scholars in

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[14] Ahmed Shafiqul Huque and Habib Mohammad Zafarullah, 'Public Management Reforms in Developing Countries: Contradictions and the Inclusive State' in Ahmed Shafiqul Huque and Charles Conteh, *Public Sector Reforms in Developing Countries: Paradoxes and Practices* (Routledge 2014) 10.

[15] Alex Ingrams, Suzanne Piotrowski and Daniel Berliner, 'Learning from our Mistakes: Public Management Reform and the Hope of Open Government' (2020) *Perspectives on Public Management and Governance* 1-16.

[16] Claudine Kearney, Robert Hisrich and Frank Roche, 'A Conceptual Model of Public Sector Corporate Entrepreneurship' (2008) 4(3) International Entrepreneurship and Management Journal 295-313.

[17] Jamie Peck and Adam Tickell, 'Neoliberalizing Space' (2002) 34(3) Antipode380-404; D. Osbourne, 'Good Governance Initiatives in the Global Context' (1993) 2(2) Hong Kong Public Administration107-116; Ahmed Shafiqul Huque, 'Managing the Public Sector in Hong Kong: Trends and Adjustments' (2010) 18(3) Asian Journal of Political Science269-288; John Forrer, James Edwin Kee, Kathryn Newcomer and Eric Boyer, 'Public-Private Partnerships and the Public Accountability Question' (2010) 70(3) Public Administration Review475-484; Emanuel Savas, *Privatization and Public-Private Partnerships* (Chatham House 2000).

[18] Christopher Pollitt, *Advanced Introduction to Public Management and Administration* (Edward Elgar Publishing 2016); Christopher Pollitt, 'Be Prepared? An Outside-in Perspective on the Future Public Sector in Europe (2016) 31(1) Public Policy and Administration3-28.

[19] Martin Painter and B. Guy Peters, 'Administrative Traditions in Comparative Perspectives: Families, Groups and Hybrids' in Martin Painter and B. Guy Peters (eds), *Tradition and Public Administration*

the advanced industrialised countries took the lead in advancing new ideas relevant to improving governance. About the same time, international and regional institutions, such as the United Nations, World Bank, International Monetary Fund (IMF), the Asian Development Bank and others, have provided prescriptions for managing state endeavours either alone or in collaboration with other entities, such as civil society organisations, the market and inter-organisational policy networks.[20]

When 'governance' was brought to the global limelight in 1992 by the World Bank, it was simple in its construction and objectives. The focus was on the nature and form of the political regime, the process of exercising authority, and the design and delivery of public policies. Later, the idea of multi-level governance was advanced and human rights, democratisation, transparency and accountability, public service capacity, participatory development, networks and partnerships were incorporated in a more comprehensive governance framework.[21]

While this framework was being formulated, public administration was already in the middle of going through a paradigmatic change.An innovative model—*New Public Management* or NPM crystallised in the 1980s and began influencing the trajectory of governance reform in the developing countries. NPM sought to eliminate or attenuate differences between public and private sector practices and make governments operate like business firms. Accountability was to be results-based rather than process-determined.[22]

Leading up to the 1980s, neoliberal governance reforms were essentially designed to build and consolidate the macroeconomic structure and establish a new model of growth. The targets were economic stability, productivity and performance, while financial liberalisation, deregulation and privatisation of underperforming state enterprises became priorities.[23] This set of 'first-generation reforms' proved limited

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(Palgrave Macmillan Publishing 2010) 19-30; Christopher Pollitt and Geert Bouckaert, *Public Management Reform: A Comparative Analysis. New Public Management, Governance and the Neo-Weberian State* (3rd edn, Oxford University Press 2011); Manto Lampropoulou and Giorgio Oikonomou, 'Theoretical Models of Public Administration and Patterns of State Reform in Greece' (2016) 81(11) International Review of Administrative Sciences1-21; Ewan Ferlie, 'The New Public Management and Public Management Studies' in *Oxford Research Encyclopaedia of Business and Management*<https://doi.org/10.1093/acrefore/9780190224851.013.129>accessed 26 January 2021.

20 Peters (n 7).

21 World Bank, *Governance: The World Bank's Experience* (World Bank 1994); Mark Schacter, *Public Sector Reform in Developing Countries: Issues, Lessons and Future Directions* (Canadian International Development Agency 2000); Derick W. Brinkerhoff, 'Introduction – Governance Challenges in Fragile States: Re-establishing Security, Rebuilding Effectiveness and Reconstituting Legitimacy' in Derick W. Brinkerhoff (ed) *Governance in Post-conflict Societies: Rebuilding Fragile States* (Routledge 2007) 1-12; R.A.W Rhodes, 'The New Governance: Governing without Government' (1996) 44(4) Political Studies652-667.

22 Christopher Pollitt, *Managerialism and the Public Services: The Anglo-American Experience* (Basil Blackwell Publishing 1991); Christopher Pollitt, 'Thirty Years of Public Management Reforms: Has There Been a Pattern? (World Bank 2011) <https://blogs.worldbank.org/governance/30-years-of-public-management-reforms-has-there-been-a-pattern> accessed 26 January 2021; Christopher Hood, 'The 'New Public Management' in the 1980s: Variations on a Theme' (1995) 2(2/3) Accounting, Organisations and Society93-109.

23 John Williamson, 'Democracy and the 'Washington Consensus'' (1993) 21(8) World

in scope and had to be reinforced by other initiatives such as building and strengthening institutions or consolidating them. Institutionalisation involved capacity building in the civil service and improving service delivery. Emphasis was placed on competition policies and enforcement, robust regulatory frameworks and effective property rights. More important was the inclusion of social issues in the reform agenda.[24]

The application and practice of governance became prominent in the 1980s with public sector reforms undertaken in many western liberal democracies. These reforms encompassed a wide range of both state- and market-centric phenomena mainly based on the ideas of neoliberalism, deliberation, partnership, networking and social inclusion.[25]Following the World Bank/IMF prescribed 'second generations reforms' in 2000, the developing countries began vigorous programs of governance reforms. NPM-based reforms, entrenched in many advanced liberal countries, provided useful lessons for emulation or adaptation by the developing nations. The 'good governance' paradigm, reinforced by NPM principles, emerged as the *essential* agenda.[26]Governance embodied the overall concern not only of governmental administration and the public policy process but also of the market, the private sector, civil society and of the environment because of its focus on fiscal, social and ecological matters.[27] Its democratic inclination helped governance realise "the goals of progressive government"[28] and steering function enabled governance to fulfil NPM objectives, such as effective intra-organizational relations, output- and outcome-oriented procedures through hands-on management and infusion of entrepreneurism in managerial leadership.Governance endorsed the NPM usage of business principles in managing public organisations and contracts and competition in allocating resources and delivering services.[29]

By the 1990s, 'good governance' became the buzzword in the global quest for better governmental administration in the developing world. However, as a paradigm, it

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Development1329-36.

[24] Erlend Krogstad, 'The Post-Washington Consensus: Brand New Agenda or Old Wine in a New Bottle?' (2007) 50 Challenge67-85; See also Narcis Serra and Joseph Stiglitz, *The Washington Consensus Reconsidered: Towards a New Global Governance* (Oxford University Press 2008); Mark Bevir and R.A.W Rhodes, *Interpreting British Governance* (Routledge 2003).

[25] Mark Bevir, 'Governance' in Mark Bevir, *Encyclopaedia of Governance* (Sage Publishing 2007) 364-381.

[26] Erik-Hans Klijn, 'Public Management and Governance: A Comparison of Two Paradigms to Deal with Modern Complex Problems' in David Levi-Faur (ed), *The Handbook of Governance* (Oxford University Press 2012) 201-214.

[27] Mark Bevir and R.A.W Rhodes, *The State as Cultural Practice* (Oxford University Press 2010); Habib Mohammad Zafarullah and Abu Elias Sarker, 'Public Management Reforms in Developing Countries: Towards a New Synthesis' in Nizam Ahmed (ed), *Public Policy and Governance in Bangladesh: Forty Years of Experience* (Routledge 2016) 42-52; Gerry Stoker, 'Governance as Theory: Five Propositions' (1998) 50(1) International Social Science Journal17-28.

[28] Habib Mohammad Zafarullah and Ahmed Shafiqul Huque, *Managing Development in a Globalised World: Concepts, Processes, Institutions* (CRC Press and Taylor & Francis 2012) 162.

[29] Christopher Hood, 'A Public Management for All Seasons' (1991) 69 Public Administration3-19; Stephen P Osbourne, *The New Public Governance: Emerging Perspectives in the Theory and Practice of Public Governance* (Routledge 2010).

continued to be adjusted, synthesised and reconfigured and adapted in different contexts. NPM is often considered a transitory phase in the TPA-NPG (New Public Governance) continuum.[30] Several scholars have highlighted the limitations of NPM as a global application because of geographical variegation, lack of a solid theoretical foundation, overly managerialistic and instrumentalised approach and inadequate practical advantage.[31]

Among other ideas that emerged during the transitional phase and later, included *Public Value Management* (PVM), *Digital Era Governance* (DEG), *New Public Service* (NPS), *Neo-Weberian State* (NWS), *Network Governance* (NetGov) and *New Public Governance* (NPG). These are primarily overlapping layers of different governance forms. From a reform perspective, taken together, they form a hybrid arrangement or 'compound governance' taking elements from one another and guiding alternative reform strategies for appropriate adoption in specific situations.[32] PVM stressed the social or service value function of state institutions in contrast to the economic value or profit creating behaviour by the private sector.[33] NPS is centred on serving citizens rather than customers with the public interest at its core. Its emphasis is on strategic thinking and democratic action, collaboration and collective endeavour.[34]

As an extension of e-Government, DEG drew on the positive effects of ICT in all operational areas of government, especially in enhancing transparency, reducing unethical practices and efficiently serving citizens. DEG features inter-institutional communicative relations, simplified agency-client interaction, digitalisation through transformative routes, engagement of non-state stakeholders in policymaking, decentralised decision making, information sharing and dissemination—all of which are critical for transparency, accountability and integrity.[35]

NetGov has been a response to the highly centralised, rigidly hierarchical and overly bureaucratised state structure and societal fragmentation. It creates more transparent,

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30 Stephen P Osbourne, 'The New Public Governance?' (2006) 8(3) Public Management Review377-387.

31 Patrick Dunleavy, Helen Margetts, Simon Bastow and Jane Tinkler, 'New Public Management is Dead – Long Live Digital Era Governance' (2006) 16 Journal of Public Administration Research and Theory467-494; Walter Kickert, 'Public Governance in the Netherlands: An Alternative to Anglo-American 'Managerialism' (1997) 75(4) Public Administration731-752; Sandford Borins, 'New Public Management: North American Style' in Kathleen McLaughlin, Ewan Ferlie and Stephen Osbourne (eds) *The New Public Management: Current Trends and Future Prospects* (Routledge 2002) 181-194; George Frederickson and Kevin Smith, *The Public Administration Primer* (Westview Press 2003); Alex Matheson and Hae-Sang Kwon, 'Public Sector Modernisation: A New Agenda' (2003) OECD Journal on Budgeting3(1) 7-23.

32 Colin Crouch, *Capitalist Diversity and Change: Recombinant Governance and Institutional Entrepreneurs* (Oxford University Press 2005).

33 Mark Moore, *Creating Public Value: Strategic Management in Government* (Harvard University Press 1995); Gerry Stoker, 'Public Value Management: A New Narrative for Networked Governance?' (2006) 36(1) American Review of Public Administration41-57.

34 Robert Denhardt and Janet Denhardt, 'The New Public Service: Serving Rather than Steering' (2000) 60(6) Public Administration Review549-559.

35 Dunleavy (n 31); Habib Mohammad Zafarullah and Abu Elias Sarker (n 27).

responsive and interactive arrangements within state structures and eclipses the conventional distinctions between government and non-state entities and connects public organisations at different levels.[36] Broadly, NetGov or 'joined-up governance' involves a wide body of stakeholders through partnership, synergy and inclusion, it makes them part of a democratised policy process.[37]

NWS reinvented Weber in governance and emphasised the supremacy of the state. It recommended new forms of administrative law within the ambit of representative democracy supported by a professionalised and politically neutral bureaucracy with a public service ethos. A basic code guiding citizen-state relations would ensure equality for everyone and protection against arbitrary state actions.[38]

NPG builds upon TPA and NPM but differs with both in some ways, the most significant departure being its shift from hierarchical-bureaucratised administration and management concerns (managerial judgment and contractual procedures) to citizen needs. In Osborne's words, "NPG has become the dominant regime of public policy implementation and public services delivery, with a premium being placed upon the development of sustainable public policies and public services and the governance of interorganizational relationships."[39]

All of the above conceptual 'models' have had an important impact on the design and application of governance reform in both developed and developing countries. However, many countries accepted parts of different models and tailored them according to their needs, the reform perspectives of the leadership, availability of resources and the capacity of implementing agencies. The United Nations endorses, "a hybrid approach to public sector reform that embraces adaptive responses to complexity…".[40]

IV. THE TRAJECTORY OF REFORMS IN BANGLADESH

The change imperative was evident right after Bangladesh achieved its nationhood. The new political leadership, wary of the imperious role of the bureaucracy during pre-independence times, was bent upon transforming the inherited administrative landscape. The bureaucracy encultured during the colonial and post-colonial eras was considered elitist, illiberal, overly formalistic, resistant to change and condescending

[36] Mark Bevir, 'Governance as Theory, Practice and Dilemma' in Mark Bevir (ed) *The SAGE Handbook of Governance* (SAGE Publications 2011) 1-16; Kim Junki, 'Networks, network governance, and networked networks' (2006) 11(1) International Review of Public Administration19-34.

[37] Tom Christensen and Per Laegried, 'The Whole-of-Government Approach to Public Sector Reform' (2007) 67(6) Public Administration Review1059-1066; Bevir (n 25); Christopher Hood, 'The Idea of Joined-Up Government: A Historical Perspective' in Vernon Bogdanor (ed), *Joined-Up Government* (Oxford University Press 2005) 19-42.

[38] Christopher Pollitt and Geert Bouckaert (n 19).

[39] Stephen P Osbourne (n 29) 414.

[40] UNDP, *From Old Public Administration to the New Public Service – Implications for Public Sector Reform in Developing Countries* (United Nations Development Programme 2015) 15-16.

of political control.[41] The shift from a highly centralised presidential system to one built upon Westminster nuances entrusted the political executive with complete control over the administrative system. By default, many who had served in the Civil Service of Pakistan (CSP) and other provincial generalist services were now inducted into the newly organised national bureaucracy. They were unfamiliar with parliamentary practices *vis-à-vis* public administration and, thus, resisted further moves to strip them of their privileged position and authority in the governmental system. An atmosphere of unease prevailed when a high-profiled body—the Administrative and Services Reorganization Committee (ASRC) went through the routine of recommending radical measures influenced by the contemporary British Fulton Committee reforms. It confirmed existing concerns about various problems surrounding the bureaucracy.Fearing the proposed measures would compromise their exclusive status and power, the generalists felt despondent and manifested a negative stance *vis-à-vis* the regime.[42] The bureaucracy obtained a reprieve as the government shelved the ASRC report mainly because of social tensions, the economic downturn and political antagonism as well as the discontent brewing within the upper ranks of the civil service. The regime had to mark time as its priority shifted to finding solutions to more pressing issues, mainly relating to the economy and in maintaining itself in power amidst internal and external threats.[43]

Ironically, while a political government failed to produce practical solutions to familiar problems in managing government, two stints of military rule brought about systemic order by reorganising the bureaucracy and streamlining administrative functions.[44]However, from political, economic and ethical perspectives, more needed to be done. The quasi-democratic regime with the backing of the military introduced policy reforms for better economic performance and improved governance following the directions of the Bretton Woods institutions, which by the 1980s had imposed conditions on developing countries as a requirement for obtaining aid.[45] However, the rush towards establishing institutions and practices often went wrong, weakening

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41 Habib Mohammad Zafarullah, 'Administrative Reform in Bangladesh: An Unfinished Agenda' in Ali Farazmand (ed), *Administrative Reform in Developing Nations* (Praeger Publishers 2002); Habib Mohammad Zafarullah, 'Shaping Public Management for Governance and Development: The Case of Pakistan and Bangladesh' (2006) 9(3) International Journal of Organization Theory and Behaviour352-377; Hamza Alavi, *Capitalism and Colonial Production* (Croom Helm 1982).

42 M.M Khan and Habib Mohammad Zafarullah, 'Bureaucratic Intransigence and Administrative Reforms in Bangladesh' in Gerald Caiden and Heinrich Seidentopf (ed), *Strategies for Administrative Reform* (Lexington Books 1982) 139-152; Emajuddin Ahmad, *Bureaucratic Elites in Segmented Economic Growth: Pakistan and Bangladesh* (Dhaka University Press 1980).

43 R. Jahan, 'Bangladesh in 1973: Management of Factional Politics' (1974) 14(2) Asian Survey125-135; T. Maniruzzaman, 'Bangladesh in 1974: Economic Crisis and Political Polarisation' (1975) 15(2) Asian Survey117-128.

44 Habib Mohammad Zafarullah, 'Public Administration in the First Decade of Bangladesh: Some Observations on Developments and Trends' (1987) 27(4) Asian Survey459-476.

45 Jean Grugel, *Democratisation: A Critical Introduction* (Palgrave Macmillan 2001).

political and economic arrangements. The externally imposed economic policy changes –the structural adjustment programs—focused on demand management and financial stabilisation that covered trade liberalisation, foreign direct investment, deregulation, and privatisation.[46] Implementation, however, was tardy and ineffective caused by "a suffocating regulatory environment, and obstructionism, incompetence, and downright venality in the bureaucracy".[47] Indeed, governance was in a bad way and needed thorough reform.

The successive 'democratic' regimes that followed since 1991 made a pretence of reform. The UNDP, IMF and World Bank overtures were ignored, while the reports of government-created reform bodies—the Administrative Reform Committee (ARC) and the Public Administration Reforms Commission (PARC), found little appreciation by their initiators.[48] Evasive political support and bureaucratic circumvention deterred any possibility of change happening. The current trends in governance reform elsewhere had very little influence on the political leadership or the policymakers in the country. Indeed, a political approach to governance has remained inconspicuous, the governments being indifferent of political, institutional and technological dimensions of governance. Rather, politically bureaucratised style and technical orientation influenced reform efforts. A recent study contended that the "bureaucracy, in effect, colluded with the political elites in political accumulation and were able ultimately to thwart [sensible] reform initiatives".[49] Yet, external pressure for wide-ranging reform kept stiffening,[50] as domestic demands for improving governance heightened. A World Bank report argued for greater intervention in governance reform (rule of law, security, and coordination) and freeing the policy process from elite capture, promoting human development and controlling climate change.[51]In Bangladesh, with intensified politicisation and poor performance, the image of the civil service kept drowning as "unbridled corruption, poor governance, and confrontational politics" along with "the near absence of the rule of law and an

[46] World Bank, *Bangladesh: From Stabilisation to Growth* (World Bank 1994).

[47] Clare Humphrey, *Privatisation in Bangladesh: Economic Transition in a Poor Country* (Westview Press 1990) 136.

[48] UNDP, *Public Administration Sector Study* (UNDP Dhaka 1993); World Bank (n 46); World Bank, *Bangladesh: Government that Works – Reforming the Public Sector* (World Bank 1996); ADB, *Proposed Loan and Technical Assistance Grant People's Republic of Bangladesh: Strengthening Governance Management Project* (Asian Development Bank 2010).

[49] Abu Elias Sarker and Habib Mohammad Zafarullah, 'Political Settlements and Bureaucratic Reforms: An Exploratory Analysis Focusing on Bangladesh' (2019) 55(2) Journal of Asian and African Studies235-253, 10.

[50] World Bank, *Taming Leviathan: Reforming Governance in Bangladesh: An Institutional Review* (World Bank 2000); World Bank, *Bangladesh: Strategy for Sustained Growth* (World Bank 2007); ADB (n 48).

[51] World Bank, *Bangladesh Development Update: Powering the Economy Efficiently* (Dhaka: World Bank Bangladesh 2018).

ever weakening law enforcement apparatus" and "unaccountable service providers"[52] ate into the nation's fabric. Indeed, in recent years, integrity in various social and economic sectors has fallen into its lowest ebb.[53]

During the tenure of the two political parties in power (the Bangladesh Nationalist Party-BNP and the Awami League-AL), the focus has been on updating rules and regulations relating to trivial age and qualification of recruits and civil service examination matters, instead of enhancing the quality of the internal labour market, ridding the selection process of aberrant methods and promoting the merit principle against the quota system in recruitment.[54] The capacity development regime for civil servants was streamlined in the wake of the Public Administration Training Policy of 2003, but weak strategies have hindered implementation.[55] Similarly, changes to the promotion system may have been attempted in good stead, but it lacks objectivity and leans heavily towards non-merit factors and thus overwhelmingly benefits the incompetent and inefficient.[56] Some new additions to the administrative arrangements, such as citizens' charter, one-stop service centres, consumer protection, freedom of information, corporatisation of public agencies, contracting-out or outsourcing, e-governance and digitalisation of services, performance audit, public-private partnership, etc.) are related to NPM or the other conceptualisations, but the way they have been devised and are being administered have produced ineffective results.[57]

To be more specific about the course of governance changes, we can refocus on relational, institutional, operational, behavioural, ethical, legal, and technological reforms in the context of Bangladesh.

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[52] Ali Riaz, 'Bangladesh: A 'Weak State' with Multiple Security Challenges' in T.V Paul (ed) *South Asia's Weak States: Understanding Regional Insecurity Predicament* (Stanford University Press 2010) 241-264, 247.

[53] Habib Mohammad Zafarullah and Ahmed Shafiqul Huque, 'Corruption and its Control: The Pursuit of Probity in Bangladesh' in Krishna Tummala (ed), *Corruption in the Public Sector: An International Perspective* (Emerald Publishing 2021) 57-77; Salahuddin Aminuzzaman and Sumaiya Khair, *Bangladesh National Integrity System Assessment* (Transparency International 2014).

[54] A.M.M.S Ali, *The Lore of the Mandarins: Towards a Non-Partisan Public Service in Bangladesh* (Dhaka University Press 2002); A.M.M.S Ali, *Bangladesh Civil Service: A Political-Administrative Perspective* (Dhaka University Press 2011); IGS, *Institutes of Accountability: The Public Service Commission – A Policy Note* (Institute of Governance Studies, BRAC University 2008); TIB, *Bangladesh Public Service Commission: A Diagnostic Study* (Transparency International Bangladesh 2007).

[55] Md Khurshid Iqbal Rezvi, *Effectiveness of the Public Administration Training: A Study on the Administrative Cadre Service in Bangladesh* (Master of Public Policy Thesis, KDI School of Public Policy and Management 2013); UNDP, *Cost Effectiveness of Training and Course Curricula at BPATC: Developing Civil Service for 21st Century Administration* (Government of Bangladesh and UNDP 2007).

[56] Habib Mohammad Zafarullah, M.M Khan and M.H Rahman, 'The Civil Service System of Bangladesh' in John Burns, Bidhya Bowornwathana (eds), *Civil Service Systems in Asia* (Edward Elgar 2001); Salahuddin Aminuzzaman, *Career Planning of Bangladesh Civil Service* (MPPG Policy Paper, North South University 2013); A.M.M.S Ali, *Civil Service Management in Bangladesh: An Agenda for Policy Reform* (University Press Limited 2010).

[57] Pan Suk Kim and Mobasser Monem, 'Civil Service Reform in Bangladesh: All Play but Hardly any Work' (2009) 31 9(1) Asia Pacific Journal of Public Administration57-70.

A. Relational Reforms

The relation between politics and administration is quite ambiguous in Bangladesh. Historically, bureaucratism has had pre-eminence in running the state. This was evident during pre-independence days and for nearly one and a half decades since independence when the country was under military or quasi-political rule. The relationship between the bureaucracy and the ruling group, perhaps unholy, was mutually supportive. Ironically, with political regimes in power since 1991, this has continued, although democracy demands public officials are subject to control and accountability. Invasive neo-patrimonial influence, together with excessive politicisation of the bureaucracy, has diluted the value of accountability.[58] The inordinate penchant for regime maintenance by the ruling party has pushed it to rely on the bureaucracy for support, without which retention of power may be difficult. Thus, relational reform has meant keeping the bureaucracy in geniality by giving public servants frequent pay raises and lucrative perks.

The relationship between the political and bureaucratic spheres needs to be clearly defined. That public policymaking is not the exclusive domain of the politicians nor of the bureaucrats must be understood and acknowledged. Similarly, a delineated political space for citizens, policy stakeholders and the private realm will expand the inclusivity of the state, as will the incorporation of social and environmental issues into the policy agenda. The major political parties need to have clear thinking about these nexuses and tone down on the degree of political patronage as it relates to the bureaucracy.[59] Similarly, the patronising attitude of public officials over citizens, an offshoot of the patron-client syndrome[60] needs to be tapered off to make the administration citizen-centred.

Vision 2021 of the incumbent government does enunciate some of the areas that would connect the state with the people and enhance their status as citizens through the rule of law, freedom of expression, equity and fairness, citizen access to services, social justice, environmental protection, equal opportunities and women's empowerment.[61] The National Sustainable Development Strategy 2010–2021, if implemented correctly, has the scope of creating an enabling environment for state-civil society exchanges, government-business mutuality, and public-private synergy.[62] While political control of the civil service is crucial in a democracy, intense politicisation is unwarranted for the sake of objectivity, neutrality and

[58] Habib Mohammad Zafarullah and M.M Khan, 'The Bureaucracy in Bangladesh: Politics within and the Influence of Partisan Politics' in Ali Farazmand (ed), *Handbook of Comparative and Development Public Administration* (2nd edn, Marcel Dekker 2001) 981-997.

[59] UNDP, *Building a 21st Century Public Administration in Bangladesh* (UNDP Bangladesh 2007); Noore Alam Siddiquee, 'Human Resources Management in Bangladesh Civil Service: Constraints and Contradictions (2003) 26(1) International Journal of Public Administration35-60; Habib Mohammad Zafarullah and M.M Khan (n 58).

[60] Ali (n 54).

[61] Government of Bangladesh, *Perspective Plan of Bangladesh 2010-21: Making Vision 2021 a Reality* (Government of Bangladesh 2010).

[62] Government of Bangladesh, *National Sustainable Development Strategy 2010-21* (Government of Bangladesh 2010).

professional conduct of the bureaucracy that has been hindering sound administration and thwarting reform initiatives relating to NPM. Vision 2021 acknowledges this and emphasises the primacy of keeping the civil service free from partisan influence.[63] However, the Civil Service Act of 2018, does not focus on bureaucratic anonymity, neutrality or non-partisanism nor is it specific about serving the citizens; instead, it protects public officials against criminal charges.[64]

B. Institutional Reforms

In response to the imperatives of neoliberalism and external donor influences, institutional reforms within the governmental machinery and beyond have come about but in relatively low measure. The steady growth of the economy has been fostered by some degree of structural transformation, innovation, entrepreneurship and private investment. With the dominance of market forces, changes in the dynamics of government-business and public-private sector engagements are noticeable. Important reforms in public procurement, fiscal reporting, audit management and integrity surveillance have led to improvements in financial management.The Financial Management Reform Programme initiated in 2003 has gone on to streamline government accounting, while the 'Strengthening Public Expenditure Management Program' covered public auditing. The Public Finance Management Reform Strategy (2016-2021) is focused on creating an enabling environment for fiscal discipline, prioritised resource allocation, efficient resource use and service delivery, and external scrutiny, transparency and accountability.[65]

The move towards economic liberalisation in the late 1970s through to the 1990s provided the ground for disinvesting in the public sector, privatisation of hitherto nationalised industries and provision of incentives for private sector growth. Several policy measures and macroeconomic adjustments despite occasional hiccups stabilised the economy, but governance-related issues continue to serve as deterrents.[66] Indeed, the success of past reform efforts in the financial sector has often been impeded by a laid-back reform posture, systemic ambiguities, limited capacity, bureaucratic inertia and indecision, and "opportunistic short-term political gains".[67] Despite remarkable gains in social indicators, development snags and pro-poor growth have been hamstrung by poor governance.

At the political level, the return of parliamentary democracy did little to change the nature of public administration, except for the prime minister taking on the role of head of government and concentrating more power in her office. The 'Rules of

[63]Government of Bangladesh (n 61).

[64]Public Service Act 2018 (Bangladesh).

[65] Government of Bangladesh, *Public Financial Management (PFM) Action Plan 2018-23 to Implement the PFM Reform Strategy 2016-21* (Government of Bangladesh 2018).

[66] See Wahiduddin Mahmud, Sadiq Ahmed and Sandeep Mahajan, *Economic Reforms, Growth and Governance: The Political Economy Aspects of Bangladesh's Development Surprise* (World Bank 2008).

[67] World Bank, *Strengthening Public Expenditure Management Program – Strengthening Auditor General's Office* (Report No 142700, World Bank 2020) 1.

Business' and the way the ministries worked and interacted among themselves and controlled departments and subordinate offices remained unchanged. The statutory bodies, supposed to be autonomous, continued to be dominated by the ministers. The courts have remained an appendage of the executive with minimal scope to operate on their own. Judicial review of administrative actions has been rare.[68] Parliament, overwhelmingly controlled by the ruling coalition since 'democracy' was restored, has seldom deliberated on governance issues or made concerted efforts to scrutinise executive action in the same rigour and force as it does in berating the opposition.[69] Its assertive role in influencing policy development and policy evaluation has been misplaced with parliamentary committees being passively active (regular and procedural, but deviant) in realising their objectives.[70] Despite some positive institutional changes in parliamentary practice (prime minister's question time, replacing ministers as chairs of the standing committees (SC), expansion of SC's powers, committee scrutiny of bills, live telecast of proceedings, "[v]arious structural, procedural, behavioural and political factors tend to discourage the parliament from becoming an effective institution".[71] Whatever reforms have been achieved need to be consolidated to make parliament more productive but less partisan.

One of the major governance reforms undertaken with wide ramifications was administrative decentralisation initiated by a military ruler. In some measure, central control over field administration was diluted with the emergence of representative bodies at the local level handling developmental functions, though masterminded by locally deployed officials directly controlled by the national administration. This created a grey area in central-local relationship and undermined the power of democratically elected local institutions.[72]

Structural reform of the civil service, begun and consolidated under military regimes, have been left untouched by successive regimes, except for a few cosmetic alterations. Statutory bodies, meant to be at arms-length, remain under executive vigilance and control unable to uphold their autonomous status. Thus, constitutional bodies, such as the Public Service Commission, Election Commission, and

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68 Habib Mohammad Zafarullah, 'The Governmental Machinery in Bangladesh' in Nizam Ahmed (ed), *Forty Years of Public Administration and Governance in Bangladesh* (University Press Limited 2015).

69 Rounaq Jahan and Inge Amundsen, 'The Parliament of Bangladesh: Representation and Accountability', *CPD-CMI Working Paper No 2* (Centre for Policy Dialogue, 2012); S.S Islam, 'Good Governance and Political Culture: A Case Study of Bangladesh' (2016) 24(2) Intellectual Discourse245-271.

70 M. Maniruzzaman, 'Parliamentary Democracy in Bangladesh: An Evaluation of the Parliament during 1991-2006' (2009) 47(1) Commonwealth & Comparative Politics100-126; Muhammad Mustafizur Rahman, 'Parliament and Good Governance: A Bangladeshi Perspective' (2008) 9(1) Japanese Journal of Political Science39-62.

71 Nizam Ahmed, 'Parliament and Democratic Consolidation in Bangladesh (2011) 26(2) Australasian Parliamentary Review53-68, 63.

72 Ahmed Shafiqul Huque and Pranab Kumar Panday, 'Local Institutions and Governance in Bangladesh: Progress, Pitfalls and Potentials' in M.A Khan and Habib Mohammad Zafarullah (eds) *Whither Bangladesh: Accomplishments, Opportunities, Challenges and the Future* (South Asian Journal, Special Issue 2018).

Comptroller and Auditor-General, generally work with their wings clipped being overseen by people toeing the ruling party line.[73] The creation of the Anti-Corruption Commission for fighting corruption and the Information Commission for ensuring greater transparency in public affairs have been two significant initiatives in governance reform, but both bodies have been underperforming.[74] Human rights surveillance remains at a low level despite the installation of a Human Rights Commission.[75]

C. Operational Reforms

According to the Worldwide Governance Indicators (WGIs), governmental effectiveness[76] is fairly weak in Bangladesh. It currently ranks at 147 among 193 countries with a score of -0.74 points, much lower than the South Asian median.[77] The government acknowledged that low public administration capacity, occasional weaknesses in economic management and persistent corruption lie at the heart of the overall shortcoming in national governance. As a result, the public sector has not been able to play as effective a role as could have been the case in providing services and creating an environment for growth.[78]

Both the 6th and 7th Five Year Plans identified the civil service system, local governance, public-private partnership arrangement and fiscal management processes as operational problem areas needing rectification.[79] To these can be added the perennial issue of program and project implementation and, to cap everything, enduring bureaucratisation triggered by hierarchical and procedural rigidity, red-tape, formalism, procrastination, obstinacy and responsibility avoidance. Organisational dysfunctionality and procedural complexities complicate government operations due to misallocation of resources, misplaced expertise, functional overlap, incoherent rule

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[73] Saadat Husain, 'Constitutional Bodies in a Democratic Polity' *The Daily Star* (Dhaka, 12 March 2014).

[74] Harold Baroi and Shawkat Alam, 'Operationalising the Right to Information Act through e-governance in Bangladesh: Challenges and Opportunities' (2020) International Journal of Public Administration<https://doi.org/10.1080/01900692.2020.1747489> accessed 26 January 2021 (accepted for publication); Nurul Sakib, 'Institutional Isomorphism of Anti-Corruption Agency: The Case of Anti-Corruption Commission in Bangladesh (2020) 5 Chinese Political Science Review222-252; Salahuddin Aminuzzaman and Sumaiya Khair (n 53).

[75] Human Rights Watch, *World Report 2020: Events of 2019* (Human Rights Watch, 2020) 61-64 <https://www.hrw.org/sites/default/files/world_report_download/hrw_world_report_2020_0.pdf> accessed 26 January 2021.

[76] 'Governmental effectiveness' "captures perceptions of the quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government's commitment to such policies" 'Bangladesh: Government Effectiveness' (*theglobaleconomy.com*) <https://www.theglobaleconomy.com/Bangladesh/wb_government_effectiveness/> accessed 05 March 2021.

[77] World Bank (n 67).

[78] Government of Bangladesh, *Sixth Five Year Plan 2011-15: Accelerating Growth and Reducing Poverty* (Government of Bangladesh 2011) 31.

[79] Ibid; Government of Bangladesh, *Seventh Five Year Plan 2016-20: Accelerating Growth, Empowering Citizens* (Government of Bangladesh 2016).

application, flawed inter-agency coordination or consultation, and decision delays.[80] The limitations of overarching policies in many areas of governance, complemented by the constrained application of procedural norms and best practice are notable. This has been despite there being a plethora of rules directing public officials to discharge their obligations in predetermined ways. The machinery of government operates according to constitutional principles, several statutory guidelines, regulations, executive directives and instruction manuals. Some achievements are apparent in alleviating poverty, augmenting budgetary resource flow, increasing primary school enrollment and attaining gender equity at both primary and secondary levels, reducing infant and maternal mortality, managing disasters and climate change through adaptation, mitigation and climate financing mechanisms, widening the social protection of the poor and disadvantaged, easing access to public services through national identification cards, and promoting innovation in the bureaucracy for improved service delivery. These have been effected through specific policies relating to education, health, social security, gender and women, science and technology, information access, anti-corruption and so on, all directly or indirectly relevant to governance issues, primarily social inclusion, transparency and accountability.[81]

Operational reforms focus on capacity development in the public sector, program and results-based approach in budgeting and planning monitoring/evaluation, e-governance and e-service mechanisms, procurement and contracting-out schemes, fiscal and tax management, public service delivery methods. However, most times, their implementation has been sluggish and outcome mixed. Several Acts, manuals and guidelines exist that instruct how specific agencies and individuals are to act, interact and react in the realisation of their organisational objectives.[82] However, these have not always been instrumental in securing compliance in operational terms.

D. Behavioural Reforms

The colonial legacy still lingers on in Bangladesh's administrative system. Longstanding cultural beliefs influence civil servants' role in society and their approach to administrative pursuits. The contradiction between the dispassionate application of formal rules and deviation from official obligations for personal, kinship or political reasons leaves the bureaucracy in a quagmire. Historically, the 'self-interest' approach of bureaucrats or inter-cadre (especially specialists vs generalists) antagonism created tensions and led to goal displacement conflicting, as it did, with the overall mission of the civil service.[83] This proved detrimental to bureaucratic integration, dented cohesion and worked against professionalism.

The obsession with rule-based operations and manifestations of power and authority in a closed and secretive post-colonial bureaucracy featuring sub-system autonomy, uneven superior-subordinate relationship and top-down decision-making are at odds

[80] Habib Mohammad Zafarullah (n 68).
[81] Government of Bangladesh (n 78); Government of Bangladesh (n 79).
[82] Habib Mohammad Zafarullah (n 68).
[83] Habib Mohammad Zafarullah and M.M Khan (n 58).

with governance-centred reforms that emphasise democratic controls, transparency and openness, integrity, policymaking equity, citizen focus, consultation and collaboration, and protection of the public interest. While none of the reform initiatives of the past targeted the behavioural dimension *per se*, several prior and existing maxims[84] support positive bureaucratic demeanour and performance, including conduct and discipline, information sharing, reporting, incentives and probity.[85]These rules cover the entire career of civil servants and range from post-recruitment responsibilities to participating in training programs to conducting themselves properly.

From a behavioural and attitudinal perspective, "a majority of civil servants is satisfied with their job, [are] trusting towards their colleagues, committed to staying in the public sector and motivated to serve the public interest...[but]…only just over half of [them] are motivated to work hard".[86] The main stimulating factors are accelerated promotion, periodic salary increases[87]and unconventional perks, such as soft car and subsidised housing loans and mobile phone bill payment.[88] Needless to say, legislations, policies, rules or procedures cannot really change the actions and attitudes of public officials by compulsion overnight. The age-old ideas and attributes ingrained in the bureaucratic mind linger (even among those not bred in those norms) through enculturation-- a continuous process of transferring cultural attributes from the old-guards to the new. That way, newcomers, over time, assimilate the behavioural attributes of their predecessors.[89]Behavioural reform, thus, has not happened or is improbable as time-honoured perceptions and orientations are entrenched in the bureaucratic psyche.

E. Ethical Reforms

As is widely known, one of the WGIs in which Bangladesh ranks fairly low is 'control of corruption'—with a score in 2019 of -0.99 the country ranked at 159 among 193 countries.[90] It ranked 146 (out of 180) with a score of 26/100 in

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84 Key ones include: The Government Servants (Conduct) Rule 1979; Government Servants (Discipline & Appeal) Rule 1985; Government Servants (Special Provisions) Ordinance 1979; Public Employees Discipline (Punctual Attendance) Ordinance 1982; Prescribed Leave Rule 1959; Government Servants (Discipline and Appeal) Rules 2018.

85 Government of Bangladesh, *Annual Report of MOPA* (Government of Bangladesh 2018).

86 Jan-Hinrik Meyer-Sahling, Christian Schuster, Kim Sass Mikkelsen, Taiabur Rahman, Kazi Maruful Islam, Ahmed Shafiqul Huque, Fanni Toth, *Civil Service Management in Bangladesh* (UK Department of International Development 2019) 11.

87 Habib Mohammad Zafarullah, M.M Khan and M.H Rahman (n 56).

88 J U Haroon, 'Civil Servants Get Stunning Benefits' *The Financial Express* (Dhaka, 19 August 2019).

89 Habib Mohammad Zafarullah, 'Bureaucratic Elitism in Bangladesh: The Predominance of Generalist Administrators' (2007) 15(2) Asian Journal of Political Science161-173; Habib Mohammad Zafarullah, 'Bureaucratic Culture and the Social-Political Connection: The Bangladesh Example' (2013) 36 (13) International Journal of Public Administration932-939; Ishtiaq Jamil, 'Administrative Culture in Bangladesh: Tensions Between Tradition and Modernity' (2002) 12(1) International Review of Sociology93-125.

90 Global Economy, *Control of Corruption – Country Rankings* (The Global Economy 2020). Available at <https://www.theglobaleconomy.com/rankings/wb_corruption> accessed 26 January

Transparency International Corruption Perception Index.[91] Corruption has taken many forms in the present neo-liberal economic environment with the scope for unethical practices widening. It has engulfed the business sector, the bureaucracy, defence and coercive forces and even political circles.[92] Incidence of corruption is attributed to venal state capture by devious elements, partisan decisions at the highest levels, unsound accountability structures and procedures, and bureaucratic non-compliance to the principles of probity.[93]

This is one reform area where substantial inroads have been attempted but seldom providing the desired results. Following up on the United Nations' 'Convention Against Corruption' of 2003, several measures have been put in place, such as the Anti-Corruption Act(2004), Public Procurement Act (2006), National Integrity Strategy (2008),Right to Information Act (2009), Public-Interest Information Disclosure Act (2011), Money Laundering Act (2012), and Finance Act (2018) while other exiting laws (some dating to colonial times) have been updated or amended to counter corrupt practices in both the public and private sectors.Other measures, including the Government Auditing Standards, Code of Ethics, two other Codes relating to auditing and public accounts, have the potential to ensure transparency of and accountability in government operations. The institutional spin-off of these actions has been the formation of the Anti-Corruption Commission, the Information Commission, Financial Intelligence Unit of the Central Bank, and Central Procurement Technical Unit, etc. As emphasised before, codifying operational ethics in and beyond government is a complex task, while instilling a culture of ethics and morality in public governance is even harder. Yet, these are important for enhancing the credibility of the government, raising the bureaucracy's public image and building trust among citizens.

F. Legal Reforms

Ethical reforms cannot be institutionalised unless accompanied by reforms of the legal system of the country. The judiciary and the framework under which it operates must be robust enough to administer justice by prudently interpreting laws and upholding citizens' rights without fear or favour. Constitutionalism and the Rule of Law are preeminent in public governance without which democratic practice will remain spurious.The constitution affirms the independence of the judiciary, but the fairness of the justice system has been compromised by undue political interference, condescending patronage networks, prolonged or delayed trials and pervasive

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2021.

91 Transparency International, *Bangladesh, In Corruption Perception Index 2019* (Transparency International 2020) <https://www.transparency.org/en/cpi/2020/results/bgd> accessed 26 January 2021.

92 Salahuddin Aminuzzaman and Sumaiya Khair (n 53); Iftekharuzzaman, *Fighting Corruption in Bangladesh: From One Myth to Another?* (Transparency International 2007).

93 Iftekharuzzaman, 'Corruption: Towards Kleptocratic State Capture' *The Daily Star* (Dhaka, 1 January 2014); Ahmed Shafiqul Huque, 'Accountability and Governance: Strengthening Extra-Bureaucratic Mechanisms in Bangladesh' (2011) 60(1) International Journal of Productivity and Performance59-74; Habib Mohammad Zafarullah and Ahmed Shafiqul Huque (n 53).

corruption. Judges giving verdicts "unfavorable to the government risked transfer to other jurisdictions" create trepidation and misgivings in the legal community.[94] The separation of the judiciary from executive control formalised by a non-political caretaker government in 2007, the creation of two separate magistracies for judicial and executive functions and the requirement that president consults with the Supreme Court while exercising control over the judicial service were significant initiatives.[95] Other reforms included the amendment of the age-old Criminal Procedure Code of 1898, vesting of judicial powers upon executive magistrates through the Mobile Court Ordinance (2007) and the creation of 'Metropolitan Courts of Sessions' in Dhaka and Chittagong for the rapid dispensation of justice.[96]

The 1972 Constitution had provided for an Ombudsman, but even after almost 50 years, this has remained illusory. Successive governments promised of its initiation but backtracked. Perhaps, it would have served as an 'independent' mediator in resolving government-citizen disputes and promoting natural justice. A Law Reforms Commission exists but not quite effective in impressing upon the political leadership to go for meaningful reform of the legal regime for sound governance.

G. Technological Reforms

Bangladesh has been effectively using technology in managing the operations of government. Notable achievements are the projects and programs in e-governance, e-service, e-commerce, e-marketing, e-banking, e-procurement and mobile phone connectivity. The country is now connected to the information superhighway, and broadband networks and smartphones link citizens to the state. Local service centres enabled by ICT serve the people in different ways—providing access to governmental information, applying for and getting documents (various kinds of certificates, passports, land mutation, etc.), paying utility charges, and permitting two-way interaction between service providers and users.[97] Paper-based governmental operations have been opaque, tardy and amenable to malpractices; now these are transparent, faster and less prone to corruption.Indeed, Bangladesh currently ranks among the top 10 least developed countries in e-governance encompassing poverty alleviation, health, education, agriculture, and public administration. It is now among the high EGDI countries and making "impressive advancements in online

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94 USDS, *2019 Country Reports on Human Rights Practices: Bangladesh* (US Department of State, 2019) 8 <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/bangladesh/> accessed 26 January 2021. See also Abdul Alim, 'Corruption in Civil Litigation System: An Approach to Judicial Reform in Bangladesh (2018) 9(2) Asian Journal of Law and Economics1-11.

95 Global Legal Monitor, *Bangladesh: Judiciary Separated from Executive Control* (Global Legal Monitor 2007) <https://www.loc.gov/law/foreign-news/article/bangladesh-judiciary-separated-from-executive-control/> accessed 26 January 2021.

96 N. R. Anzara, 'Independence of Judiciary: A Bird's Eye View (2016) (*Bangladesh Law Digest*, 13 August 2016) <https://bdlawdigest.org/independence-of-judiciary-in-bangladesh.html> accessed 26 January 2021.

97 Md Gofran Faroqi, 'An Assessment of e-Government: Case Study on Union Digital Centres (UDC) in Bangladesh' (2015) 1(1) Australian Journal of Sustainable Business and Society84-96.

services provision despite having middle or low levels of infrastructure development".[98]

While these have been admirable achievements that bode well for effective governance, several laws relevant to the application of technology have adverse implications for freedom of expression. For instance, the 'Digital Security Act' and the excessive power granted to the coercive and regulatory agencies in capriciously enforcing its stipulations by persecuting political opposition and silencing criticisms against the government or its policies have invited condemnation.[99]

V. CONCLUSION

Bangladesh can learn from the experiences of the advanced democracies and a few developing countries where governance reforms have provided productive outcomes benefiting all who matter--the people, in particular. The several approaches and models outlined above can influence reform thinking and persuade reform strategists to adopt a combination of elements from the most appropriate ones. Whatever option is chosen, building inclusive, effective, accountable and ethical institutions should be the definitive consideration for societal wellbeing and development. Institutions build nations and, thus, must be run sensibly by a corps of well-groomed administrators steered by politicians possessed of acumen, ability and altruism to serve citizens and earn their trust. A truly representative parliament elected freely and fairly can be *the* instrument for neutralising executive dominance and, along with other agencies of surveillance and control, can contribute to maintaining a sound governance regimen in the country.

In the past decade, some sporadic reforms in a few areas of governance have been evident in Bangladesh. These have been fragmentary and incremental, attempted at irregular intervals, and devoid of any overarching rationale or structured framework. Reform planners and policymakers have generally been unmindful of new ideas or the positive effects of practical solutions to problems elsewhere.Thus, the outcome of reform attempts has been inconsistent and impact unpredictable and perfunctory. The reform phenomenon has touched the fringes rather than the entirety of the governance edifice, leaving crevices and missing links. At the helm, the political leadership can do better by driving governance reform with care, conviction and commitment. The bureaucracy must discard its 'resistant-to-change' baggage and be more forthcoming in supporting innovation and change. Civil society is expected to adopt a more active role as a democratic watchdog and impress upon the government for meaningful reforms, while the external donors attend to the country's contextual needs rather than be overly obtruding.The unfinished governance reform agendas require utmost attention and accelerated action, otherwise the pursuit of sustainable inclusive development will remain stuck in a blind alley.

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[98] United Nations, *E-Government Survey 2020* (Department of Economic and Social Affairs, UN 2020) 21; K. Kosenkov, 'UN E-Government Development Index'(*UN*, 2018) <https://knoema.com/infographics/mctunlb/un-e-government-development-index> accessed 26 January 2021.

[99] Amnesty International, *Muzzling Dissent Online: Bangladesh* (Amnesty International 2018) <https://www.amnesty.org/download/Documents/ASA1393642018ENGLISH.PDF> accessed 26 January 2021; EurAsian Times, 'How the Draconian 'Digital Security Act' of Bangladesh is Muzzling Press Freedom, Secular Voices? (*EurAsian Times*, 26 May 2020).

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Environmental Obligations in International Watercourse Law and South Asian Practice

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I. INTRODUCTION

International watercourses had long been seen as an economic resource ignoring environmental implications of their utilizations and resulting in conflict of interests between Basin States. Attempts to help resolve those conflicts by regulating their utilization and also for addressing environmental concerns, have given rise to a number of applicable legal principles over the last decades. In this regard, the 1997 UN Watercourse Convention remains as a landmark agreement, not only as the first global treaty on the subject, but also as an authentic evidence of customary rules governing utilization, development, and management of transboundary water.[1]

The convention entered into force on 17 August 2014 and so far it has counted a small number of ratifications.[2] However, having its origin in the International Law Commission's (ILC) Draft Articles on the Law of the Non-navigational Uses of the International Watercourses, the Convention remains important also as a codification of international law potentially applicable even to the non-state parties.[3]

The period, after the Convention, has witnessed many interesting developments that in turn crystallized the rules and principles enshrined in the Convention. These developments are reflected in new treaties, regional conventions, and perhaps more notably in the proceedings of the watercourse disputes before the International Courts.

One important trend of such developments is the increasing focus on the environmental aspects of the utilization of transboundary watercourses. The global

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1 Convention on the Law of the Non-navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) 2999 UNTS. It was adopted by a vote of 103 in favour including Bangladesh to 3 against with 27 abstentions including India and Pakistan. See UNGA Res 51/229 (21 May 1997) UN Doc A/RES/51/229 7-8.

2 The number of state parties to the Convention is 37 and signatories are 16, among them most are European and African states. See 'UNTC' (*Treaties.un.org*, 2021) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&lang=en> accessed 16 February 2021.

3 The ILC was established in 1946, under Article 13, Para. 1(a) of the UN Charter, to promote 'progressive development' and 'codification' of international law. On the International Law Commission, see, Ian Sinclair, *The International Law Commission* (Cambridge: Grotius Publications Limited 1987). For the ILC Draft Articles, see, UNGA 'Report of the International Law Commission on the work of its forty-sixth session' UN GAOR 49th Session Supp No 10 UN Doc A/49/10 (1994) 218 [hereinafter *1994 ILC Report*].

opening in 2016 of the 1992 UNECE Convention,[4]which incorporates detailed environmental provisions, the 2004 International Law Association Berlin Rules, the decisions of the International Court of Justice (ICJ) on a number of cases involving transboundary water, and the ever-increasing focus of environmental treaty regimes like the 1992 Biodiversity Convention on watercourse issues – all add to the strength of such an argument premised upon the environmental provisions of the 1997 Convention.[5]

On the basis of detailed analysis of these trends, this study argues that South Asia as a region has largely failed to conform with or sometimes even to discern the increasing focus of international watercourses law on environmental obligations. International watercourses in this region are still either governed by narrow understanding of economic interests or left to the unilateral control of the upstream countries. This argument is substantiated, among others, mostly by comparing the 1996 Ganges Water Treaty between Bangladesh and India to the contemporary developments of international watercourse law analyzed in the foregoing sections.

This study is important in order to highlight the lacking in sustainable management and utilization of international rivers among basin states of this region and suggest ways for developing a more efficient and sustainable regime for the benefit of the people of the concerned countries. It would make important contribution by suggesting the approach which should be adopted in future negotiation on the extension of the 1996 Treaty after its expiry in 2026 and in concluding agreements on other shared rivers.

II. THE 1997 WATERCOURSE CONVENTION

On 21 May 1997, the General Assembly adopted the convention on the basis of the draft articles prepared by the ILC and elaborated by the United Nations General Assembly (UNGA) sixth committee working group.[6] The Convention entitled 'Convention on the Law of the Non-navigational Uses of International Watercourses' [hereinafter the Watercourse Convention or the 1997 Convention] entered into force in 2014.

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4 The title of the convention is 'Convention on the Protection and Use of Transboundary Watercourses and International Lakes'. It was adopted by the members of United Nations Economic Commission for Europe in 1992. See, Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 March 1992, entered into force 6 October 1996) 1936 UNTS 269 [Hereinafter UNECE Convention].

5 See for example, Sabine Brels, David Coates and Flavia Loures, 'Transboundary Water Resources Management: The Role of International Watercourse Agreements in Implementation of the CBD' (CBD Technical Series no. 40, Montreal: CBD Secretariat 2008) <https://www.cbd.int/doc/publications/cbd-ts-40-en.pdf> accessed 13 December 2020.

6 The initiative for the 1997 Watercourse Convention was undertaken by the United Nations General Assembly (UNGA). In a resolution of 8 December 1970, the UNGA recommended the International Law Commission (ILC) to take up a study of the law of the non-navigational uses of international watercourses with a view to its 'progressive development and codification'. See, UNGA Res 2669 (XXV) (1970) UN Doc A/CN.4/244/Rev. 1, para1. For the text of the draft articles adopted in 1994 and the commentaries of the ILC to these articles, see, *UNGA* (n 3) 197-327.

The Convention sets forth the general principles and rules governing non-navigational uses of international watercourses in the absence of specific agreements among the States concerned and provides guidelines for the negotiation of future agreements.[7]It consists of seven parts containing 37 Articles: Introduction; General Principles; Planned Measures; Protection Preservation and Management; Harmful Conditions and Emergency Situations; Miscellaneous Provisions and Final Clauses.[8] An annex to the Convention sets forth the procedures which could be used in the event the parties to a dispute agree to submit it to arbitration.

The following sections identify, analyze and highlight the environmental obligations specifically or impliedly addressed in various provisions of the Convention. Among these provisions, the 'General Principles' laid down in Part II of the Convention and the procedural principles incorporated in Part III refer to environmental obligations as their inseparable component. On the other hand, Part V of the convention elaborates the environmental provisions of the Convention and relates them to other substantive obligations defined in the convention. In the course of discussing the above principles, this study takes into account the relevant 'Statements of Understanding' of the Sixth Committee Working Group[9] and the commentaries of ILC to the draft articles it adopted in 1994.[10]

A. Environmental focus in substantive principles

The 1997 convention centers on two important substantive principles, namely, equitable utilization and no-harm principles and explains their relationship. Unlike the previous codifications such as the Helsinki Rule of 1966, [11] it defines those

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7 UNGA Press Release, 'General Assembly adopted Convention on the Law of Non-navigational Uses of International Watercourses' (21 May 1997) GA/9248.

8 The introduction part of the Convention explains the scope of the Convention and defines key terms. Article 1 provides that this Convention applies to non-navigational uses of international watercourses and consequently also to those navigational uses which affect non-navigational uses of international watercourses. Article 2 defines international watercourse as a watercourse parts of which are situated in different States and provides that watercourse means a system of surface waters and ground waters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus. It also provides that Watercourse State means a State in whose territory part of an international watercourse is situated.

9 These Statements were included in the Report of the Sixth Committee Working Group to the General Assembly. McCaffrey and Sinjela described these Statements as *travaux preparatoires* of the 1997 Convention. See, Stephen C. McCaffrey and MpaziSinjela, 'The 1997 United Nations Convention on international watercourses' (1998) 92 AJIL 102. For the 'Statements of understanding' with the text of the Convention see, UNGA, 'Report of the Sixth Committee convening as the Working Group of the Whole' (11 April 1997) UN Doc A/51/869 <https://www.un.org/ga/search/view_doc.asp?symbol=A/51/869> accessed 16 February, 2020.

10 These commentaries appear in the *1994 ILC Report*, *UNGA* (n 3). The legitimacy of invoking ILC commentaries is established by the Sixth Committee Working Group during its elaboration of the Convention. The Sixth Committee Working Group (ibid para 8) noted that: "[T]hroughout the elaboration of the draft Convention, reference had been made to the commentaries to the draft articles prepared by the International Law Commission to clarify the contents of the articles".

11 The Helsinki Rules were based on reports of the River Committee, established in 1954 by the International Law Association, a highly reputed international non-governmental organization. The Committee submitted its final report to the Helsinki conference of ILA in 1966 and the articles

principles in a way which represents an integration of environmental concerns and economic interests of the watercourse states. Further, their inclusion in the convention as general principle suggests that those environmental concerns must not be overlooked in utilization and development of international watercourses.

1. Equitable utilization

Article 5(1) of the convention requires a Watercourse State to exercise its rights to utilize an international watercourse in an 'equitable and reasonable manner'. The objectives are to attain 'optimal and sustainable utilization', to take into account the interests of other Watercourse States concerned and at the same time, to ensure 'adequate protection of the watercourse'.[12] This emphasis on `sustainable' utilization and adequate `protection' of the watercourse is a comparatively new development and it underlines a duty to protect the ecological features and functions of the watercourse in planning and executing its development, management and utilization.

Article 5(2) introduces a complementary principle of equitable participation of Watercourse States in 'the use, development and protection' of an international watercourse. As ILC commentary to this Article explains, equitable participation is linked to Article 8 which defines the principle of co-operation in more general terms, necessitating compliance with procedural duties.[13] This requirement is environment friendly as it underscores the necessity of involving all the watercourse states without which the indivisible ecological character of the watercourse cannot be safeguarded.

Article 6(1) contains a non-exhaustive list of factors to be taken into account in determining whether a utilization of international watercourse is equitable and reasonable. These factors include environmental issues such as conservation and protection of the water resources along with other traditional and long-established factors: the natural condition of the watercourse, social and economic needs of the Watercourse States, dependent population, effect of a use of the watercourse on other Watercourse States, existing uses of the watercourse and available alternatives. The incorporation of conservational aspects of the watercourse and also of the 'potential uses' along with existing uses in Article 6(1) corresponds with the provisions of Article 5 on sustainable use and adequate protection of watercourse. This enjoins the watercourse States with greater responsibility which the Working Group considered to be appropriate in view of the recent development of the international environmental law (IEL).[14]

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included in the report were adopted as 'Helsinki Rules' by the ILA conference. See, Bourne, 'The International Law Association's contribution to international water resources Law' (1996) 36 Natural Resources Journal 155-213.

12 Para 2 of the Commentary to Article 5 of *1994 ILC Report*. See, *UNGA* (n 3) 220.

13 Para 6 of the Commentary to Article 5 of *1994 ILC Report*. Ibid.

14 See, UNGA Summary Record of 24th Meeting (17 September 1996) GAOR 51st Session Sixth Committee UN Docs. A/C.6/51/SR.l5-20 4, para 14. The Chairman of the Drafting Committee of the Working Group recalled that inclusion of the principle of sustainable development and protection of ecosystem in the Convention was proposed 'in order to bring the draft articles more fully into line with contemporary international environmental law'.

2. No- harm principle

As observed by the ILC, "Article 5 [concerning principle of equitable utilization] alone did not provide sufficient guidance for States where harm was a factor".[15] The Commission found enough legal materials to formulate a principle concerning harm, although the question of its stringency and its relationship with equitable utilization formed lengthy debate both in the ILC and in the Sixth Committee of the General Assembly.[16]

Article 7 obligation comprises both pre-harm obligation of takingpreventive measures foravoiding causing of `significant harm' to other watercourse States[17]and post-harm obligation of consulting the affected State in order to mitigate such harm and pay compensation in appropriate cases.

The whole process indicates that Article 7, although basically sets forth or entails obligations of conduct, it also reflects obligations of result. A watercourse State first has to take preventive measures and thereafter, if harm is caused, has to consult with the affected State for an equitable resolution for eliminating or mitigating harm and for compensating in appropriate case and lastly if the consultation fails, has to enter into dispute settlement procedures for such resolution.

It should be pointed out here that the above explained no-harm principle covers environmental harms as well. The ILC, while formulating this Article, defined harm as a detrimental impact of some consequence upon sectors which include environment in the affected State along with its public health, industry, property or agriculture.[18] As McCaffrey, the longest serving rapporteur of the ILC on the subject, explained, such harm "may take the form of a diminution in quantity of water, due, for example, to new upstream works or pumping of groundwater" and it could also result from factors such as pollution, obstruction of fish migration, increased siltation due to upstream deforestation, negative impacts on the riverine ecosystem due to conduct in another riparian state etc.[19]

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15 Para 2 of the commentary to Article 7 of the *1994 ILC Report*. See, *UNGA* (n 3) 236.

16 See Nussbaum, 'Report of the working group to elaborate a convention on international watercourses' (1997) 6 RECIEL 49-50. Stephen C. McCaffrey and MpaziSinjela (n 9) 101. Bourne, 'The International Law Commission's draft articles on the law of international watercourses, principles and planned measures' (1992) 3 Colorado JIELP 73-82.

17 The expression 'significant harm' was preferred by the ILC in its draft articles of 1994, although in the 1991 draft articles, it was 'appreciable harm'. The Special Rapporteur of the ILC, Mr. Rosenstock, while sitting as an expert consultant during the elaboration of the Watercourse Convention by the Working Group, explained that the change from appreciable to significant was made only to avoid the possibility that in addition to substantial harm, trivial harms could also be measured by increased scientific and technological capacities and therefore may be confused with the term 'appreciable' meaning capable of being measured. He concluded: "As the Commission's records made abundantly clear, the change from 'appreciable' to 'significant' had not been intended to alter the thresholds, but to avoid a circumstance in which the threshold could be lowered to a clearly de minis level". See, UNGA Summary Record of the 16th Meeting GAOR 51st Session Sixth Committee Para. 35.

18 (1988) II (2) Yearbook of International Law Commission 36, para 188.

19 Stephen C. McCaffrey, The *Law of International Watercourses*, (3rd edn, Oxford University Press 2019) 470.

It may also be argued that some types of environmental harm would not only be inconsistent with Article 7 on no-harm, it would also violate the principle on equitable utilization. The ILC's commentary to Article 7 provides: "A use which causes significant harm to human health and safety is understood to be inherently inequitable and unreasonable." Basing on this, McCaffrey commented, "[s]ignificant pollution harm to a state or its environment would usually entail significant harm to human health and safety, and would therefore be "inherently inequitable and unreasonable."[20]

3. Other General Principles

The Convention, in its Articles 8 to 10, spells out other general principles which facilitate implementation of equitable utilization. Under Article 8, watercourse States are required to co-operate each other on the basis of 'sovereign equality, territorial integrity, mutual benefit and good faith' which are defined as the 'most fundamental principles' in the relevant commentary of the ILC.[21]Article 9 provides for regular exchange of data and information on the condition of a watercourse.[22] The purpose is to ensure that 'the Watercourse States will have the facts necessary to enable them to comply with their obligations under Article 5, 6, and 7'.[23]Article 10 requires watercourse States to resolve conflicts between various types of uses in the light of the provisions of Article 5 to 7, giving special regard to 'vital human needs'.[24] These general principles suggest an inseparable relationship between the principles of no-harm, equitable utilization and cooperation.[25]

Further, as these general principles are to ensure compliance with Article 5-7 and as these Articles entail obligations including that of not causing environmental harm, these general principles could serve to facilitate compliance with environmental obligations.

B. Procedural obligation includes exchange of environmental information

Planned measures are defined in the 1997 Convention as 'new projects or programmes of major or minor nature' as well as 'changes in existing uses of an international watercourse'.[26] The Convention incorporates a comprehensive set of procedural obligations concerning planned measures.These include exchange of

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[20] Ibid 512.

[21] Para 2 of the commentary to Article 8 of the *1994 ILC Report. See, UNGA* (n 3) 245.

[22] Para 1 of the commentary to Article 9 of the *1994 ILC Report.* Ibid 250.

[23] Para 2 of the commentary to Article 9 of the *1994 ILC Report.* Ibid.

[24] Para 4 of the commentary to Article 10 of the *1994 ILC Report.* Ibid 257. It defines 'vital human needs' as 'an accentuated form' of the factor contained in Article 6, Para 1(b) which refers to social and economic needs of the watercourse States concerned. Vital human needs thus indicate uses of water to sustain human life, like drinking water and water required for the production of food to prevent starvation.

[25] Analyzing the way these principles have been addressed in the 1997 and 1992 Convention, Atilla concludes that they have a 'mutually reinforcing legal relationship'. He also argues that these two principles produce 'a framework for prevention, management and settlement that facilitates cooperative scenarios'. See, Attila M. Tanzi, 'The inter-relationship between no harm, equitable and reasonable utilisation and cooperation under international water law' (2020) 20 International Environmental Agreements: Politics, Law and Economics 619–629.

[26] Para. 4 of the commentary to Article 11 of the *1994 ILC Report.UNGA* (n 3) 260,

information, consultation and negotiation on the 'possible effects' of planned measures on the condition of an international watercourse. These obligations are unconditional, and irrespective of actual effects of planned measures.[27]

The first procedural duty is notification (Article 12) of planned measures which 'may have a significant adverse effect' upon other Watercourse States. Such notification is required to be accompanied by 'available technical data and information including the result of any environmental impact assessment'.

Article 16 and 17 of the Convention deal with obligations those follow notification of planned measures. Accordingly, if the notified State communicates to the notifying State that the planned measures would be inconsistent with the provisions of Article 5 or 7, then both States have to begin consultation and, if necessary, negotiation with a view to arriving at 'an equitable resolution of the situation'. The above principles had been addressed in the ILC as 'indispensable adjunct to the general principle of equitable utilization'.[28]These principles basically lay down obligations proceeding to actual dispute. These principles and Article 33 (concerning dispute resolution) appear to form an integral procedural framework for implementing the substantive obligation in relation to the utilization of international watercourses.

Article 33 contains dispute settlements procedures in order to respond to the 'complexity' and 'inherent vagueness' of the criteria to be applied for equitable utilization of international watercourses.[29]Dispute settlement procedures can be invoked gradually: first bilateral methods thereafter optional methods of third-party settlement, and lastly, if optional methods are not agreed, a mandatory Fact-finding Commission which can be established by any of the parties to a dispute.[30]The purpose of such Fact-finding Commission would be to facilitate resolution of a dispute through the 'objective knowledge of the facts'.[31] Article 33 puts noticeable emphasis on Fact-finding Commission by making detailed provisions explaining the procedures concerning appointment and functions of such Commission.

It should be noted here that facts which are central in complying with the obligations under the 1997 Convention include facts relating to environmental impact of any planned measure. Article 12 specifically mentions such requirement and it was later reinforced in the decisions of international court. For example, in the Pulp Mill case, the ICJ opined, **"**it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource." [32]

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[27] Para 3 of the commentary to Article 11 of the *1994 ILC Report.* Ibid 259, 260.

[28] Stephen C. McCaffrey, 'Second report' (1986) II(2) *YILC* 139, para 188. For detail, see Stephen C. McCaffrey, 'Third Report' (1987) II(1) YILC 22-23, paras. 32-35.

[29] Para. 21 of the Commentary to Article 7 of the *1994 ILC Report.UNGA* (n 3) 244.

[30] Clause 3, 4 and 5 of Article 33.

[31] Para 4, Commentary to Article 33 of the *1994 ILC Report.UNGA* (n 3) 324.

[32] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) ICJ Reports 2010 83, para 204 <https://www.icj-cij.org/public/files/case-related/135/135-20100420-JUD-01-00-EN.pdf> accessed 16 February 2021.

C. Protection and preservation of the watercourse

The 1997 Convention lays stress on the needs for sustainable use of international watercourses and its adequate protection in a number of articles particularly in Article 5-7. Further, it devotes a whole Part (Part IV) to elaborate the principles concerning protection, preservation and management of the international watercourses.

Article 20 of Part IV of the 1997 Convention requires watercourses states to act individually and in appropriate cases jointly to protect and preserve the ecosystems of international watercourses.[33]The obligation to protect the watercourse ecosystem is a specific application of the requirement contained in Article 5 that watercourse states are to use and develop an international watercourse in a manner that is consistent with adequate protection thereof. In essence, it requires the watercourse states to shield the ecosystem of international watercourses from harm or damage.[34]

While commenting on this article, McCaffrey observed that **"**Together with the pronouncements of the ICJ in Gabčíkovo-Nagymaros, Pulp Mills, the Road case, and the Nuclear Weapons Advisory Opinion, it shows that international law is adapting to take into account advances in scientific understanding of natural systems."[35]

Article 21 spells out a specific obligation of protection of international watercourses by requiring the watercourse states to "prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse."

Article 23 provides for protection and preservation of the marine environment, including estuaries, taking into account generally accepted international rules and standards. Article 24 and 25 provide for mutual cooperation respectively for management and regulation of international watercourses. Article 27 requires prevention and mitigation of harmful conditions related to international watercourses that may have adverse impact on other watercourse states.

Further, these articles can be interpreted to address much wider normative expectations. For example, the obligation of causing no significant environmental harm under Article 21 may include regulating activities which reduce downstream flow and thus help saline intrusion from the sea.[36] Likewise, the obligation of prevention and mitigation of harmful conditions under Article 27 may include environmental impacts of human activities.

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33 As Commentary to Article 20 of the *1994 ILC Report.UNGA* (n 3) 280. It provides that "[T]he term ecosystem means an ecological unit comprising living and non-living components that are interdependent and function as a community".

34 Ibid 282.

35 Stephen C. McCaffrey (n 19) 517.

36 Owen McIntyre, *Environmental Protection of International Watercourses under International Law* (Aldershot: Ashgate 2007) 117.

D. Customary rules concerning environmental obligations

Being based on the draft articles of the International Law Commission, the 1997 Watercourse Convention comprises 'codification (existing rules) and progressive development (developing principles)' of the laws of non-navigational uses of international watercourses.[37]The ICJ in a number of cases recognized this dual utility of multilateral conventions.[38] In its commentaries to the draft articles, the ILC itself made valuable indication to the customary international law status of various principles of the Convention.For example, the ILC described the principle of equitable utilization as a 'well-established rule'[39] and the no-harm principle as a 'general obligation' of watercourse states, although the UN Sixth Committee Working Group, while negotiating the Convention, experienced lack on unanimity on the relation between the two.[40]

While completing the final draft in 1994, the ILC noted the existence of relatively few examples of state practice on some issues. For example, while it strongly endorsed most of the environmental and procedural obligations, such as protecting the watercourse ecosystem, not causing pollution, and negotiating in good faith, it also noted that mandatory fact-finding commission has received only 'considerable attention by States[41] and the obligation of protecting marine environment from watercourse pollution is 'recognized only relatively recently'.[42]

Nevertheless, the ILC's suggestion that most of the principles enshrined in the 1997 Convention are either established or emerging principles of customary laws, is substantiated by the way the Convention has influenced subsequent watercourse agreements including those in the Asian and African regions.[43]

The above provisions, if read with other contemporary codifications discussed below and also with the near-universally accepted multilateral environmental agreements such as those on biodiversity and climate change, suggest that disregarding environmental issues in any planned utilization of an international watercourse would be a clear deviation from the applicable global norms.[44]

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37 Statute of the International Law Commission,*UNGA Res. 174 (II) 2 UN GAOR (Res) UN Doc. A/519 (1948)* art 1 and 15.

38 For example, Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States) (Merits) [1986] ICJ Rep 14; *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* [1969] ICJ Rep 3, 37-41.

39 *UNGA* (n 3) 218-331.

40 *UNGA Res 51/229* (n 1) 1-12.

41 Para 4 of the Commentary to Article 33 of the *1994 ILC Report.UNGA* (n 3) 324.

42 Para 1 of the Commentary to Article 23 of the *1994 ILC Report.UNGA* (n 3) 285.

43 For resources on global influence and relevance of the Convention, see, 'Global Relevance - UN Watercourses Convention' (*Unwatercoursesconvention.org*, 2021) <https://www.unwatercoursesconvention.org/global-relevance/> accessed 16 February 2021. See also, Flavia Rocha Loures and AlistarRieu Clarke (eds), *The UN Watercourses Convention in Force, Strengthening International Law for Transboundary Water Management* (London: Routledge 2017).

44 Md Nazrul Islam, 'Environmental Impacts of the Ganges Water Diversion and Its International Legal Aspects' in M MonirulQader Mirza (ed), *The Ganges Water Diversion: Environmental Effects and Implications* (Dordrecht: Kluwer 2004) 218-220.

III. 1992 UNECE CONVENTION AND ITS GLOBAL OPENING IN 2016

The integration of environmental issues in the watercourses law had been cemented through the adoption of the 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes and its global opening in 2016.[45] This global opening signaled the realization of state parties to the UNECE Convention that with more emphasis on environmental and institutional aspects, the Convention should be expanded to countries outside the UNECE region.[46] Also, the joining of two African Countries, Chad and Senegal, to this Convention in 2018 and the willingness of few more to join indicate the increasingly broader acceptance of the Convention.[47]

The 1992 ECE Convention is a strong endorsement against significant adverse effect of watercourse utilization. Such effects include "effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors".[48]

The 1992 Convention[49] provides for integrated water resources management through the basin approach involving all the basin states of a shared watercourse.[50]Compared to the 1997 Convention, the central focus of the 1992 Convention is ecologically sound and rational water management, conservation of water resources and environmental protection.[51]It has therefore established more detailed and specific duties for delimitation or elimination of environmental harms in a number of ways.

First: the 1992 Convention requires pollution prevention, control and reduction at source, prior licensing of waste-water discharges, application of biological treatment

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45 The Convention was originally negotiated as a regional instrument for the member states of the UN Economic Commission for Europe. Amendments in 2003 to Articles 25 and 26 of the Convention allowed all UN Member States to accede to the Convention as from 1 March 2016.

46 See UNESC 'Draft strategy for the implementation of the Convention at the global level' (30 July 2018) UN Doc ECE/MP/WAT/2018/6<https://www.unece.org/fileadmin/DAM/env/documents/2018/WAT/10Oct_10-12_8thMOP/Official_docs/ECE_MP.WAT_2018_6_ENG.pdf> accessed 16 February 2021.

47 During the Meeting of the Parties in 2018, around 20 countries from Africa, Latin America and Asia announced their interest to accede to the 1992 Convention, see,'The Water Convention and The Protocol on Water and Health | UNECE' (*Unece.org*, 2021) <https://www.unece.org/env/water.html> accessed 16 February 2021.

48 UNECEConvention (n 1) art 1(2).

49 It entered into force in 1996 and as of August 2019, it counts 43 Parties – almost all countries sharing transboundary waters in the region of the United Nations Economic Commission for Europe (UNECE).

50 As the UNECE observed, the 1992 Framework Convention has contributed to or served as a model for the transboundary agreements on the Chu-Talas, Danube, Dniester, Drin, Rhine and Sava Rivers, as well as agreements on the Belarus-Russian, Belarus-Ukrainian, Estonian-Russian, Kazakh-Russian, Mongolian-Russian, Russian-Ukrainian and many other transboundary waters. For detail, See, UNECE, 'The Global Opening of 1992 Water Convention' (New York and Geneva 2017) <https://www.unece.org/fileadmin/DAM/env/water/publications/WAT_The_global_opening_of_the_1992_UNECE_Water_Convention/ECE_MP.WAT_43_Rev1_ENGLISH_WEB.pdf>accessed16 February 2021.

51 UNECE Convention (n 1) art 2(2)(b) and (d).

or equivalent processes to municipal waste-water to enhance national systems for water resources management and protection (Article 3). In taking measures to prevent, control and reduce any transboundary impact, including on the environment, the Parties are required to be guided the precautionary principle and polluter-pays principle and the principle of inter-generational equity (Article 2.5). Such details are absent in the 1997 Convention.

Second: the 1997 Convention mentions only the phrase 'Environmental Impact Assessment' as part of the obligations under exchange of information. Conversely, the 1992 Convention details out the environmental assessment requirements and requires exchanging information and data on environmental conditions of transboundary waters and measures taken to prevent, control and reduce transboundary impact (Articles 9, 11 and 13).

Third: the 2000 European Water Directives adopted under the 1992 Convention asks, in line with Article 2(2) (d) of the Convention, for reviewing planned measures every five years and restoring river ecosystems through measures like floodplain restoration and installation for fish migration.

Further, Article 9 of the 1992 Convention obliges the basin states to enter into new agreements or adapt existing watercourse agreements and establish joint bodies for implementing the agreement in line with the basic contents of the Convention, whereas the 1997 Watercourses Convention only recommends watercourse States to do so. The suggested tasks of such joint bodies include collecting, compiling and evaluating data in order to identify pollution sources, elaborating joint monitoring programmes concerning water quality and quantity, evaluating the effectiveness of control programmes, serving as a forum for the exchange of information on existing and planned uses of water and related installations and participating in the implementation of environmental impact assessments.

However, it needs to be noted that these differences in the aforesaid Conventions are more in detail than in core substance. Therefore, the implementation of one Convention would not impede the implementation of the other. [52]Rather, the complementary nature of these two conventions has been underlined by the the UN Secretary-General at the 6th session of the Meeting of the Parties to the 1992 UNECE Water Convention, where hestated that, 'These two instruments are based on the same principles. They complement each other and should be implemented in a coherent manner.' [53]

[52] 'Fragmentation Of International Law: Difficulties Arising From The Diversification And Expansion Of International Law — Analytical Guide To The Work Of The International Law Commission — International Law Commission' (*Legal.un.org*, 2021) <https://legal.un.org/ilc/guide/1_9.shtml> accessed 16 January 2021.

[53] UN, 'The Secretary-General Message to Meeting of the Parties to the United Nations Economic Commission for Europe (UNECE) Convention on the Protection and Use of Transboundary Watercourses and International Lakes' (Rome, 28-30 November 2012) <https://www.unece.org/fileadmin/DAM/env/water/mop_6_Rome/Presentations/Secretary_General_message.pdf> accessed 6 February 2021.

IV. THE 2004 BERLIN RULES

The 2004 Berlin Rules represents a revision of the Helsinki Rules formulated by the ILA in 1966.On the basis of analysis of representative international agreements, these Rules integrate traditional rules regarding transboundary waters with rules derived from the customary international environmental law and international human rights law that apply to all waters, national as well as international.[54]They emphasize more on environmental issues than any other previous codification.

Articles 7 and 8 of the Rules require the States to take all appropriate measures to manage waters sustainably and prevent or minimize environmental harm. The commentary on Article 8 recognizes the importance of other factors in determining equitable utilization, but asserts that environmental harm 'deserves special attention'. Articles 29-31 and Articles 56-67respectively elaborate environmental impact assessment obligations as well as obligations of international cooperation and administration for applying the Article 8 principle.

Berlin Rules put heavy emphasis on establishing a basin wide or joint agency or commission with authority to undertake the integrated management of waters of an international drainage basin to ensure equitable and sustainable use of waters and prevention of harm (Article 64). A basin wide management mechanism requires having adequate authority to establish harmonized, coordinated, or unified networks for permanent observation and control and harmonized water quality objectives. It must have the functional and financial autonomy and a defined legal status (Article 65). The Commentary on Article 64 provides that although customary international law does not specifically require such institutions be established, basin wide management mechanisms are the best or even a necessary means for achieving equitable and sustainable management of waters.

A. Judicial Recognition of Environmental Obligation

The above codification, in particular the 1997 Convention, has been highly regarded in international legal proceedings. Some of the later judicial decisions provide strong evidence of an increasing focus on the applicability of environmental principles in the use of international watercourses.

Within months of its adoption, the ICJ referred to this Convention in its judgment in the *Gabčíkovo-Nagymaos*case.[55]As Philippe Sands and others summarized, ICJ judgment in this case affirmed the importance of environmental considerations in addressing rights and obligation of riparian states in an international watercourse. [56]

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[54] ILA, 'Berlin Rules on Water Resources Law,' (Berlin Conference 2004) <https://www.unece.org/fileadmin/DAM/env/water/meetings/legal_board/2010/annexes_groundwater_paper/Annex_IV_Berlin_Rules_on_Water_Resources_ILA.pdf> accessed 16 December 2020.

[55] *Case Concerning Gabčikovo-Nagymaros Project (Hungary v Slovakia)* (Merits) [1997] ICJ Rep 7, Para 85.

[56] Philippe Sands, Jacqueline Peel, With Adriana Fabra and Ruth MacKenzie Frontmatter, *Principle of International Environmental Law* (2nd edn, Cambridge University Press 2012) 318.

Some of the principles of the Conventions have been taken into account in subsequent cases as well. For example, in 2010, the ICJ in the *Pulp Mills on the River Uruguay* case recalled that "the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment".[57] Previously, in its interim Order of 13 July 2006, the court underscored the importance of sustainable development and conservation of the river environment.[58]The Court also reiterated the observation in the Gabcikovo-Nagymaros case: "in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.[59]

In a more recent case, concerning the *status and use of the waters of the Silala River* (2016), Chile complained[60] that Bolivia, the upstream state of the Silala River, had breached the American Treaty on Pacific Settlement of 1948 as well as customary law of equitable utilization and no-harm by undertaking unilateral planned measures.[61]

Bolivia did not deny customary legal obligations associated with the use of the river. Instead, it merely argued that the Silala is not an international watercourse as it had been *artificially* diverted to Chile long before its own planned measures. Chile, on the other hand, maintained that the Silala River *naturally* flows towards Chile due to the natural inclination of the terrain. The application of customary rules, in this case, would depend largely on resolving this dispute over the status of the river, but the customary status of the principles remains valid.[62]

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57 See *Pulp Mills on the River Uruguay* (n 32) 7.

58 Ibid para 80.

59 *Case Concerning Gabčikovo-Nagymaros Project* (n 54).

60 see, *Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia)* (Application instituting proceeding) (2016) <https://www.icj-cij.org/public/files/case-related/162/162-20160606-APP-01-00-EN.pdf> accessed 6 February 2021.

61 As Cullet observed, the application of substantive rules of equitable utilisation and no-harm as well as the procedural rules of cooperation were argued to be applicable as customary rules in view of considering the Silala River as an international watercourse. Philippe Cullet, 'Water Law – Evolving Regulatory Framework' in Philippe Cullet, Alix Gowlland-Gualtieri, Roopa Madhav, and Usha Ramnathan (eds), *Water Governance in Motion, Towards Socially and Environmentally Sustainable Water Laws* (Foundation Books 2010)27-31. See also, Mihajlo Vučić, 'Silala Basin Dispute-Implications for the Interpretation of the Concept of International Watercourse' (2017) LXV:4 Annals FLB – Belgrade Law Review 91 <https://www.researchgate.net/publication/323179435_Silala_basin_dispute_Implications_for_the_interpretation_of_the_concept_of_international_watercourse> accessed 16 February 2021; and Roberta Greco,'The Silala Dispute: Between International Water Law and the Human Right to Water' (2017) 39 QIL 23-37 <http://www.qil-qdi.org/silala-dispute-international-water-law-human-right-water-forthcoming/> accessed 6 February 2021.

62 On June 21, 2019, The ICJ authorizes the submission by Chile of an additional pleading relating solely to the counter-claims of Bolivia.

The above discussion clearly shows increasing integration of environmental obligations with the basic principles of international watercourse law. While analyzing this integration, Owen McIntyre commented that, "[a]t any rate, it is possible to argue that environmental factors are likely to enjoy a certain priority, or at least an increasing significance, within the balancing process that comprises practical implementation of the principle of equitable utilization."[63]

B. South Asian Practices

The ecology centric approach or ecological focus of the above codifications has noticeable influence on or reflection in subsequent state practice.In addition to the hugely efficient environmental regime established in internationals watercourses in Europe such as those concerning the Danube or Rhine rivers,[64] agreements with similar provisions are also concluded in less developed areas in Asia and Africa. Examples concerning sustainable development and use of transboundary watercourses in Africa include the Revised SADC Watercourses Protocol of August 2000 and the 1994 Agreement on the preparation of A Tripartite Environmental management program for Lake Victoria.[65]

Among the watercourse agreements in Asia addressing obligation to take account of environmental concerns, one prime example is the 1995 Agreement on co-operation for Sustainable Development of the Mekong River Basin. It aims at fostering cooperation in all fields of sustainable development, utilization, management and conservation of the water and related resources of the Mekong River Basin (Art. 1, Mekong Agreement). It, therefore, requires parties to make every effort to avoid, minimize and mitigate harmful effects to the environment, water quality and quantity and ecological balance of the river system (Art. 7).Further, the agreement established a Mekong River Commission to fulfill the above objectives and over the past years, the Commission has formulated a variety of procedures for complementing and facilitating implementation of the general provisions. These include Procedures for Maintenance of Flows on the Mainstream approved in 2006 and Procedures for Water Quality, approved in 2011.[66]

C. Existing Watercourse Regimes

The above recent developments of international watercourse law, however, have very little influence on state practice in South Asia. Among the major agreements in this

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63 Owen McIntyre (n 36) 361.

64 The 1998 Convention on the protection of the Rhine covers aquatic and terrestrial ecosystem which interact with the Rhine and the 1994 Convention on Co-operation for the Protection and sustainable Use of the Danube River provides for protection of the riverine environmental, conservation and restoration of ecosystem and sustainable development of the River. See, Ibid 289.

65 For resources on global influence and relevance of the Convention, see, *'Global Relevance - UN Watercourses Convention'* (n 42). See also, *Flavia Rocha Loures and AlistarRieu Clarke* (n 43).

66 Rémy Kinna and Alistair Rieu-Clarke, 'The Governance Regime of the Mekong River Basin, Can the Global Water Conventions Strengthen the 1995 Mekong Agreement?' (2017) 2(1) Brill Research Perspectives in International Water Law 1-84.

region, the Indus Water Treaty of 1960 between India and Pakistan has simply apportioned the Indus water system between the two states without making reference to or reflecting any environmental obligation. Although the text of the Treaty includes review provisions in Article XII (3), this opportunity has never been taken by the contracting parties for updating it in accordance with the developing environment norms of international watercourse law.

This Treaty however has stronger procedural obligations like third party dispute settlement which has succeeded in resolving disputes on the interpretation of the treaty in a number of occasions. But such interpretation, as well, had largely avoided reflecting on the development of related environmental norms due to disagreement of the Parties on this issue.

For Example, in a recent dispute concerning the Kishenganga dam project undertaken by India at the upstream of the Indus, India opposed Pakistan's argument for interpreting the 1960 Indus Treaty in the light of present state of international watercourse law and transboundary environmental obligations. International tribunals have, on a number of occasions, underscored the necessity of employing such evolutionary approach in interpreting earlier treaties. [67] But this could hardly be done in this case due to the opposing view of the concerned state parties.

In the Kishenganga case, as Musa observed, Pakistan referred to Iron Rhine arbitration, the ICJ's decisions in Gabcikovo-Nagymaros, and Pulp Mills to argue that determination of the material damage to be caused by diversion of the Kishenganga/Neelum from its natural channels should include ecological harm. India, on the other hand, argued that its project was in conformity with the Indus Treaty and the treaty should be interpreted according to its ordinary meaning which did not permit importing principles of environmental harm in elaborating its content. Consequently, the tribunal avoided addressing whether environmental harm constituted material damage.[68]

The tribunal, in its Final Award of 2014, refused to accept that environmental considerations could override the balance of rights and obligations enshrined in the Indus Treaty. As Musa concludes, while fixing the structure and capacity of the India's project, it did reflect some notions of environmental harm, but only to the extent established as customary international law.[69]

India's general reluctance to interpret treaties in the light of development of IEL could also be inferred from its strong objection against the relevant provisions of the 1997 Watercourse Convention.During the UNGA Sixth Committee Working Group negotiation for adoption of the Convention, India observed that Article 3 of the convention failed to reflect the right of the States to conclude international

[67] Such evolutionary or dynamic treaty interpretation was applied by the Arbitral Tribunal in the Iron Rhine case and by the ICJ in the Gabcíkovo-Nagymaros case. See, Jasmine Moussa, 'Implications of the Indus Water Kishenganga Arbitration for the International Law of Watercourse and the Environment' (2015) 64 International and Comparative Law Quarterly 714.

[68] Ibid 705-6.

[69] Ibid 713.

watercourse agreements without being fettered by the present Convention'[70] and objected to the 'superimposition of the concept of sustainable development' on the principle of optimum utilization in Article 5.[71]

Among the other watercourse treaties in the South Asia, the older agreements between India and Nepal on the Kosi and Gandak Rivers did not have any provision concerning environmental obligations of the state parties.[72] The 1996 Mahakali River Treaty between India and Nepal is the only one which in part addresses environmental issues. Article 1(2) of the Treaty requires India to ensure a minimum flow of 350 cusecs downstream of the Sarada Barrage in order to maintain and preserve the river eco-system.[73] This Treaty has, however, hardly been implemented because of strong disputes between the State Parties concerning the interpretation of its various provisions. [74]

The Bangladesh-India treaty relations appear to be even worse. Bangladesh is a downstream country of 57 international rivers, 54 among them are flowing from India after originating from various sources. Among them, Bangladesh and India have entered into treaty relations in respect of only one international river although a joint river commission between them was established as early as 1972. That treaty was concluded for sharing of the Ganges for a period of 30 years commencing from 1996.

This treaty basically provides for sharing of the Ganges flow for meeting various needs of Bangladesh and the requirement of the Farakka project constructed in the

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[70] See Attila Tanzi, 'Codifying the minimum standards of the law of international watercourses' (1997) 21 NRF 111. Tanzi noted that during the Sixth Committee Working Group meetings, India was one of the States (others were Argentina, Egypt, France, Pakistan, Switzerland and USA) who proposed that a specific provision should be inserted that the rights and obligations arising from existing agreements should not be affected by the Convention. According to Nussbaum, such proposal was also made by Italy, Turkey, Canada and Romania. See Nussbaum(n 16).

[71] As its delegate explained the reasons: "international environmental regimes contain certain elements such as transfer of technology, resources and technical expertise to promote capacity-buildings among developing countries. None of these elements is elaborated in the present Convention". See,UNGA Res 51/229(n 1) 9.

[72] Agreement between the Government of India and the Government of Nepal on the Kosi Project (25 April 1954) (1963) UNLegislative Series 290; See also, Agreement between the Government of India and the Government of Nepal on the Gandak Irrigation and Power Project (4 December 1959) (1963) UN Legislative series 295.

[73] The Treaty between His Majesty's Government of Nepal and the Government of India Concerning the Integrated Development of the Mahakali River Including Sarada Barrage, Tanakpur Barrage and Pancheshwar Project (New Delhi, 12 February 1996) 36 ILM 531 <https://docs.pca-cpa.org/2016/01/Treaty-Between-His-Majesty%E2%80%99s-Government-of-Nepal-and-the-Government-of-India-Feb.-12-1996-36-I.L.M.-531.-1.pdf> accessed 16 February 2021.

[74] For an overview of India-Nepal Relation in regard to utilization of shared rivers, see Salman M. A. Salman and Kishor Uprety, *Conflict and Cooperation on South Asia's International Rivers: A Legal Perspective* (Washington DC: World Bank Group 2003) 65-125 <http://documents1.worldbank.org/curated/en/249581468325224527/pdf/multi0page.pdf> accessed 16 February 2021. For very recent analysis of the deadlock concerning the Mahakali Treaty, see Nabraj Lama, 'Re-negotiating the Mahakali Treaty in the changing geopolitics of Nepal' (2019) 9(1) International Journal of Scientific and Research Publications 417 <http://www.ijsrp.org/research-paper-0119/ijsrp-p8554.pdf> accessed 16 February 2021.

1970s for diverting the Ganges flow to rejuvenate Calcutta Port in West Bengal of India. However, it has disregarded the impact of Indian projects in the further upstream areas of the Ganges, such as those in Bihar and Uttar Pradesh,[75] on water availability at Farakka, a place near Bangladesh-India border and the agreed point of allocation of downstream Ganges flows between Bangladesh and the Calcutta Port of India.[76] Consequently, the actual water availability was found to be less than the stipulated figures on many occasions during the driest period from mid-March to mid-May.[77] The Treaty, has, thus, failed to protect the downstream Bangladesh from economic and environmental harm.[78]

Further, the 1996 Treaty is silent on substantive rules on protecting the environmental flow and river-based ecosystem, prevention and control of pollution. It also ignores procedural obligations on environmental impact assessment, third-party dispute settlement and harmonization of water policies.

V. THE 1996 GANGES TREATY IN THE LIGHT OF THE 1997 CONVENTION

The 1996 Ganges Treaty will expire in 2026. A brief comparison between this treaty and 1997 Watercourse Convention is outlined below for indicating the areas, which any future negotiation between these countries should take into account.

First, the 1997 Convention provides for taking all appropriate measures to prevent causing of significant harm to other watercourse States (Article 7). Further, the Convention, by elaborating the post-harm obligation, has established a firm relation between equitable utilization and harm factor, which is not done in the 1996 Ganges Treaty. The 1996 Treaty does not oblige its Parties to take any preventive measures.

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[75] In a 1972 debate on Farakka Barrage in the Indian Parliament, the Ministry of Irrigation and Power asserted that Indian Government would 'fully' safeguard the interest of the irrigation projects in upstream states of India. A World Bank study warned that these upstream projects could divert 40% of the dry season flow of the Ganges. See, Md Nazrul Islam, 'Equitable Sharing of the Water of the Ganges, Applicable Procedural Rules under International Law and Their Adequacy' (unpublished PhD thesis, SOAS- University of London 1999) 66. Complaint about withdrawal by hundreds of upstream projects was raised in Indian Media as well. See, for example, 'Indo-Bangla Accord, Defying the current' *India Today* (India, 15 January 1997) 110-11.

[76] The Ganges water dispute originated from the unilateral construction by India of the Farakka Barrage during the 1960s to divert the Ganges dry season flow to the Hooghly-Bhagirathi River to rejuvenate its Calcutta Port. See, Ben Crow et al., *Sharing the Ganges, The Politics and technology of river development* (Dhaka: UPL 1995) 26-75.

[77] Kimberley Thomas, 'The Ganges water treaty: 20 years of cooperation, on India's terms' (2017) 19 Water Policy 724–740 <https://www.researchgate.net/publication/315119940_The_Ganges_water_treaty_20_years_of_cooperation_on_India's_terms> accessed 6 February 2021.

[78] Bangladesh received less water in crucial periods and raised question about unlimited upstream diversion and later also about the projects India was planning to undertake in the tributaries of the Ganges with Nepal. see, 'Record Of The Discussion Of The Thirty Fifth Meeting Of The Indo-Bangladesh Joint River Commissions Held at Delhi On 29th and 30th September 2003' (*Waterbeyondborders.net*, 2003) <http://waterbeyondborders.net/files/minutes_of_meeting/Ind_ban_JRC_35_sep2003.pdf> accessed 6 February 2021. Similar statement was made in the 36th meeting in 2005.

It also fails to spell out that unlimited upstream diversion of the Ganges water is not compatible with ensuring adequate protection of the river which is an essential component of equitable utilization as explained in the 1997 Convention.

Second, the Convention requires exchange of all relevant information on watercourse conditions (Article 9), and planned measures (Article 11) as well as technical data and information including the result of any EIA (Article 12). It also provides for adequate consultation between the watercourse states (Article 17). A comprehensive application of these provisions would, therefore, require India to consult Bangladesh regarding all the upstream projects on the river Ganges including those with Nepal. Regrettably, under Articles I, II, and IV, the 1996 Treaty provides for exchange of information available only at and down the Farakka point and for consultations apparently on the basis of such information.

The 1996 Treaty appears to have taken into account only the economic aspects of the Farakka project, not the environmental impact of that or other upstream projects. It is also silent on pollution issues so emphatically addressed in the global codifications and judicial decisions discussed earlier.

VI. CONCLUDING REMARKS

Although none of the South Asian countries have so far ratified or acceded to the 1997 Watercourse Convention, they may have an obligation of complying with the customary rules of international watercourse codified in the Convention. This is because none of them is persistent objector to any of the substantive or procedural principles emerged or established during the negotiation of the 1996 Treaty or thereafter. For example, although India objected to third party dispute settlement during the negotiation of the 1997 Convention, it previously concluded agreements with both Pakistan (in regard to Indus Treaty) and Nepal (in regard to Mahakali Treaty) which provide for third party dispute settlement.

India's (and to some extent Bangladesh's) objections to other issues basically centre on the relationship between equitable sharing and no-harm principles. The procedural principles for addressing this and environmental issues have not been objected by India or Bangladesh during the elaboration of the 1997 Convention. These principles require negotiation in good faith, rejection of unilateral measures and equitable adjustment of all uses. Full compliance with such principles would ensure utilization of a shared watercourse in a way which would more efficiently ensure the interest of the basin states of an international watercourse.

India did object to the superimposition of the environmental issue in the definition of equitable utilization, but that alone cannot qualify it as persistent objector to environmental obligation. India along with all other states of South Asia are party to important environmental agreements such as 1992 convention on Biodiversity, and 2015 Paris Agreement on Climate change which require them to take account of environmental aspects of use and management of natural resources including

international watercourses.[79] When faced with the prospect of adverse impact of China's plan for constricting a gigantic dam on the upstream of the Brahmaputra river, India also raised question about the legality of this move.[80]

The above analysis suggests that Bangladesh and India (and other states of South Asia in general), for their long-term benefits, need to have a wider vision to establish a basin-wide management for sustainable development and utilization of the transboundary water resource. They need to understand that equitable utilization or no-harm principles cannot be translated into reality without taking account of the environmental function of the watercourse. In doing that, they should respect and embrace both established and emerging customary rules reflected in the 1997 Convention and other relevant instruments.

This could always be done by modifying the existing regime which lacks in reflecting contemporary or later developed environmental norms. As McCaffrey commented on the observation of the ICJ in the Gabčíkovo-Nagymaros Project case on related issues, the Court recognizes an environmental imperative as so powerful that it requires the new norms and standards be taken into account and given proper weight even when states are "continuing with activities begun in the past." Otherwise, economic development would not be sustainable.[81]

Bangladesh and India could have modified the 1996 Treaty by paying due regards to the contemporary development of international watercourse law during review of the Ganges Treaty. They still have the scope of doing this both in future negotiations for extension of the Ganges Treaty after its expiration in 2026 and for concluding agreements in regard to the utilization of other common rivers. Such opportunities are available for other South-Asian States as well.

[79] *Md Nazrul Islam* (n 44).

[80] For updates on this issue, <https://timesofindia.indiatimes.com/india/india-plans-dam-on-brahmaputra-to-offset-chinese-construction-upstream/articleshow/79510971.cms> accessed on December 1, 2021

[81] Stephen C. McCaffrey (n 19) 508.

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Pandemic and the Emerging Threshold of Disaster Law in South Asia

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Staying Prepared as 'Biological Warfare' is unavoidable?

An unprecedented biological warfare upon mankind from an unknown microbe of nature has shot down human arrogance notwithstanding its unbridled desire to conquer nature even if it is for an ephemeral moment. This arrogance to control nature has been built over years as science progressed from its invention of gunpowder around the 11th century to the Alfred Noble's invention of dynamite in 1867. Currently, as we wade through the 'Anthropocene'[1] the robot armies managed from miles away through a remote button of Artificial Intelligence (AI) human life becomes increasingly vulnerable. Scientific and technological developments over centuries have been giving an illusion to mankind that man is a supreme being and in full command of nature whereas the pandemic has thrown off all such illusions of power to thin air and it's a pandemic which may not end, nor would end man's ambition to control nature. As epidemiologists have warned that the spell of death and destruction will be repeated as a large number of virology labs across the world have been working on lethal viruses[2] ready to destroy mankind with deadlier microbial disasters as microbial research is one of the biggest businesses[3] of today. However, mankind has to create a more robust system to prevent and to manage such a pandemic which is likely to become a feature of modern life.

This period has also exposed the lack of disaster preparedness of some of the most developed nations which are ironically, leaders in global virology research, and has

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1 The term 'Anthropocene' was coined in 2000 by Nobel Laureate Paul Crutzen and Eugene Stoermer to denote the present geological time interval in which human activity has profoundly altered many conditions and processes on Earth.

2 Eduardo Baptista, Linda Lew, Simone McCarthy and Peter Langan, 'The Labs where monsters live' *South China Morning Post* (China, 12 September 2020) <https://multimedia.scmp.com/infographics/news/world/article/3101114/biosafety-laboratories/index.html> accessed 26 April 2021. "As countries around the world invest in Biosafety Level 4 laboratories to study lethal viruses and prepare against unknown pathogens, some scientists are sounding the alarm about the potential for a catastrophic accident or attack."

3 Maria Poptsova, 'Market Analysis- Clinical Microbiology 2020' (2019) 10(6) Archives of Clinical Microbiology <https://www.acmicrob.com/microbiology/market-analysis-clinical-microbiology-2020. pdf> accessed 26 April 2021, 'Applied Microbiology size was valued at over USD 24.3 billion in 2017 and will exceed USD 675.2 billion with 7.9% CAGR from 2017 to 2024. At Global Market Insights, It is a unique blend of primary and secondary research, with validation and iterations, in order to minimize deviation and present the most accurate analysis of the industry.'

evoked consciousness amongst the not so developed towards neighbourhood collaborations, regional and multilateral agreements. These nations rich or poor, have demonstrated immense confusion, fuzziness and visible ignorance to laws on the subject, notwithstanding the warnings given by the Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters (Paragraph 16), that nations need to develop policy legislative and institutional frameworks to track progress through measurable indicators.

> *Countries that develop policy legislative and institutional frameworks for disaster risk reduction and that are able to develop and track progress through specific and measurable indicators have greater capacity to manage risks and to achieve widespread consensus for, engagement in, and compliance with disaster risk reduction measures across all sectors of society.*

However, deficits of information on the pathogenesis and prognosis of the microbe has kept on hold a matching legislative and institutional frameworks.

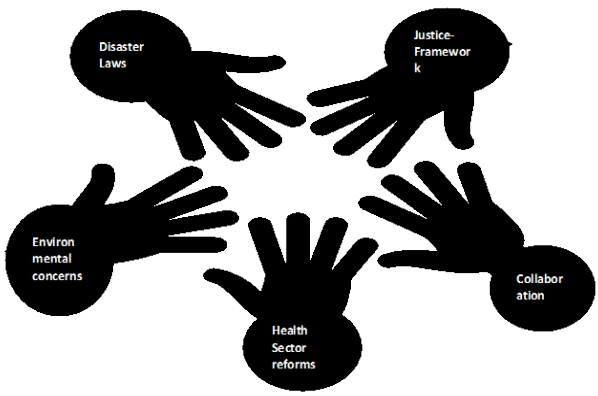

Fig: Covid-19 highlights five key opportunity areas for legal research

Five takeaways from the current pandemic for staying prepared

1. ***Update laws for disaster preparedness*** in the context of biological disasters. These disasters are quite different from other disasters in terms of their nature, impact and post disaster challenges. This would require a relook at country specific Disaster Management Acts and all regulations emerging from them.
2. ***Refineframework for substantive justice for victims of disasters***. There are many types of victims of disasters: those who get infected, medical workers also known as frontline workers, burial workers and people and business centres affected by lockdowns.
3. ***Strengthening international and regional collaboration***. The basic framework as set by the Hyogo Declaration and Sendai framework of Action

carried forward through several regional efforts with the initiative of UNO and International Federation of Red Cross & Red Crescent Societies are lighthouses in this direction.

4. ***Urgent need for an inclusive Health Sector Reforms.*** Covid-19 has exposed the fragility of big high class hospitals which had become a norm since the coming of globalization. Government based health care reforms, management of basic health infrastructure expenditure even in most developed countries which systematically ignored many experts' warnings[4]and despite legislative measures a larger part of GDP of most countries was lost to health care costs.

5. ***Prioritizingenvironmental concerns of climate change*** which includes concerns forwaste disposal, animal-meat-wet markets[5], water bodies-forest-land management. The pandemic apparently started from Wuhan wet market but there is still no law against them in the UN list.

I. LAW AS LAG, CASE STUDY OF LAWS FOR PANDEMIC MANAGEMENT IN INDIA

Even though South Asian countries are more or less moving together in the management of pandemic control in tandem with their legal frameworks for disaster management yet for a more appropriate clarity of data this paper will focus only on one country's case study. Biological disasters have not been uncommon in human history but were inadvertently left out in disaster management acts of most countries due to lack of experience about them in traditional literature of disaster management. India has been the first country in South Asia to bring about a Disaster Management Act in 2005[6] (DMA2005) but the management of biological disasters came later in the 2008 National Disaster Management Guidelines of National Disaster Management Authority. Prior to the DMA2005, a 1999 document 'Report of the High Power Committee on Disaster Management'(RHPCDM) had formed a Sub-Group V on Biological Disasters which had alerted on the need for preparedness through research and infrastructural development against a microbial epidemic[7].

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4 Peter Zweifel, Friedrich Breyer and Mathias Kifmann, *Health Economics* (London: Springer 1997) 1. "Given continued growth, the entire GDP of many industrialized countries could be consumed by health care expenditure (HCE) before the end of the twenty-first century."

5 Dina Fine Maron, ''Wet markets' likely launched the coronavirus. Here's what you need to know.' (*National Geographic*, 15 April 2020) <https://www.nationalgeographic.com/animals/2020/04/coronavirus-linked-to-chinese-wet-markets/> accessed on 26 April 2021.

6 Other countries in the region which have disaster management acts are Afghanistan, Bangladesh, Bhutan, Maldives, Nepal, Pakistan and Sri Lanka.

7 Government of India, "Disasters related to this sub-group are biological disasters and epidemics, pest attacks, cattle epidemics and food poisoning. Our response mechanism to diseases which are forgotten or considered as conquered as well as the vulnerability of the population even to infections which respond favourably to most of the widely available anti- microbial agents such as plague needs to be strengthened. We have virtually no infrastructure, tools or expertise to contain them. Handling exotic pathogens warrants suitable infrastructure, notably, high containment laboratories of bio-safety level 3 and 4; recruitment of highly committed, dedicated and trained professionals;

If laws facilitate just and inclusive disaster management, countries also need sophisticated science and advanced virology and microbial research labs to feed laws with full information on the pathogenesis of the virus. The behaviour of a clandestine microbe which defies standard locations or an epicentre of disaster considered as step one in disaster management becomes an absconding offender in conflict with the police. A microbe, which throws into irrelevance massive investments in GPS-earth sciences and meteorological technology over generations and catches top policy makers off guard, can further complicate threshold measurements in disaster management. Despite a need for a legal framework to handle such a disaster, there was none available in the whole of South Asia beyond a mere acknowledgement of its existence as a fashionable symptom of progressive law making. So, the Covid-19 pandemic consequently threw governments into a panic search for civil and criminal penal codes and even return to colonial laws despite their long forgotten disappearance and redundancy such as The Epidemic Diseases Act of 1897 which was found and invoked in India.

The impact of the pandemic has gone much beyond the devastating Indian Ocean Tsunami of 2004 and the Pacific Tsunami of Tōhoku 2011 in Japan. The magnificent global cities with most technologically advanced medical systems groaned under the spectre of dead bodies, most other less privileged poor countries which were condemned for poverty, homelessness and big population performed relatively much better (See Table 1). Mitigation became more a concern for the rich countries which had become absolutely cosmetic, where the old family members survived in nursing homes and food was mostly churned through wet markets and refrigerators. The mortality rate of the elderly in developed countries as given in Table 2 would shock anyone in the region of South Asia. The culture of parental care in old age and the stigma of not abandoning seniors in old age homes has kept mortality of seniors drastically low in South Asia as compared to the western countries. This cultural support to governments by default in containing the virus does not mean that the attention wasn't needed to prevent myths and rumours from spreading to harm anyone's security as people panic under lack of correct information. Perceiving many species as spreaders of the deadly epidemic people started killing the clueless bats, then they started abandoning their pets, some found it a good opportunity to get rid of their poor tenants or their rural labour triggering a mass out-migration from cities. Repeated Guidelines and clarifications were being released from the World Health Organization (WHO) under 'myth-busters'[8]. Within countries their national disaster

continuous availability of diagnostic reagents; enhancement of skills at various echelons of health professionals in early identification of such infections, investigation of outbreaks and institution of specific control measures. The impact of Transboundary Animal Diseases (TAD) causes constant loss to livestock production directly but also inhibits investment in the stock of higher productive potential and production system. India is currently following the eradication program for rinderpest. Ministry of Agriculture, 'Report of High-Powered Committee on Disaster Management' (NIDM, October 2001) 85 <https://nidm.gov.in/pdf/pubs/hpc_report.pdf> accessed 27 April 2021.

[8] WHO, 'Coronavirus disease (COVID-19) advice for the public: Mythbusters' (*WHO*, 26 March 2021) <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public> accessed on 01 April 2021.

management authorities, Medical research organizations and health directorates helped in updating people on corona related information. However, for lack of complete information there have been furious eruptions from the masses against lockdowns, quarantining, isolation, tests and vaccination. To spread out such an extensive framework of disaster law which could capture the unresearched microbe from a lab and a wet market down to a legislature is a challenge that modern law makers are faced with. It's a full-fledged world war with no Treaty of Versailles[9] to penalize the originator and bring peace on its conclusion.

Table 1: A Comparative progression of Covid-19 & Performance towards containment

Countries Approx. Population	**Total Cases**		**Total Deaths**		**Total tests**	**Tests / Million**	**Deaths /million**
	Early March	***Early June***	***Early March***	***Early June***			
China 1.4b	82078	83064	3298	4634	Xxxxx	Xxxxx	3
Italy 60m	80539	236,142	8165	34167	4,443,821	73493	565
USA 340m	68334	2,089,825	991	1,16,035	23,076,038	69,737	351
Spain 47m	56188	289,787	4089	27,136	4,465,338	95,507	580
Germany 84m	42,288	186,795	253	8851	4,694,147	56,036	106
Iran 83m	29,406	180,156	2234	8584	1,173,208	13,978	102
France 65m	28,786	155,561	1695	29,347	1,384,633	21,215	450
UK 68m	11,662	291,409	578	41,279	6,240,801	91,956	608
ASIA							
S.Korea	9332	12003	139	277	1,081,487	21,095	5

[9] The Treaty of Versailles of 1919 brought an end to World War I. It codified peace terms between the Allies and Germanyand by holding the latter responsible for starting this war imposed harsh penalties upon it. At an outbreak of the current pandemic, many countries felt the need for such penalties upon China, as it was discovered that Wuhan lab was where the microbe generated from. This led to investigations by international teams including the BBC after a surprise revelation was made on this channel by a lady scientist Prof Shi Zhengli from the Wuhan Institute of Virology (WIV). She is known as the China's Batwoman since she had found that the 2003 SARS virus originated from a species of bat in Yunnan caves. See John Sudworth, 'Covid: Wuhan scientist would 'welcome' visit probing lab leak theory' *BBC News* (Yunnan, 21 December 2020)<https://www.bbc.com/ news/world-asia-china-55364445>accessed 04 January 2021.

51m							
Japan 127m	1387	17,292	46	920	328,730	2599	7
Thailand 70m	1136	Xx	5	58	468,175	6708	8
Pakistan 220m	1057	1,25,933	8	2463	809,169	3667	11
Indonesia 273m	893	35,295	78	Xx	463,620	1696	7
India 1.3b.	724	2,98,283	17	8501	5,363,445	3889	6

Source: *United Nations Geoschemeavailable athttps://www.worldometers.info/coronavirus/?#news, accessed 5th June 2020*

Table 2: Ageing Population and Covid-19 Deaths

S.NO	**Countries**	**Ageing 60+**	**death/m**
1	Japan	28%	7.29
2	Italy	23%	565.78
3	Germany	21%	105.78
4	France	20%	437.4
5	Sweden	20%	472.74
6	Spain	19%	580.78
7	UK	18%	620.84
8	Russia	15%	45.14
9	South Korea	14%	5.36
10	China	11%	3.33
11	Sri Lanka	10%	0.51
12	India	6%	6.28
13	Bangladesh	5%	6.5
14	Pakistan	4%	11.61
15	Saudi Arabia	3%	25.43
16	UAE	1%	29.7

Source: Singh in Malhotra,Fernando,Haran 2020

Data Source: data available at WHO sites and Statista, available at https://www.statista.com/statistics/1104709/coronavirus-deaths-worldwide-per-million-inhabitants/ and WHO websites

A. Updating Understanding on Disasters

Disaster Management Acts in most countries, need redefinition of the word 'disaster' in a manner which accommodates both ample comprehensiveness to include new biological and nuclear challenges and highlights culpability of decision makers as its cause especially in their failure to manage and maintain infrastructure that becomes a cause for disasters. Due to definitional clarity, disaster management agencies in most South Asian countries had primarily handed the responsibility of containing Covid-19 to health departments and the officials of disaster management came into action much later. The fuzziness of law delayed the processes of identification, coordination and then responding to the new challenges which came with it. When the pandemic provoked policy makers in India to seek a comprehensive legal framework on mitigating such a disaster, they sought recourse to Entry 23, Concurrent List of the Constitution, which mentioned "*Social security and social insurance*" and Entry 29, of the Concurrent List which mentioned "*Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants,*" can also be used for specific law making. Let us take a look at the definition of 'disaster' as found in the Disaster Management Act 2005 of India which was one of the first legal documents on disaster management in the region, the other came from Sri Lanka following the 2004 Tsunami[10].

> *A catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man-made causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of property, or damage to, or degradation of environment and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area.*

This definition is very difficult to apply to a microbial or biological disaster which is neither restricted by space nor by time. It is still debatable whether the pandemic source was Wuhan in China or Italy, a laboratory or a wet market, so the current pandemic has not only caused a grave human catastrophe but also a political calamity despite the seeming absence of damage to property and the environment. A decade later a 2011 document of the Ministry of Home Affairs, titled 'Disaster Management in India' where a disaster is defined to include ecosystems, '"*catastrophic situation in which the normal pattern of life or eco-system has been disrupted and extra-ordinary emergency interventions are required to save and preserve lives and or the environment"*. It is ironical that NDMA which is the apex disaster Management Body directly under the Prime Minister was oblivious of its earlier reports which had ample indicators the need for preparedness against a possible biological microbial attack.Disaster Law encounters a methodological change since the loss and damage assessments may require new tools for finding out the impact of the pandemic on society and people.

[10] Pakistan came up with its Disaster Management Act in 2010, Bangladesh and Afghanistan in 2012, Bhutan in 2013 and Nepal in 2017.

B. Sustaining Business during Lockdowns

As firms and businesses shut down with lockdowns which are quite arbitrary as night curfew or 20-30 days' lockdown, country's business comes crashing down. The labour in cities cannot cope up with reduced or uncertain wages and most industries or MSMEs (Micro, Small and Medium Enterprises) for lack of backend supplies close down. Generally, in situations of disasters *force majeure* clause is invoked in agreements. The law that governs disaster management has been dismissive about this legal terminology and so it was invoked from a case to case basis during the pandemic times. The Government of India issued an Office Memorandum (OM)on 19th Feb.2020[11] which was prior to an Official declaration of a pandemic and the lockdown, which said that '*the disruption of the supply chains due to spread of coronavirus in China or any other country should be considered as a case of natural calamity and "force majeure clause" may be invoked, wherever considered appropriate, following the due procedure..'*. However, the events which unfolded during the pandemic neither committed the government to support the affected commerce and business nor obliged it to extend any help as the interpretation of force majeure was restricted as per the terms of the contract with many conditions for its application from case to case. Legal experts and business analysts have found that*companies cannot take shelter under section 56 of the Contract Act and seek frustration of a contract to avoid their contractual obligations*[12]. Such situations have been allowed to happen despite the OM issued in advance by the government only brings to surface the advisory nature of the OM which is not binding on either party. In reality it is nothing and defeats the very purpose of the DMA 2005. The OM reads, 'coronavirus should be considered as a case of natural calamity and force majeure may be invoked, wherever considered appropriate, following the due procedure…a force majeure clause does not excuse a party's non-performance entirely, but only suspends it for the duration of the force majeure. The firm has to give notice of force majeure as soon as it occurs and it cannot be claimed ex-post facto…If the performance in whole or in part or any obligation under the contract is prevented or delayed by any reason of force majeure for a period exceeding ninety days, either party may at its option terminate the contract without any financial repercussion on either side'. Since this is not implicitly a binding document, it does not hand hold business trapped in an uncertain disaster.

There is a government side of the story too which prefers an executive recourse instead of a judicial one to address a problem emerging during a pandemic. The problem is doubled by the fuzzy contours of force majeure which has not been defined in Indian statutes except its reference can be found in Section 32 and Section 56 of the Indian Contract Act, 1872 which can be revisited in the context of their applicability during the pandemic. The two sections are read as follows;

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[11] Ministry of Finance, 'Office Memorandum: Force Majeure Clause' (Government of India, 19 February 2020) <https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf> accessed 27 April 2021.

[12] Mini Raman and Angelina Talukdar, 'No Entitlement For claiming Force Majeure Relief during Covid-19' (*Lexorbis*, 31 July 2020)<https://www.lexorbis.com/no-entitlement-for-claiming-force-majeure-relief-during-covid-19/> accessed 27 April 2021.

> Section 32: ***Enforcement of contracts contingent on an event happening***: Contingent contracts to do or nor to do anything in an uncertain future event happens, cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void.(contingent contracts)
>
> Section 56: ***A contract to do an act*** which, after the contract is made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.(Frustration of a contract).

An interpretation of whether any party be given relief under the force majeure clause has a high threshold extending from its language, putting in specific situations, timing of the disaster event and the nature of business itself. In some recent cases it has refused to do so even to grant an ad interim-injunction in favour of the petitioner[13]as recently in the Bombay High Court of ***Standard Retail Pvt. Ltd. vs. M/s G.S. Global Corp & Ors***[14]**,** Order dated April 8, 2020. The precedent as set in a previous case of ***Standard Retail Pvt. Ltd***, in which the Court relying upon Section 56 of the Indian Contract Act, 1972 terminated its contract with ***M/s G.S. Global Corp & Ors*** (Respondent 1) could not be accepted by the Court. According to the petitioner, the Government had declared COVID-19 a pandemic and as a result lockdown was declared, therefore the petitioner terminated the contract with the Respondent 1 as unenforceable on account of frustration, impossibility and impracticability[15]. The petitioner's claim that the contract was subject to force majeure clause and Arbitration in accordance with the laws of Korea/Singapore/London was rejected. The Disaster Management Acts across South Asian countries are in need of greater clarity on the Clause when contracting parties would be relieved from performing their respective obligations under the contract during the period that such force majeure situations like the current pandemic continue.

C. Exodus of Migrant Labour

The current pandemic has also witnessed a strange but massive panic exodus of rural migrants or city construction workers from major cities in India when lockdown was announced. The Covid-19 virus arrived as a city calamity but the manner in which the government handled it made it look as if the rural migrants were unwanted not just in cities but anywhere else too. They were neither given safe passage back home or assured of basic relief if they wished to stay back in cities. The Prime Minister made lockdown announcement barely giving a four hours' notice for a billion plus population on which they were to lose wages, jobs and food. The relief he promised was that they would not be charged any rent during the lockdown period but with no

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[13] *Energy Watchdog v CERC* (2017) 14 SCC 80: (2018) 1 SCC (Civ) 133.

[14] *Standard Retail Pvt. Ltd. v M/s G.S. Global Corp & Ors (2020) Commercial Arbitration Petition(L) No. 404 of 2020.*

[15] *Commercial Arbitration Tribunal(L) No. 404 of 2020 also available at Law Street India LSI-257-HC-2020 (BOM)*

guarantees against being thrown out by landlords. The DMA 2005 was blank on encountering a situation which renders 240 million workers jobless in cities and the executive were left free to make ad hoc short-sighted unplanned announcements which only deepened crisis. There was no framework to synchronize relief with management.

The trade unions instead of the executive announcements demanded four basic requirements to be fulfilled during such a pandemic[16]:

- A cash transfer of Rs. 7500 (US$ 99,5) to all households below the income tax level for April, May and June
- Wages for workers at medium, small and micro enterprises paid for the same months
- Universal food distribution to all working people for at least six months
- Safe journey for millions of migrant workers

The executive announcements, on the one hand, forced the landlords to push out tenants and on the other hand trapped most MSME (Micro, Small and Medium Enterprises) owners into an extremely difficult position of paying high salaries to their employees without their company making any business. DMA 2005 had no clue on how to incorporate the demands of labour laws especially in the MSMEs so that community resilience building by the government does not end up as a nightmare for enforcement agencies.

D. Vulnerable People

Covid-19 has substantially changed the world of labour and work. Within three months of the first lockdown unemployment rate shot up from 6.74% to 24% pushing more than 40 crore people into abject poverty[17]. It also alerted about a falling labour participation ratio which weakens resilience and prevents smooth return to pre-lockdown economy. Such a deep impact of unprecedented economic and social disruption has contracted economy as never before[18]. The ILO in its Report *The*

[16] 'Unions call for non-cooperation against Modi government' (IndustriALL, 09 June 2020) <http://www.industriall-union.org/unions-call-for-non-cooperation-against-modi-government> accessed on 27 April 2021.

[17] Yogima Seth Sharma, 'Unemployment rate in India at 24% for week ended May 17: CMIE' *The Economic Times* (Mumbai, 19 May 2020) <https://economictimes.indiatimes.com/news/economy/indicators/unemployment-rate-in-india-at-24-for-the-week-ended-may-17-cmie/articleshow/75821968.cms> accessed 27 April 2021.

[18] World Bank, *Global Economic Prospects 2020* (Washinton DC: World Bank Group 2020) 'The baseline forecast envisions a 5.2 percent contraction in global GDP in 2020—the deepest global recession in eight decades, despite unprecedented policy support. Per capita incomes in the vast majority of EMDEs (Emerging Markets and Developing Economies) are expected to shrink this year'. See World Bank, 'COVID-19 to Plunge Global Economy into Worst Recession since World War II' (World Bank 08 June 2020) <https://www.worldbank.org/en/news/press-release/2020/06/08/covid-19-to-plunge-global-economy-into-worst-recession-since-world-war-ii> accessed 27 April 2021. That would represent the deepest recession since the Second World War,

International Labour Standards (ILS) and Covid-19[19]has reiterated a need for revisiting International labour standards in the context of threats to public health and livelihoods for a long term and sustainable well-being of people across the world. It has brought out relevant sections which countries should incorporate in their Covid-19 management policies. It suggests a tripartite (government, employers and workers) resolution of pandemic related problems such as unemployment, disruption of business chains, productivity, labour health, insurance support, migration and availability of goods and services within the legal framework of ILO.

The DMA 2005 under Chapter II,Sec.12and Sec.13has indicated a grant of some relief to victims of disasters. Sec.12 recommended guidelines for the minimum standards of relief to be provided to persons affected by disaster which includes medical cover and restoration of means of livelihood., Sec.13 recommends relief in repayment of loans or for grant of fresh loans to the persons affected by disaster on such concessional terms as may be appropriate. Under these sections, government had announced relief but despite Sec.12 (ii) suggesting special provisions for widows, orphans and others in vulnerable populations such as disabled, children and old citizens received no attention. The Hindu pilgrimage of Vrindawan, which, as per the 2019 Sulabh International Reportishome to more than ten thousand widows as per a 2019 report by an NGO called Sulabh International, starvation, disease and isolation affected them very severely[20]. An equitable distribution of food between oversupplied and undersupplied regions has always been a challenge for governance in India despite her food surplus. The Global Hunger Index ranked India at 102 out of 117 countries in 2019 which became worse in 2020 as people lost jobs and rural wages dropped due to urban workers returning to their villages during lockdowns[21].There are findings on how child trafficking[22] and violence against women increased manifold during covid-19. UN Women in its finding has called this increase in violence as 'The Shadow Pandemic'[23]which needs collective efforts nay almost a movement for its prevention. These vulnerable groups of people found their welfare funds diverted to bring Covid relief notwithstanding an intensification of their problems during the same period.

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with the largest fraction of economies experiencing declines in per capita output since 1870.'

[19] ILO, 'ILO Standards and COVID-19 (coronavirus): FAQ' (International Labor Organization, 29 May 2020) <https://www.ilo.org/ wcmsp5/groups/public/---ed_norm/---normes/documents/ genericdocument/wcms_739937.pdf> accessed 27 April 2021.

[20] Yogesh Bhardwaj, 'In Vrindavan, A Home for Widows Prepares to Protect Its Elderly From COVID-19' (*IndiaSpend*, 04 April 2020) <https://www.indiaspend.com/in-vrindavan-a-home-for-widows-prepares-to-protect-its-elderly-from-covid-19/> accessed 27 April 2021.

[21] Murali Krishnan, 'Coronavirus exacerbates India's Hunger Problem' (*DW*, 16 October 2020) <https://www.dw.com/en/coronavirus-exacerbates-indias-hunger-problem/a-55299109> accessed on 01 April 2021.

[22] Joseph Wesley, 'How COVID-19 is exposing children to traffickers' *Down to Earth* (New Delhi, 04 December 2020) <https://www.downtoearth.org.in/blog/governance/how-covid-19-is-exposing-children-to-traffickers-74525> accessed on 27 April 2021.

[23] UN Women, 'The Shadow Pandemic: Violence against women during Covid-19'<https://www.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response/violence-against-women-during-covid-19> accessed on 27 April 2021.

II. DRACONIAN LAWS TO FILL THE LAG

Covid-19 has seen an imposition of draconian laws across many countries to enforce pandemic control measures. Implementing agencies which could not understand most medico-legal terminologies were posted in enforcement teams. As a consequence measures related to many situations in Covid-carewere arbitrary due to confusions between policies of prognosis and pathogenesis in Covid-care, between quarantine and isolation and between social distancing and physical distancing[24]. These harsh measures that the government enforced[25] led to a belief that covid-19 means death and people started abandoning even the dead bodies of Covid patients and also stopped entry of frontline Covid care doctors to their apartments. People felt that the government had not done its homework[26] appropriately prior to its recourse to such harsh measures.

A. Enforcement dilemmas

In the absence of any required training or laws on the nature of epidemic, thermal screening at airports started by mid- January for passengers coming from China but later the list started becoming longer as Thailand, Singapore, Hong Kong, Japan and South Korea were added to it. Problems started soaring due to non-availability of a comprehensive nationwide surveillance system, testing infrastructure and public awareness. Most governments were free to apply laws the way it suited them. There was panic and overreaction at the level of ill-informed local administration encouraging them to use stringent measures for a larger mission driven control of pandemic which seemed like a 'foreign imported death' to one's country. This led to stigmatization and ostracization of human beings, racial profiling of certain religious groups and nationalities leading to violence and hate against foreigners[27]. It was

[24] Amita Singh, 'Covid-19 Pandemic and the Future of SDGs' in V.K. Malhotra, R.L.S. Fernando and N.P. Haran (eds), *Disaster Management for 2030 Agenda of the SDG* (Springer 2020) 313. 'Lack of training led to many avoidable problems in the implementation of a biological disaster. Most frontline workers, policemen and district officials did not have any idea on the history of epidemics or how nations have previously handled it or even the fact that there were guidelines which could save people from the worst…..Doctors and Nurses were not allowed entry into their apartment areas by the Resident Welfare Associations, bats were slaughtered, dogs and cats were killed and abandoned, a Covid-19 patient was stigmatized for being a cause for further spread of virus …… the 'spirit' of law was violated due to the inexperience of authorities and also under the subtle and inscrutable influence of caste, class, gender and religion upon district authorities and the police'.

[25] WE. Parmet 'Quarantining the law of quarantine: why quarantine law does not reflect contemporary constitutional law' (2018) 9(1) Wake Forest Journal of Law and Policy 1-33.

[26] Singh, mentions the case of two doctors Ai Fen and Li Wenliang who were reprimanded for raising an alarm about a 'Sars Coronavirus which they had detected on 30th December. P.313. Also read Monica Rull,'The Ebola Wake-up call: The System's failings in Responding to Outbreaks' and Monica Rull, Ilona Kickbusch and Helen Lauer, 'International Responses to Global Epidemics: Ebola and Beyond' (2015) 6(2) International Development Policy | Revue internationale de politique de développement [Online] <http://journals.openedition.org/poldev/2178> accessed 27 April 2021. Also see Debora Mackenzie, 'We were warned -so why couldn't we prevent the coronavirus outbreak?" (*NewScientist*, 04 March 2020) <https://www.newscientist.com/article/mg24532724-700-we-were-warned-so-why-couldnt-we-prevent-the-coronavirus-outbreak/> accessed 27 April 2021.

[27] "Covid-19 is not just a health issue; it can also be a virus that exacerbates xenophobia, hate and

unfortunate that a time when compassion and care should have guided thoughts and actions, debauchery and impiety became lighthouses for official action. This gross psychology only proved counterproductive to the spirit of preventive regulations. There followed more defiance to law which was perceived to be racially motivated in a political environment which appeared opaque and lacked trust in governance[28]. It also brought minorities to cling together in these unprecedented times when political leaders roamed free for electioneering[29] and other political meetings but poor and peacefully protesting citizens were booked for not following the Covid-19 regulations.

Coercive, discretionary and sectional implementation does not spring from the Cabinet Secretary's enforcement of Section 2(d) of the Disaster Management Act 2005 but from the Section 2A of the Epidemic Disease Act (EDA) of 1897. The disaster management bureaucracy could conceal its culpability to a great negligence and further create much fear by imposing a 123-year-old draconian Epidemic Disease Act (EDA) of 1897 invoked for the first time in 1897 to prevent the spread of Bubonic Plague.This law was brought back to strengthen the hands of central government by legitimately transcending ordinary provisions of the law on the pretext that they were insufficient to prevent the spread of the disease. This law gave extraordinary powers to the central government to inspect, detain and punish people, ships and vessels (2A) where disobedience to any regulation or order made under the EDA shall be deemed to have committed an offence punishable under section 188 of the Indian Penal Code (45 of 1860) (Sec.3). Still, Section (4) comes like a protective sheath for administration assuring that 'no suit or legal proceedings shall lie against any person for anything done is good faith intended to be done under the Act. Thereafter administration attributes to itself despotic power as civil liberties are suspended to contain the epidemic'. Studies have found that coercive measures may look like a fast pace achievement of overcoming the pandemic but they are primarily responsible for spreading the epidemic. A democratic society with a free flow of

exclusion," said Fernand de Varennes, the UN Special Rapporteur on minority issues. See 'COVID-19 stoking xenophobia, hate and exclusion, minority rights expert warns' (UN News, 30 March 2020) <https://news.un.org/en/story/2020/03/1060602> accessed on 27 April 2021.

[28] The Shaheen Bagh protests over the Citizen Amendment Bill and Tablighi Jamaat celebrations at the Nizamuddin Dargah Markaz occurred during the lockdown despite tough regulations in force. What followed was a massive manhunt for participants in these events who for fear of arrest hid around the country at undiscoverable destinations. See Abhishek Bhalla, 'Tablighi Jamaat coronavirus patient's Shaheen Bagh visit under scanner as contact tracing gets underway' (*India Today*, 02 April 2020) <https://www.indiatoday.in/india/story/tablighi-jamat-coroanvirus-patient-s-shaheen-bagh-visit-under-scanner-as-contact-tracing-gets-underway-1662509-2020-04-02> accessed on 27 April 2021. Also read Sunil Rahar Report 'Covid norms go for a toss during political gatherings in Baroda' *Hindustan Times* (New Delhi, 25 October 2020) <https://www.hindustantimes.com/cities/covid-norms-go-for-a-toss-during-political-gatherings-in-baroda/story-TwqApRpKH7N5lrWf4yHubK.html> accessed on 27 April 2021.

[29] C K Manoj, 'No distancing, masks at Bihar poll rallies: Experts warn of spike in COVID-19 cases Health experts warn of rallies turning into 'super-spreader' events' (*Down to Earth*, 19 October 2020) <https://www.downtoearth.org.in/news/health/no-distancing-masks-at-bihar-poll-rallies-experts-warn-of-spike-in-covid-19-cases-73854> accessed 27 April 2021.

information[30] is best suited to control the source of a pandemic. By relying on coercive draconian laws the bureaucracy for disaster management could divert attention from its own ineptitude on advance preparations in health sector reforms as given in the 1999 RHPCDM and 2011 document of the Ministry of Home Affairs, titled 'Disaster Management in India'. This led to an enormous slippage of the framework of substantive justice during the pandemic as given in the Constitution of India and read with the Disaster Management Act 2005.

B. People Ignored by Law

A large number of people got ignored by law during the pandemic i.e.; those in prisons, immigration detention facilities, refugee camps and psychiatric care centres. A UN Subcommittee on Prevention of Torture (SPT) which was created in 2007 for monitoring and advising governments to prevent torture and ill-treatment in places of detention issued an advice to prevent inhuman behaviour against those in detention during the pandemic. Of the total 90 states only 3 from South Asia (Afghanistan, Maldives & Sri Lanka) have so far ratified this advice. Sir Malcolm Evans , the Chairman of this Committee said, 'Governments have to take precautionary measures necessary to prevent the spread of infection, and to implement emergency measures in ensuring that detainees have access to appropriate levels of health care and to maintain contact with families and the outside world…..[31] .Further he issued a statement from the SPT as *'an advice to state parties and national preventive mechanisms relating to the coronavirus disease (COVID-19) pandemic'*. It has a preventive mandate focused on an innovative, sustained and proactive approach to the prevention of torture and ill treatment.

C. Ostracization and Civil Liberties

Such coercive laws that subjugate civil liberties through harsh applications of medical tools such as quarantines and isolation have been coming from old law books written on narratives from the ghastly and agonizing Bubonic Plague or 'black death' of the 17th century London and the Spanish Flu of 1919. The Spanish Flu infected one third of the world population and killed more than 50m of them. These narratives used old tools of governance since a behavioural understanding of science and its impact upon human mind and disease control had not yet arrived in medical and legal research[32]. As Gostin and Hodge (2020) comment on the use of old enforcement measures as of limited utility and if imposed with too heavy a hand, or too haphazard a manner, they can be counterproductive. Courts have also intervened to disallow such a harsh use of

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[30] Mathew M. Kavanagh, "Transparency and Testing Work Better Than Coercion in Coronavirus Battle" (*Foreign Policy*, 16 March 2020) <https://foreignpolicy.com/2020/03/16/coronavirus-what-works-transparency-testing-coercion/> accessed 27 April 2021.

[31] 'International Day in Support of Victims of Torture: detainees need protection from Covid-19' (*Council of Europe*, 26 June 2020) <https://www.coe.int/en/web/portal/-/international-day-in-support-of-victims-of-torture-detainees-need-protection-from-covid-19> accessed 27 April 2021.

[32] L.O. Gostin and JG Hodge, 'US Emergency Legal Responses to Novel Coronavirus: Balancing Public Health and Civil Liberties' (2020) 323(12) JAMA - Journal of the American Medical Association 1131-1132.

quarantines and isolation. This came up in a few old cases during the bubonic plague of 1900 ie; of Wong Wai v.Williamson and Jew Ho v.Williamson in the Federal Circuit Court for the Northern District of California at San Francisco's Chinatown. The plaintiffs stood against the Surgeon General of the United States who had ordered health authorities to implement 'extraordinarily coercive measures' aimed at city's Asian inhabitants, and this action led to ostracization of Asians in an American community. The verdicts coming out of these cases launched a new discourse in medico-legal policies which highlights court's innate capacity to act as an arbiter between the rights of an ostracized minority and public interest during periods of epidemics when governments use extraordinary coercive measures to address health emergencies[33]. The court prevented the use of racially motivated emergency measures by the Surgeon General.

III. PANDEMIC CONTROL REQUIRES SINCERE REGIONAL COLLABORATION

South Asia is not just home to one-fourth of the world's population but 48% of the world's multi- dimensional poor as well[34]. It barely occupies 3.5% of world's land area and generates 3.6% GDP per annum. The region's rich biodiversity demands conservation and environmental safety for a healthy society.As per the SACEP Report (2016) South Asia is home to approximately 15.5 and 12 percent of the world's flora and fauna respectively[35]. The faunal diversity of the region comprises of 933 species of mammals, 4,494 birds, 923 reptiles, 332 amphibians and 342 freshwater fishes. The floral diversity accounts for 39,875 species of flowering plants, 66 conifers and cycads, 764 ferns and 6,652 higher plants[36].Such bountiful natural resources over a single topographical platehave great potential for cooperation and collaboration for sustainable development policies. However, the region is predominantly a flood affected area and has the largest concentration (approx.40%) of world's poor and vulnerable living and practising agriculture around these transboundary river basins[37].The Ganges-Brahmaputra-Meghnariver basin which equally affects Bangladesh, Bhutan, Nepal and India is the biggest of all[38]. It's called a 'hot spot' of Asia Pacific disaster zones. The GDP of this region is directly proportional to the many disasters they face many times in a year.

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[33] Charles McClain, 'Of Medicine, Race, and American Law: The Bubonic Plague Outbreak of 1900' (1988) 13(3) Law & Social Inquiry 447–513.

[34] Sabina Alkire and Gisela Robles, 'Global Multidimensional Poverty Index 2017' (2017) OPHI Briefing 47 <https://ophi.org.uk/global-multidimensional-poverty-index-2017/> accessed 27 April 2021.

[35] SACEP, 'Milestones' <http://www.sacep.org/milestones> accessed on 27 April 2021.

[36] SACEP, 'South Asia's Biodiversity: Status, Trend and Challenges' (South Asia Co-operative Environment Programme, December 2016) 1 <http://www.sacep.org/pdf/new-publication/South-Asia-Biodiversity-Status-Trend-and-Challenges.pdf> accessed on 27 April 2021.

[37] World Bank, 'South Asia Water Initiative: Annual Report from the World Bank to Trust Fund Donors – July 2014–June 2015' (2016) World Bank Working Paper Report No. 103878 <http://documents1.worldbank.org/curated/en/442761468197632182/pdf/103878-AR-SAWI-Progress-Report-2015-PUBLIC.pdf> accessed 27 April 2021.

[38] Marufa Akter, 'Conceptualizing environmental governance on the GBM basin' (2016) 3(1) Bandung: Journal of the Global South 25.

Disasters in South Asia are repeated encounters with hydro-meteorological and geological hazards such as floods, landslides, droughts, cyclones, earthquakes, heat waves, avalanches and tsunamis. Every year for the last many decades the low-lying countries like India and Bangladesh complain that the higher countries like Nepal and China flush out water to drown low lying regions. These seasonally flooded areas include Assam and surrounding sanctuaries and islands in the Sundarbans, the world's largest mangrove forest straddling Bangladesh and India. The flooding of Kurigram in Bangladesh and Supaul in Bihar are classic examples of the need for collaborative law framework for addressing disasters in South Asia. Within the region Koshi flooding in South Asia (2008), Kashmir earthquake (2005), Indian Ocean Tsunami (2004), and recurrent tropical cyclones in Bangladesh and India. The tropical storm Aila on 2009 gripped India and Bangladesh over the Sundarbans island and their frontiers were obliterated.

It was only in the 3rd SAARC Summit when a comprehensive Regional Study on the Causes and Consequences of Natural Disasters was discussed for the first time. A SAARC Meteorological Research Centre was established in Dhaka in 1995 and a SAARC Coastal Zone Management Centre was set up at Male in 2004. Later in June 2005 a Special Session of the SAARC Environment Ministers adopted the Male Declaration, which called for formulation of a Comprehensive Framework of Disaster Management in South Asia. Yet it was only in the 13th SAARC Summit at Dhaka in November 2005 which considered the issues of regional cooperation for preparedness and mitigation of national disasters and set up a SAARC Disaster Management Centre (SDMC) in New Delhi in 2006. The Scope of the centre is expanded by merging the other Regional erstwhile centres of Bangladesh, Bhutan, Maldives with SDMC.

The recent pandemic has brought out a need for a common disaster law framework for South Asia which may be challenging enough considering many unresolved border issues amongst them. Climate change and global warming is leading to a steady sea level rise which is marooning many land areas and also eroding many islands. Consistent changes in ambient temperature and rainfall patterns combined with increase in cyclonic activity has affected all countries of the region equally. The coming of the pandemic pulls in stronger and more urgent reasons to explore and strengthen a common disaster law framework to encourage smooth collaboration for disaster mitigation and prevention.

Regional cooperation was initially spearheaded by the South Asian Association for Regional Cooperation (SAARC) which was formed in 1985 at Dhaka, Bangladesh, with the main objective; *'to promote welfare of people of South Asia, accelerate economic growth and increase collaboration and mutual assistance in economic, social, culture, technology and scientific fields'*[39].There was no mention of either environmental protection or ofdisaster management but these requirements got added up as realization dawned that development and economic progress has close

[39] SAARC Charter, Objectives Art.1 <https://www.saarc-sec.org/index.php/about-saarc/saarc-charter> accessed on 02 April 2021.

interdependence like Siamese twins with the former.The pandemic has strengthened a logic for environmental action alongside disaster response for each member state.

In this context it would be important to focus on Multiple Mortality Risk Index (MMRI) besides the co-morbidity concerns which caused more deaths due to corona virus infection. This multi-dimensional and a more holistic index makes a justifiable assessment of vulnerability in South Asian countries. UNESCO describes Mortality Risk Index (MRI) as, 'a Category of disaster risk based on both expected average killed per year and expected average killed per million people per year'. A UNESCO report further clarifies that this indicator considers hazard (intensity, frequency), population exposure and vulnerability for identifying vulnerability based upon MMRI[40]. MRI is a revised version of Disaster Risk Index (DRI) which is traditionally used to assess a country's vulnerability to disasters. Lately due to awakened sensitivity towards achievement of the Millennium Development Goals (MDGs, 2000-2015) and now the Sustainable Development Goals (SDGs, 2015-2030) other factors such as governance, nature of developmental policies, political instability and border management are added to mortality risk for the assessment of vulnerability. This is referred to as MMRI and is increasingly being used in contemporary studies on disasters. In one such study[41] it was found that even though India had almost a six times higher rate of disasters as compared to Bangladesh and Pakistan nevertheless Bangladesh tops the list on the MMRI assessment. The three countries India, Bangladesh and Pakistan have highest MMRI as compared to others in the region and have urgent reasons to cooperate in disaster management.

This realization about vulnerability connect with the GDP led to a SAARC Joint Communique of 12 Jan 2010 which emphasized, 'work together in making SAARC a purposeful organization'. Since then, many efforts at more substantive collaborations have taken place within and outside the SAARC framework. In 2002, Bangladesh, Bhutan, India, Maldives, Myanmar, Nepal, and Sri Lanka formed South Asia Sub-regional Economic Cooperation program (SASEC) to promote regional prosperity, economic opportunities and boost intra-regional trade and cooperation in South Asia. Further, South Asian Free Trade Agreement (SAFTA, 2006) which appears to be by far the greatest achiever for collaboration in the region as it has been able to reduce customs duties on all traded goods from 20% to zero by 2012. Latest (Oct.2020) Hindu Kush Agreement effort of eight countries (Afghanistan, Myanmar, Pakistan, India, China, Nepal, Bhutan, Bangladesh) of the Hindu Kush Himalaya (HKH) region, is to control disasters over one of the world's greatest mountain systems. Efforts such as these also empower the implementation of many other disaster management efforts in the region. Most of these countries are also signatories of the

[40] World Water Assessment Programme, 2006, UN World Water Development Report 2: Water: A Shared Responsibility; Paris, UNESCO and New York, Berghahn Books, p. 352 available at http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/wwap_WWDR2_Box_10.4.pdf accessed on March 8, 2021.

[41] SK Kafle, 'Disaster Risk Management Systems in South Asia: Natural Hazards, Vulnerability, Disaster Risk and Legislative and Institutional Frameworks' (2017) 7(3) Journal of Geography and Natural Disasters 5.

Sendai Framework for Disaster Risk Reduction 2015-2030 which outlines four priorities for action to prevent disasters, i.e.;

(i) Understanding disaster risk

(ii) Strengthening disaster risk governance to manage disaster risk

(iii) Investing in disaster reduction for resilience and

(iv) Enhancing disaster preparedness for effective response, and to "Build Back Better" in recovery, rehabilitation and reconstruction.

Much depends upon the ability and initiatives of the SAARC Disaster Management Centre to help incorporate the above priorities in the disaster management frameworks of SAARC member countries. In 2011, SAARC countries signed one of the most appropriate and focused agreement on improving disaster management in the region. It was titled, 'SAARC Agreement on Rapid Response to Natural Disasters' (SAARND). Its purpose was to professionalize disaster management system and strengthen emergency response system in the region, provide timely relief and humanitarian assistance in emergencies arising out of natural disasters and about institutionalizing disaster response in the region. An important point highlighted in this agreement made it incumbent upon member states to '*take legislative, administrative and other measures as necessary to implement their obligations under this agreement within the framework of the legal system prevailing in the respective member states.*' Ironically, even though it succeeded in at least one initiative of creating a Food Bank for help during disasters and collected 4,86000 million tonnes of grains, the effort stagnated and disappeared soon. One is hopeful that with the recent revival of the Bay of the Bengal Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) in which Bangladesh, India and Sri Lanka join hands with the two countries of South-East Asia (Myanmar and Thailand) may generate a more progressive and versatile groundwork for knowledge sharing and cooperation in the region.

IV. CONCLUSION

The paper refers to many new challenges which are being faced by countries across the world and specifically those of South Asia. Due to clarity of analysis India's handling of the pandemic through its legal and executive framework has been undertaken as a case study with lessons for the countries in the region. The pandemic management raises many concerns of law and governance besides exposing a mismatch which exists between the disaster management acts of most countries and the rapidly changing requirements of pandemic management. The law is not adequately prepared to encounter an epidemic and it appears that to enforce disaster management laws governments have been exploring stringent outdated laws such as India's implementation of the Epidemic Disease Act 1897. Experts who have analysed epidemic control measures of governments since the 1900 bubonic plague have suggested against their usage or it would prove counterproductive in preventing the disease. In the end the paper suggests an effective regional collaboration for

sharing information, medical support and scientific research to address biological disasters. This can be done by strengthening the SAARC and also to implement SAARND Agreement.

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Legal Liability of 'Free-Riders' during the COVID-19 Pandemic: A Mere Negligent Public Nuisance or Reckless Public Health Offence?

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I. INTRODUCTION

Offences are not static – rather concepts of offences can transform over time, space and gravity. Social malice that was once not considered a crime may well be defined as a criminal offence in the course of time. For instance, *Satipratha* (burning widows on their husbands' funeral pyres) was an acceptable social norm which was not treated as a crime until the promulgation of the *Bengal Sati Regulation 1829*, which consideredsuch actions as an offence. Likewise, adultery is not considered a criminal offence in the United Kingdom but is treated as both a moral wrong and a criminal offence in Bangladesh. Similar notion also applies to *'negligent'* activities which usually (although not always) start without any criminal intention but crystallise over time, space and gravity and amount to a *'reckless'* offence or are defined as a crime subject to more severe punishment. For instance, bats were considered the primary agent of SARS-related Coronavirus until a recent scientific discovery claiming the cross-species jump of the virus from bats to human.[1] Consequently, violation of SARS regulation now incurs enhanced penalty.[2]Thus, determining the universal or static concept of an offence is not justified.

New laws relating to emerging issues are always being enacted or amended in many societies. Hinging on this dynamic notion of offence, this paper illustrates how the gravity of criminal offence caused by 'negligent' free-riders duringCOVID-19 outbreak has evolved from mere *'negligent public nuisance'*[3] to '*reckless public health offence'*[4] around the globe.[5] In this paper, 'free-riders' during COVID-19

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1 Jie Cui and others, 'Evolutionary relationships between bat coronaviruses and their hosts' (2007) 13(10) Emerging Infectious Diseases 1563.

2 Lawrence O Gostin et al., 'SARS and International Legal Preparedness' (2004) 77 Temple Law Review 155. See also, Tan Chorh Chuan, 'National Response to SARS: Singapore' (WHO Global Conference on SARS, Singapore, June 2003).

3 Section 180 of *the Penal Code 2008 of UK* stipulates that, *"Any person who unlawfully does any act, or omits to do any act which it is his duty to do, not being an act or omission specified in section 179, by which act or omission harm is caused to any person, shall be guilty of an offence and liable on summary conviction to imprisonment for six months"*.

4 However, special law was enacted in many countries only for dealing this life-threating virus. For example, *the Coronavirus Act 2020* (UK), which was enacted on 25 March 2020, under the head of Health protection regulations *provides that, "(a) may not create an offence punishable with a fine exceeding £10,000"*.

5 See also, The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place)

pandemic signify people in a given society, who do not comply with prescribed health guidelines (e.g. wearing masks, social distancing, quarantine rules, isolation rules etc.) set by the World Health Organization (WHO)and the Government of Bangladesh to curb the communal spread of the highly contagious Coronavirus.[6] The Stanford Encyclopaedia of Philosophy defines it as "*someone who receives a benefit without contributing towards the cost of its production*"[7]. Therefore, the imposition of restriction and penalty on reckless free-riding is essential to establish fairness and justice in society. As explained in Hart's Principle of *'Mutuality of Restriction'*[8]:

> when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission.

Accordingly, this paper urges policymakers of Bangladesh to make 'free-riders' criminally liable with prompt and stringent punishments, especially for their *'reckless'* behaviour manifest in repeated violations of health regulations. For instance, according to Section 34(7) of the *COVID -19 (Temporary Measures) Act, 2020, of Singapore,'differential monetary penalty'* and penal provision is suggested for a person who violates COVID-19 regulations. It states that *a person who, without reasonable excuse, contravenes a control order, commits an offence and shall be liable on conviction —*

(a) to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 6 months or to both; or

(b) ***in the case of a second or subsequent offence, to a fine not exceeding $20,000 or to imprisonment for a term not exceeding 12 months or to both.***

Thus, penalty provision for the violation of COVID-19 related regulation in Singapore effectively differentiates between *first time* violation and *frequent or repetitive* violations of health regulations.[9]

(England) Regulations 2020; The *Corona Virus Act, 2020* (Philippines) (Republic Act No. 11469) which came into existence on 24 March 2020; *the COVID-19 (Temporary Measures) Act 2020* (Singapore) etc.

6 According to Section 9 of the Communicable Diseases (Prevention, Control, and Eradication) Act, 2018, the 'International Health Regulations' published by WHO, after necessary adaptations, will be applicable to procedural measures for protecting public rights against the spread of communicable diseases in Bangladesh; See, *Communicable Diseases (Prevention, Control, and Eradication) Act, 2018*(Bangladesh)(s 24). As COVID- 19 is a global pandemic spreading across continents, compliance with someinternationally recognized standard operating procedure for its prevention, control and eradication would be commendable. See, David P Fidler, 'Globalization, international law, and emerging infectious diseases' (1996) 2(2) Emerging Infectious Diseases 77.

7 Russell Hardin, 'The Free Rider Problem' (*Stanford Encyclopaedia of Philosophy*, First published 2003, 2020) <https://plato.stanford.edu/entries/free-rider/> accessed 25 January 2021.

8 Herbert L Hart, 'Are There any Natural Rights?' (1955) 64 Philosophical Review 175, 185.

9 Doctrine of enhanced punishments were incorporated for the subsequent violation of the same offence earlier done. See also the Penal Code 1860 (No. XLV of 1860), s 75 where it states that, "Whoever, having been convicted by a Court in Bangladesh of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years

Surprisingly, much before the enactment of this 'new' law in 2020 in Singapore for curbing COVID-19 pandemic, the Penal Code 1860, applicable in Bangladesh, inserted the ***Doctrine of enhanced punishment for a second or subsequent offence***.[10]Section 291 of the Penal Code 1860 (Act No. XLV of 1860) stipulates that:

> Whoever repeats or continues a public nuisance, having been enjoined by any public servant who has lawful authority to issue such injunction not to repeat or continue such nuisance, shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both.

Although the term 'reckless' is not defined in the Penal Code 1860, it can be explained, based on the Cambridge dictionary, as doing something hazardous and not worrying about the risks and the possible results. Oxford Law Dictionary further defines *'recklessness'* as *"a form of mens rea that amounts to* ***less than intention but more than negligence"***.

The *'novel'* Coronavirus (COVID-19) is a life-threatening virus, which is highly infectious and deadly in nature, and which has taken millions of lives worldwide[11] since its detection in January 2020. Consequently, the World Health Organisation (WHO) has declared COVID-19 as a *'Pandemic'* after two months of its first detection in China[12]. It gradually spread to almost all countries in the world. On the related note, the Health Directorate-General of Health Services of the Ministry of Health, Bangladesh issued a notification on 24 March 2020 flagging that the whole country was endangered to COVID-19 risk and their respective preparedness in this regard[13].

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orupwards, shall be guilty of any offence punishable under either of those Chapters with like imprisonment for the like term, shall be subject for every such subsequent offence to imprisonment] for life, or to imprisonment of either description for a term which may extend to ten years". Similarly, see the Laws of Malaysia (Act 574), s 75.

10 The Penal Code 1860 (Bangladesh), Chapter XIV: of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals. Though the Penal Code 1860 does not have any provision for quarantine of individuals, according to Sec 271, whoever knowingly disobeys any government promulgation to keep any vessel in quarantine shall be punished with an imprisonment of both either description that may extend up to six months, or with fine or both. Thus, considering the similarity in context and penalty provisions discussed under Sec 271 and 291, it will not be unjustified if we apply Sec 291 to punish those 'free riders' who knowingly violate the self-quarantine rule of the Government and roam around *recklessly* and contribute transmission of the highly contagious and life-threatening virus.

11 Deaths, 'COVID 19 Coronavirus Pandemic' *worldometer* <https://www.worldometers.info/coronavirus/?utm_campaign=homeAdvegas1?%22> accessed 25 January 2021.
bdnews24.com (Online, 23 March 2020) <https://bdnews24.com/bangladesh/2020/03/23/its-official-bangladesh-lists-covid-19-as-a-communicable-disease> accessed 18 August 2020.

12 News: Coronavirus Pandemic, 'Timeline: How the new coronavirus spread' (*Al-JazeeraOnline*, 20 September 2020) <https://www.aljazeera.com/news/2020/9/20/timeline-how-the-new-coronavirus-spread> accessed 11 September 2020.

13 Nasima Sultana, 'Status of Noble Corona Virus 2019' (*Press Briefing*, 24 March 2020) <https://corona.gov.bd/storage/press-releases/March2020/press-release_2020_03_24.pdf> accessed 22 September 2020. To restrain the spread of the Coronavirus, the Government has recently postponed the Junior School Certificate examinations that are held annually nationwide. Please see Star Online Report, 'Junior School Certificate, equivalent exams won't be held this year' *The Daily*

Due to the absence of any vaccine or other workable remedies, the WHO has declared a series of preventive measures against this deadly viral disease, including wearing masks and maintaining social distancing, quarantine rules, and isolation guidelines which were deemed as the only functional alternatives to mitigate its community transmission. Furthermore, scientists of different countries, including the UK, Australia and India, *'warned their policymakers against the increase in transmission of COVID-19 during winter'* as *'the winter may environmentally favour coronavirus transmission'*.A group of scientists from the University of Sydney, Australia warned about the gravity of this *'new wave'* by suggesting that *'a one per cent fall in humidity could increase the number of infections by six per cent'*.[14]

Hence, the enactment of new laws in different counties with more stringent punishment, aimed at deterring the spread of coronavirus infection, was imperative, more particularly as world authorities were apprehending a *'second wave'* of COVID-19 in the coming winter.[15] In this regard, this paper has identified existing legal provisions, their recent evolution, and lack of implementation to adequately address the COVID-19 related health risks in Bangladesh. Analysing relevant legislative provisions and associated implementation strategies followed in the UK and other countries, including Singapore, India, and Sri Lanka, this paper emphasises on strategic legal provisions to improve the effectiveness of existing laws in this regard.If adopted, these legal provisions can effectively separate those who *'negligently'* violate health regulations from those *'reckless free-riders'* who repeatedly disregard health guidelines and violate Government regulations over and over again.

II. REVISITING THE ELEMENTS OF CRIME: FROM 'INTENTION' TO 'NEGLIGENT' AND 'RECKLESS' ACT AS *MENS REA*

A person may commit a criminal offence when s/he does something, which is legally prohibited, or omits to do something, which he is legally bound to do. However, to consider an act or omission as crime, it must fulfil some pre-defined criteria, usually termed as elements of a crime. *'As a matter of simple analysis, we can think of a crime as being made up of three ingredients: actus reus, mens rea, and the absence of*

Star (Dhaka, 27 August 2020) <https://www.thedailystar.net/country/news/junior-school-certificate-equivalent-exams-wont-be-held-year-1951893> accessed 20 January 2021.

[14] 'Coronavirus likely to hit Bangladesh harder in winter' *The Daily Prothom Alo* (Dhaka, 25 July 2020) <https://en.prothomalo.com/bangladesh/coronavirus-likely-to-hit-bangladesh-harder-in-winter-experts> accessed 12 September. See also, UNB News, 'Prepare for Covid's second wave in winter: PM to admin' *United News of Bangladesh* (Dhaka, 21 September 2020) <https://unb.com.bd/category/bangladesh/prepare-for-covids-second-wave-in-winter-pm-to-admin/57763> accessed 22 September 2020. Authorities around the globe made similar predictions. See also, Joel Achenbach and Rachel Weiner, 'Experts project autumn surge in coronavirus cases, with a peak after Election Day' *Washington Post* (Washington, 5 September 2020) <https://www.washingtonpost.com/health/coronavirus-fall-projections-second-wave/2020/09/04/6edb3392-ed61-11ea-99a1-71343d03bc29_story.html> accessed 12 September 2020.

[15] Ibid.

a valid defence'[16] According to the vital principle of English criminal law- *Actus non facit reum nisi mens sit rea* (i.e. a crime is not committed if the mind (*mens rea*) of the person doing the act in question is innocent, and the guilty mind and act must both exist at the same time). For a criminal offence, the matter of 'innocence' is not a moral issue, rather it is usually defined by law.

A. Meaning of Mens Rea in a Crime

The maxim '*actus non facit reum nisi mens sit rea'* (i.e. the act is not culpable unless there is a guilty mind) is one of the cardinal principles of criminal law.[17] The literal meaning of *mens rea* is 'guilty mind'. This is because the definitions of various offences contain express propositions as to the state of mind that is requited of an accused. The definitions of various offences generally imply whether the act was done 'intentionally,' 'voluntarily,' 'knowingly,' 'dishonestly' or 'fraudulently,' and so on.Therefore, *mens rea* will mean one thing or another based on the particular offence. In other words, *mens rea* may signify a fraudulent mind, or a dishonest mind, or even a negligent or reckless mind. Every offence under the Penal Code,1860 describes the requisite of *mens rea* in an offence in some form or the other.

The term '*mens rea'* is not explicitly used in the Penal Code, 1860 (hereinafter referred to as the Code, 1860). Nevertheless, its essence is found in different terms. Words commonly used to denote this is *'state of mind'*, including intention, knowledge, recklessness, negligence, etc. It is pertinent to mention that different types of *mens rea* form a hierarchy, with intention and knowledge being the most grave in extent, followed by recklessness and negligent act. There are other specific forms of *mens rea* arising in individual offences, which are difficult to fit within this hierarchy.[18] For example, under the Code 1860, the state of mind required for the crime of theft is 'dishonesty' (s. 378). Cheating must be committed 'fraudulently', while murder must be committed either 'intentionally' or 'knowingly'.

Each definition of an offence under the Code, 1860 underpins the requisite state of mind of the accused when he was committing the act.Generally, if a criminal act is committed, and it can be established that the act was done with any of the states of mind as mentioned above, the requisite *mens rea* can be said to have been present. Notwithstanding, the determination of the various states of mind that constitute dishonesty or fraudulence remains a challenge, and countries choose to adopt ways to determine them based on contextual priorities.For example, the Model Penal Code of USA defines *mens rea* as a continuum of four states of mind starting from the *'most*

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16 David Lanham, 'Larsonneur Revisited' (1976) Criminal Law Review 276–281.

17 According to Section 32 of the Penal Code, 1860, "in every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions." Section 33 further denotes that, "the word "act" denotes as well a series of acts as a single act: the word "omission" denotes as well a series of omissions as a single omission".

18 David Ormerod, *Criminal Law* (13th edn, Oxford University Press 2011) 106.

of guilty mind' to the *'least of guilty mind'* during the occurrence of an event. These are:

- Intention;
- Knowledge;
- Recklessness; and
- Negligence.

Further to the state of a criminal mind of an offender as defined in a point of time during the occurrence of a crime, there is another state of social mind that collectively defines or considers a particular act or omission to be a crime. This social state of mind also has a specific nature. That is to say, when the gravity and frequency of a criminal offence in a society increase progressively, less culpable offences may be defined as more grievous crimes. In other words, non-cognisable offences may become cognisable and attract punishment in due course of time as it seemingly causes great social malaise. For instance, eve-teasing is not a new phenomenon in Bangladesh. A social movement emerged against eve-teasing, culminating in High Court Division directives against sexual harassment in workplaces and educational institutions.The Court advised against the use of the term euphemistic "eve-teasing" and defined circumstances, including unwanted contact through cell phones, mobile, email or any other media that may reasonably cause a woman to feel endangered about her safety. This is an example of how new forms of criminal acts get recognition and are emancipated from euphemistic use. However, punishing such crimes is often challenging, as offenders usually defend an absence of their intent of knowledge or describe it as an accident, despite the lack of negligence.

B. "Absence of Guilty Mind is No Excuse" for Many Crimes

As noted earlier, generally speaking the definition of crime contains expressly, or by implication, a description of the state of mind required to commit such a crime. *"Although prima facie and as a general rule, there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not"*.[19] These are *'strict liabilities'* in law that do not consider the mental state of the person who committed that offence. Thus, if the mental element of any conduct alleged to be a crime is proved to have been present in any given case, the crime so defined is committed, no matter what. On the other hand, if a crime is defined, any act or omission may amount to that crime if it falls within that definition, no matter what.As such, there are some crimes where the maxim '*actus non facit reum nisi mens sit rea'* has no spontaneous application under the criminal law.As mentioned, the presence of a guilty mind is not necessary when any offensive behaviour is tagged with strict legal liability.

For the purposes of this paper, the principle of *mens rea* may not be essential in some

[19] James W. Cecil Turner and Arther L. Armitage, *Cases on Criminal Law* (3rd edn, Cambridge University Press 1964) 17.

cases, such as:

- in matters concerning *public health*, food, drugs etc.; where *mere negligence may not be tolerated due to a public safety concern*;
- where a statute imposes strict liability;[20] and
- in cases concerning public nuisance.

C. Concurrence of 'Mens Rea' and 'Actus Reus' May be Attributed Rather Than Actual: The 'But For' Principle to Prove Actus Reus

Commission of a crime is possible without a criminal mind or when people are not knowingly or intentionally committing an illegal activity. Therefore, the *actus reas* gets more importance in determining criminal liability. In the absence of a guilty mind, to prove the crime of the accused, it must be proved that the crime would not have been committed '*but for'* the *actus reas* (reckless or negligent act or omission) of the offender. If this test is met, the alleged offender is held liable for committing the offence. Hence, the essence of this *'but for'* principle is that criminal liability arises for acts or omissions that may constitute the *'proximate cause'* of the harm – not constitute mere *'remote causes.'* It is based on the maxim' *causa proxima, non remota spectator'*: essentially, the immediate, and not the remote cause, is essential. Thus, imagine that **X**, a clinically tested COVID-19 patient, invites his business partner **B** to have dinner at **X**'s house and sign their next business deal. Just after his return, **B** got sick and later died in a hospital after testing Corona +ve. As **B** got ill and was hospitalised just after visiting a clinically tested COVID-19 patient **X** and having dinner with him, it could be considered a proximate cause of **B**'s death.

Courts sometimes have to struggle determining the proximate cause of a crime, as *actus reas* get prominence in an offence. Determining criminal liability, therefore, becomes more difficult. For instance, in the *Jordan* case,[21]**O** stabbed **P**, admitted to the hospital and died eight days later.In this case, **O** was initially held liable for causing the death of **P**. However, in the Court of Criminal Appeal, due to the submission of fresh evidence by two doctors, it was observed that death had not been caused by the stab wound, which had primarily healed at the time of death. Instead, the cause of death was the *'negligence'* of medical personnel in providing treatment. The Court of Appeal held that *"if the jury had heard this evidence, they would have felt precluded from saying that they were satisfied that the stab wound caused the*

[20] Strict liability refers to those offences for which no *mens rea* or even negligence is required. These offences are constituted without require to prove fault. See more on Jeremy Horder, 'Strict Liability: Statutory Construction and the Spirit of the Liberty' (2002) 118 Quarterly Law Review 458; Kiron Reid, 'Strict Liability: Some Principles or Parliament' (2008) 29 St LR 173. However, there are considerable criticisms against offences with strict liability. It is argued that there are some difficulties of imposing strict liability, particularly, in offenses of serious nature. *'There is real sense of unfairness in convicting someone for conduct which on his part was "faultless".'* See further Duff (n 29) Ch 10.

[21] *R v Jordan* (1956) 40 Cr App R 152, 155.

death and they quashed the conviction."[22] The *'but for'* principle relates to whether the accused's act (the factual cause of criminal harm) was *'probable'* and *'foreseeable'*.

Further, it should be kept in mind that the *'but for'* principle is the starting point of the causation inquiry, but not a conclusive one.In the example of COVID-19 case mentioned above, if **X** had worn a mask when meeting **B**,used disinfectants, maintained a distance and informed **B** that he had testedCorona positive, he could have pleaded the exercise of due care and ask the court to consider the event as an accident.

In the COVID-19 instance stated above, one major hurdle for prosecution to frame an offence is to establish both *actus reus* and *mens rea*.In common understanding, it has to be established that they occurred *simultaneously* – a concurrence of *mens rea* and *actus reus*. There must be a guilty mind behind the act itself – crime is not committed if the mind of the person committing the said relevant act is innocent. As mentioned earlier, the principle is based on the maxim *actus non facit rum nisi mens sit rea*, meaning that the act itself does not constitute guilt unless done with a guilty intent.The Model Penal Code of USA states that *"Where the relationship between the mens rea and the result are at issue because the crime in question requires that there be concurrence between the mens rea and the result (as opposed to the act), the prosecution must show that the result was attributable to the mens rea in order to sustain a conviction."*[23] Hence, in the above COVID-19 example, as **X** knew he was COVID+ve, **X** should have remained in isolation and informed **B** about his infection in a conscious effort to avoid infecting him. Suppose, it was necessary to sign the contract in person. In that case, **X** should have taken all necessary preventive measures, including informing **B** about his condition to protect against potential infection. In this context, B's family may charge **X** with *'reckless'* behaviour.

Therefore, even with the absence of any strict liability of a COVID positive patient, B's death could be attributed to the *reckless* behaviour of **X**. That said, X's activities could still be considered negligent even if he was *not* aware that he wasCOVID positive since he failed to conform to standard health guidelines. The Model Penal Code of the USA makes a distinction between *'reckless'* and *'negligent'* behaviour. *"Although the level of risk is the same for both recklessness and negligence, the difference between the two is that with recklessness, the actor must be aware of the risk involved with her actions, whereas, for negligence, the actor is not aware of the*

[22] Ibid.

[23] See more, The American Law Institute, 'Model Penal Code: Official Draft and Explanatory Notes' (The American Law Institute 1985) sec 2.02, 25 <https://www.legal-tools.org/doc/08d77d/pdf> accessed 7 March 2021.

risks but should have known (hazards) what those risks were".[24] By applying this distinction, the criminal liability of a COVID-19 patient may be linked with *'reckless'* behaviour which is likely to increase aggregate harm to society without intending to cause anyone harm.

D. Indirect Attribution to Aggregate Harm May Suffice to Attract Criminal Liability

Attribution of *mens rea* would be applicable even when the *actus reus* may cause *'collective harm'* and the particular person suffering harm may not be explicitly identified. Indirect attribution of harm through *actus reus* suffice to attract criminal liability. Professors Gardner and Shute define the *'Harm principle'* as follows:

> It is enough to meet the demands of the harm principle that, if the actions were not criminalised that would be harmful … Non-instrumental wrongs, even when they are perfectly harmless in themselves, can pass this test if their criminalisation diminishes the occurrence of them, would detract from people's prospects – for example, some public good.[25]

Hence, these events would be an issue of public justice and should be dealt with by the State. Individuals may inform the Government authority about the malicious behaviour of a person. However, because of the indirect nature of harm, an individual may not have sufficient *locus standi* to deal with these cases. Along the same line, '*reckless'* or '*negligent'* behaviour of an individual that may transmit noxious diseases is already declared as criminal activity under the *Communicable Diseases (Prevention, Control, and Eradication) Act 2018*, hereinafter mentioned the 2018 Act.[26]Further, the *Mobile Courts Act, 2009* has already included relevant sections of 2018 Act in its Schedule.[27]In the 2018 Act,compliance with safety measures, such as wearing a face mask, has not yet defined as strict liability, unlike using safety equipment while working in a factory or a construction site[28]. Hence, at present, there is no legal provision for alleviated punishment to 'free-riders' in Bangladesh, who '*persistently'* violate requisite health guidelines during the COVID-19 pandemic.

III. COHESION IN CRIMINAL LAWS: ACROSS-CUTTING DIVERSITY

Although conceptualising a crime as a universal or single concept is not possible, some characteristics of crime can be generalised. According to Duff, it is hard to find:

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24 Ibid.

25 John Gardner and Stephen Shute, 'The Wrongness of Rape' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence* (Fourth series, Clarendon Press 2000) 216; See also Jeremy Horder, 'Bribery as a form of criminal wrongdoing' (2011) 127 Law Quarterly Review 37; Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living Standard Analysis' (1991) 11 Oxford Journal of Legal Studies 1. See further Chris Clarkson, 'Aggravated Endangerment' (2007) 60 Current Legal Problems 279.

26 Communicable Diseases (Prevention, Control, and Eradication) Act 2018,s 24(1).

27 See, bdnews24.com (n 49); See also, *The Daily Star* (n 51).

28 Bangladesh Labour Code 2006, s 78(A).

> some single concept or values that will capture the essence of crime or the essential characteristic in virtue of which crimes are properly punished … in favour of pluralism that recognises a diversity of reasons for criminalisation, matching the diversity of kinds of a wrong which can legitimately be the criminal law's business.[29]

Therefore, while analysing the *mens rea* involved in reckless movement during COVID-19, this paper follows a general principle suggested by the American Law Institute. It is pertinent to mention here that, in general, the key characteristic of the criminal law is to set out primarily the boundaries of acceptable behaviour for the people of a State, and the power of the State to inflict punishment on those acting beyond those boundaries.Acknowledging the diversity in boundaries that define crime in different societies, "the definition of offences" in the American Law Institute's Model Penal Code can be taken as the basis of criminal law in a modern legal system. According to this Code, the aims of criminal law are:

- To prevent offences or conducts that unjustifiably and inexcusably inflicts or threatens substantial harm to the individual or *public interests*;
- To impose public control on persons whose conduct indicated that they are disposed to commit an offence;
- To safeguard conducts from without fault condemnation as a criminal offence;
- To give reasonable warning of the nature of the conduct declared to be an offence;
- To differentiate between serious and minor offences.[30]

The purposes of the criminal law are discharged by the criminal justice system, particularly by law enforcement agencies following the five propositions prescribed in the American Model Penal Code.[31] These form the *"basic ethical building blocks of the criminal law"*.[32] Although these five propositions are defined as basic, principled and humane purposes of criminal law, they *"fail adequately to account for the majority of criminal laws in operation"*.[33] Amongst these five propositions, clause (1) is a convenient starting point for discussing the aims of criminal law, since it deals with the concept of the '*public interest'*. The significance of the concept of *'public interest'* in defining crime is acknowledged by Duff:

> We should be held criminally responsible for wrong-doings, which are public in the sense that they properly concern all members of the polity and merit a

[29] Anthony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing 2007) 139.

[30] Nigel Walker, *The Aims of the Penal System* (Edinburgh University Press 1966).

A. [31] Liz Campbell, Andrew Ashworth, and Mike Redmayne, *The Criminal Process* (5th edn, Oxford University Press 2019).

[32] William Wilson, *Criminal Law* (5th edn, Pearson Education Limited 2014).

[33] Ibid, 5.

formal public response of censure and condemnation.[34]

As discussed, the notion of crime may vary in society, and it may evolve over time. As society gets more sophisticated, the gravity of the same offence, especially those related to privacy and personal safety, may increase over time. The following section deals with the dynamics of criminal offences, particularly offences by negligence, which constitute a core argument of this paper.

IV. LEGISLATIVE RESPONSES AGAINST NEGLIGENT AND RECKLESS MOVEMENT DURING PANDEMIC: HISTORICAL PRACTICE IN HEALTH EMERGENCIES AND CURRENT TREND UNDER COVID-19

The practice of limiting contagious and virulent diseases through isolation of infected patients can be traced back to Egypt around 1250 BC when Ramses II ordered the evacuation of nearly 80,000 leprosy patients and resettle them on the edge of the Sahara desert[35]. The *'notion of quarantine'* evolved much later in 14th century Europe when countries in Europe were affected by the Plague when, according to different estimates, almost one quarter to half of the population of Europe died during a four-year period 1347 to 1350[36]. Following this deadly consequence, in 1377, one Italian ruler Viscount Reggio prohibited anyone from a Plague affected area from entering Reggio, *with a penalty of death penalty attached to the violation of his order.*[37] This order is considered the beginning of the current-day notion of quarantine when the authority also controls the movement of people who are suspected of being infected with an contagious disease. Another striking feature was the *harshness and promptness* of the penalty imposed on people in violation of the quarantine rule.

Although the process of isolation was an established idea, the practice of avoiding people coming in from infected areas that had originated in Italy, began to spread throughoutEurope. In 1448, the Venetian Senate, passed the *'first quarantine law'*, ordering every person or ship coming in from an infected region to remain isolated.[38] The first law allowed a 30-day isolation of patients affected by the Plague. Many countries later replicated this law. The term *'quarantine'* evolved as the period of isolation was increased from 30 to 40 days. This new term replicated the Latin term '*quadraginta'* which referred to 40-day detentions of ships.[39] The notion of quarantine was also applicable to other nations of Europe, albeit with greater harshness towards

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34 Duff (n 29) 123.

35 John H. Kilwein, 'Some historical comments on quarantine: part one' (1995) 20 Journal of Clinical Pharmacy and Therapeutics 185–7.

36 Martha Anker and D. Schaaf, *WHO report on global surveillance of epidemic-prone infectious diseases* (World Health Organization 2000) 25; see also, Jenny Howard, 'Plague was one of history's deadliest diseases—then we found a cure' (*National Geographic*, 6 July 2020) <https://www.nationalgeographic.com/science/health-and-human-body/human-diseases/the-plague/> accessed 25 January 2021.

37 Kilweing (n 35).

38 Philip A. Mackowiak, 'The origin of quarantine' (2002) 35 ARCANUM 1071.

39 Kilwein (n 35) 186.

those who violated the quarantine rule, just to curb its mass and community transmission. In Germany, the measures were so harsh that even death was not an excuse to avoid punishment for any violation of quarantine rules. For instance, once, when a servant girl in Germany died of Plague, and it was discovered after her burial that she had violated the health Code, her dead body was exhumed from the grave, then dangled inside the coffin and burnt after a couple of days. All these were done to raise public awareness against violation of health regulations[40].

The notion of quarantine regulations appeared in the law of the United States almost two centuries after it was first applied in Europe. Quarantine regulations were first introduced in the Massachusetts Bay Colony in 1647 when they were imposed on ships coming from Barbados for fear of Plague.[41] Almost 15 years later in 1662, the first land-based quarantine law was used in a town of East Hampton, Long Island. The *'prompt and harsh punishment'* was also evident from the notice placed at the entry in the town:

> ...that no Indian shall come to town into the street after sufficient notice upon penalty of 5s. or be whipped until they be free of smallpox... and if any English or Indian servant shall go to their wigwams, they shall suffer the same punishment.[42]

The historical perspectives on the *'prompt and harsh actions'* taken by different countries during similar public health emergencies demonstrate the seriousness of the offence of health regulation violation and indicate the possibility of strenghething of the implementation of health directives by imposing strict restrictions.

A. Legal Liability for 'Negligent' or 'Reckless' Movement during the COVID-19 Pandemic: Bangladesh Perspective

On 14 November 2018, the Government of Bangladesh passed a new law titled the *Communicable Diseases (Prevention, Control, and Eradication) Act 2018*[43] *(*hereinafter mentioned as the2018 Act*)*. Section 4 of theAct 2018,which replaced the *Epidemic Diseases Act 1897*, lists many known diseases, including typhoid, influenza, diarrhoea, tuberculosis, nipa, Ebola, meningitis, etc. as a contagious disease[44]. Although the spreading of infectious diseases has been discussed earlier as a variation of 'public nuisance' under Section 268 of the Code, 1860, the Act of 2018 is first of its kind in Bangladesh which has categorically inserted some contagious diseases. This law has many features, including the declaration of lock-down in areas, quarantine and isolation of any person suffering from severe infectious diseases,

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40 Kenneth Walker, *The Story of Medicine* (New York: Oxford University Press 1955).

41 LEDA, 'Origins of Federal Quarantine and Inspection Laws' Harvard Law School <https://dash.harvard.edu/bitstream/handle/1/8852098/vanderhook2.html?sequence=4> accessed 20 Sep 2020.

42 Ralph Chester, *The United States Public Health Service, 1798-1950* (Commissioned Officers Association of the United States Public Health Service, Washington, D.C., 1951) 63.

43 The Infectious Disease (Prevention, Control, and Elimination) Act 2018.

44 Ibid, s 4.

etc.[45]. The Act of 2018 has given the government the authority to add more diseases to this with the emergence or re-emergence of diseases over time. As a result, the government has incorporated COVID-19 in the Act of 2018 by a Gazette on 23 March 2020 with retrospective effect from 08 March 2020 — the day the first confirmed COVID-19 patient was identified in Bangladesh.

Thus, as the COVID-19 pandemic mostly embraces all provisions of the Act of 2018, the 2018 Act legally served as a good regulatory tool for the government during this outbreak.Section 24 of the Act of 2018 provides that any known spread of the virus is a criminal offence punishable with a monetary penalty up to Taka 100,000 or imprisonment up to 6 months or both[46]. Therefore, any Corona positive patient, who, due to his/her reckless free-riding, spreads the deadly virus may be prosecuted under this section. Section 25 of the Act furtherprovides that any person who refuses to comply with any government order for the prevention, control, and eradication of any infectious disease shall be punished with a fine of up to Taka 50,000 or imprisonment up to 3 months or both[47].Therefore, any person who violates the quarantine rule or leaves the house without a mask can be prosecuted under Section 25 of the Act of 2018. Section 14 of the Act empowers the government to enforce *'quarantine'* and *'isolation'* rules against any infected person.These provisions are almost similar to the criminal liabilities implied as a public nuisance under the Code 1860.[48]

However, there were at least two initial but vital limitations to the implementation of the provisions of the 2018 Act.Initially, COVID-19 was not included in the Schedule of theAct until the High Court Division of the Supreme Court of Bangladesh ordered the government to include COIVID-19 in the Schedule of the law.[49] As a result, although Section 24 of the Act does not provide for harsher punishment for the violation of public safety regulation related to a contagious disease, a *'quick response'* by the law enforcement to violation of Coronavirus related health guidelines was not possible as the criminal offences under the 2018 Act were not included in the Schedule of the *Mobile Courts Act, 2009*. In order to provide a quick remedy, on 31 May 2020,the Ministry of Home Affairs directed the Police, RAB and other law enforcing agencies to assist the local administration in operating mobile courts to monitor compliance with health directives like, the use of masks, social distancing,

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45 WHO Bangladesh, 'COVID-19'(Situation Report No 8, 2020). According to Sec 14 of the 2018 Act, if an authorized person has reason to believe that, an infected person, if not isolated, may get other people infected, then, following prescribed rules, such person can be transported to other place or quarantined.

46 The Infectious Disease Act (n 43), s 24.

47 Ibid, s 25.

48 The Penal Code 1860, ss-268-270.

49 bdnews24.com, 'it's official: Bangladesh lists COVID-19 as a communicable disease' (*bdnews24.com*, 23 March 2020) <https://bdnews24.com/bangladesh/2020/03/23/its-official-bangladesh-lists-covid-19-as-a-communicable-disease> accessed 10 September 2020.

hand washing and observing other safety measures.[50] Thus, pursuant to the provisions of the2018 Act, the *Mobile Courts* can now take cognisance of certain criminal activities and impose on-site punishment, including imprisonment.[51] Given that the *Mobile Courts Act, 2009* is a procedural law,[52]the awarding of penalties will be guided by the substantive law provisions, in this case – the Act of 2018.

Box 1: Punishments attributable to the spread of COVID-19 under theCommunicable Diseases (Prevention, Control, and Eradication) Act, 2018

Section 24 (1) If any person spreads or aid in spreading the infection of any communicable disease, or knowingly suppress from other people the risk of being infected while coming in touch with any infected person or facility then such act of that person constitutes a crime.

(2) Whoever commits an offence under subsection (1) shall be punished with imprisonment for a term, which may extend to six months, or with fine not exceeding Tk. 1 lac, or with both.

Source: Communicable Diseases (Prevention, Control, and Eradication) Act, 2018

Although the government has announced COVID-19 as a *'pandemic'* and stressed that *'risk'* extended to the whole of Bangladesh, its relegation to the level of *'negligent public nuisance'* in some legal texts created some confusion. Also, there is a lack of public awareness about the gravity of the infection and the importance of following the health guidelines as suggested by the concerned authority. By the authority vested on it by the Act,the government issued a notification on 30 May 2020, whereby the use of facial masks and the maintenance of social distancing outside of the home was made *mandatory*, and violation of this order was made punishable (i.e. fine and imprisonment). Nevertheless, it was observed that the implementation of the penalties was somewhat slack in violation of Section 24 of the Act of 2018. The following Table demonstrates the low and varying imposition of fines in different places, indicating flexibility of law enforcement agencies in penalising offenders for violation of COVID-19 health guidelines.

Table 1: Fines imposed for violation of COVID-19 regulation, April-June 2020

Area	No of cases	Total fine	Avg. fine	Source
Bagerhat	39 person	36900	946.15	UNB; 4 June 2020
Dhaka	15 person	15,600	1040.0	Dhaka Tribune; 2 May 2020
Rajshahi	1 Institution	10,000	10,000	The Business Standard; 1 April 2020c

Imprisonment under the Act 2018 is also challenging during the COVID-19 crisis, as special arrangements are required to keep these detainees away from other prisoners. Thus, on-spot punishment consisting of a hefty monetary penalty for the *reckless*

[50] Tribune desk, 'Mobile courts to monitor health guidelines' *Dhaka Tribune* (Dhaka, 30 May 2020) <https://www.dhakatribune.com/bangladesh/2020/05/30/mobile-courts-to-monitor-health-guidelines> accessed 2 September 2020.

[51] Law Desk, 'The Laws Relating to Communicable Diseases' *The Daily Star* (Dhaka, 14 April 2020).

[52] Mobile Courts Act 2009.

spread of the infection seems more appropriate in this context.[53]

While some Asian countries declared curfew or imposed a lock-down immediately after detecting the first Corona positive patient in their respective jurisdictions, the Bangladesh government instead proclaimed a two-week national holiday after the first detection of a COVID-19 positive patient in the country. On 21 July 2020, the Health Services Department of the Government issued a circular making the wearing of masks mandatory when the number of total infections had already reached as high as 210,510.[54] However, this circular also had limited impact. Consequently, on 10 August 2020, the Cabinet, with Prime Minister Sheikh Hasina in the Chair, ordered field administrators to strengthen the execution of the circular which was issued in July.[55] This limited implementation of current legislative responses can potentially have severe consequences, as experts anticipated the second wave of Corona transmission during the winter.[56]

B. Legal Liability against 'Negligent' or 'Reckless' Movement of 'Free-riders': Lessons from Other Countries

The purpose of this section is to demonstrate that despite differences in socio-economic conditions in UK, Singapore, India, Sri-Lanka and Bangladesh, the presence of *'special law with stringent punishment provisions'* and *'strict implementation'* of existing laws (such as, curfews) could be two effective tools for controlling the spread of Coronavirus pandemic.

1. Legislative Response in the UK

The *Coronavirus Act 2020*, one of the earliest Acts to restrict COVID-19 was passed in the UK on 25 March 2020[57]. The UK remains innovative, prompt and flexible in developing its legislative provisions against this deadly pandemic.The UK already has the *Public Health (Control of Disease) Act 1984* to survive two other epidemics earlier. Nonetheless, the new *Coronavirus Act 2020* was enacted by inserting provisions –"*in connection with Coronavirus";* and "*for connected purposes"*[58]. The interim nature of this special law can be understood from its Preamble.The Preamble

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[53] It is evident from recent media reports that the Government is gradually adopting a hard stance against the unlawful omission of wearing masks. Please see response of the Cabinet Secretary to a query from a media perosonnel regarding the possibility of raising punishment against free-riding without masks. Ali Asif Shawon, 'Tk5,000 fine for not wearing a mask?' *Dhaka Tribune* (Dhaka, 23 November 2020) <https://www.dhakatribune.com/bangladesh/2020/11/23/govt-considering-stricter-punishment-for-not-wearing-masks> accessed 7 February 2021.

[54] 'Bangladesh makes wearing of masks mandatory, DGHS resigns' (*Medicircle,* 22 July 2020)<https://www.medicircle.in/bangladesh-makes-wearing-masks-mandatory-news-cases-everyday> accessed 2 September 2020.

[55] 'Cabinet orders mobile court operation to ensure mask use' *New Age* (Dhaka, 10 Aug 2020) <https://www.newagebd.net/article/113144/cabinet-orders-mobile-court-opeation-to-ensure-mask-use> accessed 12 September 2020.

[56] The Daily Prothom Alo (n 14).

[57] The Coronavirus Act 2020 (UK).

[58] Ibid, Preliminary Text.

of the *Coronavirus Act* 2020 declares:

> [This] Act (except for specified provisions) expires at the end of 2 years beginning with the date of Royal Assent, see s. 89 (subject to s. 90); and a relevant national authority may by regulations suspend (and subsequently revive) the operation of any provision of this Act (except for those provisions listed in s. 88(6)), see s. 88.[59]

The *Public Health (Control of Disease) Act 1984* still remains umbrella legislation which was enacted *to consolidate certain enactments relating to the control of disease and to the establishment and functions of port health authorities, including enactments relating to burial and cremation and to the regulation of common lodging–houses and canal boats, with amendments to give effect to recommendations of the Law Commission*.[60]On the other hand, the *CoronavirusAct* 2020 includes many provisions to meet emergencies, including the emergency recruitment of doctors, nurses and volunteers for a temporary period. New regulations to meet the Coronavirus emergency are still being made under several provisions of the *Public Health Act 1984*. Section 45 of the *Public Health Act 1984* discussed legislative requirements for making such regulations under different contexts.[61]For instance, as mentioned the Preamble to the *Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations, 2020* states that:

> These Regulations are made in response to the serious and imminent threat to public health, which is posed, by the incidence and spread of severe acute respiratory syndrome Coronavirus 2 (SARS-CoV-2) in England.

In accordance with section 45R of the Act, the Secretary of State is of the opinion that, due to urgency, it is necessary to make this instrument without a draft having been laid out before, and approved by a resolution of each House of Parliament.[62]

According to Regulation 20(2) of Regulation 2020, an offence is punishable with fine on summary conviction. Regulation 20(5) states that Section 24 of the *Police and Criminal Evidence Act 1984* applies concerning an offence under this regulation as if the reasons in subsection (5) of that section included—(a) to maintain public health or (b) to maintain public order. Regulation 21 includes *fixed penalty provisions for violation of Coronavirus restrictions* that support fair penalty and avoid partisan behaviour or corruption by law enforcement authority in this regard.[63]

Regulation 21 of the *Police and Criminal Evidence Act 1984* further suggests *an incremental penalty schedule for those who violate the regulation for the first time or second, third, fourth or many times hereafter*.[64] This differential penalty schedule is more appropriate for maintaining equity between the one-time offender and the

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59 Ibid.
60 The Public Health (Control of Disease) Act 1984 (UK), Introductory Text.
61 Ibid, s 45
62 Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020,Introductory Text
63 Ibid, reg 21 (1).
64 Ibid, reg 21 (6).

frequent reckless offender who violates health regulations and endangers public health. Though UK is not a neighbouring country of Bangladesh, understanding the features of legislative responses made by the UK to restrain the spread of COVID-19 is imperative, as it constitutes the basic legislative structure of counties in this subcontinent.

2. Legislative response in India

India remains one of the most hard-hit countries in Asia by the COVID-19 pandemic. Although India already had the *Epidemic Disease Act, 1897* in its legal domain, the main limitation lies in its quick and effective implementation[65]. There was serious concern whether the century-old law was enough to tackle a 21-century pandemic.[66] In many cases, government officials seemed non-responsive due to lack of sufficient legal provisions applicable to current day scenarios. Public response to such offences, (e.g. not wearing a mask) was slow, a fact compounded by the nominal penalty prescribed for breach of the relevant law.[67]

India started to apply quarantine rules and impose lock-downs at about the same time as Bangladesh. However, as shown in Table 2 below, in the absence of a *'special law'*[68] to tackle this unique pandemic and harsh punishment for violation of government regulations, the daily death toll of India sky-rocketed compared to other countries in the region, like Singapore, Malaysia, or Sri Lanka.

Table 2: Trend of newly detected cases and daily deaths in Asia

	New cases detected on			New Death on		
Country	**8-Mar 2020**	**2-Jun 2020**	**1-Sep 2020**	**8-Mar 2020**	**2-Jun 2020**	**1-Sep 2020**
Bangladesh	7	2381	2174	0	22	33

[65] The Epidemic Diseases Act 1897; Section 3 of the said Act provides that *"Any person disobeying any regulation or order made under this Act shall be deemed to have committed an offence punishable under section 188 of the Indian Penal Code"*.

[66] Ibid.

[67] According to s. 188 of the Indian Penal Code, "Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or trends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. Explanation: It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm."

[68] Manuraj Shunmugasundaram, 'India needs to enact a COVID-19 law' *The Hindu* (India, 8 May 2020) <https://www.thehindu.com/opinion/lead/india-needs-to-enact-a-covid-19-law/article31529036.ece#!> accessed 10 September 2020.

India	5	8171	69921	0	204	819
Malaysia	0	56	6	0	1	1
Pakistan	1	3938	300	0	78	4
Singapore	12	408	41	0	1	0
Sri Lanka	0	10	37	0	1	0

Source: *World Health Organization*

Although India is a big country with a massive population, by the beginning of 1 September 2020, Indian death tolls passed a point beyond rationalisation by any comparative statistics. The Hindu analysed why India appeared to fail in containing the pandemic:

> Both the UK and Singapore's laws set out unambiguous conditions and legally binding obligations. *As such, under Singaporean law, the violators may be penalised up to $10,000 or face six months imprisonment or both. In contrast, Section 188 of the Indian Penal Code has a fine amount of Rs.200 to Rs.1,000 or imprisonment of one to six months*. Even then, proceedings under Section 188 can only be initiated by private complaint and not through a First Information Report.[69]

It follows, therefore, that several Asian countries, such as,Sri Lanka, Malaysia and Singapore, have successfully managed to fight the Coronavirus by what appears to be the stringent enactment and strict application of new law.

3. Legislative response in Singapore

When the pandemic was first detected in Singapore in January 2020, they immediately decided in a Ministerial meeting to apply some restrictions on public movement in line with the SARS Regulation used in 2003[70]. Later, on 7 April 2020, Singapore passed the *COVID–19 (Temporary Measures) Act*, 2020. Under this umbrella Act, the *COVID-19 (Temporary Measures) (Control Order) Act, 2020* was passed to restrict public movement, control trade, social gatherings and other charitable activities.[71] The country even amended its Constitutional provisions to enable parliament members to attend sessions online. Later, *the Parliamentary Elections (COVID-19 Special Arrangements) Act, 2020* was passed in the Parliament to allow voters to cast their votes without coming to polling booths.

Although Singapore did not impose curfew to implement their quarantine rule like its Asian neighbours, it nonetheless made significant progress in bringing necessary amendments to its laws, enacting new laws and regulations and ensuring proper

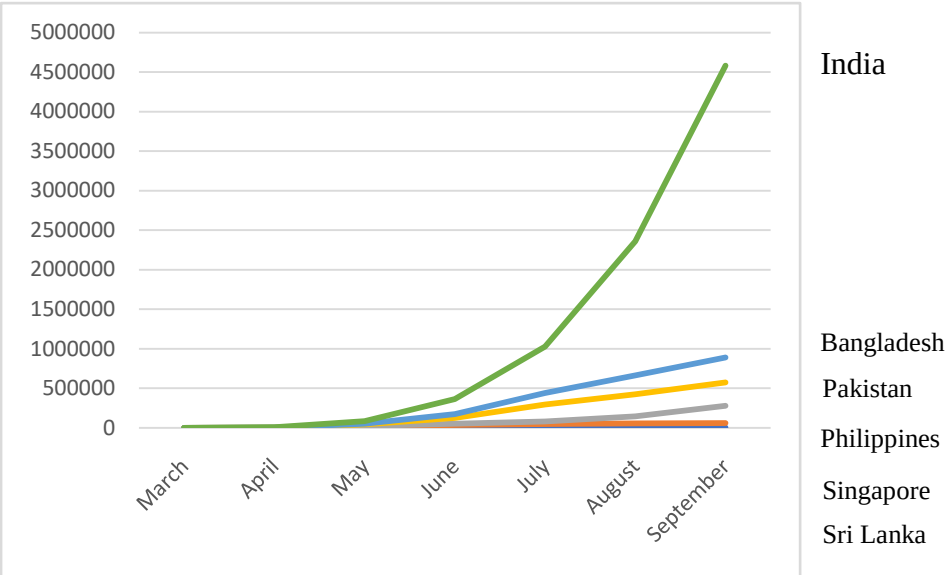
[69] Manuraj Shunmugasundaram, 'India needs to enact a COVID-19 law' *The Hindu* (India, 08 May 2020) <https://www.thehindu.com/opinion/lead/india-needs-to-enact-a-covid-19-law/article31529036.ece#!> accessed 10 September 2020.

[70] Kevin Y. Tan, 'Singapore's Regulatory Response to COVID-19' *The Regulatory Review* (Singapore, 15 June 2020).

[71] The COVID-19 (Temporary Measures) (Control Order) Regulations 2020(Singapore).

implementation of the same to contain the pandemic. As the comparative scenarios from the inception of the pandemic are revealed in Figure 1, Singapore has successfully controlled its Covid-19 induced death toll despite its much higher infection rate[72]. Despite a much weaker socio-economic condition compared to Singapore, Sri Lank similarly controlled the spread of the pandemic by way of curfews and lock-downs[73].

Figure 1: Cumulative number of COVID-19 cases detected in countries (March 2020 to September 2020)



Source: *World Health Organization, 'WHO Coronavirus Disease (COVID-19) Dashboard'*

It is evident from the above Figure that although compared to India and Bangladesh, the detection of COVID-19, which started in January 2020, was initially high in Singapore. Proper implementation and compliance with health directives have been effective in reducing new cases. [74] India and Bangladesh, both of which started to detect Coronavirus cases in March 2020, began with a low base. Gradually, their trend of seeing new patients surpassed that of Singapore[75].

4. Legislative response in Sri Lanka

[72] For effective control on the spread of the COVID- 19 Pandemic, Singapore imposed hefty monetary penalty of USD 7000 along with a maximum of 6 months imprisonment to those who provide false information in this regard. See more, Oppah Kuguyo, Andre P Kengne, and Collet Dandara, 'Singapore COVID-19 Pandemic Response as a Successful Model Framework for Low-Resource Health Care Settings in Africa?' (2020) 24(8) OMICS 470.

[73] Police patrol or even deployment of Army was also observed in UK, Spain, Italy and South Africa for an effective implementation of lock-down. See more, Ibid.

[74] 'WHO Coronavirus Disease (COVID-19) Dashboard' (*WHO Website*) <https://covid19.who.int/?gclid> accessed 16 September 2020.

[75] Ibid.

On 20 March 2020, only a couple of days earlier than Bangladesh and India, Sri Lanka imposed a lock-down to restrain the spread of COVID-19. The Sri Lankan authorities announced a three-day nationwide *'curfew'* to curb the spread. The nationwide curfew started at 18:00 (local time) on Friday, 20 March 2020, and lasted until 06:00 on Monday, 23 March, during which individuals were prohibited from leaving their homes except for essential needs. This 24-hour curfew continued for a month during which the length of the curfew was gradually relaxed spanning from midnight to 4 AM.[76] Once the curfew was withdrawn, Sri Lanka started to impose lock-down of different degrees. This early imposition of curfew under the *'doctrine of necessity'* helped this island nation to create sufficient social awareness about the gravity of the pandemic and the response required in this regard.

As indicated in Figure 1 above, the cumulative detection of COVID-19 patients in India alone was much higher than any other country depicted here. Since India has a vast population, it is not unseemly for the number of COVID-19 patients in India to be increased. What is alarming is that the detection of new COVID-19 cases in India.As indicated by the trend line, the rate of new patients have increased every month and made the trend line steeper over time. On the other hand, Bangladesh, Pakistan and the Philippines managed to hold a moderate increase over time. Singapore and Sri Lanka were most successful in keeping the cumulative detection rate almost flat over time. While Pakistan's total population is larger than the total population in Bangladesh, the incremental detection of Covid cases in Pakistan was higher than in Bangladesh. Similarly, Sri Lanka has managed to keep the number of Covid cases low despite having a dense population, which is three times more than the population of Singapore. It therefore appears, that both legislative and administrative responses based on prompt and stringent penalties effectively controlled the pandemic in these countries.

V. DOES THIS ONLY QUALIFY AS A 'NEGLIGENT' PUBLIC NUISANCE OR CAN IT BE DEEMED TO BE A 'RECKLESS' PUBLIC HEALTH OFFENCE?

Prior to the detection of the novel' Coronavirus in Bangladesh on 08 March 2020, the spreading of the infectious disease endangering life was dealt with under s. 269 (Chapter XIV relating to public nuisance) of the Code, 1860 as follows:

> Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both (s. 269).

[76] Editorial, 'Sri Lanka completely lifts coronavirus curfew as no community infection in nearly two months' *The Indian Express* (Chennai, 28 June 2020) <https://www.newindianexpress.com/world/2020/jun/28/sri-lanka-completely-lifts-coronavirus-curfew-as-no-community-infection-in-nearly-two-months-2162628.html> accessed 08 March 2021.

The same punishment, i.e. "six months, or with fine" has also been incorporated in Section 291 of the Code 1860 for reckless or repeat public nuisance that is indeed being done by reckless 'free riders' by repeatedly violating health regulations during the COVID 19 pandemic. By the passage of time, in 2018, another special law was enacted to regulate negligent behaviour of an individual that may transmit noxious and infectious diseases; this has already been declared a criminal activity by the 2018 Act.

As stated earlier, the *Mobile Courts Act, 2009* has already included relevant sections of the Schedule 2018 Act. However, as a general law, the Code, 1860, considered this crime within the ambit of an offence relating to 'public nuisance' (i.e. Chapter XIV) and imposed a minimal penal provision, while the Act of 2018, imposed a comparatively higher penalty. Careful consideration of section 24(1) of the Act of 2018 indicates that a maximum penalty of Tk.100,000 has been imposed, which is sufficient to curb frequent violations if it is rigorously implemented. The Act of 2018failed to effectively distinguish punishment between single negligent violators and reckless frequent or recurrent violators of health regulations, as was done, for instance, in the UK and Singapore.

Despite several warnings from WHO and other international organisations regarding possible spread throughout the world, many countries, including Bangladesh, did not seem to take these seriously, which resulted in wide community transmission throughout the country. At this point, it would not be exaggerated to mention that the Coronavirus spread in Bangladesh rapidly expanded since 08 March 2020 until 30 September 2020 whereby the death toll had already passed 5,231. Notwithstanding, many people in Bangladesh are 'free-riders' going about normally without wearing masks, and adopting other preventive measures, knowing full well that they might be posing risks for others, including death by their *indirect attribution to aggregate harm to others*. Sadly, they will simply be liableforoffences relating to *'negligent'* public nuisance under s. 269 of the Code, 1860 or a minimum penalty under the Act 2018. Unless *stricter punishments* are in place and unless relevant laws are *strictly enforced*, these 'free-riders' will continue to pose health risks for others. Alternatively, their criminal liability should go beyond the notion of a *'negligent public nuisance'* and extended to *'reckless public health offence'*, which is likely to deter repeat occurrences of negligence.

VI. CONCLUSION

The stringent implementation of the law was successful in curbing the spread of COVID-19 in many Asian countries. As the potential of the virus reaching more people across more significant geographic coverage increase inBangladesh, a legislative response with a rigorous implementation like in other countries can be more appropriate to encompass the pandemic effectively. Although, in contemporary political culture, the declaration of an emergency[77] by using the Constitutional

[77] For example, the Philippines has promulgated ‘emergency’ in order to curb the COVID-19 pandemic, which came into existence on 24 March 2020 and was initially effective for three months

provisions could create controversies among legal scholars, yet the imposition of curfew would be possible under the *Special Powers Act, 1974* to restrain free movement and in turn, to contain the deadly disease.[78]The imposition of curfew was effectively employed in some countries to curb the spread of this life-threatening disease. Drawing on lessons from other countries in South and East Asia, this paper suggests some amendments to the 2018 Act. Although the Act imposes a hefty fine, the slack implementation does minimal to address the emergency. This could have severe implications for future waves of the infection. Thus, it is high time for Bangladesh to amend the law and incorporate *'differential penal provisions'* distinguishing *'first-time negligent offenders'* from *'frequent reckless offenders'*who repetitively violatethe health guidelines. The law should ensure that 'free-riders' who recurrently do not comply with health guidelines of the concerned authority, will be criminally liable to the extent that the act of *'negligent public nuisance'* should be extended to a *'reckless public health offence'*. Indeed, the need for efficient mobile court operations could not be emphasised more in addition to creating strong social awareness[79] in order to induce the desired deterrent effect and curb the spread of the *'invisible enigma'* of the Century.

only then further extended up to 30 September 2020 (s.9). See more on The Corona Virus Act, 2020 of Philippines (Republic Act No. 11469), where s. 2 states that "State of national emergency – Presidential Proclamation No 922, s.2020, was issued declaring a State of Public Health Emergency throughout the Philippines due to the Coronavirus disease 2019 (COVID-19) in accordance with the recommendation of the Department of Health (DOH) and the Inter-Agency Task Force for the Emerging Infectious Disease". In order to mitigate any debate on the said national emergency, section 7 of the same Act 2020 clarifies that," Nothing herein shall be construed as an impairment, restriction or modification of the provisions of the Constitution. In case the exercise of powers herein granted conflicts with other statutes, orders, rules or regulations, the provisions of the Act shall prevail". The Philippines Official Gazette, <https://www.officialgazette.gov.ph/downloads/2020/03mar/20200324-RA-11469-RRD.pdf> accessed 26 September 2020.

78 The Special Powers Act 1974, s 24(1).

79 According to the Act of 2018, the purpose of its enactment was to prevent, control, and eradication of communicable diseases and raise public awareness to deal with public health emergencies and reduce health hazards. As Bangladesh is a lower-middle income country with numerous illiterate people living in urban slums and villages, continuing lockdown, strict maintenance of health regulations and enhanced testing and healthcare facilities are suggested as frontline measures to tackle this situation. See, Saeed Anwar, Mohammad Nasrullah and Mohammad J Hosen, 'COVID-19 and Bangladesh: Challenges and How to Address Them' (2020) 8 Frontiers in Public Health <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7203732/> accessed 08 February 2021.

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Development of the Laws of Tortious Liability in Bangladesh

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Throughout advanced legal systems, tort law is a very popular and an advanced area of practice. Unfortunately, this is not the case with the legal system of Bangladesh. Generally speaking, which is the worst of all, there is a misconception that there is no tort law in Bangladesh. There is no doubt that this misconception is fundamentally based on the fact that we do not have any statute respecting tort law. However, we have some statutes in our country that tacitly address various issues of tort law both in our criminal and civil jurisprudence. On top of that both of our Appellate Division and the High Court Division of the Supreme Court have given some substantially important judgments that have directly developed the laws of tortious liability within our jurisdiction. In this article, some of those very important judgments of our Supreme Court would be discussed with specific reference as to how those judgments are having an impact in developing the tortious regime within the legal system of Bangladesh.

Bangladesh Beverage Industries Limited v Rawshan Aktar and Ors[1] is a seminal case in the context of assessment of damages in tortious claims. Moreover, in this case the apex court of Bangladesh has laid down significantly important principles which would substantially assist the plaintiff to identify the heads of damages and also to calculate the quantum of damages when the plaintiff is seeking relief from the court of law under the cause of action of negligence. Here the suit in question was originally filed in the form of a Money Suit by the wife and two minor sons of the deceased as plaintiffs whereby the deceased who was a news reporter of "The Daily Songbad" died of a fatal accident caused by a mini truck hitting him from the wrong side while he was crossing the road. The trial court in decreeing the suit in favor of the plaintiffs awarding damages amounting to Tk3,52,97,000/- found that the driver of the defendant was driving the vehicle negligently, recklessly and in violation of law. Before embarking on the aspect of quantum of damages, it is noteworthy to mention that admittedly the cause of action in that case was negligence, the root of which obviously lies in tort law.

This case subsequently went up to the High Court Division whereby the High Court Division allowed the appeal-in-part and modified the judgment and decree, and finally to the Appellate Division whereby the Appellate Division disposed of the leave petition with some observations upholding entitlement of the plaintiffs in the suit to get a decree of Tk 1,71,47,008/-.Therefore, it is manifestly clear from the judgment of the apex court that in upholding the decree, though in a modified form, the highest court of our country recognized the tort of negligence within the jurisdiction of Bangladesh. Following Article 111 of the Constitution of the People's

[1] *Bangladesh Beverage Industries Limited v Rawshan Aktar and Ors* (2016) 4 CLR (AD) 411.

Republic of Bangladesh, the implication of this judgment is enormous because all the courts subordinate to the Appellate Division which includes the High Court Division are bound by the law declared by the Appellate Division.

Now, two things certainly follow this judgment. Firstly, the tortious cause of action of negligence has its root at common law or case law in Bangladesh as this is the same in both the United Kingdom and India. Secondly, the claim under the cause of action of negligence would have to be brought by the plaintiffs in the form of a money suit. Dealing with the first aspect requires some consideration of some settled laws in most of the advanced jurisdiction like that of the UK and United States of America. As the UK has a common law jurisdiction and as our legal system still has a lot of laws that we have retained since the British period including the Code of Civil Procedure 1908, it is worthwhile to briefly look into the development of the law of negligence in the UK.

Donoghue v Stevenson[2]is certainly the starting point in this regard which is the most classical English case on the point of tort law and the law of negligence. The UK House of Lords in that case developed the famous doctrine of neighbor principle. Determination of the success of the plaintiff's claim for negligence would depend on the proof of certain elements, i.e. the duty of care, breach of that duty of care, causation and remoteness of damages. Over the time, different cases have laid down different tests for proving each of these elements. When professionals were sued for breach of their professional duty, the courts have laid down special tests for professionals. After many academic debates and changes of some common laws, it can now safely be assumed that the above-mentioned elements of the law of negligence are now universally accepted. The Indian jurisdiction has also adopted a similar approach towards the law of negligence.

In *Bangladesh Beverage Industries Limited*, after assessment of evidence, the trial court found that the driver of the defendant was recklessly driving the mini truck in the course of his employment causing serious injury to the victim which led to his death in the hospital; and also, that the driver of the defendant was driving the vehicle negligently, recklessly and in violation of law. Analysis of these two findings is vitally important to understand the nature of development of tort law in Bangladesh through case laws. While finding the defendant liable for the tort committed by its driver in the course of his employment, the trial court and both the Divisions of the Supreme Court of Bangladesh applied the doctrine of vicarious liability. Learned advocate of the petitioner argued that the trial court erred in law in failing to find out whether the employee was acting within the course of his employment before the employer can be held vicariously liable for his employee's tort. Even though the Appellate Division held that the High Court Division rightly found that the petitioner was vicariously liable for the fault of the driver, this aspect of vicarious liability was not discussed in the judgment. This is why it is pertinent to investigate into how the doctrine of vicarious liability is getting developed in our jurisprudence and also what the legal requirement of the doctrine is when proof of the same will be in issue.

[2] *Donoghue v Stevenson* (1932) UKHL 100.

It should be noted that vicarious liability, being a tortious concept, is not a cause of action. Vicarious liability is in essence a form of joint liability whereby the employer can be sued for the tort committed by its employees in course of his employment. Therefore, application of the doctrine of vicarious liability allows the plaintiff to hold liable the employer for the action or omission of his employee even though the employer was not directly involved in the said commission or omission. In determining the issue as to who is an employee, classically the level of control over the supposed employee by the employer is to be looked into.[3]Whether or not the employer has sufficient control over his employee is certainly a matter of fact and it requires taking of evidence from the contesting parties. An interesting case on this point is *Grameenphone Ltd. v Chairman, First Labour Court, Dhaka and Ors*[4]even though this case was decided in our writ jurisdiction and in the same the judgment of the Labour Appellate Tribunal was in issue.

Throughout the world, outsourcing of workers from third parties to the supposed employers is a burning issue. If we turn to the UK law, *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*[5]marks a radical change in the English tort law approach whereby for the first time the concept of dual vicarious liability was established. Prior to *Viasystems*, it was understood that the doctrine of vicarious liability applies to only one employer and it was one of the fundamental tasks of the court to identify who the potential employer is where more than one employer was in the scene. Clearly the decision in *Viasystems* is a dynamic judgment evidently showing the ability of common law to respond to changing social conditions.[6] The judgment of the above cited *Grameenphone Ltd* case in our jurisdiction is, in my opinion, somehow laying down a somewhat different principle to that of *Viasystems*.

In *Grameenphone Ltd*, even though the respondent workers had been working and providing services for the petitioner Grameenphone Ltd company, their Lordships concluded that there was no contract of employment or service between the respondent worker and the petitioner Company Grameenphone. Their Lordships further concluded that the respondent workers are merely outsourced workers/drivers employed by the respondent No. 4 (Smart Services Ltd. and/or Jamsons International) on the terms and conditions agreed between the petitioners and the respondents No. 4. Thus since the respondent workers are not even employees of the petitioner Grameenphone the question of treating them 'permanent workers' of the petitioner does not arise.[7]Therefore, so far as outsourcing of employees is concerned, the *Grameenphone Ltd* case would stand as a strong proposition in favor of the employers against who the plaintiffs might bring a tortious claim under the doctrine of vicarious liability.

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3 Fleming James Jr, 'Vicarious Liability' (1953-1954) 28 Tul L Rev 161, 173.

4 *Grameenphone Ltd. v Chairman, First Labour Court, Dhaka and Ors* (2018) 70 DLR 581.

5 *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* (2005) England & Wales Court of Appeal, Civil Division (EWCA Civ) 1151 (2006) Queen's Bench (QB) 510.

6 Paula Giliker, 'Vicarious Liability on the Move: The English Supreme Court and Enterprise Liability' (2013) 4 JETL 306, 307.

7 *Grameen Phone Ltd* (n 4) para 33.

Another very interesting case of our jurisdiction on the point of vicarious liability is *British American Tobacco Bangladesh Company Ltd v Begum Shamsun Nahar*[8]where a female employee of the appellant company filed a money suit against the employer company claiming damages for the tort committed by its employees at her workplace by committing acts of sexual harassment and bullying on her even when she had been persistently bringing the same to the notice of her superior officer. The employer company filed an application for rejection of plaint in the trial court which was rejected and then the employer company filed a civil revision in which the High Court finally discharged the Rule. Subsequently the employer company moved a civil petition for leave to appeal before the Appellate Division.

The Appellate Division in the *British American Tobacco* case held that "A person can be liable for tort as well and damages may be claimed against him for such wrong doing as well as against an organization or establishment if it fails to ensure the prevention of sexual harassment and bullying to a woman, where she can work with honour and dignity and without being harassed or disturbed by her male boss or other male colleagues."[9] The Appellate Division further observed that "…Whatever may be the allegations made by the plaintiff in the plaint, whether the employees of the defendant-company harassed her in the work place, or the plaintiff made written complaints to the management of the defendant-petitioner-company about the sexual harassment and bullying by the said employees of the defendant-petitioner-company and whether the defendant-petitioner-company took any step to remedy the grievances of the plaintiff-respondent, or the defendant-petitioner-company took steps to prevent or deter the commission of the acts of sexual harassment and bullying by its employees and whether the defendant-petitioner-company could be held responsible for such sexual harassment and bullying caused to the plaintiff-respondent are all questions of facts and can only be decided on the evidence to be adduced by the concerned parties in the trial of the case. Moreover, question of vicarious liability of the defendant-petitioner-company is also a question of fact to be proved by adducing evidence. Both the High Court Division and the Trial Court from clear reading of the plaint rightly found that the plaintiff has clearly stated the facts of the cause of action to bring the suit against the defendant. The power to reject a plaint should not be exercised hastily without affording opportunity to the plaintiff to cure the defect or to amend the plaint."[10]

From the above discussions, it is clear that the settled law of our jurisdiction is that vicarious liability is a matter of fact, and not that of law. Determination of the issue as to whether or not the employee has committed a tort in course of his employment is, thus, clearly a matter of fact which can only be ascertained after all the contesting parties have adduced evidence before the trial court. However, it remains arguable as to what would amount to a course of employment and to what extent the court would extend the doctrine of vicarious liability, e.g. when the employee is working for his

[8] *British American Tobacco Bangladesh Company Ltd v Begum Shamsun Nahar* (2014) 66 DLR (AD) 80.

[9] Ibid, para 12.

[10] Ibid.

own purpose and not for the purpose of facilitating his employer's business. Noteworthy to mention in this regard that the meaning of "course of employment" has been very debatable in the recent years in many jurisdictions. However, in light of the *British American Tobacco* case, it can safely be said, at least for the time being, that whether or not the employee has committed the tort in course of his employment is a matter of fact the ascertainment of which would certainly require adducing of evidence before the trial court.

It is also very interesting to note that the criminal jurisprudence of our country also recognizes the concept of vicarious liability. The relevant section in this regard is section 34 of the Penal Code 1860 which reads as follows: "When a criminal Act is done by several persons in furtherance of common intention of all each of such person is liable for that Act in the same manner as if it were done by him alone." Section 34 of Penal Code thus recognizes the principle of vicarious liability in criminal jurisprudence.[11] It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence.[12]As vicarious liability does not and cannot operate as a cause of action in the context of civil law, it cannot operate as an offence in the criminal law context. Proof of the doctrine of vicarious liability is completely dependent on the evidence adduced by the parties in a case and this is applicable in the context of both civil and criminal law. Therefore, it can very strongly be argued that vicarious liability is an established concept in our jurisprudence and judicial recognition of the same by the apex court of our country certainly means that substantial development of tort law in the Bangladeshi legal system is only just a matter of time.

Now returning to the second substantial finding of the trial court in the *Bangladesh Beverage Industries Limited* case to the effect that the driver of the defendant was driving the vehicle negligently, recklessly and in violation of law, a very interesting point comes to the forefront. From this finding this is clear that the trial court decreed the suit on recognition of the cause of action of negligence which undoubtedly has its root under tort law. Later, the High Court Division and the Appellate Division have also recognized this cause of action of negligence under tort law. Both the Divisions of the Supreme Court heavily emphasized on various tortious measures while assessing the heads of damages and determining the quantum of the same. However, before embarking on the aspect of damages of tortious nature, it is pertinent to understand how the tort of negligence and other torts are getting recognition within our legal framework.

Our High Court Division in a case while recognizing the tort of nuisance has stated that respecting tort law claims, we do not have any statute of our own.[13]Therefore, our courts have always adopted the English common law as being consonant to

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11 *Aminul Islam and others v The State* (2007) 12 BLC 332, para 16.

12 Ibid.

13 *Wahid Mia alias Abdul Wahid Bhuiyan v Dr. Rafiqul Islam and others* (1997) 49 DLR 302, para 9.

justice, equity and good conscience.[14] I wholeheartedly agree with this view as tort is a subject mostly based on common law under the UK legal system. Even though popular tortious causes of action like occupiers' liability, product liability and defamation have started to get statutory framework in the English legal system, the most important cause of action of negligence still has its basis in common law in the UK. As already seen, the law of tort is developing in Bangladesh in the form of case laws of both the Divisions of the Supreme Court. The two judgments of the Appellate Division already cited above contain very specific reference in this regard which would further advance our understanding in this area.

In the *Bangladesh Beverage Industries Limited* case, the Appellate Division specifically approved the observation of the High Court Division whereby the High Court Division opined that the judges are empowered to create new tort and also that the pain, agony, anguish, suffering and loss of expectation of life are tortious liability for which monetary compensation can be awarded.[15] While maintaining that tort is a common law action, the Appellate Division in the *British American Tobacco* case gave the following findings:

> "9. The original definition of tort that appeared in the well-known work on Law of Torts by Clerk and Lindsell ran as follows: 'A tort may be described as a wrong independent of contract, for which the appropriate remedy is a common law action.' Underhill amplifies this definition thus:
>
> A tort is an act or omission which is not authorized by law, and independently of contract infringes either-
>
> (a) some absolute right of another;
>
> (b) some qualified right of another causing damage; or
>
> (c) some public right resulting in some substantial and particular damage to some person beyond that which is suffered by the public generally;
>
> and gives rise to an action for damages at the suit of the injured party."[16]

Therefore, a thorough perusal of the said two judgments of the apex court makes it clear that the law of tort has its basis at common law and, thus, the same would have to be developed through case laws. No doubt that it requires judicial activism on the part of the judges and the recent attitude of the judiciary towards such development obviously requires close scrutiny to deeply understand the judicial approach towards tort law in Bangladesh. Even after the two judgments of the Appellate Division cited above have been reported in well reputed law journals of the country, recognition of the law of tort by the courts below has been almost insignificant. The *British American Tobacco* case has been reported in 2014 and the *Bangladesh Beverage Industries Limited* case has been reported in 2016. Even after the lapse of a

[14] Ibid.
[15] *Bangladesh Beverage Industries Ltd* (n 1) para 27.
[16] *British American Tobacco Bangladesh Company Ltd* (n 8) para 9.

substantial period since then, the number of reported case laws in the areas of tort law is almost non-existent, except for some very few. In the meantime, compensation culture is somehow getting developed within our writ jurisdiction but, in my opinion, the law of tort would have to be developed within the civil jurisdiction of our legal system as this is the case with all the advanced legal systems including India.

The concern as to the lack of development of tort law was made manifestly clear by the High Court Division in the case of *Catherine Masud and others v Md Kashed Miah and others*.[17]In the *Catherine Masud* case, the High Court Division firstly disposed of some transfer petition cases under Article 110 of the Constitution of the People's Republic of Bangladesh. In this case, the High Court Division made the following observations:

> "15. We also note that the petitioner's claim raises questions as to application of the law of tort in Bangladesh. As part of the English Common law, the law of tort has become part of the law in India, as it is not considered contrary to "justice, equity, and good conscience" (Law of Torts by Dr. Nurun Nahar, published by Bangladesh Law Book Co. 1st Edition, 2011). It has also become part of the law in many other Commonwealth countries. However, law of tort is not integral part of the legal structure of Bangladesh. This is primarily because the subordinate courts do not feel empowered to determine a tortious claim unless the tortious claim is purely statutory. For that reason, we do not see rulings of the subordinate courts on medical negligence, vicarious liability etc. We were unable to provide guidelines since we were not called upon to review the issues relating to tort in entirety. In our opinion, the time has come for us to review the law of tort and consider whether law of tort should be incorporated in Bangladesh law so that claims arising from negligence, be it medical or otherwise, are properly dealt with."[18]

Two very important points emerge from the above observations of the High Court Division. First of all, in both the *Wahid Mia* case[19] (cited above) and *Catherine Masud* case, the High Court Division emphasized on the concept of "justice, equity and good conscience" for recognizing and developing the law of tort in Bangladesh. Secondly, in the *Catherine Masud* case, the High Court Division expressed its concern explicitly about the lack of rulings of the subordinate courts on matters of tort law as because the High Court Division felt that the subordinate courts do not feel empowered to determine a tortious claim. Earlier it was noted that Appellate Division expressed that the judges are empowered to create new tort. Now the question arises as to the validity of the concern of the High Court Division about the lack of rulings from the subordinate courts in tort law cases even when the Appellate Division has expressly approved the judicial empowerment in creating new tort.

Even though this question does have an academic dimension, the answer to it lies in the practical arena. If we consider various news getting huge coverage in national media as well as social media, we would find a substantial number of cases involving

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17 *Catherine Masud and others v Md Kashed Miah and others* (2015) 67 DLR 523.
18 Ibid, para 15.
19 *Wahid Miah* (n 13).

allegations of clinical negligence, rash and reckless driving, fire at work places etc., all of which are matters of tortious nature. However, in practice, very few cases are filed involving tort law claims and very few of them ultimately see some light. My opinion is based on the very few number of reported cases in the law journals involving tort law cases. Here the problem for development of tort law is certainly not legal as our apex court has given the judges the power to create tort law and apply them to any given scenario. Rather the problem is with our reluctant attitude towards developing tort law in this country. The solution, in my opinion, lies with the increase in judicial activism in all the courts of our jurisdiction while dealing with tort law claims. Bearing in mind the extreme effect of tort on the family of the victim and the plaintiff, high time has come to take the matter seriously and work on the substantial development of tort law within our legal system.

In tort law claims, one of the most important issues relates to the identification of the heads of damages and assessing the quantum of damages. In the *Bangladesh Beverage Industries Limited* case, plaintiffs claimed damages on several heads on the basis of the monthly salary of the deceased till his retirement age, receivable increments per year, potential earning for subscribing articles in different papers and journals, deprivation of the minor sons of their father's affection, care and nursing, jeopardy in the education of the children, loss caused by sudden and untimely widowship of the wife of the deceased along with her deprivation from her husband's care, protection, nursing and affection, struggle for food, homestead, treatment and other benefit, other potential income and loss of reputation of the family. Relying on *Sri Manamath Nath Kuri v Mvi Md Mokhlesur Rahman and another*,[20]the High Court Division held that the plaintiffs are entitled to compensation for continuous pain and suffering and such compensation must have to be given in a lump sum basis and not on calculation.

In the *Bangladesh Beverage Industries Limited* case, the Appellate Division drew a distinction between general damages and special damages. General damages flow from the kind of harm and loss which naturally and normally follows from the wrong and which do not need to be specifically pleaded and proved, such as personal injuries, pain and suffering, loss of limbs, loss of expectation of life, future pecuniary loss etc. Special damages flow from such kind of loss as will not be legally presumed to have followed from the defendant's wrongful act, but which must be specifically pleaded and be strictly proved, such as pecuniary loss actually suffered up to the date if trial, e.g. loss of earning etc. So far as the actual or prospective pecuniary loss is concerned the amount of compensation can be assessed with a degree of accuracy.[21] The principle of fair and reasonable compensation is more appropriate to non-pecuniary heads of damage such as pain and suffering. It has been well established that pain and suffering is a head of damage for which monetary compensation can be awarded.[22]Moreover, the Appellate Division with approval cited some observations of the case law reported in 22 DLR (SC) 51 which is as follows:

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[20] *Sri Manamath Nath Kuri v Mvi Md Mokhlesur Rahman and another* (1960) 22 DLR (SC) 51.
[21] *Bangladesh Beverage Industries Ltd* (n 1), para 28.
[22] Ibid.

> "26. Assessment of damages in such a case must, therefore, necessarily be to some extent of a rough and approximate nature based more or less on guess work, for, it may will be impossible to accurately determine the loss which has been sustained by the death of a husband, wife, parent or child."[23]

The Appellate Division further held that no definite or hard and fast rule can be laid down respecting assessment of damages in tort law claims. The plaintiff would be able to recover damages for their financial sufferings that they would be able to prove. While making the assessment of such damages, the court will have to take into account the age of the deceased, his or her health, earning capacity and also the chances of advancement. There must be evidence of "reasonable expectation of pecuniary advantage" as opposed to "mere speculative possibility."[24]

In the *British American Tobacco* case, the Appellate Division recognized the devastating effect of sexual harassment on both the economic opportunities and physical and emotional well-being of a working woman. The Appellate Division further noted that sufferings arising out of sexual harassment may include insomnia, depression, nervousness, fear, feeling of powerlessness and other symptoms of psychological harm which sometimes may lead to a complete emotional breakdown. In consequence of this emotional breakdown and sometimes independently physical effects such as headache, loss of appetite, loss of weight, nausea and fatigue may occur. It hinders a woman's chances of economic prospects by reducing her efficiency and productivity at work. Therefore, sexual harassment definitely gives rise to the liability under the law of tort.[25]

In the most recent case of *Catherine Masud and Ors. v Md. Kashed Miah and Ors.*,[26] the High Court Division while disposing of an application under section 128 of the Motor Vehicles Ordinance, 1983 for compensation over the road accidental death of Abu Tareque Masud and injuries caused to claimant No. 1, Catherine Masud, reviewed the related laws of the country in great details. Here claims were made under different heads, such as loss of income, loss of dependency, loss of future advancement, loss of estate, loss of love and affection, medical expenses, funeral expenses and damages to property.

In the *Catherine Masud* case, the High Court Division while determining the issue of quantum of compensation rightly observed that neither the Motor Vehicle Ordinance nor the Motor Vehicle Rules nor any other statute prescribes any criteria or guideline in determining the quantum of compensation payable in case of a road accident.[27]A thorough perusal of the judgment in the *Catherine Masud* case makes it abundantly clear that the High Court Division thoroughly followed the guidelines of the *Bangladesh Beverage Industries Limited* case, word by word, while determining the quantum of damages in favour of the plaintiffs in that case. The High Court Division

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[23] Ibid, para 29.
[24] Ibid.
[25] *British American Tobacco Bangladesh Company Ltd.* (n 8) para 11.
[26] *Catherine Masud and Ors. v Md. Kashed Miah and Ors.* (2018) 70 DLR 349.
[27] Ibid, para 186.

further quoted the following guidelines from the *Bangladesh Beverage Industries Limited* case in this regard:

> "It is the consistent view of the apex courts of the Sub-Continent and also of the courts of the United Kingdom that assessment of damages in such cases necessarily be to some extent of rough and approximate nature based more or less on guess work because it would be impossible to accurately determine the loss which has been sustained by the death of the victim who happened to be the husband and the father of the plaintiffs. It has also been observed in the decision reported in 22 DLR (SC) 51 at page 59 that although no rule of mathematical calculation can be adopted in every case yet it is the duty of the plaintiff to adduce some evidence to afford the court a reasonable basis for the ascertainment of the damages suffered. The Supreme Court of Pakistan in the decision reported in 22 DLR (SC) 51 held that merely because some element of guess work has been introduced in the calculation it cannot be said that there has been any departure from the principles laid down in the decided cases for determining the quantum of damages in such cases."[28]

Therefore, in light of the observations given by both the Divisions of our Supreme Court, it can safely be assumed that neither Division gave any concrete guideline for determining the quantum of damages in a tort law claim. However, at the same time, it should have to be borne in mind that both the Divisions awarded damages and compensation favoring the plaintiffs from where it is easily inferable that the plaintiff succeeded in proving their case and cause of action and won damages of tortious nature. Hence, the issue obviously arises as to the basis on which both the Divisions relied while compensating the plaintiffs with damages of tortious nature because every award of compensation given by the court of law must have to be supported by concrete basis and sound reasoning. If such basis can be discovered in light of specific reference, no doubt the same will enormously assist the lawyers practicing the laws of tort, the judge giving judgment in tort law cases, academicians researching in tort law and lay people thinking of how to agitate their grievances with appropriate evidence before the proper forum.

From judgments of the *Bangladesh Beverage Industries Limited* case and *Catherine Masud* case, it is clear that both the Divisions of the Supreme Court have adopted similar views regarding the test to be applied in determining the quantum of damages of tortious nature. Five very important principles become apparently visible from a thorough reading of those judgments. Firstly, ascertainment of damages of tortious nature cannot be based on a mere rule of mathematical calculation. Secondly, such assessment of damages by the court would largely depend on a guess work on the basis of rough and approximate estimate of damages sustained by the plaintiff. Thirdly, the plaintiff requires to prove his or her damages by adducing evidence in support of his or her claim. Fourthly, the evidence adduced by the plaintiff in this connection would be of such nature so as to afford the court a reasonable basis for the ascertainment of the damages suffered. And finally, the whole assessment of quantum of damages by the court would have to be based on an objection basis, and certainly not on a subjective basis.

[28] Ibid, para 192.

In the *Catherine Masud* case, the High Court Division while considering the aspect of damages sustained by the plaintiffs on account of loss of their dependency took into account the monthly income of the deceased Tareque Masud which the plaintiffs proved by adducing his income tax returns, the fact that Tareque Masud was a renowned film-maker which was a matter on record and also the fact that there was nothing on the record to show that he had any health problem. The High Court Division then considered the aspect of compensation on account of loss of love and affection. While considering this head, the Division held that this is a very sensitive aspect and there is no concrete and strict principle for quantifying love and affection in terms of money and also that the nature of relationship between the deceased and the plaintiffs was a very important consideration which can be proved by facts showing continuous and visible manifestation of love. The High Court Division considered the aspect of loss of future advancement as being too remote as it gets merged with the of loss of dependency. The High Court Division in considering the head as to loss of estate found no evidence in support of the plaintiff's claim. In considering the head of medical expenses, funeral expenses and the destroyed vehicle, the High Court Division took into account the relevant evidence adduced by the plaintiffs in the concerned behalf. Therefore, the *Catherine Masud* case makes it clear that the plaintiffs entitlement to damages of tortious nature is a matter of evidence, and also that the principles laid down in the *Bangladesh Beverage Industries Limited* case are to be strictly adhered to while making an assessment of damages.

From the discussions as made above, it is manifestly clear that the law of tort is a recognized cause of action under the legal system of Bangladesh. Our Appellate Division and the High Court Division have considered various causes of action under the law of tort and have awarded compensation and damages of tortious nature in favor of the plaintiffs. A thorough analysis of the judicial attitude towards development of tort law in Bangladesh demonstrates the emphasis given by our Supreme Court primarily on the recognition of different heads of damages sustained by the plaintiffs in tort law claims. Our Supreme Court has also shown concern regarding the test to be applied while assessing the quantum of damages. However, in my opinion, it is also very important to understand the elements of different torts including negligence because the plaintiffs will need to prove these elements first in the trial court before winning his or her tort law claim. Then shall eventually come the aspect of quantum of damages. As our Appellate Division has expressly stated that the courts are empowered even to create new torts, our trial courts should not be hesitant to develop tort law in line with the settled laws of our country, the UK and other advanced jurisdictions. Undoubtedly the law of tort and tortious liability is already an established feature of our jurisprudence. Certainly, time has come to develop the laws of tortious liability in Bangladesh in a more radical fashion to respond to different social changes and challenges. In the presence of such approval being given by the highest court of our country, all the courts of law should take the matter seriously and should apply their judicial mind to ensure development of tortious liability further within their jurisdiction.

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The Role of Foreign Direct Investment Towards the Goal of Sustainable Development: Underscoring the Need for A Regulatory Policy Approach in Developing Countries

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I. INTRODUCTION

Foreign direct investment (FDI) has a developmental role in capital and technology impoverished developing countries. FDI remains their largest and most sought-after external source of finance for economic development. Liberalised entry, speedy facilitation, incentivised operation, and investor-state dispute settlement (ISDS) under bilateral investment treaties (BITs) are the common features of FDI governance policy today. As more countries compete for FDIs, its domestic regulation has become more promotional with attractive fiscal and non-fiscal incentives and less policing. This trend has implications for the economic sovereignty and development of most host developing countries. A blankly incentivised FDI policy does not necessarily protect their FDI-induced economic interest. Generally, BIT led FDI governance and ISDS afford caveats that militate in favour of protecting corporate interests more often than the competing interest of host developing countries. As a result, some host developing countries, notably Bolivia, Ecuador, Venezuela, Australia, India, and others, which once followed open and liberal FDI policies, now impose stringent regulatory restraints and pursue diverse FDI policy approaches to protect their national interests.[1]

Recent record of the UN Conference on Trade and Development (UNCTAD) reveals that after its record rise worldwide in 2015, FDI flow in 2016-18 has declined globally though flows to developing countries remain stable; and a substantial amount of FDIs between developing countries is actually owned by multinational corporations (MNCs) of developed countries.[2] Even when FDI growth was at its peak in 2015, that growth failed to bring an equivalent economic development in host developing countries, which alarmed the UN Secretary-General. In his preface to the UNCTAD Report 2016, he cautioned that 'this growth [in 2015] did not translate into an equivalent expansion in productive capacity in [host] countries' and urged parties to follow the Addis Ababa Action Agenda 2015 'for reorienting … FDI towards sustainable development ...to leave no one behind and build a world of dignity for

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1 M Sornarajah, *The International Law onForeign Investment* (3rd edn, Cambridge University Press 2010) 59; Karl Souvant, 'FDI Protectionism is on the Rise' (2009) World Bank Policy Research Working Paper No. 5052.

2 UNCTAD, *World Investment Report 2019* (UN Doc. UNCTAD/WIR/2019) x, xi.

all'.[3] Signs of further marginalisation of FDI-induced sustainable development due to the intrusion of 'digital divide' are evident in UNCTAD *World Investment Report 2017*.[4]

The premise of this article is the above concern of the UN Secretary-General on the lopsided outcomes of FDIs. It critically examines the prevailing international policy framework pertaining to FDI to highlight the underlying reasons of such outcomes. It argues that the peripheral policy approach to the developmental role of FDI has led to the perennial problem of asymmetrical protection for FDI at the expense of the competing interest of host developing countries. This failure in effect hamstrings the pursuit of FDI-induced development in these countries. Both foreign investors and host countries engage in FDI activities to maximise their competing interests. The former seeks to maximise FDI-induced profit-making, while the latter needs FDI for economic development. The liberalisation and regulation of FDI therefore must co-exist pragmatically to balance these competing interests. If host countries need to be FDI protection-friendly, FDI must reciprocate by being development-friendly. The ailing post-war pro-investor policy warrants a searching reappraisal with a view to develop an inclusive global policy framework for the 21st century. Such a policy must accommodate a liberalised FDI market for investors and the regulatory right of host countries to ensure their sustainable development goal to face the challenge of the 2030 agenda. A balanced policy based FDI governance supporting the goal of sustainable development has the potential to minimise uncertainty and maximise predictability of FDI contributions, a win-win for both stakeholders.

The existing orthodox policy of a highly liberalised FDI regime compels developing countries to make a precarious trade-off between attracting FDIs and maintain control to derive benefits. This article argues for a liberalised FDI environment with a development-focused regulatory approach in which host developing countries can define their national interest test for incoming FDI screening to achieve its purpose. It recommends that various internal non-commercial risk to FDI in many developing countries undermine commercial certainty. These risks need to be addressed by improving law and order free from political unrests, professional administration free from red-tapes and corruption, infrastructure for cost-efficient transportation and market access, technology-based facilitation at the custom, and effective local judicial remedies. These internal reforms may be more palatable than regulatory relaxation to present developing countries as attractive FDI destinations. The partisan liberal and neoliberal push for further FDI liberalisation and facilitation is now ongoing at the World Trade Organization (WTO). If such push persists unabated, regulatory restraint on FDIs inimical to the national interest and security will continue to remain a necessity in many host developing countries.

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[3] UNCTAD, *World Investment Report 2016 – Investor Nationality: Policy Challenges* (UN Doc. UNCTAD/WIR/2016); the Addis Ababa Action Agenda on Financing for Development was adopted by the Third International Conference on 13-16 July 2015 in Addis Ababa and endorsed by UNGA Res 69/313 (27 July 2015).

[4] UNCTAD, *World Investment Report 2017* (UN Doc. UNCTAD/WIR/2017) xiv.

II. ECONOMIC RATIONALES OF INTERNATIONAL FDI POLICY

A. Liberalism in FDI policy: its birth and bloom

The international FDI policy regime prior to the Second World War ensured the full imperial control over the natural and human resources of the colonised world.[5] The interwar period witnessed the policy of dogmatic nationalism, excessive economic rationalism, and aggressive protectionism that created insurmountable barriers to the cross-border movement of FDIs. The post-war FDI regime reversed the inward-looking policy to an outward-looking liberal policy and became a vehicle for the recovery and reconstruction of the world economy devastated by the war. The US was the only economy with substantial surplus capital sought-after by capital-deficit economies. For the uninterrupted free flow of its capital across the world, the US required and pursued market liberalisation with no economic frontiers. Its post-war economic thoughts were heavily dominated by Adam Smith's *Wealth of Nations* and economists relentlessly campaigned for the virtues of free capital market. The liberalised FDI market was shown as the efficient manager of the world economic recovery by virtue of its self-regulatory capacity to determine the elasticity of competition in free market conditions. With its surplus capital and no restrictions on cross-border movement of capital, the US facilitated the creation of MNCs to manage the cross-border flow of capital. This is how there emerged a liberalised global FDI market dominated by MNCs as the institutionalised foreign investors.[6] Deregulation, freedom of contract, privatisation, and private property protection became the main economic rationales of this liberalised FDI policy, which had manifestly anchored in the immediate post-war period and remains at the epicentre of the global FDI policy regime today.[7]

The UN was established in 1945 as a global organisation with political and economic agendas. UN members have pledged 'international economic cooperation' under Chapter IX of the UN Charter. This economic cooperation of UN members was replaced by the 'competition' element of the post-war FDI-led economic recovery policy. The UN decolonisation process prior and after the 1960s conferred statehood on many colonies, which are mostly developing countries. These new countries lacked capital, technology, and skill necessary for post-independence development owing to their prolonged exploitation by the colonial powers. Consequently, they had to import foreign capital, technology, and know-how in the form of FDI as a catalyst for economic development. This is how FDIs have assumed an important developmental role in host developing countries. These countries increasingly pursue

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5 Kate Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (Cambridge University Press 2013) part I.

6 Rainer Hellmann, *The Challenge to US Dominance of the International Corporation* (Dunellen Publications 1970); Raymond Vernon, *Sovereignty at Bay: The Multinational Spread of US Enterprises* (Basic Books 1971).

7 Kenneth Vandevelde, 'Sustainable Liberalism and the International Investment Regime' (1998) 19 MichiganInternational Law Journal 375-85; John Conybeare, *United States Foreign Economic Policy and the International Capital Markets* (Routledge 1919).

their nation-building venture of development, which has resulted in an exponential increase in their demand for FDIs. This increased demand for FDI has led each country to compete with the rest to attract more and more FDIs, culminating into a covert competition of more incentivised liberalised national FDI policy and less policing to augment inbound FDI inflow - a race to the bottom.

B. Neoliberalism in FDI policy: expanding the 'transnational capitalist class'

The current global FDI policy of market liberalism represents the economic conditions of few post-war western industrialised countries. It is not based on an epistemological appreciation of the economic conditions of the rest of the world. The marginalised economic plight of the impoverished underdeveloped world was beyond the mindset of post-war economic policymakers. The narrowly focused Euro-centric economic recovery plan (both the Bretton Woods and Marshall Plans) took no account of the special economic plight of FDI importing host countries; indeed, many of them did not exist then. The existing policy framework within which FDIs operate continues to pursue increasing liberalisation, which appears to be a mature manifestation of the post-war liberalism imposed on developing countries. The current global FDI regime, being rooted in post-war liberal market policy, has introduced a web of rules and policies that overtly militate in favour of corporate interest, which has paved the emergence of a new 'transnational capitalist class' free from any jurisdictional restrictions and yielding decisive economic power to undermine the 'social contract between the state and citizens'.[8]

MNCs now have the power to influence national resource allocation and exploitation, which has been transferring many national economic activities from public to private sector regardless of their detrimental effects on the socio-political needs and economic priorities of a developing country. These powerful market players threaten many host developing countries with the fear of capital flight to avoid any regulatory intervention curtailing corporate freedoms. The traditional role of host developing countries as the provider of social welfare and public goods and the protector of human rights of their own citizens is now eclipsed under the shadow of their role as FDI market liberalisers. This neoliberal FDI environment is the new global policy paradigm of FDI. It is this policy that has steadily cascaded down in most host developing countries to limit their regulatory space and the jurisdiction of their domestic judiciary.[9]

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[8] Justin Schwartz, 'Neoliberalism and the Law: How Historical Materialism Can Illuminate Recent Governmental and Judicial Decision Making' (2013) 22 New Labour Forum 71, 77; David Harvey, *A Brief History of Neoliberalism* (OUP 2005) 152, 154.

[9] Louis Turner, *Invisible Empire: Multinational Companies and the Modern World* (Harcourt Brace Jovanovich 1971); Stephen Hymer and Robert Rowthorn, 'Multinational Corporations and International Oligopoly: The Non-American Challenge' in Charles Kindleberger (ed), *The International Corporation: A Symposium* (MIT Press 1970) ch 3; Jonathan Moran, 'The Dynamics of Class Politics and National Economies in Globalisation: Marginalisation of the Unacceptable' (1998) 22(3) Capital and Class 53-83.

In recent time, successive attempts have been made to widen and implement neoliberal FDI law and policy. The first institutionalised attempt to circumvent the host country's authority was the high-profile OECD Multilateral Agreement on Investment (MAI) 1998, which failed following widespread public protests in developed and developing countries alike.[10] The next attempt was the Trans-Pacific Partnership (TPP) 2015 on 'investment' and ISDS in chapter 9. Its overarching definition encompasses almost every significant component of the social infrastructure of 11 signatory states and extends far beyond the protection of private property to include 'speculative financial instruments, government permits, intangible contract rights, intellectual property right and market share' (section A).[11] Its ISDS provisions expose state parties to investor-initiated claims for the breach of minimum standard of treatment, prompting some states to reform their laws to weaken environmental protection.[12] Its 'Minimum Standard of Treatment' accords 'fair and equitable treatment and full protection and security' to investments (Art 9(6)(1)), which exposes a party to lawsuits for breaching minimum standard of treatment obligation caused by 'an action that may be inconsistent with an investor's *expectations*'.[13] The TPP investment regime regards capital as the most sacred that requires strict legal protection; but makes no reference whatsoever to any quantifiable or indicative contribution that an investment may make to the host economy.

Neoliberalism has also gained momentum in the form of a new WTO investment facilitation framework. The stalled debate over such a framework has been resuscitated at the WTO Ministerial Conference in 2017. Some developing countries, notably China, Brazil, Argentina, Mexico, and South Korea, have become sources of outward FDI and been pressing for a WTO investment facilitation framework to further simplify and liberalise the FDI approval procedures for speedy entry. The Economic Community for West African States and WTO Friends of Investment Facilitation for Development organised the Abuja High Level Trade and Investment Facilitation Forum for Development in 2017 to press African countries to support a WTO investment facilitation agreement.[14] This shifting posture of major developing countries with surplus capital on the negotiation of a WTO investment facilitation framework has reinvented the link between multilateral trade and investment regimes

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10 MAI text adopted on 24 April 1998; M Rafiqul Islam, *International Trade Law* (Law Book Co 1999) 257-65.

11 Australian Department of Foreign Affairs and Trade (DFAT), *TPP Text and Associate Documents* (Canberra, 6 October 2015) Annex 9-D; Patricia Ranald, 'The Trans-Pacific Partnership Agreement: Reaching Behind the Border, Challenging Democracy' (2015) 26 Economic and Labour Relations Review 241.

12 Centre for International Environmental Law (CIEL), *The Trans-Pacific Partnership and the Environment: An Assessment of Commitments and Trade Agreement Enforcement* (November 2015) 10; Public Citizen's Global Trade Watch, *Case Studies: Investor–State Attacks on Public Interest Policies* (Washington DC) <https://www.citizen.org/sites/default/files/egregious-investor-state-attacks-case-studies_4.pdf> accessed 10 June 2020.

13 CIEL (n 12) 106.

14 WTO, *Deepening Africa's integration in the global economy through trade and investment facilitation for development- Abuja statement in the Ministerial Conference* (7 November 2017) WTO Doc. WT/MIN (17)/4 WT/GC/186.

under the WTO. The idea of an 'investment facilitation agreement for development' at the WTO was first coined in 2015 under the E15 Initiative by International Centre for Trade and Sustainable Development (ICTSD) and the World Economic Forum (WEF) to support the achievement of sustainable development objectives.[15] Parallelly, a group of high, upper-middle, and middle income developing members calling themselves as 'friends of investment facilitation for development' (FIFD) headed by China and MIKTA Group launched informal discussions in April 2017 on investment facilitation for development in the WTO.[16] A coalition of 70 WTO members co-sponsored a joint ministerial expression of interest at the WTO Ministerial Conference in Buenos Aires in December 2017 to engage in 'structured discussions' with the objective of adopting a multilateral framework on investment facilitation at the 12th WTO Ministerial Conference in Kazakhstan in June 2020 but suspended due to the Covid-19 outbreaks and is rescheduled to be held in Geneva on 30 November – 3 December 2021.[17]

The relationship between trade and investment was one of the four Singapore issues raised by developed members in the first WTO Ministerial Conference in 1996 gained no support from developing members. The Singapore Ministerial Declaration 1996 expressly provided that future negotiations on any Singapore Issues would take place only after an *explicit consensus* decision is taken among WTO members.[18] This requirement of *explicit consensus* was successively reaffirmed and reiterated in theDoha Ministerial Declaration 2001,[19]Cancun Ministerial Conference 2003,[20]July 2004 Package,[21] and Nairobi Ministerial Declaration 2015.[22] The proposal for a WTO investment facilitation framework suffers from a mandate crisis for want of an *explicit consensus*. Many WTO members openly oppose it arguing that the inclusion

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[15] ICTSD, 'Crafting a Framework on Investment Facilitation' Policy Brief (June 2018) 2; Ana Novik and Alexandre Crombrugghe, 'Towards an International Framework for Investment Facilitation' (*OECD Investment Insights*, April 2018) 1.

[16] FIFD consists of 11 WTO members: Argentina, Brazil, Chile, China, Colombia, Hong Kong, Kazakhstan, Korea, Mexico, Nigeria, and Pakistan; MIKTA is an informal partnership between Mexico, Indonesia, South Korea, Turkey, and Australia.

[17] *Joint Ministerial Statement on Investment Facilitation for Development, Eleventh WTO Ministerial Conference, Buenos Aires* (13 December 2017) WTO Doc. WT/MIN (17)/59; 12th WTO Ministerial Conference <https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm> accessed 26 November 2021.

[18] WTO, 'Singapore Ministerial Declaration' (*WTO Website*, 13 December 1996) para 20 <https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm> accessed 23 May 2020.

[19] WTO, 'Doha Ministerial Declaration' (*WTO Website*, 14 November 2001) para 20 <https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#tradeinvestment> accessed 23 May 2020.

[20] Robert Baldwin, 'Failure of the WTO Ministerial Conference at Cancun: Reasons and Remedies', (2006) 29(6) World Economy 677-696; Khor, Martin Khor, 'An Analysis of the WTO's Fifth Ministerial Conference' <https://www.g24.org/wp-content/uploads/2016/01/Session-2_5.pdf>accessed 29 May 2020.

[21] Package 2004, Art 1(g), <https://www.wto.org/english/tratop_e/dda_e/dda_package_july04_e.htm> accessed 21 May 2020.

[22] WTO, 'Nairobi Ministerial Declaration' (*WTO Website*, 19 December 2015) preamble para 3 <https://www.wto.org/english/thewto_e/minist_e/mc10_e/mindecision_e.htm> accessed 24 May 2020.

of this new issue will obscure and detract the WTO from advancing long overdue negotiations on the priority issues emanating from the Doha Development Agenda.[23]

The push for neoliberalism in investment has come at a time when multilateral economic cooperation has reached its rock bottom level at the WTO, which is increasingly sidelined by national and regional protectionism. Its very existence faces increasing uncertainties in the face of continuous outbreaks of trade wars, tit-for-tat arbitrary imposition of tariffs, sanctions, and quotas between the US and China in which the WTO has become a helpless spectator. Powerful members consistently defy the WTO rules with impunity. The new 'America first' among many protectionist policies contradict and undermine economic multilateralism. In December 2019, the Trump Administration blocked the appointments of new judges to the WTO Appellate Body to replace those who retired, which effectively has paralysed the ability to settle disputes.[24] The trying times for the WTO has further been compounded by the premature resignation of its Director General on 31 August 2020, one year before the expiry of his tenure.[25]

Investment liberalisation through speedy entry facilitation is not enough for host developing countries, which need FDI for their economic development. So, entry screening for selection and subsequent national regulation of the operation of FDIs in their national interest must be included in any negotiation for an investment facilitation framework at the WTO. Otherwise, such a framework with expansive right of entry would tilt the balance further in favour of investors. It is yet another neoliberal pressure to liberalise the international FDI regime more for the benefit of newly emerged capital exporting developing countries which opposed such an agreement in 2003 when they did not have sufficient outward investment. Now they are looking for bringing investment under the 'single undertaking' of the WTO for the mandatory enforcement of easy or unrestricted FDI frontiers to maximise the benefits of their surplus capital. The operation of neoliberalism is solely devoted to

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[23] WTO, 'Ministerial Conference Statement by Members and Observers at the Plenary Session of the Eleventh Session of the Ministerial Conference' (*WTO* Website, 9-13 December 2017) <https://www.wto.org/english/thewto_e/minist_e/mc11_e/mc11_plenary_e.htm> accessed 24 May 2020; 'Minutes of the meeting held in the Centre William Rappard on 10 and 18 May 2017' <https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/237843/q/WT/GC/M167.pdf> accessed 24 May 2020.

[24] Aditya Rathore and Ashutosh Bajpai, 'The WTO Appellate Body Crisis: How We Got Here and What Lies Ahead' (*Jurist* 14 April 2020) <https://www.jurist.org/commentary/2020/04/rathore-bajpai-wto-appellate-body-crisis/>accessed 29 May 2020; Keith Johnson, 'How Trump May Finally Kill the WTO' (*Foreign Policy*, 9 December 2019) <https://foreignpolicy.com/2019/12/09/trump-may-kill-wto-finally-appellate-body-world-trade-organization/>accessed 29 May 2020; 'US blocks appointment of WTO judges'(*New Europe*, 10 December 2019) <https://www.neweurope.eu/article/us-blocks-appointment-of-wto-judges/>accessed 29 May 2020.

[25] Elena Pavlovska, 'WTO chief Azevedo resigns amid appeal dispute with US' (*New Europe*, 15 May 2020) <https://www.neweurope.eu/article/wto-chief-azevedo-resigns-amid-appeals-dispute-with-us/>accessed 29 May 2020; 'WTO director-general announces surprise resignation amid trying times for trade' (*Global Trade Review*, 14 May 2020) <https://www.gtreview.com/news/global/wto-director-general-announces-surprise-resignation-amid-trying-times-for-trade/>accessed 29 May 2020.

the unrestricted cross-border movement of capital and its flourishment to the exclusion of competing interests of capital importing countries to preserve their public policy space, welfare, and environmental considerations. FDI operation within this neoliberal systemic value is likely to result in outcomes maligning for economic benefits and sovereignty, a forewarning for host developing countries desirous of relying on FDI for their sustainable development.

III. INTERNATIONAL FDI REGULATORY POLICY

A. Fractured public international law regulation: a victim of North-South conflicts

Strictly speaking,there is no international law, principle, or convention that specifically govern FDI operation. The International Court of Justice (ICJ) held that there is 'no generally accepted rules in the [investment] matter have crystallised on the international plane'.[26] The ownership of and control over vast amounts of world's economic resources has made MNCs the champions in setting the global economic agenda. But MNCs have no international legal personality and their status is the same as that of citizens, determined by the law and under the jurisdiction of their respective country of incorporation.[27] MNCs are privately funded profit-making commercial entities which generally conduct their business beyond any inter-state cooperation and agreements and hence they are not 'subject' and 'person' in international law.

FDI presupposes that MNC investors engage in and operate their business in foreign countries. As a result, the link between their FDIs operation and the country of incorporation is too remote and has no effect on its MNCs in foreign countries. Moreover, MNCs' FDI profits are a major source of revenue earnings for the incorporating countries, which are usually sympathetic and pliable to corporate will. It is this vested interest of the incorporating countries that militates against the adoption of an internationally agreed-upon regulatory policy for MNCs. MNCs conduct their business globally through an integrated network of offshore subsidiaries and affiliates, which keep them beyond regulatory reach.[28] Since MNCs lack locus standi before international law, they can conduct their businesses on the international stage without the regulatory grip of international law. Their FDI operations in free market conditions, global mobility, and freedom of FDI flight make them unamenable to the control of host developing countries. Hence, the combined effect of lacklustre regulation of incorporating countries, no status in international law, and inability of host developing countries to regulate has enabled MNCs to conduct FDIs free from any regulatory intervention.[29]

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[26] *Barcelona Tractioncase (Belgium v Spain)* [1970] ICJ Rep 47; *ELSIcase (US v Italy)* [1989] ICJ Rep 15; *Diallo case (Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639.

[27] *Barcelona Traction* Case (n 26) 42.

[28] Michele Rioux, 'Multinational Corporations in Transnational Networks: The Theoretical and Regulatory Challenges in Historical Perspective' (2014) 4(3) Open Journal of Political Science 109-117; Beibei Dong et al, 'Factors that Influence MNCs' Control of their Operations in the Foreign Markets: An Empirical Investigation' (2008) 16(1) Journal of International Marketing 98-116.

[29] ILC, 'Report of the International Law Commission on Draft Articles on Responsibility of States for

The lack of a consensual global policy for the regulation of MNCs is also attributable to the North-South conflict of economic interests between the FDI-exporting and FDI-importing countries. While the former strongly support free FDI market for MNCs, the latter encounters continuous erosion of their sovereign right to manage their economic affairs to serve national interest. It is this intense polarisation that has stultified all attempts at reaching a consensus-based international regulatory policy for MNCs. However, these attempts have resulted in some codes of conduct and guidelines for the regulation of FDI operations. The UN Centre on Transnational Corporations and UNCTAD, both dominated by FDI-importing countries, have formulated a code of conduct for FDI business practices of MNCs to protect the interest of host countries. The OECD and World Bank, both dominated by FDI-exporting countries, have developed a code of conduct and Guidelines respectively to protect FDIs and MNCs in host countries. These codes and guidelines are voluntary, diametrically opposite to each other, and self-contradictory entailing no binding policy option. This fragmented global policy allows MNCs to exploit an unregulated FDI market to maximise corporate interest.

B. Private international law regulation: sowing the seeds of contradictions

During the colonial era, the national resources of colonies were exploited through FDIs mostly by the colonial powers. In the immediate post-decolonisation period, the UN adopted a declaration on the 'permanent sovereignty over natural resources'[30] in 1962 proclaiming the state ownership of and control over the natural resources. Newly emerged decolonised developing countries felt the urgency of exploiting their leftover natural resources for development. In response to this necessity and encouraged by the UN declaration, these countries embarked on widespread nationalisation of FDIs in the 1960s and 1970s. This wave of nationalisation became a cause of concern for foreign investors who were unwilling to invest in the absence of FDI protection. As a result, these countries felt the adverse effect of steady decline in FDIs on their economies, which compelled them to provide adequate FDI protection through bilateral and multilateral contracts concluded under private international law. One of such protection measures is bilateral investment treaties (BITs) with pre-determined ISDS mechanisms, predominantly binding international arbitrations between investors and state.

BITs are bilateral contracts between countries to provide mandatory protection to each other's FDIs in their territories. These contracts are negotiated between the parties reflecting their commercial consideration, FDI needs, economic status, political conditions, currency strength and convertibility, cheap labour availability, corporate tax incentives, and relative bargaining strength. Textually, BIT provisions

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Internationally Wrongful Acts 2001' (2001) UN Doc. A/56/10, Arts 57-58; Donald Lecraw, 'Bargaining Power, Ownership, and Profitability of Transnational Corporations in Developing Countries' (1984) 15 Journal of International Business Studies 27-43.

30 UN GA Res 1803 (XVII) (14 December 1962); Karol Gess, 'Permanent Sovereignty over Natural Resources: An Analytical Review of the United Nations Declaration and Its Genesis' (1964) 13(2) International and Comparative Law Quarterly 398-449.

are meant to promote and protect two-way FDIs but in reality FDIs usually flow in only one direction from capital-exporting developed and major developing countries to capital-importing developing countries. Dictated by their urgent need for FDIs and inferior bargaining power, capital-importing countries often consent to overly imposing BITs skewed to protect FDIs with no explicit guarantee of economic benefits.

International arbitration, a quasi-judicial mechanism, is the main form of ISDS for resolving FDI disputes arising under BITs. FDI operation in host countries has both advantages and disadvantages, supporters and doubters. The socio-economic impacts and political considerations of FDI can generate public interests and concerns. The settlement of these domestic issues and concerns in privately organised ISDS arbitration without the involvement of national judiciary can create jurisdictional conflict. Conflicting interpretations and arbitral awards on the same point of law and fact are a distinct possibility when they are decided by different ISDS arbitrations and arbitrators. There is no higher arbitration chamber with appeal jurisdiction to resolve these contradictions.[31] Unlike ISDS arbitration, it is the availability of appeal in domestic courts that offers remedies to the disputant parties to overcome or correct contradictory interpretations and judgments. These 'jurisdictional conflict and interpretive inconsistency'[32] are inevitable when FDI disputes, being essentially domestic falling within the purview of the domestic law and judiciary of host countries, are resolved internationally by ISDS arbitration. The *UNCTAD International Investment Arbitration Issues Note*, 'Reform of Investor-Sate Dispute Settlement: In Search of a Roadmap' criticises the arbitral decisions (a) that 'have exposed recurring episodes of inconsistent findings', including 'divergent legal interpretations of identical or similar treaty provisions as well as differences in the assessment of the merits of cases involving the same facts', which has resulted in not only'uncertainty about the meaning of key treaty obligations and lack of predictability of how they will be applied in future cases', but also 'erroneous decisions'.[33] The grounds for annulment enumerated in the ICSID Convention do not allow for 'manifest errors of law' but only on what could be considered procedural grounds (Art 52(1)).

The competing interests of investors in profit maximisation and host countries' maximisation of development can give rise to conflict of interests that sometimes lead to disputes. Foreign investors prefer and use international arbitration, as opposed

[31] Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2004-2005) 73 Fordham Law Review1521-22; William Park and Alexander Yanos, 'Treaty Obligations and National Law: Emerging Conflicts in International Arbitration' (2006) 58(2) Hastings Law Journal 251-98.

[32] Doug Jones, 'The Problem of Inconsistency and Conflicting Awards in Investment Arbitration' (paper presented to German-American Lawyers' Association, Frankfurt, March 2011) <https://pdfs.semanticscholar.org/fb6f/302e99015ba3a1df0b7cbfaf8f3fa7cf2065.pdf> accessed 11 June 2020.

[33] UNCTAD, 'Reform of Investor–State Dispute Settlement: In Search of a Roadmap' (No. 2, 26 June 2013) 3-4 <https://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf> accessed 12 June 2020.

to national courts of host countries, a trend that is seemingly building momentum due to the continuing influence of neoliberal policy on FDI governance. This trend has implications for the economic sovereignty and development of host developing countries. They invariably show their reluctance to regulate for fear of FDI flight. Amid this lacklustre domestic regulation, international arbitration is becoming a dominant ISDS mechanism under which cases have been soaring with massive compensation liability for host developing countries. These countries need to be more careful and measured in offering incentives in negotiating BITs to avoid exposure to exorbitant damage claims. Indeed, it is difficult for developing countries needing FDIs for development not to be succumbed to the unrelenting pressure of neoliberal capital market, which regards capital as sacred to be protected at all cost and, if necessary, coercively.[34] Given the operation of ISDS arbitration dedicated to the profit-making drive of investors, host developing countries should approach ISDS arbitration to settle FDI disputes cautiously and accept it as the last resort, preferably after exhausting domestic judicial remedies.

IV. FDI DISPUTE SETTLEMENT POLICY

A. The World Bank Arbitration: a judge of its own cause

BITs generally prescribe ISDS arbitrations as alternative to domestic courts or tribunals. The International Centre for the Settlement of Investment Disputes (ICSID) of the World Bank has become the dominant forum for ISDS arbitration. According to a UNCTAD report of December 2013, ICSID arbitrated 407 FDI disputes against 158 by UNCTRAL.[35] This preference warrants a contextual and purposive analysis of ICSID. As noted, the nationalisation of FDIs scared investors, halted FDI flows, and reduced economic growth in many developing countries. This economic downturn reduced their World Bank/IMF debt-servicing capacity. In pursuit of recovering its loaned funds from debtor countries, the World Bank stepped in to revive a safe FDI environment by initiating a strong FDI protection regime in host countries.

Foreign investors and their incorporating countries rejected the domestic laws and courts of host developing countries in favour of international arbitration to settle FDI disputes. This rejection was attributable to: (a) the rights of host countries to their natural resources under the UN declaration on ‘permanent sovereignty over natural resources’, (b) weak application of rule of law, (c) inefficient legal systems with corrupt domestic courts, and (d) lacklustre law compliance and enforcement.[36]

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[34] Andrew Ives, ‘Neoliberalism and the Concept of Governance: Renewing with an Older Liberal Tradition to Legitimise the Power of Capital’ (2015) 14 OpenEdition Journals (Online) <https://journals.openedition.org/mimmoc/2263> accessed 11 June 2020.

[35] Patrick Carvalho, ‘Investor-State Arbitration and the Rule of Law: Debunking the Myths’ (Research Report No. 13, The Centre for Independent Studies, Sydney, April 2016) 6 <https://www.cis.org.au/app/uploads/2016/04/rr13-snapshot.pdf> accessed 11 June 2020.

[36] Leon Trakman, ‘Choosing Domestic Courts over Investor-State Arbitration: Australia’s Repudiation of the Status Quo’ (2012) 35(3) UNSW Law Review 984; Olivia Chung, ‘The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration’ (2007) 47(4)

Investors raised these concerns to record their 'no-confidence' in the domestic courts of host countries and favour ISDS arbitration instead. The World Bank sought to dispel these concerns by creating its own mechanism for FDI dispute resolution. This mechanism opted for private international law to avoid international and national law mechanisms. It created a self-contained arbitration process under ICSID to settle FDI disputes between host countries and private foreign investors, which entitled the parties to lodge FDI disputes directly to ICSID without recourse to the domestic law and judiciary of host countries. ICSID was created primarily to protect the debt-servicing interest of the World Bank and its creditors' FDIs by circumventing nationalisation and eliminating the alleged judicial bias and discrimination in host countries.[37] The World Bank used ICSID as a carrot to encourage investors by affording reliable FDI protection through a dispute settlement outlet free from the control of host countries. It also used ICSID as a stick for debtor host countries with a veiled threat not to nationalise FDIs and risk the prospect of World Bank/IMF loans in the future.

The justification for ISDS arbitration under ICSID suffers from inconsistencies and contradictions. Foreign investors accrue a right to file a case against host countries for alleging breaches of contractual obligations under BITs. This arbitration process has no appeal process and host countries, aggrieved by any contradictory facts and/or erroneous interpretations of BIT arbitration clause/s, cannot challenge or appeal against ICSID arbitral awards. These arbitral awards are individualistic by nature and have no precedential effect on any future FDI disputes with similar facts and circumstances.[38] These features of ICSID arbitration open a floodgate of interpretive inconsistencies and contradictory awards that militate against the crystallisation of ICSID arbitral jurisprudence and reliable interpretations of dispute resolution clauses under BITs. ICSID arbitrators are selected from a pre-determined list of qualified commercial litigators mainly from Europe and North America and about 95% of them are male.[39]The Corporate Europe Observatory has found 'an elite 15' arbitrators (a) 'have captured the decision making in 55% of the total investment treaty cases known today'; (b) are men from 'the rich North' who 'enjoy close links with the corporate world and share business' viewpoint in relation to the importance of protecting investors' profits'; and (c) unveil 'a dark irony' that these arbitrators, with close ties to the corporate world displaying their conflict of interest, decide on the 'issues that arise out of governments' implementation of policies to defend the public interest'.[40]

Virginia Journal of International Law 956.

37 Leon Trakman, 'Investor-State Arbitration: Evaluating Australia's Evolving Position' (2014) 15(1)Journal of World Investment & Trade 152, 162.

38 International Institute for Sustainable Development, *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights* (in association with World Wildlife Fund 2001) 85.

39 Chief Justice Robert French, 'ISDS: Litigating the Judiciary' (2015) 26 Public Law Review 155, 158, 161.

40 Corporate Europe Observatory 'Chapter 4: Who Guards the Guardians? The Conflicting Interests of Investment Arbitrators' (CEO Website, 27 November 2012),

The conflict of interest is not a consideration in nominating ICSID arbitrators, who may even be the previous legal counsel for the investor party and they are not barred to be ICSID arbitrator in a subsequent dispute involving the same previous investor clients.[41]This situation persists notwithstanding the ICSID Convention requirement that the arbitrators shall be persons who can 'exercise independent judgement' (Art 14(1)), UNCITRAL Rules 2010 providing the 'impartiality or independence' of arbitrators (Art 12(1)), and *IBA Guidelines on Conflict of Interest in International Arbitration2014* stipulating that the arbitrators must be free from potential conflicts of interest. The homogeneity of ICSID arbitrators in a heterogenous world with legal plurality and cultural diversity is the clearest yet explanation as to why the operational narratives of the ICSID arbitration process appears to be inherently biased towards investors and their FDIs. The Harten Study of 2012 examined ICSID awards and revealed their typical pro-investor and expansive claimant-friendly approaches, an 'approach [that] would be accentuated where the claimant was a national of a major Western capital-exporting state'.[42]

ICSID awards for compensation in favour of the winning party (usually investors) are excessively high. UNCTAD Study of 2015 showed that the investors of developed countries and their MNCs lodged 35 claims (out of total 42 claims) in 2014 and they gained significantly from ICSID compensatory awards.[43] Its 2017 Report recorded no noticeable change in this trend. The total number of ISDS cases was 819 by November 2017, including 62 new cases initiated in 2016; 52% cases decided in favour of the investors; 33% cases pending; and Australia and 15 Asian countries were sued for over $30 billion.[44] Parties must pay for ICSID arbitration, which is cost-intensive - a questionable access to justice. According to OECD, the average cost of initiating arbitration is US$ 8 million,[45] which is affordable by only wealthier MNCs. Therefore, there is no reason to believe that the ISDS arbitration of FDI disputes under ICSID is impartial, apolitical, and objective.

ICSID arbitration available to foreign investors is not available to domestic investors of host countries and the latter is required to initiate investment disputes in domestic

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<https://corporateeurope.org/trade/2012/11/chapter-4-who-guards-guardians-conflicting-interests-investment-arbitrators> accessed 11 June 2020.

41 Roderick Abbott et al, 'Demystifying Investor-State Dispute Settlement' (2014) 5 European Centre for International Political Economy 23; Jason Yackee, 'Investment Treaties and Investor Corruption: An Emerging Defense for Host States' (2012) 52(3) Virginia Journal of International Law 723.

42 Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50(1) Osgoode Hall Law Journal 15.

43 UNCTAD, 'Recent Trends in IIAS and ISDS' (IIA Issues Note No 1, February 2015) 1, 6, 10 <http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf> accessed 12 June 2020.

44 UNCTAD, 'Investment Dispute Settlement Navigator' <http://investmentpolicyhub.unctad.org/ISDS> accesed 12 June 2020; 'The Hidden Costs of RCEP and Corporate Trade Deals in Asia' (Friends of the Earth, Australia, 2016) <http://www.foei.org/wp-content/uploads/2016/12/The-hidden-costs-of-RCEP-and-corporate-trade-deals-in-Asia-FoEI.pdf> accessed 12 June 2020.

45 OECD, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community'(2012) Working Papers on International Investment 2012, No.03 by David Gaukrodger and Kathryn Gordon 19.

courts, a discriminatory competitive advantage in favour of foreign investors over their domestic counterparts. ICSID arbitration settles FDI disputes privately and confidentially beyond any public access or participation, which requires consent from both parties. Such consent is unlikely from the investors side particularly when a dispute involves host countries' public interest and policy, such as the environment, human rights, public health, green technology transfer, and corporate culture, and social responsibility. The confidentiality of ICSID arbitral proceeding is intended to avoid public scrutiny and reaction, public criticism and lobby, and potential challenge to compensatory award enforcements.[46] More importantly, it is this narrowly focused confidentiality that keeps the public unaware of the extent and conditions of natural resource exploitation in host developing countries by MNC investors.[47]

International Chamber of Commerce (ICC) and UN Commission on International Trade Law (UNCITRAL) amended their ISDS arbitration rules in 2012 and 2014 respectively to ensure transparency, disclosure obligations, cost-effectiveness and time-efficiency in award-making, and improved public accessibility. ICSID has so far made no reform in its ISDS arbitration rules, nor is bound by the reformed case management standards of ICC/UNCITRAL. A UNCITRAL arbitral award is not binding when it is 'set aside or suspended by a court of the country [or] the recognition or enforcement of the award would be contrary to the public policy of this State' (Art 36(1v)). But all ISDS awards by ICSID arbitration are unequivocally conclusive and binding: 'courts shall treat the award as if it were a final judgment of the courts of a constituent state' (ICSID Convention Art 54). The admissibility of arbitration claims under the ICSID Convention does not require investors to exhaust domestic remedies available in host countries as a precondition for the lodgement of arbitration petitions (Art 26).

B. Disabled domestic courts of host countries

Foreign investors invariable exclude the jurisdiction of the judiciary of host developing countries in favour of BIT-based ISDS arbitrations of FDI disputes. The foreign investors' perception that the domestic courts of host countries are biased and incapable of protecting investors' interests and upholding the rule of law is arguably based on sound questionable merit and legal validity. Nonetheless, in all fairness to them it is conceded for the sake of argument that their perception entails limited merit in some lower courts in certain host developing countries' jurisdictions due to time-inefficient, cost-ineffective, and corrupt practices. But the fact remains that even the highest courts' decisions in developed host countries have been unacceptable and

[46] Mohsen al Attar, 'Reforming the "Universality" of International Law in a Globalizing World' (2013) 59(1) McGill Law Journal 97; Ciara Hackett, 'Accountability for Responsibility: An Assessment of the Transnational Capitalist Class Role in Driving a Global CSR Agenda' (2012) 27(2) Australian Journal of Corporate Law 189, 189; Leslie Sklair, 'Capitalist Globalisation: Fatal Flaws and Necessity for Alternatives' (2007) 13(1) Brown Journal of World Affairs 29.

[47] Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2004-2005) 73(4) Fordham Law Review 1521; Amanda Norris and Katina Metzidakis, 'Public Protests, Private Contracts: Confidentiality in ICSID Arbitration and Cochabamba Water War' (2010) 15(3) Harvard Negotiation Law Review 31.

ignored by foreign investors. The Australian *Tobacco Plain Packaging Act 2011*, to give an example, restricted the branding freedom of tobacco companies to reduce smoking and consequential lung cancer rate as a life-saving health measure. Cigarettes producing MNC Philip Morris Ltd regarded this health measure as a threat to its profit-making and challenged the Tobacco Act in the High Court of Australia arguing that the Act expropriated its intellectual property (IP) right but the apex court found no expropriation of IP right by the Act.[48] Incorporated in the US, Philip Morris restructured itself as a Hong Kong based company. Australia had a BIT with Hong Kong since 1993, which had an international arbitration clause. Philip Morris initiated an arbitration action on the same ground of IP right infringement that the Australian High Court had rejected before. The Permanent Court of Arbitration (PCA) in Singapore dismissed the action on a completely different ground. Philip Morris failed to prove that it was an Asia-based Hong Kong company and the PCA did not go ahead with the merit of the case for want of jurisdiction.[49]

The consequence of ISDS is easily discernible. Foreign investors can (a) challenge the law of sovereign host countries enacted by elected parliaments with no regard for the public interests; (b) invoke BIT-based ISDS arbitration to undercut the authority and legitimacy of a host country court decision, which is binding under the constitutional law; (c) pursue ISDS arbitration beyond the domestic jurisdiction pursuant solely to private international law different from the domestic law of host countries; (d) ignore any unfavourable decisions by host countries' court and submit the same dispute to ISDS arbitration; (e) trigger the settlement of a FDI dispute by two different judicial bodies under two different laws, producing two different interpretations and outcomes; and (f) get a host country court decision overruled by an ISDS arbitration award, which is not appealable and has no obligation to consider the host country court's interpretation, binding decision and persuasive judicial precedent.[50]The advent of ISDS poses a threat to state sovereignty by 'shifting power from host countries' courts, whose authority is derived from their Constitution, to unaccountable ISDS tribunals'.[51]

ISDS thus usurps the jurisdiction of local courts in favour of international arbitration. Host developing countries should be extremely careful in negotiating necessary safeguard provisions in BITs. These safeguards may inclusively include: favouring open arbitral proceedings over secretive arbitration rules and tribunal, requiring the availability of arbitration documents to the other party, choosing domestic judiciary as the ISDS forum and its exhaustion as a condition of initiating international

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48 *British America Tobacco Australasia Limited & Others v Commonwealth of Australia* (2012) HCA 43, 181.

49 *Philip Morris Asia Limited (Hong Kong) v Commonwealth of Australia* (PCA Case No 2012-12 award of 17 December 2015) <https://www.pcacases.com/web/view/5> accessed 12 June 2020.

50 Jurgen Kurtz and Luke Nottage, 'Investment Treaty Arbitration "Down Under": Policy and Politics in Australia' (2015) 30(2) ICSID Review: Foreign Investment Law Journal 465, 472.

51 Elizabeth Warren, 'The Trans-Pacific Partnership Clause Everyone Should Oppose' *The Washington Post* (Washington, 25 February 2015) <https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html> accessed 12 June 2020.

arbitration as the last resort, setting a limit for potential damage claims, and avoiding any plea of 'commercial in confidence'. The scope of international arbitration may be restricted by precluding some sensitive areas of national interests, such as, public interest, welfare, and policy relating to health, occupational safety, human rights, industrial relations, the environment, fiscal interests, over-exploitation of natural resources, and land acquisition and resettlement.[52] In this global free FDI market and mobility of MNC investors, it would be exceedingly difficult to carve-out the above sensitive areas of national significance from the realms of international arbitration. But it is worth trying to exclude as many areas inimical to national interest with an unequivocal standard of specificity in BIT drafting to avoid ambiguity or expansive interpretations as a ploy to circumvent investors' obligations and initiate ISDS compensatory arbitration claims.

Notwithstanding its confidential and non-transparent proceedings, growing ISDS cases with their serious implications for the economies of host countries are increasingly felt worldwide. This has resulted in more public attention to and scrutiny of the effects of once an obscure feature of BITs, which impedes on economic sovereignty to the benefit of MNCs with no enforceable obligations to operate responsibly to socio-economic issues and public interests. Many FDI hosting countries, such as Australia, Indonesia, South Africa, India, the EU and Poland, are among those taking steps to revisit and renegotiate their BITs. Australia, being a developed economy, has been taking a cautious approach to the inclusion of an international arbitration clause in its BITs. The 2010 Research Report of the Australian Productivity Commission (APC) found no evidence to 'suggest that ISDS provisions have a significant impact on FDI flows' with 'few benefits and considerable risks' of an international arbitration clause in FDI treaty, which is an imminent challenge for the economic sovereignty of Australia.[53] In April 2011, Australia adopted a policy of rejecting any ISDS provisions inimical to its sovereign authority to make policy and law to protect its national interest and social, environmental and economic policy-matters and would accept ISDS provisions conditionally upon evaluating their merits on a 'case-by-case basis'.[54]

V. NATIONAL REGULATION OF FDI TOWARDS THE GOAL OF SUSTAINABLE DEVELOPMENT

FDI-induced development in host developing countries must be sustainable and synergised towards achieving the sustainable development goal (SDG) -10 of the UN to alleviate poverty and reduce inequality by 2030. An investment is considered

[52] Kyla Tienhaara, *Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (CUP 2009); A Titi, *The Right to Regulate in International Investment Law* (Hart Publishing 2014).

[53] APC, *Bilateral and Regional Trade Agreements* (Research Report, November 2010) xxv, 265, 271-74.

[54] 'Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity' (DFAT, Canberra, April 2011) 14; Thomas Faunce, 'Australia's Embrace of Investor State Dispute Settlement: A Challenge to the Social Contact Ideal?' (2015) 69(5) Australian Journal of International Affairs 595, 597.

'sustainable' when it is:

> [C]ommercially viable investment that makes a maximum contribution to the economic, social and environmental development of host countries and takes place in the framework of fair governance mechanisms. This definition goes beyond "do no harm" and calls for efforts on the part of foreign affiliates to make an active contribution to sustainable development.[55]

The developmental sustainability of FDIs is to be measured by its life-cycle contribution to host counties, which does not occur automatically in an unregulated environment. It requires proactive policy intervention by involving multi-layered national authorities, regulators, and policymakers of a host country in the determination process of what is required of its sustainable development to support strategic domestic priorities in its national interest and public policy space. It necessitates the formulation of rules to quantify FDI contributions, investment objectives, process to identify quality of sustainable development, and consequences of failure to deliver. The sustainable developmental goals of developing countries are uniquely dissimilar due to their diverse socio-economic conditions warranting FDIs to be tailored to cater for their individual uniqueness and special circumstances.[56] The determination of these parameters is essentially a domestic matter and the decision-making task of governments to allow and regulate FDIs in their home markets by domestic legislation.

Mounting public backlash against the orthodoxy of the post-war FDI policy framework has led some developing countries to reintroduce their FDI regulatory national policies and even withdraw from ISDS to opt for FDI dispute settlement under their domestic laws by national courts.[57] The mounting evidence of exploitation of ISDS by MNCs in these countries led them to exercise their sovereign right to domestically regulate FDIs and resolve FDI disputes. The European Union has initiated a two-tier international investment court (IIC) (first instance and appellate chambers) since 7 May 2015 to replace ISDS. This proposal has been approved by the European Parliament for recommendation to the EC in the following terms:

> [T]o replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and

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[55] Karl Souvant and Howard Mann, 'Towards an Indicative List of FDI Sustainability Characteristics' (ICTSD and WEF, 2017) 2 <http://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-Sauvant-and-Mann-Final-1.pdf>accessed 21 May 2020; Karl Sauvant, 'Determining Quality FDI; A Commentary on the OECD's "FDI Qualities Project"' (*Kluwer Arbitration Blog*, 20 April 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3376328> accessed 21 May 2020.

[56] UNCTAD, 'Investment policy framework for sustainable development' (Geneva, 2015) <https://investmentpolicy.unctad.org/publications/149/unctad-investment-policy-framework-for-sustainable-development> accessed 2 May 2020.

[57] Bolivia denounced on 2 May 2007, Ecuador on 9 July 2007, and Venezuela on 24 January 2012; Diana Wick, 'The Counter-Productivity of ICSID Denunciation and Proposals for Change' (2012) 11(2) Journal of International Business & Law 239; Michael Waibel et al (eds), *The Backlash against Investment Arbitration: Perception and Reality* (Kluwer International 2010).

> scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives.[58]

The proposed IIC is meant to treat both investment protection issues and public interests in host countries on equal footing devoid of any automatic priority of the former over the latter. This policy has been embodied in the *Canada Comprehensive Economic and Trade Agreement* (CETA) and the *EU–Vietnam Free Trade Agreement* (FTA).[59] UNCITRAL has also been working on a project for the creation and establishment of a Multilateral Investment Court.[60] These ongoing alternatives to ISDS arbitration are indicative of the fact that ISDS has fallen prey on its own sword. ISDS derives its adjudicative authority from a derivative state consent conferred by host countries in exercise of their sovereignty. Where this state consent is exploited in bad faith, the possibility of its withdrawal and discontinuation may not be gainsaid.[61] However, despite these emerging developments, the post-war global FDI regulatory policy remains dominant and continues to shackle the regulatory authority and exacerbate existing poverty and inequality in many host developing countries.

A. Curtailing the regulatory power of host developing countries

The domestic regulatory agency of a host developing country may be reluctant, even unwilling, to make policy and law necessary for its national interest and welfare of citizens for fear of directly or indirectly breaching BIT provisions, which has the potential of exposing itself to international arbitration and huge compensation liability. This chilling effect of FDI disputes hamstrings its legislative freedom and

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58 European Parliament Resolution of 8 July 2015, Doc. 2014/2228(INI) (2014), para 2(d)(xv); Piero Bernardini, Reforming Investor–State Dispute Settlement: The Need to Balance Both Parties' Interests'(2017) 32(1) ICSID Review: Foreign Investment Law Journal 38-39; Anne-Karin Grill and Sebastian Lukic, 'Towards a Post-Arbitration Age: The European Commission's Fast-Track Reform of Investment Dispute Settlement' <https://www.lexology.com/library/detail.aspx?g=b519e52d-b890-4674-9055-23309601b7fd> accessed 16 June 2020.

59 CETA ch 8, s F: Resolution of investment disputes between investors and States, Arts 8(18) – 8(45) and EU–Vietnam FTA ch 8, s 3: Resolution of Investment Disputes, Arts 1–34, and Annexes I, II, III and IV.

60 Lino Torgal and Claudia Pinto, 'The Multilateral Investment Court Project: The "Judicialization" of Arbitration' <https://www.lexology.com/library/detail.aspx?g=318efe3f-e1db-473e-b21b-de423d8109 d8> accessed 16 June 2020; Catharine Titi, 'The Nationality of the International Judge: Policy Options for the Multilateral Investment Court' Columbia FDI Perspectives, No. 280, 15 June 2020 (Columbia Center on Sustainable Development).

61 Patrick Blyschak, 'State Consent, Investor Interests and the Future of Investment Arbitration: Reanalyzing the Jurisdiction of Investor-State Tribunals in Hard Cases' (2009) 9(2) Asper Review of International Business & Trade Law103; Antonius Hippolyte, 'The Unsettled Relationship between International Investment Agreements and the Developing World: A Critical Appraisal' (July 2013) <https://www.researchgate.net/publication/272226466_The_Unsettled_Relationship_between_International_Investment_Arbitration_and_the_Developing_World_A_Critical_Appraisal> accessed 12 June 2020.

authority. Regulatory chill can only be instilled by foreign investors, but not extended to domestic investors, which is discriminatory. Even the potential risks of FDI arbitration have led some host governments to shelve a Bill in progress and/or amend existing legislation regardless of their adverse effect on domestic public policy and national interest and security.[62]

The scope of ISDS arbitrations of FDI disputes may encompass regulatory issues over and above FDI-specific claims depending on agreed BIT terms and conditions. ISDS awards on such BIT provisions may produce unexpected interpretations and unpredictable outcomes, which can bewilder host countries to understand the operational principles of ISDS arbitrations. It is this lack of understanding on the part of host countries that often leads them to prefer no-regulation as the safest option to avoid potential ISDS arbitration. This is how the regulatory risk of FDIs is passed on from foreign investors to host countries through the ISDS arbitration process. This process ignores legal pluralism and cripples state sovereignty to flourish the neoliberal pursuit of an internationally homogeneous monist FDI governance policy for a heterogeneous dualist world.

B. The digital divide between FDI exporting and importing countries

The global business operations of corporate investors have embraced Internet-based digital technologies, which has significantly improved their efficiency in managing FDIs. This technological advancement has seriously impacted the regulation of FDI in technology impoverished host developing countries, which need transition to digital economy as a matter of urgency to boost their competitive edge and avail new opportunities. But the global spread of digital innovation is lopsided and protected. The global policy on technology transfer and FDI policymaking process are yet to be targeted to improve technological capacity in most FDI importing developing countries. These countries find the road to technology is riddled with obstacles created by their capacity constraints, including lack of skill, infrastructure, and human resources with capacity to cope with the technological innovations in FDI exporting countries. Their traditionally weak regulatory systems cannot change fast enough to keep pace with rapid automatisation and digitalisation of complex Internet-specific FDI regulatory matters. Public concerns of negative impacts of digital economy, including the protection of data security and privacy and preservation of socio-cultural values, have but added to hamstring their capacity to regulate the FDI-related risks that may have harmful effects on economies. Consequently, the growing wave of digital economy has, instead of benefiting them, effectively masked their marginalised economic plight.

The current state of affair has contributed to widen further the gap between non-digital capital importing countries and hyper-digital capital exporting countries,

[62] Susan Franck and Lindsey Wylie, 'Predicting Outcomes in Investment Treaty Arbitration' (2015) 65(3) Duke Law Journal 459, 471; Miriam Sapiro, 'Transatlantic Trade and Investment Negotiations: Reaching a Consensus on Investor-State Dispute Settlement' (2015) 5 Global Economy and Development 1, 9.

exacerbating existing inequality. These challenges lead the FDI seeking developing counties to face two stark choices: rely and depend on technology-intensive MNCs with competing interest or risk further alienation from the global digital economy, the ultimate outcome of the digital divide.[63] However, limited attempts have recently been made to bridge this digital gap. OECD has launched 'The Going Digital Project' providing digital assistance to its rich members. UNCTAD has also initiated 'eTrade for All' with easy access to sources of financial and technical assistance for improving digital capabilities in developing countries. But with so many developing countries lagging so far behind from the digital ladder and Internet access, their achievement of sustainable development and prosperity through FDI in the one-sided digital economy is increasingly becoming daunting, if not insurmountable.

VI. CONCLUSION WITH RECOMMENDATIONS

There is an inseparable nexus between the regulation and developmental role of FDIs. Profit maximisation comes foremost at the radar of MNCs to invest. FDI-induced development in host countries does not necessarily occur automatically but requires appropriate check and balance between the protection and development aspects of FDIs. The existing global FDI governance is an asymmetric policy in which ISDS is marked by unpredictable and non-appealable awards, secretive proceedings, inconsistent legal interpretation, appointment of biased arbitrators, exorbitant claims and cost-intensiveness. These features of neoliberalism have infiltrated into the global FDI policy regime to shift the bargaining power to MNC investors and compensatory burden to host developing countries.[64] It is crucial for host countries to improve their capacity to face the ongoing onslaught of neoliberal and safeguard their national interests. FDI should be treated as merely a means towards the end of achieving sustainable development. Therefore, protection and promotion should be given to only those FDIs that support sustained development, not to those inimical to national interests. The global FDI policy regime can no longer ignore the challenge of achieving tangible FDI-induced sustainable development in host developing countries. Where the domestic laws and policies to attract FDIs are open and generous enough and do not constitute barriers to inbound FDI flows, further regulatory relaxation may militate against development. Instead, a defined national interest test for incoming FDI screening would be of paramount importance to secure the competing interest of host developing countries.

The tension between the competing interests of foreign investors and host countries has persisted despite an evolving backdrop of legislative, judicial, and arbitral attempts to reconcile. FDIs are double-edged impacting host countries positively and negatively, which calls for domestic regulatory intervention to make the positive outcomes outweighing the negative impacts. A regulatory FDI policy need not be FDI protectionism. Rather, it is a pathway to ensure FDI-induced sustainable

63 UNCTAD Report 2017 (n 4) 156-57.

64 Olivia Chung, 'The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration' (2006-2007) 47(4) Virginia Journal of International Law 953.

development that should go together with adequate protection to FDIs. The existing global FDI policy framework warrants a reappraisal to strike a balance between the competing interests of foreign investors and host countries. Corrective liberalisation and preventive regulation of FDI must co-exist to support the exercise of rights and performance of obligations by both stakeholders to achieve their respective purpose of FDI. The policy of maximum protection for FDIs with no specified obligation to contribute to host countries and/or no consequence for failure to deliver is no longer tenable.

The role of FDI towards the goal of sustainable development in host developing countries has steadily been encroaching into the mainstream of international diplomatic vocabulary and policymaking. The Addis Ababa Investment Policy Framework for Sustainable Development 2015 has been embodied in the consensus-based Shanghai Guiding Principles for Investment Policymaking adopted by FDI exporting countries including G20 in July 2016 and endorsed by the G20 leaders in Hangzhou in September 2016. The overt recognition in these Principles of the right of host countries to regulate FDIs for legitimate public policy purposes (principle VI) is a positive step. UNCTAD Report 2017 also underscores the need for FDI-led sustainable development in host developing countries and reveals that most modern international FDI agreements embrace sustainable development, preserve the right to regulate and duty to protect, ensure responsible investment, reform dispute settlement, and improve systemic efficiency for promoting and facilitating FDIs.[65]

However, the post-COVID-19 pandemic period is expected to witness a substantial 'fall by up to 50 percent' in inbound FDI movement to advance sustainable economic recovery and development.[66] This alarming drop will certainly hit hard capital and technology importing developing countries. This predicted collapse of FDIs warrants a searching reappraisal and reform of their existing FDI law, policies, and measures to develop a positive agenda to make them as an attractive destination of FDI. To this end, certain inclusive reformative steps are recommended below for developing countries to consider.

- The liberalised FDI policy has failed to be a catalyst for sustainable development in many developing countries. Host developing countries seeking FDI must have their respective sustainable developmental goal, which requires pre-determined criteria to identify FDI objectives, quantify contribution of FDI, assess the quality of sustainable development, and consequences of failure to deliver. This prior articulation of sustainable development parameters is crucial for not only transparency and fairness of the FDI operation, but also to maximise their unique developmental goal to be set to commensurate individual socio-economic conditions. The advance

[65] UNCTAD Report 2017 (n 4) 119, 147.

[66] Matthew Stephenson et al, 'How the G20 Can Advance Sustainable and Digital Investment' T20 Policy Brief, Saudi Arabia (September 19, 2020) <http://ccsi.columbia.edu/files/2020/09/KPS-T20-2020-How-the-G20-can-Advance-Sustainable-and-Digital-Investment-Sept.-2020-FINAL.pdf> accessed 30 November 2020.

determination of these domestic requirements is crucial for host developing countries to achieve FDI-induced sustainable development.

- Most developing countries often conclude BITs to increase their FDI entries. But BIT-based FDI encounters a declining trend due to increasing regional free trade agreements, such as TPP and recently concluded the Regional Comprehensive Economic Partnership in the Asia-Pacific, aiming to integrate international investment law, direct and portfolio alike, and replace BIT-based FDI policy and law. Developing countries, particularly non-members of these regional blocs, are often vulnerable in negotiations and the victims of overly imposing BITs due to their unequal and inferior bargaining power. So, they need to be more careful and measured in offering incentives and conferring additional substantive or procedural rights on investors in BITs over and above those already available under the domestic law in negotiating future BITs. It is safe for them to standardise their BIT provisions. Overly imposing BITs will expose these countries to compromise their regulatory sovereignty. Investors navigate through these BITs to circumvent local laws to secure favourable outcomes.

- International arbitration has become a dominant private FDI dispute settlement mechanism. FDI disputes are essentially domestic in nature, falling squarely under the domestic law and judiciary of host states, which must be given priority. Such domestic law must contain provisions prescribing the methods and forums of FDI dispute settlement. Effective local judicial remedies are to be improved through specialised courts with greater judicial capacity in speedy commercial dispute settlement. Domestic alternative dispute resolution (ADR) mechanisms with functional competence can act as a reliable non-governmental commercial arbitration forum. Conciliation or/and mediation by neutral good offices, such as UN Secretary-General or WTO Director-General, may be explored prior to embarking on binding arbitration and requiring the parties to engage in ADR in good faith to resolve their disputes amicably. The exhaustion of domestic judicial and/or ADR remedies must be made a condition for resorting to external arbitration. Developing countries must be cautious in approaching and approving such arbitration as the last resort to limit its exposure to exorbitant damage claims. They should carve-out national policies in sensitive areas from the realms of international arbitration. Given its pro-investor secretive orientation, ICSID arbitration should be minimised in favour of exploring more palatable options, such as ICC and/or UNCTRAL arbitration rules and tribunals having improved transparency, open-hearing, disclosure obligations, time-efficient, and cost-effective for greater accessibility to the public in resolving FDI disputes.

- Investor-state conflict-management mechanisms (CMMs) has been suggested

to serve as a safety-valve to obviate outright dispute in many instances.[67] It would allow host developing countries and investors to negotiate their grievances at a very early stage and decisions to be implemented effectively in a non-litigious and cost-effective way. This intermediatory conflict management process has the potential of preventing full-blown legal disputes from developing requiring resort to costly ISDS.

- The operation of FDI projects is usually tilts more towards profit maximisation often at the expense of public interests and policies pertaining to health, occupational safety, human rights, industrial relations, and the environment in host developing countries. Foreign investors cannot conduct their FDI projects in a foreign jurisdiction in defiance of local laws and public policies. Host developing countries must retain and enforce their public policy space and sovereign right to regulate for achieving public welfare objective and regulating the sensitive areas of national significance, such as fiscal interests, prevention of over-exploitation of natural resources, and land acquisition and resettlement. Public concerns of negative impacts of FDI in this era of digital economy, including the protection of data security and privacy and preservation of socio-cultural values warrant careful consideration in formulating FDI policies.
- FDIs are invariably exposed to non-commercial risks in many developing countries. These uncertainties are beyond the control of foreign investors. Host countries are in a better position to minimise these risk by improving their utility and infrastructural services, energy and water supplies, technology-based customs clearance, administrative professionalism, law and order, accounting practices, and curbing civil unrest, political violence, bureaucratic red-tapes, and systemic corruption.

In pursuit of its post-pandemic FDI-induced economic recovery, the international FDI regime must reorient itself to drive digital transformation and help achieve sustainable development goals in developing countries. It must facilitate necessary technical assistance and specific measures to promote FDIs in digital infrastructural development and digital adoption by traditional non-digital economies to achieve sustainable development in host developing countries. Should this new generation FDI governance eventuate, it would have the potential of easing the tension between the competing interests of host countries and foreign investors and modernising the ailing post-war international policy framework for FDI regulation.

[67] Roberto Echandi, 'The blind side of international investment law and policy: The need for investor-state conflict management mechanism fostering investment retention and expansion' Columbia FDI Perspectives No. 290 (November 2, 2020).

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The Bangladesh Competition Law – Improving the Efficiency of the Market

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I. INTRODUCTION

The economy of Bangladesh is the 41st largest economy in the world.This means only 40 countries in the world are bigger than Bangladesh. To put things into perspective, the Malaysian economy is only 18% bigger than Bangladesh's and if the current growth rates persist, the Bangladeshi economy overtake the Malaysian economy by 2025.However, pursuing economic growth requires careful planning. There is a need to ensure continuous economic growth and promotion of justice and equity in the society.In this aspect, a market, which is a source of economic growth, needs to be fair. If it is controlled by a few, it may lead to both inequality andexploitation insociety.In this situation, consumers pay a higher price and new and small producers cannot enter the market.As such, there is a need to ensure that the markets remain competitive.

In this context, the competition laws are used by governments to ensure that the markets remain fair and so it continues to extract investments, protects young investors and brings prosperity in the society.This article analyzes the Competition Act of Bangladesh with a view to understand its implications for the economy of Bangladesh. Since the law is yet to be fully implemented so this article provides a comparative legal analysis in order to see how it might be implemented through regulations in order to achieve the objectives of the law as stipulated in its preamble.

II. HISTORY OF THE BANGLADESH COMPETITION ACT

The Government of Bangladesh enacted the Competition Act in 2012.In the Preamble, the Act stated that,

> *"WHEREAS in the context of gradual economic development of the country, it is expedient and necessary to make provisions to promote, ensure and sustain congenial atmosphere for the competition in trade, and to prevent, control and eradicate collusion, monopoly and oligopoly, combination or abuse of dominant position or activities adverse to the competition".*[1]

Passing of the law, however, is only the first step towards fulfilling its goal.In fact, it took two years for the Government of Bangladesh to establish the Bangladesh Competition Commission in 2014.This, however, was not enough because there was a need to approve a regulation to begin proper functioning of the Commission.A most

[1] The Competition Act 2012.

vital component of the law is also to develop appropriate awareness on the rules and procedures on the competition law so that it can be applied and also used by the victims to protect them against unfair market behaviors. The most difficult part of implementing such law is that the terms and the concepts used to charge a business with anti-competitive behavior are alien to common legal practitioners.

As it has been mentioned earlier, the primary goal of the law is to promote consumer's welfare through elimination of anti-competitive practices in the market.However, economic literature does not clearly stand for or against any practice and label them as 'anti-competitive'.It is the intent and the consequences of the practice that define a behavior as anti-competitive rather than the behavior itself.This makes it difficult to label a market behavior as bad or good.As such it is important to analyze how, other countries or regions used this law to promote market competition.

III. EU AND US LAWS AND THEIR IMPACTS

The EU competition law has three major objectives (among others) and they are: a) consumer protection, b) redistribution, and c) protection of competitors.[2]The first competition law in the world was, however, the Sherman Antitrust Act of 1890 in the US and was the first formal law to prohibit formation of a monopoly or similar behavior in a market for any product or service.

> *"The Sherman Antitrust Act—proposed in 1890 by Senator John Sherman from Ohio—was the first measure passed by the U.S. Congress to prohibit trusts, monopolies, and cartels. The Sherman Act also outlawed contracts, conspiracies, and other business practices that restrained trade and created monopolies within industries".* [3]

Although the US law and the EU law had different objectives in mind, they have many common tools to detect anti-competitive practices.However, the differences between them are still visible in their practices as these economies began to take actions against any anti-competitive practices in a market.One of the hidden objectives of the law in both EU and US was to prohibit the creation of monopoly behavior in the market. Monopoly or a cartel behavior in a market often allows one or few producers to accumulate wealth.The competition laws, on the other hand, had an underlying intention of ensuring economic equity rather than economic efficiency alone.The impact of the actions taken by the Commission on companies to ensure equity, however, did not always guarantee the intended results.For example, the decision by the US Competition Commission to split the Standard Oil in 1911 eventually created bigger wealth.According to the *Economist*:

> *AMERICAN courts do not much like breaking up successful companies. But when they do, the results are not always dire. Think of Exxon, Mobil, Amoco,*

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2 Richard Whish and David Bailey, *Competition Law* (9th Edition, Oxford University Press 2018).

3 Will Kenton, 'Sherman Antitrust Act Definition' (*Investopedia*) <https://www.investopedia.com/terms/s/sherman-antiturst-act.asp> accessed 30 January 2021.

> *Chevron: those companies, with a long and valuable history, are among the fragments of Standard Oil, broken up in 1911. In the subsequent decade, the value of Standard Oil's divided assets rose fivefold. John D. Rockefeller, lucky man, thus made more money in retirement than during his working life.*[4]

It is, therefore, important to carefully interpret the economic consequences of an anti-competitive behavior rather than defining them as 'anti-competitive' per se.The Bangladesh Competition Act, 2012 provided several definitions on anti-competitive practices and in the following sections, a few of the sections of the Act is analyzed in terms of their impact on market competition.

IV. ANTI-COMPETITIVE AGREEMENTS

A. Collusive agreements

The Bangladesh Competition Act, 2012 defined an anti-competitive agreement in Section 15(1) as:

> *"any agreement or collusion, in respect of production, supply, distribution, storage or acquisition of any goods or services which causes or is likely to cause an adverse effect on competition or creates monopoly or oligopoly in the market".*[5]

This shows that anti-competitive agreements are expected to be between producers or suppliers with an objective to cause an adverse effect – implying increase in price – by creating monopoly or oligopoly in the market.The implication of such a broad definition is rather scary because, by definition, any oligopoly market (and of course a monopoly market) will result in increase in price.Thereby, the most important aspect is to examine the word 'adverse effect' and provide reliable evidence towards it. This means, does it mean to say that any agreement of cooperation is necessarily anti-competitive?

It is difficult to interpret this as there are evidence to show that cooperation may also reduce inefficiency.For example, when multiple cable operators compete for subscribers in one single area, it may lead to increased subscription prices because of high initial investment costs.On the contrary, it they cooperate and divide their service areas through a mutual agreement, it will reduce the service charges for subscribers and bring efficiency in the market.Cable TV operators in Dhaka, have formed a cartel as only one cable TV operator operates in any area of Dhaka.

Accordingly, it can be concluded that the cartel of Cable TV operators did neither lead to inefficiency nor did it result in accumulation of wealth and hence, a sweeping conclusion to define any agreement for formation of a cartel in an oligopoly market as an anti-competitive practice might work against the ultimate objective of the law.

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4 'Bill Rockefeller?' (*The Economist*, 29 April 2000) <https://www.economist.com/leaders/2000/04/27/bill-rockefeller> accessed 30 January 2021.

5 The Competition Act 2012.

B. Abnormal Purchases or Bid Rigging

Section 15(2)(a) of the Competition Act, 2012 states that:

> *The practice or decision of any person or association of persons engaged in any agreement, any trade of identical or similar goods or in any provision of services shall be deemed to have adverse effect on competition in the market of goods or services if it:*
>
> *(a) directly or indirectly*
>
> *(i) determines abnormal purchase or sale prices; or*
>
> *(ii) determines the deceptive price in all process including bid rigging;*[6]

This section stipulates that firms or individuals engaged in agreements that have both direct or indirect impact in the market in terms of 'abnormal purchase or sale prices' or 'deceptive prices in all process' are deemed anti-competitive.

From a pure economic theory point of view, such a definition is dangerous unless there is a clear definition of 'abnormal' price behavior.For example, the Ministry of Commerce in 2007 imposed a draconian rule under which a price difference between wholesale and retail prices beyond 10% is called 'abnormal' and hence required actions to be taken against the businesses.Such an interpretation of 'abnormal' behavior is simply frightening. To explain this, let me use the following simple case:

> 'A' – a retailor purchased a produce from 'B' – the wholesaler, at a price of Taka 100. Imagine that A sells the same product in the same market on the same day at a price of Taka 105 which is below the 10% limit set by the government.This means by investing 100 Taka A has earned 5 Taka in one day.Now, let us assume that 'A' reinvest his 100 Taka in the same way on the following day and so on.Therefore, in one year, 'A' makes 5 x 365 = 1825 Taka from his capital of 100 Taka, an equivalent of 1825%.The question is whether this is a 'normal' or 'abnormal' rate of profit?

On the other hand, economic theory suggests that rate of profit depends for factors; a) efficiency in management, b) innovation; c) risk in doing business and d) frictional behaviors.Hence, there is a need to define the term 'abnormal' based on factors that influences profit.For example, a 10% may seem to be a 'normal' profit rate in a retail vegetable market but it may not be so in product like medicine which requires years of research to invent a medicine and yet it is also susceptible to high rate of piracy by potential competitors.Forcing a low rate of profit on them, may lead to complete collapse of the market.

C. Tie-in Agreements

Section 15(3) of the Competition Act, 2012 defines several anti-competitive practices in a market.Section (15)(3)(a) states that

[6] ibid.

> *"'tie-in arrangement', that is to say, an agreement or understanding requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods or to receive any benefit from the seller or any other person or enterprise engaged by him;"*[7]

There are cases when it can be awfully hard to define such tie-in arrangements as anti-competitive.For example, android operating system requires people to use 'android' compatible apps.Google does not allow non-android apps to be used in its android devices.A software developer needs to enroll them into the Google Ad services to receive and share income with Google.Clearly, Google has created a tie-in arrangement and it does benefit from it.Is this an anti-competitive behavior?

D. Exclusive Supply Agreements

Section 15(3)(b) defined 'exclusive supply agreement' and it states:

> *"'exclusive supply agreement', that is to say, an agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller"*[8]

There are many supply agreements that restricts buyers from acquiring other goods from another seller.Such agreements could be horizontal as well as vertical implying that a producer may restrict its buyer from purchasing products of other suppliers.A good example of this is like an agreement for price fixing by different suppliers of one product. Agreement on airfare between competing airlines or on bus fares between competing bus companies are not uncommon and yet not all of them are necessarily price distorting.One should be careful in distinguishing these agreements (overt or covert) with that of restricting supplies to increase prices.It is the latter type of horizontal agreements often accused of distorting the market.

E. Exclusive Distribution Agreements

Section 15(3)(c) defines 'exclusive distribution agreement' as:

> *"'exclusive distribution agreement', that is to say, an agreement which limits, restricts or withholds the output or supply of any goods or allocates any area or market for the disposal or sale of the goods"*[9]

This is the most common practice among suppliers in the market and are also labelled as 'vertical agreements' and are often practiced by a producer in the market chain.A car manufacturer appointing a company as exclusive distributor for its cars, or a retailer entering into an agreement to ensure that its supplier do not share the same product to other retailers are very common and may not always cause significant harm.In fact, competition pundits often regard vertical agreements as less distorting

[7] ibid.
[8] ibid.
[9] ibid.

than that of horizontal agreements.[10]However, a vertical agreement designed to prevent others to enter the market is an anti-competitive practice and hence shall be punished.

F. Refusal to Deal

Section 15(3)(d) explains 'refusal to deal' issues of anti-competitive behavior:

> *"refusal to deal", that is to say, an agreement which restricts, by any manner the persons or classes of persons to whom goods are sold or from whom goods are bought;*[11]

This behavior is difficult to trace but often exists in a market.For example, a credit card company forcing retailers to only respect its credit card and refuse other cards to clear payments or an insurance company entering into a contract with a hospital to only treat patients using the health insurance card of the company are not difficult to find in the market. It possible that such arrangement might restrict other competitors to survive in the market.Similarly, if a retail chain-shop refuses to sell products of a producer it might also restrict competition in the market or it might lead to elimination of a potential competitor.For instance, in the Sherman Act, 1890 group boycott is classified as illegal per se.[12]

G. Resale Price Maintenance

Section 15(3)(e) of the Competition Act 2012 defines the 'resale price' policy related anti-competitive behavior. It states:

> *"resale price maintenance", that is to say, an agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.*

Manufacturer of a product often control the retail price of their products. It can be used to restrict competition in the market.In a market, retailers often compete to maximize their revenue.For example, a retailor might sell a product free or at a low price to attract customers.Many grocery shops sell milk or egg at a low price to attract customers visit the shop and purchase other products.Such cross-subsidization may be part of their business policy. An agreement to prohibit such practice has been defined as anti-competitive by law.It is particularly for this reason; we often see the label 'maximum retail price' instead of 'retail price' set by the manufacturer on many products.

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[10] Dr S Chakravarthy, 'Competition-Restricting Practices' (CUTS-International undated) <http://www.cuts-international.org /NTW/pdf/Paper-2-Namibia.pdf> accessed 03 May 2021.

[11] The Competition Act 2012.

[12] Will Kenton (n 3).

H. Abuse of dominance

Abuse of dominance is another aspect of anti-competitive practices in many markets.Buyers or sellers may use their market power (either as a buyer or as seller) to restrict competition in the market.In US, for example, blue-cross health insurance was accused of such practice when it initiated an informal contract with hospitals to exclusively provide services to their insurance card holders. In EU, Google was accused of similar practices as it distributed the internet explorer – an internet browser, at free of charge and so it was effectively hatching a plan to kill Mozilla. In the Competition Act 2012, Section 16 defines this as:

if an enterprise -

(a) imposes directly or indirectly unfair or discriminatory condition in purchase or sale of goods or services or discriminatory price or predatory price in purchase or sale of goods or services;

(b) limits or restricts production of goods or provision of services or market thereof or technical or scientific development relating to goods or services to the prejudice of consumers;

(c) indulges in practice or continue to do practices which prevents others to access in the market;

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.[13]

In this definition, the legal text has used certain terms that require some explanations. These are predatory pricing and unfair or discriminatory pricing.

In addition to these, it is possible that producers might also abuse their market power through creating deliberate 'misinformation' through its advertisements.The Canadian Competition Act explicitly stated that misleading or deceptive advertisements is also an anti-competitive behavior.It states that:

> "These include sections relating to bait-and-switch advertising, promotional contests, deceptive prize notices, double ticketing, testimonials, electronic advertising, "ordinary selling price" claims and sales, performance claims, multi-level marketing and pyramid selling schemes, sales above advertised prices and telemarketing."[14]

[13] The Competition Act 2012.

[14] Steve Szentesi Law Professional Corporation, 'Competition Law | Toronto Lawyer Offering Canadian Competition, Advertising and Regulatory Law Services' <http://www.ipvancouverblog.com/> accessed 31 January 2021.

Manufacturers using 'false' testimonials to mislead customers is an age-old practice in Bangladesh. It allows large producers to target young producers and dominate the market.

I. Other Relevant Aspects

Besides the above-mentioned aspects as described in the Bangladesh Competition Act, 2012, there are other practices and issues which should also be brought under the scanner of the Competition Authority in order to implement the Competition Act, 2012 effectively.In this section, we summarize a few of them based on the practices similar laws in other countries.

1. Spams

In modern marketing, electronic and telemarketing strategies are gaining strength.During the COVID-19, many producers have moved into the e-commerce platform to sell their products and services. Using hidden tools to influence customers through misleading or disseminating 'selected' information might also be a tool to abuse dominance by large producers.In the Bangladesh Competition Law, these were not stipulated and hence are not included in the explanation on abuse of dominance.

2. Leniency

Crimes under 'anti-competitive' behavior are hard to trace because their effects are not easy to trace.In particular, it is often difficult to trace 'cartel' which is a collusive behavior among a 'closely held group of producers'.Cracking cartels is often difficult.Understanding this, many of the competition laws across the world, Pakistan[15], and India[16] for example, included a provision for leniency under which lesser punishment may be awarded to a producer for providing information that leads to punishment of the members of the cartel.Such a provision is important because it will allow the Competition Commission to crack cartels in any market. Unfortunately, such a provision does not exist in the Competition Act of Bangladesh.

V. CONCEPTS AND TOOLS FOR ASSESSING ANTI-COMPETITIVE BEHAVIOUR

The Competition Commissions across the world vehemently prosecute businesses which are engaged in anti-competitive activities and distort the market.However, the primary focus of the Commissions is 'about the way in which business should be conducted'[17] and so it may not always be about ensuring consumer's welfare.For example, reducing price may always benefit consumers but in the long run it may lead to reduction in the number of competitors in the market and so in some cases

[15] Competition Commission of Pakistan, 'Competition Commission Of Pakistan - Competition Act' <https://www.cc.gov.pk/index.php?option=com_content&view=article&id=60&Itemid=110&lang=en> accessed 2 February 2021.

[16] The Competition Act 2002 (India).

[17] Richard Whish and David Bailey (n 2).

commissions around the world intervened and forced the market players to change their behavior.It is more about creating conditions for fair trading or ensuring fair price of a product or a service in the market.

In this connection there are economic concepts that shall be defined and tested during the legal process.Some of these concepts are discussed below.

A. Market Definition

Defining the market may be quite tricky in terms of understanding the behavior.Take the example of Microsoft.It has been providing the operating system for personal computers. In order to give better services, it included an application called 'Windows Media' free. The question is, is the application a part of the operating system or a part of application to listen to music? The competitions in each of the market are different. In the music player market, it competes with 'Real Player', VLC, and many others. Whereas in the operating system is competes with Linux.The EU Competition Commission defined these two markets separately and so penalised Microsoft for supplying the Windows Media free while selling the operating system.In this case, the definition of the market is important and the EU imposed penalty on Microsoft and forced them to stop supplying it free."What is the 'relevant market'?", remains an important consideration for the Commissions.For the purpose of defining the 'relevant market', EU, UK and also US competition commissions use an SSNIP (small but significant and non-transitory increase in price)test also known as 'hypothetical monopolist' test.It provides a specific and objective assessment for the prosecutor to define the 'relevant market'.To put simply, the hypothetical monopoly test assesses the impact of changes in behavior of producers in one market on another market.This test is particularly relevant in case analysis of merger cases or in case of agreements leading to non-competitive markets.

B. Relevant product

In the market there are many similar products and it becomes difficult for a commission to determine the 'relevant products' for a product in question.The concept relies on the measurement of interchangeability.There are several tests used by the European Commissions and that of US to define relevant products.In the case of *Europemballage Corpn and Continental Can Col Inc. v Commission,*[18]the European Court of Justice quashed the decision of the Competition Commission for its failure to define the 'relevant market'.One way to define interchangeability is to use the legal test – meaning that when the goods and services are interchangeable it is within the same product market. In case of the *United Brands v Commission*[19], the plaintiff argued that 'bananas are in the same market as other fruits' and the European Court of Justice held that whether bananas could be

> *"singled out by such special features distinguishing it from other fruits that it is only to a limited extent interchangeable with them and is only exposed to their competition in a way that is hardly perceptible".* [20]

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18 ibid.

19 ibid.

20 *United Brands v Commission* (1978) Case No. 27/1976, 1 CMLR 129, para 22 (ECJ).

A second strategy is to measure interchangeability between products.In many cases, however, it may be difficult to observe in practice due to lack of reliable data. There are also issues of demand-side substitutability where changes in specification in one product may lead to creating monopoly in another product.In case of horizontal mergers, it may be important to use demand side substitutability to determine the relevant products. The European Commission defined 'relevant products' in terms of product characteristics, prices and intended use by consumers.[21]Competition Commissions across the world use several techniques including econometric analysis including estimation of cross-price elasticities as an evidence of substitutability.

C. Relevant Geographic markets

It is often argued that two products may be substitutable in one market and not in the other.For example, while in a community pork meat is a substitute product of other meats, it may not be same in another community.Similarly, merger of two companies in one market may reduce competition but it may not be so in another market because there are other substitutes.Competition Commissions, while defining 'relevant market' also consider such cases implying that there could be both demand-side and also supply-side substitutability between markets in two locations.

D. Temporal Market

Competition conditions may vary across seasons and consequently it is possible that the firm faces a fierce competition in one season while it may be a dominant firm in another season.

E. Consumers' Survey

Consumer's survey is also a tool used by Competition Commissions across the world to define substitutability or interchangeability of products.However, it is important to note that such survey does not use any *ad hoc* method to elicit consumer's mind or ask questions in such a way to achieve favourable outcome.

F. Market Power

Market power is a measurement of competitive behavior in a market. It can be measured using index of market share or market concentration.The Herfindahl-Hirchman Index (HHI) is often used as a tool to measure the market power. The HHI is measured in a market using square of market shares of all competitors in a market.

$$\square\square\square = \sum \square^2$$

Where s is the market share of the competitor and s is measured a value of the market

[21] 'Relevant Market', (*Wikipedia*, 2020) <https://en.wikipedia.org/w/index.php?title=Relevant_market& oldid=940239033> accessed 3 February 2021.

share.For example s = 10 if the share is 10%,

The market concentration is low if HHI is below 1000, moderate if it is between 1000 and 1800 and high it is above 1800.

G. Barriers to Expansion and Entry

Barriers to expansion and entry is also assessed to understand the nature of competition in a market. The Director General of Competition of the European Commission in their discussion paper exclusionary abuses defined several factors that may be considered giving rise to barriers.[22]These are: a) legal barriers – such as limiting number of firms to acquire licenses or conferring intellectual rights to one that may prevent others to enter the market; b) capacity constraints – like huge sunk costs to enter the market; c) economies of scale – meaning expansion may lead to continuous fall in the average cost; d) privileged access to supply – a firm having an advantage because of its ownership of a component of production; e) highly developed distribution and sales network – which may bar others to enter the market with a substitution product and so on.

VI. CONCLUSION

The Bangladesh economy is growing. Unlike many other growing economies, its economic activities are run by the private sector. As the Bangladesh economy expands with a growth rate of more than 7 or 8 percent, it is generating significant opportunity to earn profit for the private sector. A simple calculation would reveal that if, for example, a 320-billion-dollar economy grows at the rate of 7%, it means we expect at least 38 billion dollars[23] worth additional value or economic activity added to our economy in the following year. This is an opportunity to earn more profit and an economy without competition will increase inequality and hence will lead to concentration of wealth in the hands of a small group of entrepreneurs. It is in this context that the implication of the competition law should be understood.The competition law, if implemented well, ensures equal opportunities for all entrepreneurs, reduces inequality and helps create a just society.

[22] DG Competition Commission, EU, 'Discussion Paper on the Application of Article 82' (European Commission 2005).

[23] 7% real economic growth plus 5% inflation = 12% nominal growth of GDP

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Cybersecurity and Cyber Diplomacy at the Crossroad: An Appraisal of Evolving International Legal Developments in Bangladesh Context

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I. INTRODUCTION

A clearly defined territory, sovereignty, and the security of the state including its subject are very fundamental and less disputed issues recognised by the principles of classical international law.[1] Though it could not be anticipated that the main hallmark of the Third Industrial Revolution i.e. the information and communication technologies (ICTs) would create any genuine challenge in this regard, things started to change dramatically when the Internet was made open for general use in the mid-1990s with the introduction of the World Wide Web. The ICTs, the most important scientific innovation having a similar impact like electricity, and an enabling, disruptive, and general-purpose technology,[2] have the prospects to assist in achieving every single goal listed in the United Nations Sustainable Development Goals (UN SDGs).[3] However, the ICTs are dual-use products i.e. can be used for both good and

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1 *Corfu Channel* case, Judgment of April 9th, 1949: I.C. J. Reports 1949, 4; *Nicaragua Case, 1986 I.C.J. Rep 14 (1986)*; *Nicar. v. Costa Rica), Judgment, 2015 I.C.J. Rep. 665 (2015)*; Schmitt M and Vihul L, 'Respect for sovereignty in cyberspace' (2017) 95 Texas Law Review 1639.
The concept 'national security', started with the creation of the Westphalian or modern state, focuses on protection of state values or the prerogatives such as "territory, sovereignty, foreign policy interest and national economy" from e.g., outside arms attacks which amount to the commission of internationally wrongful act having legal consequences. Mijalković S and Blagojević D, 'The basis of national security in international law' (2014) NBP Nauka, bezbednost, policija 49-68.

2 Generally speaking, enabling technologies promise to offer radical changes in performance ability of anything, including existing technologies. Disruptive technologies promise to change the operation behavour of anything including human being, business and industries significantly. General purpose technologies virtually can be used everywhere and can affect everything in an economy.

3 According to the United Nations Development Program and UN ICT Task Force, "ICTs are basically information-handling tools – a varied set of goods, applications and services that are used to produce, store, process, distribute and exchange information. They include the "old" ICTs of radio, television and telephone, and the "new" ICTs of computers, satellite and wireless technology and the Internet. These different tools are now able to work together, and combine to form our "networked world"– a massive infrastructure of interconnected telephone services, standardized computing hardware, the Internet, radio and television, which reaches into every corner of the globe." See, 'Tools for Development Using Information and Communications Technology to Achieve the Millennium Development Goals' (2003) United Nations ICT Task Force Working Paper, December 2003 <http://www.itu.int/net/wsis/stocktaking/docs/activities/1103056110/ICTMDGFinal.pdf> accessed 1 March 2021.
The Internet, interconnection of computer networks, was initially invented for military use and subsequently expanded for academic purpose. In the mid-1990s, it was made open for general, public and commercial use. For an authoritative history of the Internet, please see, Leiner BM and others, 'A

evil purposes, and a conventional product that can be weaponised, very easily available and accessible, and are not expensive like other dual-use products/items such as nuclear technology, arms, and chemicals, etc. While the combination of ICTs and the Internet has shaped the lives of millions in every corner of the earth diminishing the apparent inequalities through the 'digital revolution' which is often showcased as the laurel of success by the policymakers of all levels, this combination, on the flip side empowers anyone interested to enter the cyberspace of another country using various devices and applications and cause economic and socio-political damages through unauthorized access to the ICT systems, sometimes having catastrophic impacts.[4] Thus, the ICTs are additionally projected as double-edged sword.

Though some forms of cybercrime can be committed individually or by a small group of technerds having limited ideas or incomplete understandings about the consequences, various forms of cybercrimes are white-collar organized crimes and a multi-trillion-dollar industry.[5]Due to the complex nature of the cyberspace and diversified use of ICTs in our daily life, it is hard to quantify the overall misfortunes caused due to cybercrimes. While by and large, if not in most cases, the affected parties tend to hide the incident on the fear of trust or reputation issues, some reliable international bodies have shared some figures of consequential financial loss.[6]In the United States of America (USA), the official statement from the Whitehouse revealed that the malicious cyber activity such as denial of service attacks, data and property destruction, business disruption, theft of sensitive financial and strategic information, and intellectual property, etc. cost the private and public entities of the country between USD 57-109 billion only in 2016.[7]The United Kingdom's National Cyber Security Centre estimated that in 2019, the country received on an average weekly ten cyber-attacks, most of which were targeted by the state-sponsored cybercriminals, popularly known as hackers.[8]Bangladesh, with its economy size of USD 3,02,571

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brief history of the Internet' (2009) 39 ACM SIGCOMM Computer Communication Review 22.

4 For a list of major international cyberattack and cybercrime incidents till 2013, please see, Marco Roscini, *Cyber operations and the use of force in international law* (Oxford University Press, USA 2014).

5 See, United Nations Office on Drugs and Crime, 'The Globalization of Crime- A Transnational Organized Crime Threat Assessment', (2010) <https://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf> accessed 1 March 2021.

6 In a Working paper published in 2018, the International Monetary Fund (IMF) calculated the losses caused to financial institution due to cyberattacks was USD 100 billion. See, Antoine Bouveret, 'Cyber Risk for the Financial Sector: A Framework for Quantitative Assessment', IMF Working Paper, WP/18/143. Renowned Cybercrime Magazine estimates that the financial damage of cybercrime will be USD 6 trillion by 2021. See, Cybercrime 'Damages $6 Trillion By 2021' (*Cybercrime Magazine Report,* 2016) <https://cybersecurityventures.com/annual-cybercrime-report-2017/> accessed 27 November 2021.

7 The Council of Economic Advisers, 'The Cost of Malicious Cyber Activity to the U.S. Economy' (2018) <https://www.hsdl.org/?view&did=808776> accessed 1 March 2021.

8 'National Cyber Security Centre, Weekly threat reports' (2020) <https://www.ncsc.gov.uk/section/keep-up-to-date/threat-reports?q=&defaultTypes=report&sort=date%2Bdesc> accessed 1 March 2021.

million,[9]experienced one of the worst cyberattacks in global history when USD 81 million was heisted from the Central Bank, Bangladesh Bank in February, 2016. As the classical international law principle of sovereignty applies to cyberspace also,[10] such an attack on the Central Bank, being one of the most important institutions of any government and the ultimate custodian of citizens' fund, should be considered as a clear case of an attack on Bangladesh's sovereignty.

After several cyberattacks and threats in different parts of the world led by both state-sponsored and non-state actors, different countries have started to perceive cyberspace as the *'fifth domain of warfare'* after land, sea, air, and space since 2010, as such an attack is viewed as a threat on state sovereignty.[11] While some scholars are reluctant to acknowledge this new domain of war since in a justly-waged war as happened between states, force is used to cause extreme savagery, destruction, and casualties, etc., these are apparently missing in cyberspace attacks.[12] Besides, due to the technical complexities and technological impediments around cyberspace, the elements of attribution to make any state responsible are technically difficult to establish, if not impossible. Albeit, the reality is that due to various types of cyber threats, countries around the world, irrespective of size and economy, have been suffering badly. Such a context compelled various countries to set up a dedicated workforce sometimes referred to as *cyber-army*, a group of highly skilled computer professionals employed with necessary arrangements and infrastructures to protect and maintain the national cyberspace secured.[13]

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9 The World Bank Group, GDP (current US$)-Bangladesh (2019) <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=BD>accessed 1 March 2021.

10 United Nations General Assembly, Note by the Secretary-General, Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, A/68/98, 24 June 2013; United Nations General Assembly, Note by the Secretary-General, Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, A/70/174, 22 July 2015.

11 In 2010, in the briefing of Jul 1st, 2020 edition, The Economist depicted computer mouse and keyboard as the new weapons of conflict in the fifth domain of warfare i.e. cyberspace. See, 'Cyberwar: War in the fifth domain' *the Economist* (London, 1 July 2010) <https://www.economist.com/briefing/2010/07/01/war-in-the-fifth-domain> accessed 27 November 2021. Since 2011, the Department of Defence of the United States of America has been officially incorporating the new domain into its planning, and the North Atlantic Treaty Organization (NATO) started to acknowledge cyberspace as an operational domain since 2014.

12 *See*, for example, McGuffin C and Mitchell P, 'On domains: Cyber and the practice of warfare' (2014) 69 International Journal 394

13 Some of the cyberwar superpowers are United States, China, Russia, Israel, the United Kingdom, North Korea and Iran who developed the cyber capabilities and have been investing more realising the importance of protection of devices and critical information infrastructures such as transport sector, information communication and telephone sector, utilities, energy, healthcare, finance and insurance sectors. *See*, Aschmann M, van Vuuren JJ and Leenen L, 'Towards the establishment of an African Cyber-Army' (2015) 14 Journal of Information Warfare 15; Keith Breene, 'Who are the cyberwar superpowers?' (*World Economic Forum*, 4 May 2016) <https://www.weforum.org/agenda/2016/05/who-are-the-cyberwar-superpowers/> accessed 1 March 2021; Lesley Seebeck, 'Why the fifth domain is different' (*Australian Strategic Policy Institute*, 2019) <https://www.aspistrategist.org.au/why-the-fifth-domain-is-different/> accessed 1 March 2021.

Technically speaking, because of its ever-dynamic nature, it is realistically difficult to calculate the depth and size of the cyberspace or infosphere alongside the ICTs devices introduced and globally used precisely. So is the variety of legal and regulatory issues and the actors involved in this sector. Yet, some relevant issues in this regard can be identified from the indexes published by different authoritative global organisations. Accordingly, different countries have been taking various measures, reviewing and updating their cyber or information security landscape within their financial and technical capabilities to garner the best of ICTs in attaining UN SDGs and to shield their cyberspace from outside attacks, though there is, unfortunately, no perfect and completely secured system/solution.

Bangladesh, being an active member of the United Nations (UN), is entitled to enjoy sovereignty within the territorial limits and to remain secured from outside attacks including a cyberattack. Simultaneously, articles 27 and 31 of the Constitution of Bangladesh, 1972 dealing with the equal protection of the law, and article 32 dealing with the protection of the right to life and personal liberty impose a duty and obligation on the State to protect and safeguard a citizen of the Republic and to ensure his security.[14] Thus, following others, the governments of Bangladesh have been taking various initiatives since the 1990s to make the best use of ICTs products and services. The present government has been taking various technological and legal measures in line with its political motto epitomised in the election manifesto i.e., 'Digital Bangladesh by 2021',[15] to make cyberspace secured to harness the optimum benefits of the ICTs.

In the first Global Cybersecurity Index, launched by the International Telecommunication Union (ITU) in 2014, Bangladesh positioned 53, which should be applauded considering the socio-economic foundation of the nation. The situation, tragically, started to deteriorate subsequently and the country slipped to 78, 74, and 147 in the Global Cybersecurity Index, National Cyber Security Index, and ICT Development Index released by the ITUrespectively, and 112 in the World Economic Forum's Network Readiness Index. However, the government took some initiatives and the recent rank of the country improved significantly to 42, 53, 147 and 105 respectively.[16] The rankings in these indexes indicate that even with some improvements, there are some gaps, limitations, and challenges in Bangladesh's existing cybersecurity legal regime which demand an investigation.

As Bangladesh has been approaching to be more digitalized steadily, the country has been experiencing cyber threats frequently. In many such occurrences, even after the availability of legal and technical solutions, Bangladesh seems to be helpless due to non-cooperation from other countries. For example, in the 2016 Bangladesh Bank

[14] *Tayazuddin and another v The State* 21 BLD (HCD) 503.

[15] Even though the present government deserves the credit to effectively utilise the 'Digital Bangladesh' slogan starting before the national election in 2009, all the previous governments since 1990 have contributions in popularising ICTs in the country. For a history of ICTs and the Internet in Bangladesh, see, generally, Karim ME, *Cyber Law in Bangladesh* (Wolters Kluwer 2020).

[16] See generally, National Cyber Security Index (2020) <https://ncsi.ega.ee/country/bd/> accessed 27 November 2021.

incident, though it is strongly believed that the North Korean cybercriminals alongside their Filipino allies committed the heist, Bangladesh could not recover the full amount but only USD 15 million,[17] due to the concept of 'attribution' needed to be established to make any state responsible under the public international law and non-cooperation from other countries. The existing tools available that could be utilized in a comparable circumstance e.g., the extradition treaty, mutual legal assistance or cooperation, etc. were found to be genuinely ineffective since such threats can be sourced from more than one jurisdiction. Hence, Bangladesh can consider the new idea which is brewing in other parts of the world i.e., 'cyber diplomacy', which also requires an examination and evaluation in the context of the initiatives taken by the government to make cyberspace more secured for the inhabitants.

In this backdrop, this paper aims to present relevant issues, challenges, and concerns around cybersecurity, and the legal tools available and utilized by different countries, including Bangladesh, in addressing those, and their efficacy in the context of cyberspace or infosphere. To accomplish these, the paper is partitioned into five sections, including an introduction and conclusion. Before delving deep into the existing challenges in the regulation and governance of cyberspace, Part two sets the scene and discusses distinctive technical issues, while Part three deals with the legal and regulatory issues, and challenges within the cyberspace landscape. Part four covers cybersecurity issues and an assessment of the initiatives taken in the Bangladesh context while sharing some policy directions.

This paper, in short, endeavours to project that though there are shreds of evidence of some advancement in cybersecurity at the domestic level, much more should be done to attain the political commitments of the government i.e., making the country completely digitalised. This paper features that while many governments started the process of securing cyberspace long ago in a systematic and coordinated manner, the Bangladesh government has only taken some systematic legal and technical steps recently, which promise to protect the country in reducing some of the inbound security threats. However, to reduce cross-border cybersecurity threats, there is no alternative than to promote cybersecurity culture among the citizens, enhance cooperation between countries by joining the relevant organization and initiatives, express this issue in the bilateral or multilateral treaties, including bilateral investment treaties (BITs); and to consider introducing cyber diplomacy immediately.

II. UNPACKING CYBERSECURITY: TERMINOLOGIES AND TECHNICAL ASPECTS

A discussion on the relevant terminologies and the technical aspects regarding cyberspace is unavoidable as there are some apparent misconceptions among the stakeholders in this regard. Some words e.g., data and information, electronic (or, very shortly 'e' or 'E'), cyber and digital, etc. are used synonymously and/or

[17] Nurul Amin & Shafayat Hossain, 'Not much progress in recovering Bangladesh Bank's stolen money' *the Business Standard* (New Delhi, 4 February 2020) <https://tbsnews.net/economy/banking/not-much-progress-recovering-bangladesh-banks-stolen-money-41711> accessed 1 March 2021.

interchangeably in the common parlance.[18] Such misconceptions may create some inevitable circumstances, even for the security professionals which may tax huge leaving the information system vulnerable in the long run.

While the word 'data' is used in many different contexts to denote different things, in the ICTs literature, it is generally used to mean processed information such as word, number, picture, knowledge, facts, concepts or instructions etc.[19] However, when these 'data' are refined and can be interpreted in a given context to enable someone to derive some meaning, these data can be considered as 'information'.[20] 'Information' can be both digital/automated and analogue/manual. Apparently, the data is used in digital or electronic systems, though information can be manual.

The word 'digital' is theoretically used more in an ethical context e.g. digital divide, whereas the word 'electronic' is used to mean the commercial or business aspects, and 'cyber' is used to mean the security aspects of the ICTs, when these are connected to the Internet.[21]Therefore, from the understandings above, one can reasonably envisage differences between 'data security', 'cybersecurity', 'digital security', and 'information security' etc. This is because one may observe that e.g., in the case of bank management, the regulators impose obligations to adopt separate cybersecurity and information security policies.

From a security context, the concept 'information security' means the security of the contextualized data, and focuses on confidentiality, integrity, and availability of the information (popularly known as the CIA Triangle). Whereas the concept 'cybersecurity' includes the protection of digital information and also digital assets which are considered non-information, but vulnerable through ICTs e.g., computer system and network, etc. An exact definition of 'cybersecurity' is difficult to craft and even the international organisations are unable to succinctly define it, though some features or characteristics can be shared.

The ITU's recommended definition considers 'cybersecurity' as the "collection of tools, policies, security concepts, security safeguards, guidelines, risk management

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[18] For example, sections 22 & 23 of the Digital Security Act, 2018 deal with digital or electronic fraud and cheating.

[19] In the context of computer, data means any information, knowledge, facts, concepts, or instructions processed or capable to be processed that can be converted through binary coding system. Section 2 (10) of the Information and Communication Technology Act, 2006 (Act no. 39 of 2006) defines "data" as "a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being processed, or has been processed in a computer system or computer network, and may be in any form including computer printouts, magnetic or optical storage media, punch cards, punched tapes or stored internally in the memory of the computer."

[20] The words 'data' and 'information' are popularly used interchangeably in the context of personal data or information protection literature to mean some of the relevant data or information of the natural individual human being in general and a very specific human being respectively.

[21] In the context of Bangladesh, it seems that as the government has been using 'digital Bangladesh' as the political slogan and has been promoting the 'digital Bangladesh' brand, the government prefers to use the word 'digital' instead of 'cyber' in all the legal and policy documents bypassing the global trend.

approaches, actions, training, best practices, assurance and technologies that can be used to protect the cyber environment and organization and user's assets" such as "connected computing devices, personnel, infrastructure, applications, services, telecommunications systems, and the totality of transmitted and/or stored information in the cyber environment". With the objectives to make assets and properties available while maintaining their integrity and confidentiality, the purpose of cybersecurity is to ensure the "attainment and maintenance of the security properties ...against relevant security risks in the cyber environment.[22] Thus, the concept 'cybersecurity' covers all aspects of information, data, technology, server, device, software, hardware, hard disc, cloud, network, the internet, etc. which are digitally connected and can be exploited to ensure data integrity and authenticity. In most of the information landscape, initiatives are taken to ensure the protection of CIA Triangle and these three, along with two additional elements i.e. authentication with uniquely identified personal information, and the inclusion of logbook through which the presence of anyone in the cyberspace can be identified are the main elements of cybersecurity. Finally, the phrase 'digital security' means the security of digital devices or digital systems.[23] Thus, it is evident that these are different things even though they are used interchangeably.

After terminologies, a technical discussion in an easy language is desired to understand the complexities in the effective regulation or governance of cyberspace. The precise origin of the word 'cyber', which generally denotes anything relating to the Internet, is unknown; so is the vastness of the web cyberspace, a domain consisting of interdependent networks of IT infrastructure i.e. the Internet, telecommunication networks, computer systems and embedded processors and controllers, etc. through the Internet.[24] Five components (i.e. geographical, physical network, logical network, cyber persona, and persona) in three layers (physical, logical, and social) generally define cyberspace.[25] While the non-technical people may consider website security as cybersecurity, these are different things as the websites are a very small component of the whole cyberspace ecosystem.

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[22] International Telecommunication Union, 'X.1205: Overview of cybersecurity' (2008) <https://www.itu.int/rec/T-REC-X.1205-200804-I> accessed 27 November 2021.

[23] Section 2 (k), the Digital Security Act, 2018. The law further defines 'digital' as the 'working procedure based on binary system (0 or 1) or digit based system, and . . . electrical, digital, magnetic, optical, biometric, electrochemical, electromechanical, wireless or electro-magnetic technology will be the part of it' [section 2(i)].

[24] It is believed that the word was derived from the word 'cybernetics', first used by the American mathematician, Nobert Wiener in 1948, having Greek origin, meaning the theory of control and communication in living beings and machines. For a historical background on the origin on how Wirner used the word 'cybernetics' in the context of World War II, see, Bynum TW, 'Computer ethics: Its birth and its future' (2001) 3 Ethics and Information Technology 109-12.

[25] In the *physical layer*, telecommunication structures, hardware, and infrastructure ensure the interoperability of the network and different other devices e.g., server, router, ICTs, etc. The *logical layer* ensures the logical connections of every device i.e., various ICT devices, network appliances, and websites having an IP address. The *social layer* is comprised of a persona and cyber persona. While 'persona' means the people, who use a common network collectively, and 'cyber persona' indicates an individual with his identification e.g., email address, computer IP address, mobile number, etc. Thus, with the possibility of more than 'cyber persona', the number of 'cyber persona' can be more that the number of natural human beings.

The websites we surf are placed in the logical layer. In terms of content accessibility, the web has again three layers i.e. surface web, deep web, and dark web. It is the surface web, which is only 4% of the whole web, where general people have access and there are more than 2 billion websites, which increase at the rate of around 400 new websites every minute.[26]The web cyberspace is dynamic and ever-evolving with the introduction of different devices. Using the super powerful and sophisticated tools, techniques, applications, and devices, etc. crimes can be committed in cyberspace from anywhere in the world, having devastating effects on the targeted objects, including implications on national security and sovereignty. Such innovative security challenges dubbed as cybersecurity is an extension of cybercrimes.

An ideal Cybersecurity Framework, promoted by the ITU Global Cybersecurity Agenda (GCA), should have five interrelated and coordinated arms.[27] These are- (a) *legal*, where a country should enact a legislation on cybercrime and cybersecurity containing provisions on spam regulation, (b) *technical and procedural measures*, where a country should establish CERT/CIRT/CSIRT, develop standards implementation framework, appoint a standardized body, adopt technical mechanisms and capabilities to address spam, use cloud for cybersecurity purposes, and employ child online protection mechanisms, (c) *organizational measures/structures* where a country should have a national cybersecurity strategy, along with an established responsible agency, and cybersecurity metrics, (d) *capacity building measures*, where a country needs to take public awareness campaign, framework for the certification and accreditation of cybersecurity professionals, professional training course, educational program or academic curricular, research and development programs and incentive mechanisms in cybersecurity, and (e) *cooperation measures* where the country should enter into bilateral and multilateral agreements, participate in international fora or associations, foster public-private partnerships, Interagency or intra-agency partnership, and adopt best practices.

In short, a cybersecurity framework must have clear objectives, action plans, reference of measures (legal, procedural, technological, and institutional), and responsibilities of the institutions designed to safeguard systems, networks, services, and data, etc. While cybercrime legislation deals with rule of law, human rights, crime prevention, and criminal justice, etc., the purpose of cybersecurity legislation is more about national interest and security, trust, resilience, and reliability of ICT. The way different forces have been working in promoting security within the national territory of a state, cybersecurity mechanisms need to be employed similarly to make different stages of cyberspace such as network, server, application, and database, etc. secured.

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[26] One of the most reliable and widely consulted live interactive database, which assist in monitoring different aspects such as the number of Internet users, users of various social media platforms, different ICTs devices computer, smartphone, tablet, etc., total number of websites, hacked websites, blog posts, electricity used, and CO2 emissions etc. See generally, Internet Live Stats <https://www.internetlivestats.com/watch/websites/> accessed 21 November 2021.

[27] International Telecommunication Union, Global Cybersecurity Agenda, <https://www.itu.int/en/action/cybersecurity/Pages/gca.aspx> accessed 1 March 2021.

III. REGULATION TOWARDS SECURED CYBERSPACE AND INTERNATIONAL LEGAL DEVELOPMENT: AN OVERVIEW

It is impractical for the discussion to accommodate all the relevant legal and regulatory issues regarding cyberspace as they are too uniquely diversified to cover in this article. Therefore, this paper will provide an overview of some of the selective and relevant events/issues. At the international level, even though the ITU, one of the oldest international organisations in operation, has been playing a significant role in shaping the regulations of the technological aspects of the telecommunication infrastructure which is a backbone of cyberspace, the vertical regulation of international law covering other areas in this regard is absent. After the Internet was made available for general use in the mid-1990s, the global community started a concerted move almost immediately. In 2003, in the framework of the World Summit on Information Society, it was pledged to achieve a "people-centred, inclusive and development-oriented Information Society [...] premised on the purposes and principles of the Charter of the United Nations and respecting fully and upholding the Universal Declaration of Human Rights". Nevertheless, even after almost two decades, the Internet is a largely legal vacuum and every country has been struggling to find out the effective form of regulation and the regulatory tools in this regard.

With the vastness of the web in cyberspace, the issue of regulatory tools and measures are also progressing at various levels focusing mainly on the five integrated areas proposed by the ITU GCA shared above. From the ITU's GCA, it is evident that law is only an enabling tool in the effective regulation and governance of the cyberspace ecosystem and therefore, it will be relevant to understand the regulatory and legal issues involved, and the challenges faced by governments in implementing these. While the words 'governance' and 'regulation' are used interchangeably, the word 'regulation' is part of the term 'governance', which deals with the role of the state, the authority of its institutions, and its use of legal rules. Legitimacy, accountability, and authority are important normative attributes of governance.

Due to the magnitude of the Web cyberspace and the actors involved along with the rapid developments in the sector, the effective or suitable way of 'regulation' of the cyberspace is a very complex, perplexing, and contentious issue. There are three main theories of cyberspace regulation- liberal institutionalists, cyberlibertarians, and statists. *Liberal institutionalists* advocate for an international institution and rule-based multilateralism in managing cyberspace, *libertarians* propose to make cyberspace free from oppressive regulation that may restrict the liberty of people in the infosphere, and *statists* feel that the state, being the most important subject of international law, should take the responsibility to govern cyberspace.[28] However, a close look at the relevant regulatory framework of any country in the world will reveal that a better regulatory framework shares some features of all these three theories and there are combinations of strict state regulations in selected sectors, institutional and industrial self-regulation in some sectors, and there are free spaces where the netizens can share ideas freely.

[28] Reardon R and Choucri N, *The role of cyberspace in international relations: A view of the literature* (2012).

As cyberspace regulation has been a very complicated issue, only selected issues are regulated at the international level while most of the issues are left in the hands of the individual states. After the historic terrorist attack on September 11, 2001, the global community started to consider the state control of online information.[29]From the Global Cyber Strategies Index, developed by the USA based Think Tank, Center for Strategic & International Studies, it can be revealed that at least 78 countries have national strategies, 31 countries have military strategies, 35 countries have content related strategies, 113 countries have privacy-related strategies, 63 countries have strategies on critical infrastructure, 114 countries have strategies on commerce and 91 countries have strategies on crime.[30] Yet, almost every country has been suffering to control various forms of crimes committed in cyberspace.

There is a close relationship between globalization,[31] economic development, and crimes.[32] The cybercriminals take the chances of weak legal and regulatory systems, and technological weaknesses, as can be seen in developing economies.[33] Besides, the easy and cheap access and the dual-use nature of the ICT products e.g. software, hardware, and devices pose serious challenges for the regulators and law enforcement agencies making the ICT products a double-edged sword.

With the ever-increasing number of internet and smartphone users, the risks of cybercrimes are also increasing. From various live interactive cyber threat maps available, it can be seen that different types of cyber threats, both successful and attempted, are a common phenomenon nowadays.[34]The situation gets worse when such cyber threats are committed in an organized manner from multiple jurisdictions. In such circumstances, despite the affected countries having the necessary technical and technological capabilities and good faith, it is somehow impossible to investigate and prosecute the criminals.

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[29] Watney M, 'The evolution of Internet legal regulation in addressing crime and terrorism' (2007) 2 Journal of Digital Forensics, Security and Law 3.

[30] 'Global Cyber Strategies Index' <https://csis-website-prod.s3.amazonaws.com/s3fs-public/Cyber%20Regulation%20Index%20V2%20%28002%29.pdf> accessed 1 March 2021.

[31] Friman HR, *Crime and the global political economy* (Lynne Rienner Publishers Boulder 2009).

[32] Soares RR, 'Development, crime and punishment: accounting for the international differences in crime rates' (2004) 73 Journal of development Economics 155-184.

[33] Kshetri N, 'Diffusion and effects of cyber-crime in developing economies' (2010) 31 Third World Quarterly 1057-1079.

[34] Though there are some limitations of these maps, the cybersecurity professional can use these important tools to strengthen the security systems after evaluating the available information. Some of these maps are- *Kaspersky*, for cyber malware and DDoS, see generally, 'Cyberthreat Real-time Map' *Kaspersky* <https://cybermap.kaspersky.com/>; *Norse Corporation*<https://norse-corp.com/map/>; for infections, attacks and spams, see generally, Bitdefender <https://threatmap.bitdefender.com> accessed 4 December 2020; Fortinet <https://threatmap.fortiguard.com/> accessed 1 March 2021; for malicious and Phishing URL data feed, see generally, *looking glass*<https://map.lookingglasscyber.com/> accessed 1 March 2021.
For a list of significant cyber incidents developed by Center for Strategic & International Studies, see generally, CSIS (*Center for strategic & International Studies,* 2020) <https://csis-website-prod.s3.amazonaws.com/s3fs-public/200901_Significant_Cyber_Events_List.pdf> accessed 1 March 2021.

Technologically speaking, anyone can access any live website hosted anywhere in the world using the correct web address.These websites can be accessed only through a national gateway, which may be considered as the territorial limit of the country where the website is hosted. Therefore, theoretically, any state should be able to bar the entry of anyone to access any such website and vice versa.[35] However, with an unfathomable number of websites registered and live in every second along with the use of sophisticated technologies and the absence of the proper level of technical understandings and capabilities; many countries, especially from the global south, are unable to protect their national virtual territory confidently. Moreover, due to the theory and philosophy of 'limited government' in modern state functioning, the government cannot interfere in all the private and economic activities of the citizens.

For a government with supporting available reliable technologies, the issue of governance of cyberspace is less troublesome when any cyber threat is committed within one single jurisdiction. The main challenges start when cyber threats are initiated from outside the territorial limit of any country. In such a context, the classical public international law principles and issues of state sovereignty, territory, responsibility and jurisdiction, etc. will arise and need to be settled. Before taking any initiatives/actions, an affected country needs to establish state-sponsorship behind such threats, grounds for use of force as self-defense, etc. Apparently, even after rampant cyberattacks, even the most developed countries have been facing challenges to establish attribution and state-sponsorship, although all countries pledge not to allow their land for e.g. cyberattacks or cyberterrorism. For an affected country, this is thus difficult, if not impossible, to establish the attack unless there is co-operation from the source countries.[36]

Moreover, this is somehow unfortunate that the classical international law principle of state responsibility, though very relevant in the case of cyber-attacks, is not well developed. In the case of cyber threats and cyberattacks, attribution is one of the most important challenges in the making of any state directly responsible and any state cannot be held responsible for the activities of non-state actors such as criminal gangs. Fortunately, the International Law Commission adopted the Draft Articles on the Responsibility of States for Internationally Wrongful Acts in 2001, which has also been referred by the International Court of Justice, etc. Though these are soft law, these cannot be treated as an authoritative document yet as these are still in Draft form. The Tallinn Manual on the International Law Applicable to Cyber Operations provide some insights and is considered to be the most comprehensive guidelines for the stakeholders in this regard; however, this manual is not legally binding on the states.[37]

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[35] For example, some countries block some of the websites or web-based services in different occasions or reasons.

[36] UN member states, under article 2(1) of the United Nations Charter, are under an obligation to fulfil in 'good faith' their obligations derived from the Charter.

[37] The very influential 'Tallinn Manual on the International Law Applicable to Cyber Warfare' was developed by a group of nineteen international law experts in 2013. According to NATO Cooperation Cyber Defence Centre of Excellence, the Manual which was subsequently revised and

What is more unfortunate is that there is no internationally binding legal instrument addressing this issue so far. The United Nations Office on Drug and Crime (UNODC), though recognises multi-jurisdictional cybercrime as organized crime, has not included any definition of 'organised crime' in the Convention on Transnational Organized Crime, 2020. Within the UN, the First Committee of the UN General Assembly (UNGA) has been functioning as an important forum to discuss various issues on state behavior in cyberspace. Russia introduced a resolution in 1998 on "Developments in the field of information and telecommunications in the context of international security" and similar resolutions are adopted almost every year by the First Committee. Besides, the Committee periodically form a Group of Governmental Experts (GGE), the first one being formed in 2004 as the successor of the Group of Governmental Experts on Information Security.[38]Additionally, the ITU established the International Multilateral Partnership Against Cyber Threats (IMPACT) in 2008. An important development in this regard is that the GGE proposed some norms of responsible state behaviour in cyberspace in their reports of 2010, 2013, and 2015.[39] Even though these are the only norms proposed by high impact bodies, these do not have any binding effects. Unlike the GGE, which is a relatively exclusive forum of 25 members, in December 2018, the UNGA established an Open-ended Working Group (OEWG), which is open for all UN member states to participate and discuss ICT related issues in cyberspace which may help in developing an International Cyber Law Convention to help shape the international move on setting the international law norms and rules on e.g. attribution and effective control. This is a wonderful opportunity for all countries in the world, including Bangladesh, to raise their voice towards making a more secured cyberspace. Besides, there are at least twenty regional agreements and initiatives on cybersecurity.[40] The European Convention on Cyber Crime (also known as "Budapest Convention"), the most famous but non-binding instrument, is also open for non-European countries to sign and ratify and the African Union Convention on Cybersecurity and Personal Data Protection (also known as "Malabo Convention") is open for signature for the African countries.

Apart from these selected moves at the international and regional level, a recent trend that some of the industrialized countries and global cyber superpower have been considering the issue of inclusion of cybersecurity issues in their BITs, can be

released with the title 'Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations' in 2017 is the most comprehensive analysis on how international law applies to cyberspace.

38 The formation of such a committee begins with an expression of interest, after that it has to receive recommendation of the High Representative to the Secretary-General (UNSG), and finally, the UNSG nominates the Committee.

39 For an overview of different moves taken in this regard, see, Paul Meyer, "Norms of Responsible State Behaviour in Cyberspace." In Markus Christen, Bert Gordijn and Michele Loi (eds.), *The Ethics of Cybersecurity*, (Springer 2020).

40 For the list of these agreements and initiatives, please see, Internet Governance Forum, 'IGF 2019 Best Practice Forum on Cybersecurity: Cybersecurity Agreements' (2019) 16-17 <https://www.dfat.gov.au/sites/default/files/cyber-submission-best-practices-forum-on-cybersecurity-igf-2-of-2.pdf> accessed 27 November 2021.

noticed.[41] Moreover, some jurisdictions e.g. Europe has been considering to impose economic sanction due to cybersecurity issues.[42] Thus, these are some of the attempts different jurisdictions have been trying to consider in the absence of any binding international instrument that the UN member states can adhere to ensure cyberspace more secured.

IV. REGULATION TOWARDS SECURED CYBERSPACE IN BANGLADESH CONTEXT

It has already been shared that ITU's GCA considers five interrelated and coordinated arms- legal, technical, and procedural measures, organization measures, capacity building measures, and cooperation measures important for an ideal cybersecurity framework. This segment will provide an overview of these initiatives taken in the Bangladesh context and share some policy directions after evaluating these.

A. Cybersecurity in Bangladesh Context: An Overview

When Bangladesh was born as an independent country, Sweden had already enacted the first national cybersecurity-related law in the year 1973 in the form of a data protection law. In the first two decades after independence, Bangladesh had to face various political turmoil and natural disasters while concentrating on her economic development. These factors, alongside the poor foresight of the then governments in power, had an impact on Bangladesh's late joining in the ICT revolution compared to some of her neighbours.[43]

The Information and Communication Technology Act, 2006 (Act no. 39 of 2006) ("ICT Act, 2006"), the first standalone piece of legislation, was enacted containing important provisions on various aspects of ICTs securities e.g. legal recognition of digital signature and electronic records,[44] attribution, acknowledgment, and dispatch of electronic records,[45] secure electronic records & digital signatures.[46] The Law also listed a good number of substantive criminal offences with punishments e.g. damage to computer system, computer system (sec. 54), temperament of computer source code (s. 55), computer system hacking (s. 56), unauthorized access to protected system (s. 61), disclosure of confidentiality (s. 63), use of computer for crime commission (s. 66), etc. Besides, the Bangladesh Computer Emergency Response Team (bdCERT) was established in 2007 to assist the stakeholders in dealing with computer threats, vulnerabilities, incidents and incident responses, etc.

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41 Shackelford S and others, 'Using BITs to Protect Bytes: Promoting Cyber Peace by Safeguarding Trade Secrets through Bilateral Investment Treaties' (2015) American Business Law Journal 1.

42 See for instance, 'Guardian of the galaxy: EU cyber sanctions and norms in cyberspace' (2019) Chaillot Paper 155 <https://www.iss.europa.eu/sites/default/files/EUISSFiles/cp155.pdf> accessed 27 November 2021; Erica Moret and Patryk Pawlak, 'The EU Cyber Diplomacy Toolbox: towards a cyber sanctions regime?' <https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief%2024%20Cyber%20sanctions.pdf> accessed 27 November 2021.

43 For a history of ICTs and the Internet in Bangladesh, see, generally, Karim ME (n 15).

44 Information and Communication Technology Act, 2006 (Act no. 39 of 2006) ch II, secs 5-12.

45 *Ibid*, ch III, secs 13-15.

46 *Ibid*, ch IV, secs 16-17.

There are several limitations and challenges due to which the provisions of the law are not implemented effectively. As a result, the news about various cybercrimes are reported almost regularly. The incidents of malware attacks or website hacking are quite common. In the Holey Artisan Bakery incident, the terrorists successfully completed the bloodshed while using electronic devices, and this raised concerns over the awareness and preparedness capabilities of the local security professionals. Besides, the security of Bangladesh National Defence College's website was breached through state-sponsored cyberattacks several times.[47]Moreover, there were frequent allegations that the provisions of the law, especially section 57 dealing with defamation in electronic form, were used for political purposes and to limit the voice of the opposition or critics of the government. Due to some technical and technological limitations of the law enforcement agencies, lack of dedicated forensic labs, etc. offences under this law committed could not be investigated, tried, and prosecuted. As a result, not a single case under this law was unfortunately brought to the higher court, and reported in the law reports in the last fifteen years. The ICT Act, 2006 was subsequently amended extensively through the provisions of the Digital Security Act, 2018 (Act 46 of 2018) ("the DSA, 2018"), leaving the ICT Act, 2006 merely a digital signature law as available in other jurisdictions. Furthermore, dedicated wings with necessary cyber forensic expertise were established in the police administration and cyber tribunals are established in all divisional districts.

Bangladesh has adopted the National Cybersecurity Strategy, 2014 following the Pillars of the ITU's GCA though unfortunately, no specific body was assigned with the responsibility for the 'design, implementation, monitoring, and revision of the strategy'. Some sectors such as communications, emergency services, energy, finance, food, government, health, transport, and water were indicated as Critical Information Infrastructure (CII) though no such specific CIIs have been formally declared yet. It was reiterated through the DSA, 2018 and the Digital Security Rules, 2020 ("the DSR, 2020") that the government may declare any computer system, network, or information infrastructure as CII.[48] In 2014, the government also issued the Information Security Policy Guidelines which provided all the government agencies to develop and implement their respective information security policy within six months of the commencement of the Guidelines.[49]

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[47] Mohammad Nurus Salam, 'Evolving Cyber Security Threat and Preparedness of Bangladesh Army' (2018) 64 Bangladesh Army Journal 83-95.

[48] See generally, Digital Security Act, 2018 (Act No. 46 of 2018), sec 15. Examples of critical infrastructures include transport/traffic (aviation, navy, railway, road traffic), government (administration, parliament, judiciary), IT & T (telecommunication and information technology), media and culture (electronic and print media and national monuments), utilities such as water (water supply and sewerage), energy (electricity, gas, oil), health (medical care, drugs, laboratories), finance and insurance (banks, stock exchange, insurance and other financial services). These are treated as critical as the control, process, circulation, or preservation of any information after damaging or compromising may adversely affect: (i) public safety or financial security or public health, and (ii) national security or national integrity or sovereignty. The example of BB cyber heist can be shared here when in February 2016, by exploiting in a SWIFT global payment network, the hackers stole USD 81 million of the national reserve.

[49] The Guidelines define 'information security policy' as "a documented list of management

In 2016, the ICT Division, under the Ministry of Posts, Telecommunications and Information Technology, established the Bangladesh e-Government Computer Incident Response Team (BGD e-GOV CIRT) under Bangladesh Computer Council to support the government efforts to develop and amplify ICT programs by establishing and maintaining cybersecurity incident management capabilities within the environment of the government.[50] One of the important contributions of BGD e-GOV CIRT is the introduction of an Information Security Manual, mainly to ensure the security of unclassified government information and systems, entitled Government of Bangladesh Information Security Manual (GoBISM), based on International Standards such as ISO/IEC 27001:2013, ISO/IEC 27002:2013 following New Zealand Information Security Manual.[51] With its mandates to support the government mainly, the BGD e-GOV CIRT has been taking various initiatives. There are some limitations and scopes for further improvements in the rapidly changing circumstances. For example, the GoBISM, which suggests two sets of controls-mandatory and recommended, is only a manual having no legally binding force and the government departments are not bound to follow this for the time being.

With all these fragmented initiatives, it is evident that there was no standalone cybersecurity law in Bangladesh, and the overall domestic cybersecurity ecosystem was not found to be satisfactory as it was reflected in the Indexes shared already.[52]

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instructions that describe in detail the proper use and management of computer and network resources with the objective to protect these resources as well as the information stored or processed by Information Systems from any unauthorized disclosure, modifications or destruction."

50 The BGD e-GOV CIRT is now serving as National CIRT of Bangladesh (N-CERT) under the administrative control of the DSA. See, Digital Security Rules, 2020, rule 8.

51 Some of the provisions included in the GoBISM are on information security governance, system certification and accreditation, information security documentation, information security monitoring, information security incidents, physical security, personnel security, infrastructure (cable management), communication systems and devices (fax machines, multifunction devices and network printers), product security, decommissioning and disposal (media usage, media sanitization, media destruction), software security, email security, access control, cryptography, network security (Network Management, Wireless LANs, Video and Telephony Conferencing and IP Telephony, Intrusion Detection and Prevention, Gateways, Firewalls, etc.), working off-site, and enterprise system security.

In the case of *M. Habibur Rahman & Ors vs. Govt. of Bangladesh & Ors.* 7 BLT (HCD) 327, it was held that- the word 'government' denotes the person or body of persons administering the laws and governing the state. 'government' is the body of persons changed with the duty of governing and exercising certain powers and performing of certain duties by public authorities or officers together with certain corporations exercising public function.

52 In the high profile report titled 'Cybersecurity Capacity Review: Bangladesh', released by BGD e-GOV CIRT, Global Cybersecurity Capacity Center (GCCC), and Oxford Martin School, Oxford University resulting from the invitation of the BCC to understand the cybersecurity capacity of Bangladesh to strategically prioritize investment in the sector have identified serious gaps and limitations in the existing system. The five sectors evaluated were- (a) cybersecurity policy and strategy, (b) cyberculture and society, (c) cybersecurity education, training and skills, (d) legal and regulatory framework, and (e) standards, organizations and technologies. The GCCC evaluates the cybersecurity capacity of any country into five stages- (i) startup, (ii) formative (iii) established, (iv) strategic, and (v) dynamic. It was found that almost all the sectors are in the 'startup' stage. See, Cybersecurity Capacity Review Bangladesh 2018 <https://www.cirt.gov.bd/wp-content/uploads/2020/01/CMM_Bangladesh_Report_FINAL.pdf> accessed 27 November 2021.

Subsequently, the government enacted the DSA, 2018 apparently in a rush just before the General Election of 2018 to ensure national digital security, and the identification, prevention, suppression, trial, and other related matters regarding digital crime. Some of the most important immediate contributions of the Law was the provision for the creation of a Digital Security Agency (DSA) and National Digital Security Council (NDSC),[53] emergency response team (s. 9), digital forensic lab (s. 10), etc. The law provides for the punishment of some relevant offences e.g. illegal access to- CII (s. 17), computer, digital device, computer system (s. 18), damage to computer and computer system (s. 19), change of computer source code (s. 20), electronic forgery (s. 22), electronic fraud (s. 23), identity theft (s. 24), sending of phishing or spam message (s. 25), collection and processing of personal information without any legal authority (s. 26), cyberterrorism (s. 27), illegal electronic money transaction (s. 28), hacking (s. 34), aiding in commission of offence (s. 35), etc. The Law also provides for mutual legal assistance as per the provisions of the Mutual Legal Assistance Act, 2012 (Act no. 4 of 2012) in case of necessity.

Besides, many relevant issues on cybersecurity are included in the National ICT Policy, 2018 where some plans of action are set, and responsibilities are assigned to different bodies.[54] The government has also issued or drafted some relevant policy documents.[55] While these are all very encouraging moves and promise towards more secured cyberspace, from the experiences of the developed economies it can be anticipated that the implementation of these will be challenging. Moreover, the Policies have no binging effects in the eye of law in Bangladesh.[56] Yet, these initiatives should be applauded for at least the authorities have realized the importance of this and considered adopting relevant necessary measures in a systematic and coordinated approach. Nevertheless, there is still room for improvement.

B. Cybersecurity in Bangladesh Context: An Evaluation and Policy Directions

Cybersecurity issues are a common concern for all countries and require collective, coordinated, and holistic attention and efforts from the relevant stakeholders within a clear policy framework to reduce the menace. It has already been discussed that there is no perfect model for cybersecurity due to the magnitudes of the web cyberspace and complexities. Apparently, the initiatives taken by the government, following the ITU's GCA five pillars should be appreciated keeping in mind that other countries that have started all these processes almost three decades ago are still struggling to

[53] The Digital Security Act, 2018 (n 41) ch II, secs 5-7, and ch IV, secs 12-14. The government established the DSA on January 16, 2019 under the ICT Division and the NDSC, headed by the Prime Minister.

[54] It will be relevant to share here that the previous National ICT Policies of 2009 and 2015 also contained some isolated provisions in this regard.

[55] For example, National Strategy for Internet of Things, Blockchain, Artificial Intelligence. The Examination and Certification of Standards of Software and Hardware, 2020 (Draft), etc.

[56] *National Board of Revenue v. Abu Saeed Khan and others*, 2012, 41 CLC (AD) [8674] = 18 BLC (AD) (2013) 116.

make their cyberspace better secured to harness the potentials of ICTs. Therefore, they have been taking innovative initiatives after reviewing the existing ones regularly as routine work.

The present national cybersecurity framework seems to be optimistically progressing, especially after the enactment of the DSA, 2018 and the DSR, 2020. While the present framework promises to protect digital crimes originated and committed from inside the country, it will be challenging to implement the available legal provisions if the threats originate from outside the country. When using malware and phishing emails, personal information is stolen to get illegal access to a computer system, Bangladesh does not effectively implement the phishing or spam related legal provisions available in the ICT Act, 2006 or the DSA, 2018. Though an Information Privacy and Protection Rule has recently been drafted, it is not finalised yet. The DSA, 2018 has a provision on the extraterritorial application; however, it is evident from various incidents of threats and attacks that unless there are proper co-operation mechanisms available between countries, this is difficult to implement such provisions in real-world criminal cases, let alone the cybersecurity incidents.

The absence of a competent national body is an important concern. Enacting the DSA, 2018 or recent formation of the DSA is not enough for a government that included 'digital dreams' in their election manifesto almost a decade ago. These are only the beginning and a lot more should be done. Bangladesh still does not have any dedicated cybersecurity policy unit responsible to develop, monitor, or implement cybersecurity policies continuously considering the developments and international best practices.[57] Until 2019, there was no dedicated national body to deal with overall cybersecurity issues, though the government established the DSA recently. While it is yet not the right time to evaluate the activities of the DSA, one serious concern is that the Defence forces are not directly included in the DSA like other countries e.g. Australia, though the Director-General of the Defence Intelligence is made as an *ex officio* member of the NDSC. It indicates that the government has been trying to address this as a technical issue only ignoring the national security aspect of it. It may be argued that since the Prime Minister heads the Ministry of Defence and is the Chair of the DSA, the defence personnel will automatically be included; however, it may not happen and therefore, we need to wait till then. Moreover, Bangladesh lacks a National Security Council; instead, the government has recently formed a National Committee on Security Affairs. The government has recently updated the previous 2-pages defence policy of 1974 in 2018. Though the National Defence Policy, 2018 could not be accessed, perhaps for some security reasons, it can be seen from the newspaper reports that the Policy provides the citizens to be ready always to play their role as they did during the time of liberation war in 1971.[58] To expect similar cooperation from the general people on cybersecurity-related threats and attacks, there is no alternative to make them aware of cybersecurity basics.

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57 See, National Cybersecurity Index (n 16).

58 Shakhawat Liton and Partha Pratim Bhattacharjee, 'Draft National Defence Policy: PM to head nat'l security body' *the Daily Star* (Dhaka, 21 March 2018) <https://www.thedailystar.net/frontpage/draft-national-defence-policy-pm-head-natl-security-body-1551244> accessed 27 November 2021.

The government should realise practically that making cyberspace safe for the citizens is fundamental to avoid catastrophic incidents in the future. In making cyberspace more secure, the need for awareness of citizens is paramount. Therefore, cybersecurity culture should be promoted in the country. This does not require a huge investment, it rather requires conveying a message effectively, which is that cybersecurity starts with awareness and personal carefulness. Citizens need to be made aware that the cybersecurity issues are for their benefit. Many universities have been offering computer science and engineering courses in Bangladesh. The students and students of other courses of these universities can be engaged as volunteers as part of their community service/contribution to make people aware of different cybersecurity issues. There is already enough literature proposed by internationally recognised bodies available in the common domain on how to develop the cybersecurity culture within an organization. It is encouraging to share that some regulators have issued instructions to initiate some awareness programs. For example, Bangladesh Bank instructs all banks to run information security awareness programmes. Besides, the DSA and other government bodies have been organising some isolated cyber hygiene programmes and taking initiatives on or before some international dates or events, but these are not enough again. There are also incidents that some over-enthusiast Bangladeshi hacktivists target the websites of different countries in the aftermath of some sensitive incidents. The government should also disseminate the information that for such activities the country may face economic sanctions.

It has been reported frequently that the provisions of the laws i.e. the ICT Act, 2006 and the DSA, 2018 are regularly abused for political purposes and to control the voice of the political opponents and criticisms of the government or ruling political party. That's why even if the enacted laws contain some favourable provisions which are common in other jurisdictions, the general mass has an apprehension about the effectiveness of the law. Though the police administration has issued some guidelines on the use and application of the provisions of these laws, it is still perceived to be misused.

The cybercrime trial and prosecution success rate in Bangladesh is very few if not nil. It is believed that the officers involved in different stages are not adequately prepared and trained. This situation can be improved. Already there are international best practices available in the public domain. The book titled "Combating Cybercrime: Tools and Capacity Building for Emerging Economies" released by the ITU is an important contribution designed targeting the capacity building of the stakeholders involved in the cyberspace landscape e.g. law and policymakers, judges, law officers, investigators, and civil society members towards making a safe, secure and equitable Internet. Besides, different countries have already come up with Cybercrime Prosecution Guidance.[59]The policymakers can consider to adopt these in the Bangladesh context keeping in mind the economic and socio-cultural issues.[60]

[59] See generally, 'Cybercrime - prosecution guidance' (26 September 2019) <https://www.cps.gov.uk/legal-guidance/cybercrime-prosecution-guidance> accessed 1 March 2021.

[60] In updating the cybersecurity policies in future, Bangladesh should consider international best

It is apparent from the DSR, 2020 that the government has realised that 'security by design' should be the primary aim behind all government digital moves. While we need to wait to evaluate the effectiveness of the government's such move, the N-CERT should actively consider taking part in the cyber drills run by ITU to evaluate its preparedness in cyberattacks scenarios. This is because except for the Bangladesh Army, Bangladesh reportedly imports most software from abroad. Though this is not sure how the procurement process of such software is conducted, this is obvious that not the software code rather only .exe file is normally shared which causes some additional problems in the maintenance of e.g. the router, firewall, software maintenance, password, backdoor hook, or maintenance hook, etc. This is even unfortunate as Bangladeshi technopreneurs are well capable to develop the required software to meet the national needs. Good thing is that Bangladesh Bank authorities have decided to use local software developed by the local developers in the banking sector, which is a very welcoming move.[61] Therefore, the involvement of the legal professionals having expertise in cybersecurity and international law should be considered in the future procurement process. Moreover, like the move of banking regulators, initiatives can be taken to organize hackathons and introduction of 'regulatory sandbox' on different aspects of cybersecurity through which the winners can be engaged to develop customised tailormade but more secured applications and systems.

Unfortunately, there is no dedicated civil society think tank to deal with cybersecurity issues exclusively. Though the most renowned think tank i.e. Bangladesh Institute of International and Strategic Studies does not also have any noticeable program on cybersecurity, the Bangladesh Institute of Peace & Security Studies has been playing some role in this regard and has been researching on this issue besides their other activities.

In the socio-economic context of the country where the education, awareness, and understanding of the people are still not satisfactory, and the government and other stakeholders are unable to invest a significant amount in the protection of national cyberspace, the government should consider promoting the notion of cyber diplomacy. Within the UN system, the co-operation between the member states is very fundamental,[62] and the act of diplomatic relations plays an instrumental role to this end. Diplomacy, a means to implement the foreign policy of any country, "uses certain set of skills, tools, procedures, methods, norms and rules . . . to orchestrate and moderate the dialogues between states . . . to optimize the content and quality of international relation . . ."[63]The issue of 'electronic diplomacy' is not a new concept

practices available at the website of United Nations Institute for Disarmament Research Cyber Policy Portal. See generally, 'UNIDIR Cyber Policy Portal' <https://unidir.org/cpp/en/> accessed 27 November 2021.

61 Special Correspondent, 'State-owned banks asked to bank on local software' *the Business Post* (Dhaka, 17 August 2020) <https://businesspostbd.com/post/5293> accessed 27 November 2021.

62 For example, the Preamble, Article 1(3), the Charter of the United Nations, 1945.

63 Bolewski W, *Diplomacy and international law in globalized relations* (Springer Science & Business Media 2007).

as different countries have been following this for years.[64] However, cyber diplomacy, relatively a new idea emerging in Europe about cyber defence and cybersecurity, aims to secure multilateral agreements on cyber norms, responsible state and non-state behaviour in cyberspace, and effective global digital governance through the joint efforts of like-minded countries and relevant stakeholders. This initiative is getting traction as cyber threats are seen as an attack on the sovereignty of the state. The European Union has already developed the Cyber Diplomacy Toolbox and some regional treaty arrangements towards making safer and more principled cyberspace.

There is no binding international instrument on cybersecurity and Bangladesh is not part of any important global alliances that work to make the cyberspace secured though the country is an active member in the various international forum, including its membership in the UN Security Council between 1979-1980 and 2000-2001, and has bilateral and multilateral agreements/treaties with several countries. Hence, Bangladesh, based on the Constitutional mandate and the initial Foreign Policy i.e. 'friendship with all and malice towards none', prefers the settlement of any kind of extra-territorial dispute, including the disputes in cyberspace, peacefully.[65] Yet, Bangladesh should consider including the issue of cybersecurity in their diplomatic agenda.

This is a good sign that the government has realised the importance of cyberwar and cybersecurity and has started to raise these at the international forum. In 2017, in her speech at the 72nd UNGA, Prime Minister Sheikh Hasina expressed her concerns on cyber threats to prevent money laundering, terrorist financing, and other transnational organized crimes.[66] In 2018, at the High-Level Side-Event on Cyber Security and International Cooperation, the Prime Minister has eloquently articulated the risks and challenges in cyberspace.[67] Thus, it is high time that the government reconsiders establishing both a cyber army wing and cyber diplomacy. This is also needed as the changing world demands the proper representation of the country at the international forum effectively and efficiently. In various databases maintained by international communities, e.g. UNODC Database on cybercrime, the position of Bangladesh is

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64 The concept 'electronic diplomacy' or 'digital diplomacy' is used in a different context. Adesina OS, 'Foreign policy in an era of digital diplomacy' (2017) 3 Cogent Social Sciences 1297175. If the definition of the term 'electronic' includes the communication of diplomatic affairs through electronic means, then Bangladesh has also been practicing this since her birth.

65 Article 25 of the Bangladesh Constitution 1972, which forms the foundation in dealing with international affairs, provides to maintain the international relation of the country based on the "principles of respect for national sovereignty and equality, non-interference in the internal affairs of other countries, peaceful settlement of international disputes, and respect for international law and the principles enunciated in the United Nations, and on the basis of those principles shall – (a) strive for the renunciation of the use of force in international relations and for general and complete disarmament; . . ."

66 External Publicity Wing, Ministry of Foreign Affairs, Government of Bangladesh, 'Selected Speeches of Prime Minister Sheikh Hasina During Official Visits (2009-2018)' 153 <https://mofa.gov.bd/site/publications/4c50b8a7-f408-4070-8504-848987691768/Selected-speeches-of-Prime-Minister-Sheikh-Hasina-during-official-visits-2009-2018> accessed 1 March 2021.

67 *Ibid*, 202-203.

not properly updated.[68] The very poor level of entry in the database may prevent another country to co-operate with Bangladesh. If not, it will surely kill a very important time in case of an emergency. Besides, in most of the previous massive successful cyberattacks having security consequences targeted in various countries, where Bangladesh has diplomatic missions, it is not apparent if the diplomatic missions realised the importance of these and update the government back home about the necessary needful. If that could be done, the experience could be utilised in recovering the heisted Bangladesh Bank fund.

Through cyber diplomacy, Bangladesh needs to take initiatives to include the issue of cybersecurity in the existing treaties and future ones. The country should delve into cyber diplomacy and should foster bilateral and multilateral efforts to settle the issue peacefully. This is because it has been reported that in the recovery of the Bangladesh Bank Cyber heist, due to non-co-operation of countries such as the Philippines, China, Malaysia, and Sri Lanka, the Criminal Investigation Department (CID) is incapacitated to submit the charge-sheet though the investigation was completed.[69]As a result, Bangladesh could only recover USD 15 million out of heisted USD 81 million. The Foreign Services Academy, responsible to train the Bangladeshi diplomats, can include the issues of cybersecurity and cyber diplomacy in their training module. Finally, Bangladesh should consider playing an active role by joining the UN OEWG and can further consider joining the Budapest Convention as a party.

Interestingly, the initial foreign policy has been changing over the years and the country has been emphasizing economic diplomacy. As Bangladesh is emphasizing economic diplomacy in recent years, the country should review the existing BITs and all future BITs to include the provisions of cybersecurity. Fortunately, Bangladesh has BITs with some cybersecurity giants and therefore, can exchange experiences if this issue is included in the meeting agenda.[70]

V. CONCLUSION

The relationship of crime with economic development and globalization is well recognised, so is the case of cybercrimes, which are committed to breaching the computer security system of a cyber persona. Cybercrime and cybersecurity are

[68] See, for reference, the Chapter on Bangladesh maintained by the UNODC's database on Sharing Electronic Resources and Laws on Crime (SHERLOC) <https://sherloc.unodc.org/cld/v3/sherloc/legdb/> accessed 1 March 2021.

[69] Nurul Amin & Shafayat Hossain (n 17).

[70] From the database of the UNCTAD, it is apparent that Bangladesh has existing bilateral investment treaties with Denmark, India, Singapore, Thailand, Iran, Austria, Switzerland, Uzbekistan, Japan, Indonesia, Philippines, Poland, China, Netherlands, Malaysia, Turkey (1987), Romania, Korea, USA, France, Belgium-Luxemburg Economic Union, Germany, and the United Kingdom. There are also some countries with whom Bangladesh has already signed the investment treaties though these are yet to come into force. The list of such countries includes- Cambodia, Turkey (2012), United Arab Emirates, Vietnam, North Korea, and Pakistan. See, for reference, UNCTAD, 'Investment Policy Hub' <https://investmentpolicy.unctad.org/international-investment-agreements/countries/16/bangladesh> accessed 1 March 2021.

concerns of all and every country in the world, everyone has been facing this in some shape or form at a varied level making it to be common concern of mankind. The recent economic progress of Bangladesh has been recognized by various authoritative bodies. With Bangladesh's vision to transform an agrarian country into a manufacturing one and with the political slogan of the present government i.e. 'Digital Bangladesh' and to fully digitalise the country to improve the socio-economic conditions of the people, the number of cyber threats has increased too since the issues of digitalization come with inherent security challenges. Therefore, the government should also consider the issue of safe and secured cyberspace seriously.

Technically speaking, there is no exclusively secured system, and none can guarantee the most effective cybersecurity infrastructure which will remove the possibilities of all the prospective future cyber threats though the taking of effective measures can promise to reduce the number of threats. With various super-powerful technologies in the market and some are in the pipeline such as 5G technology, AI and quantum computing, etc. when data will be processed within nanoseconds, and due to the immortal nature of computer data, this issue of cybersecurity should be considered very seriously. Like natural calamities, the policymakers and everyone should realize that cyberattacks will surely happen; but initiatives should be taken to reduce the chances, respond immediately and prevent the prospective intruders/criminals. There is, unfortunately, no 'one size fits all' solution to the various types of cybercrime and cyber threats. That's why different countries have been framing a tailor-made customised cybersecurity framework based on their own need. But one thing is obvious that along with the legal and technological solutions, and the formation of a dedicated body with the core mandate of cybersecurity responsibilities, the awareness of cyberspace user citizens following the adage 'prevention is better than cure' can reduce the number of cyber threats significantly.

Bangladesh has been facing various development challenges common to other developing economies such as natural calamities, lack of good governance, corruption, etc. These were reconfirmed during the novel COVID-19 time when the policymakers initially were confident about the readiness of the national healthcare system, which was reported to be scrambling or found ineffective with full of inconsistencies and mismanagements subsequently. While manmade disasters may be settled with the passage of time and proper management of allocated resources, unfortunately, the effects of the digital disaster as a consequence of the cybersecurity crisis cannot be healed easily as it takes time even to realize that the computer system has been compromised.

Bangladesh has been leading the UN Peacekeeping mission in different countries in the world to ensure the security of that area and the country has been progressing even after facing devastating natural calamities. These indicate that the people of the country are smart and can handle prospective cybersecurity threats smartly if they are properly guided. Successive governments have taken some initiatives to introduce ICTs and make cyberspace secured; however, these are not properly implemented. Even though some of the law enforcement agencies such as CID, DB have dedicated

forensic labs with the necessary expertise, the vulnerability of cyberinfrastructures can be seen through the news of ATM booths hacking reported in national media. The members of the law enforcement agencies seem to be helpless when these cyber threats are committed from outside the country. With all the technology-related initiatives, a massive, realistic, and effective campaign to make the citizens aware of their conduct in cyberspace, training of the government officials, programs adopted to produce more efficient human resources, and continuous technological updates are the key to success. Thus, the country needs to give focus on developing a culture of cybersecurity domestically and cyber diplomacy beyond the jurisdiction of the country.

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The Ideology of the Postcolonial State in Indian Constituent Assembly Debates (1946-50)*

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I. INTRODUCTION

Whereas the majority of states, including Western liberal democracies, are not completely immune from ethno-nationalism, postcolonial states are more vulnerable to this phenomenon for a variety of reasons, such as the continuation of the colonial political order, the class character of the economic organisation, and the hegemony of nation-building projects.In most cases, nationalist elites address the problem of ethno-nationalism in general and minorities in particular by identifying the 'postcolonial state' itself as an 'ideology', claiming that the unified national state and its liberal constitutional structure will solve the trouble of ethnic parochialism and, hence, the problem of minorities.

Here, I rely on John Thompson's notion of 'ideology' as a set of ways in which ideas and meanings help create and sustain relations of domination through a series of general modes of operation and strategies of symbolic construction. These include legitimation, dissimulation, unification, fragmentation, and reification.[1] By legitimation, Thompson means the process by which authority comes to seem to be valid and appropriate. Once the suppressed groups accept the legitimacy of the oppressor's authority, the relations of domination become perpetual. Dissimulation refers to a process whereby relations of domination are established and sustained by being concealed, denied, obscured, or glossed over. Thompson's third mode of ideological operation is unification – the process of constructing a form of symbolic unity which embraces individuals in a collective identity, irrespective of the differences and divisions that may separate them.The fourth mode of ideological operation, in contrast, is fragmentation. Here relations of domination are maintained by fragmenting groups who are seen as potential threats to the dominant group. And finally, Thompson's fifth mode of ideological operation is reification: representing a transitory, historical state of affairs as if it were permanent, natural, and timeless.

Within this framework of 'ideology', in this paper I demonstrate that the ideological function of the postcolonial state in the form of the 'national' and 'liberal' state

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* Ideas presented in this paper have been elaborated and published in Mohammad Shahabuddin, *Minorities and the Making of Postcolonial States in International Law* (Cambridge University Press 2021) 56-85.

1 See generally, John B. Thompson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication* (Polity Press 1990).

inflicts various forms of marginalisation on minorities but simultaneously justifies the oppression in the name of national unity and liberal principles of equality and non-discrimination, respectively. In asserting faith in the healing power of the postcolonial state, the nationalist elites conveniently avoid crucial questions as to the continuation of the colonial political order, the class character of the economic organisation, and the hegemony of nation-building projects – factors that lead to ethno-nationalism in the first place. In other words, the idea that the postcolonial state itself will solve the minority problem obscures and glosses over the real reasons for the problem and shifts attention to issues that help maintain asymmetric power relations between the minority and the majority. In this way, the postcolonial state performs the ideological function of suppressing minority group identities, but simultaneously obscures and validates further marginalisation of minorities.

To substantiate this argument, I use historical examples: the discourse used in Indian Constituent Assembly debates between 1946 and 1950 to discuss minority rights. More specifically, I demonstrate how the ideological function of the postcolonial 'national' and 'liberal' state supressed the question of the protection of religious minorities in Indian Constituent Assembly debates.

II. THE POSTCOLONIAL 'NATIONAL' STATE

The ideology of the postcolonial 'national' state is premised upon a homogenous national identity that absorbs all ethno-cultural differences. Given the long-term goal of assimilation and homogenisation, it is expected that the minority problem would wither away. At the same time, the process of diminishing all meaningful ethno-cultural diversity and reducing such diversity to a token showcase element imposes the majoritarian identity on the entire nation. In other words, the majoritarian culture, belief system, and cultural codes come to synonymise the 'national' identity in the name of nation-building and homogenisation. The ideology of the postcolonial 'national' state, presented as a solution to the minority problem, thus in fact acts as a tool to perpetuate the dominance of the majority group over the minority in all political and cultural domains of the new state, leaving the minority at the mercy of the majority on vital political and economic issues.

In the case of India, the Constituent Assembly debates clearly demonstrate this pattern of the depiction of the 'national' state as an ideology to deal with the problem of minorities. The Assembly was created under the Cabinet Mission Plan of 16 May 1946 for the purpose of 'the cession of sovereignty [from Britain] to the Indian people on the basis of a constitution framed by the Assembly'.[2] The Plan contained proposals for the constitutional future of India against the backdrop of the ongoing political rivalry – mainly between the Indian National Congress and the Muslim League – on the future of postcolonial India itself. Although the Plan rejected the League demand for a separate state for Muslims, i.e. Pakistan, it proposed a federal

[2] Initiated by the then British premier Clement Attlee, the Mission consisted of Lord Penthick-Lawrence, Secretary of State for India, Sir Stafford Cripps, President of the Board of Trade, and A.V Alexander, First Lord of Admiralty.

structure for the nascent Indian state with the assertion that such a structure would ensure adequate safeguard for religious minorities.The Plan also stipulated that the cession of power from Britain to India would be conditional upon 'adequate provision for the protection of minorities'.[3] Even though the Congress elites were duty bound to set the framework of the future constitution of India within the remit of the Cabinet Mission Plan, there was a general sense of agreement and acceptance among them that the future constitution of India must incorporate provisions for minority protection. For example, the resolution on aims and objectives of the constitution (popularly known as the 'objective resolution'), moved by Jawaharlal Nehru and described by him as the core philosophy behind the constitution of India, proclaims that 'adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes'.[4] An Advisory Committee and afterwards a sub-committee on minorities thereunder were also formed in line with the Cabinet Mission Plan to prepare a report outlining provisions for the protection of minorities.[5]

In its draft report of August 1947, in the same month India was partitioned to create Pakistan, the Advisory Committee outlined a series of special safeguards for minorities in addition to a number of fundamental rights for all citizens. As the Chairman of the Committee and the first Deputy Prime Minister Sardar Vallabhbhai Patel informed the Assembly:

> [the fundamental rights] cover a very wide range of the rights of minorities which give them ample protection; and yet there are certain political safeguards which have got to be specifically considered. An attempt has been made in this report to enumerate those safeguards […] such as representation in legislatures […].[6]

As a result, although the heavily criticised British policy of separate electorates for different religious groups was dismantled, the draft report proposed reserving seats in the parliament in proportion to the population of the minorities for a fixed period of ten years.[7] The Committee also mandated that a certain proportion of public service roles be reserved for members of certain communities for the same length of time.[8] The draft report also provided for an administrative machinery to ensure that constitutional safeguards for minorities are given effect to at both central and

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3 See, Hansard, 'India (Cabinet Mission)' House of Commons Debate (18 July 1946), vol. 425, para. 1423.

4 See, *Constituent Assembly Debates: Official Report* (hereinafter, *CAD*), vol. I (Delhi, 1946-1950), para. 1.5.10 (13 December 1946). The minority rights provision was also included in the ground rules for the Indian constitution set by a committee under the chairmanship of his father Motilal Nehru as early as 1928. The draft constitution is popularly known as the Motilal Nehru Constitutional Draft/Report, 1928. See, Neera Chandhoke, *Contested Secessions: Rights, Self-determination, Democracy, and Kashmir* (Oxford University Press 2012) 56.

5 *CAD*, vol. II, para. 2.15.13 (24 January 1947).

6 *Ibid.*, para. 5.43.11 (27 August 1947).

7 *Ibid.*, para. 5.43.12 (27 August 1947).

8 *Ibid.*, para. 5.43.11 (27 August 1947).

provincial levels.[9] Patel informed the Assembly that these decisions expressed a general consensus of opinion among Committee members, representing minority and majority communities.[10]

However, the Committee's proposed safeguards faced fierce and passionate challenge in the Assembly, based on the ideology of national unity. As a matter of fact, long before the Committee's proposals and as soon as the creation of Pakistan was decided, there was a sharp change in the mood of the Assembly regarding minority rights. As early as December 1946, M. R. Masani, despite his origin in a small minority community, argued before the Assembly for his vision of the national state:

> [T]he conception of a nation does not permit the existence of perpetual or permanent minorities. Either the nation absorbs these minorities or, in course of time, it must break up. Therefore, while welcoming the clause in this Objective Resolution which promises adequate safeguards for the minorities, I would say that it is a good thing that we have these legal and constitutional safeguards, but that ultimately no legal safeguard can protect small minorities from the overwhelming domination of big masses, unless on both sides an effort is made to get closer and *become one corporate nation, a homogeneous nation*.[11]

The minority issue itself was seen as the root cause of India's partition. Therefore, the idea of any continuation of minority protection in postcolonial India was seen by P. S. Deshmukh as counterproductive and an essential threat to India's territorial and political integrity.[12] Renuka Ray, likewise, asserted that 'we have stood helplessly while artificially this problem of religious differences – an echo of medieval times, has been fostered and nurtured and enhanced […] Today we see as a result our country divided and provinces like [Bengal] dismembered.'[13] This view was shared by numerous other Assembly members, as the record of the debates reveals.[14] Responding to the Muslim League members of the Assembly who were asking for more robust minority safeguards in the constitution in the form of a separate electorate, the Committee Chairman Patel himself concluded:

> Those who want that kind of thing have a place in Pakistan, not here. Here, we are building a nation and we are laying the foundations of One Nation, and those who choose to divide again and sow the seeds of disruption will have no place, no quarter, here, and I must say that plainly enough.

The proposals of the Advisory Committee were finally adopted and reflected in the draft constitution. The Chairman of the Drafting Committee, B. R. Ambedkar, himself was a member of the depressed (*dalit*) community. While presenting the draft

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9 *Ibid.*, para. 5.43.13 (27 August 1947).
10 *Ibid.*, para. 5.43.10 (27 August 1947). The opinion was, however, divided in the Assembly. See, *ibid.*, para. 5.43.70-78 (27 August 1947).
11 *CAD*, vol. I, para. 1.7.4 (17 December 1946). Emphasis added.
12 *CAD*, vol. V, para. 5.43.28 (27 August 1947).
13 *Ibid.*, para. 5.44.89 (28 August 1947).
14 See generally, *ibid.*, para. 5.43.10-5.46.188 (27-30 August 1947).

constitution before the Assembly for discussion, Ambedkar passionately argued that it was wrong for the majority to deny the existence of minorities, but it was equally wrong for the minority to perpetuate their own existence. Therefore, a solution had to be found that would 'enable majorities and minorities to merge someday into one'.[15]

However, even this long-term strategy of offering safeguards to minorities for a limited period of time and simultaneously attempting to absorb them into the body politic of the national state soon appeared unworthy. With the bitter experience of communal violence following the Partition, mass migration, the treatment of Hindu and Sikh minorities in Pakistan, and more importantly, with the consolidation of political power, the nationalist ruling elites in India decided to revisit the whole question of minority protection. Accordingly, in a sudden dramatic move, the Advisory Committee reopened the question of minority rights and concluded in its final report of May 1949 that there should be no provision in the constitution for the reservation of seats for any religious minorities. Such protection, however, would remain for various tribal groups and the scheduled caste Hindus[16] – but on the ground of economic and social backwardness; none of these groups was treated as a minority.[17] As the tribal leader Jaipal Singh asserted during Assembly debates, 'a group of people who are the original owners of this country, even if they are only a few, can never be considered a minority'.[18]

As a matter of fact, it is quite clear from the Assembly debates on this issue that with only a handful of exceptions, the representatives of the Muslim and Sikh communities in the Assembly (other, smaller communities never asked for a reservation of seats) by that time preferred to leave the matter to the goodwill of the majority.[19] Begum Aizaz Rasul specifically stated this in the following words:

> To my mind it is very necessary that the Muslims living in this country should throw themselves entirely upon the good-will of the majority community, should give up separatist tendencies and throw their full weight in building up a truly secular state.[20]

Sardar Patel, as the Chairman of the Committee, responded: 'the future of a minority, any minority, is to trust the majority. If the majority misbehaves, it will suffer.'[21] And taking part in the debate on this change of position on minorities, Prime Minister Nehru reminded his audience of the primacy of the national integration that must not be disturbed by any separatist tendency in the name of communalism or provincialism.[22]

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15 *CAD*, vol. VII, para. 7.48.233 (4 November 1948).
16 *CAD*, vol. VIII, para. 8.91.4-8.91.8 (25 May 1949).
17 See, *CAD*, vol. V, para. 5.43.125 (27 August 1947) and *CAD* vol. I, para. 1.9.71 (19 December 1946).
18 See, *CAD*, vol. V, para. 5.43.58 (27 August 1947).
19 *CAD*, vol. VIII, para. 8.91.27-8.92.113 (25-26 May 1949).
20 *Ibid.*, para. 8.91.169 (25 May 1949).
21 *Ibid.*, para. 8.92.109 (26 May 1949).
22 *Ibid.*, para. 8.92.41 (26 May 1949).

Nevertheless, to the surprise of Muslims and Sikhs, all other remaining safeguards in the draft report – including the provisions for reservations of public jobs and the provision for a mechanism for implementing minority protection – were also scrapped for all minorities while the same safeguards remained for the scheduled castes, tribal communities, and in some cases, for Anglo-Indian communities.[23] This, of course, elicited heated debates and fierce criticism from the representatives of the Muslim and Sikh communities, who claimed that no prior consensus had been secured on these questions.[24] In an angry response, the Sikh member Hukam Singh commented that 'this nationalism is an argument for vested interests. Even the aggressiveness of the majority would pass off as nationalism, while the helplessness of the minority might be dubbed as communalism.'[25] It was, however, confirmed by one of the members of the Committee, K. M. Munshi, that:

> at the time when the Advisory Committee met on the last occasion, there was no question of providing safeguards for any religious minority. The negotiations proceeded on the footing that except the backward classes who are economically and socially backward, and the Scheduled Castes and Tribes who have a special claim of their own, no other minority should be recognised in the Constitution.[26]

Despite Ambedkar's strong voice for minority rights previously,[27] on this occasion he was content with the protection of his own community of the scheduled castes. On 16 November 1949, a motion was proposed to remove any mention of 'minorities' even from the titles of relevant parts of the constitution and replace the word 'minorities' with 'certain classes'. The motion was enthusiastically adopted. As the Assembly member Ajit Prasad Jain succinctly put it, while reflecting on the success of the new constitution in dismantling the colonial architecture of minority protection, '[m]ay be that we have not so far succeeded in establishing a fully united and harmonious society, but much of the old rancour has disappeared and we are on the path of achieving a real national unity'.[28]

In this way, the ideology of the postcolonial 'national' state suppressed the issue of minority protection, despite the initial recognition by the ruling elites of the importance of this issue. Through the modes of operation of legitimation, dissimulation, and unification, the ideology of the national state offered necessary justification for adopting a nationalist constitutional mould that had no place for minorities. With the salience of the nation-state form as the dominant norm for

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[23] *CAD*, vol. X, para. 10.151.4 (14 October 1949).

[24] See, *ibid.*, para. 10.151.10-10.151.193 (14 October 1949).

[25] *Ibid.*, para. 10.151.38 (14 October 1949).

[26] *Ibid.*, para. 10.151.256 (14 October 1949).

[27] Cf. *CAD*, vol. III, para. 3.20.260 (1 May 1947). See also, B. R. Ambedkar, *States and Minorities: What are Their Rights and How to Secure them in the Constitution of Free India* (1947), Memorandum on the Safeguards for the Scheduled Castes submitted to the Constituent Assembly on behalf of the All India Scheduled Castes Federation, available at Vasant Moon (com), *Dr. Babasaheb Ambedkar: Writings and Speeches*, vol. I (New Delhi: Dr. Ambedkar Foundation, 2014 [1979]), 381-449.

[28] *CAD*, vol. XI, para. 11.162.158 (22 November 1949).

postcolonial statehood, the ideology of the postcolonial 'national' state also reified such marginalisation of minorities as an obvious historical destiny of minorities in the normal course of nation-building. Thus, the ideology of the postcolonial 'national' state, manifested through a series of ideological modes of operation, is intrinsically connected to the process by which homogeneous national states are made. The making of the postcolonial 'national' state leads to the marginalisation of various minority groups, for these minorities often find themselves on the wrong side of state boundaries and under the jurisdiction of hostile 'national', yet majoritarian, states.

III. THE POSTCOLONIAL 'LIBERAL' STATE

Even as the vision of the 'national' state – a homogeneous nation within a defined territory – served as an ideology in dealing with minorities, such a national state affirmed the ideological vision of its internal political organisation. After all, when the postcolonial national state dismantles the ethno-religious underpinning of minority groups on grounds of national integration, it needs to find for itself a 'neutral' and apparently 'non-majoritarian' philosophical outlook. The predominance of the liberal worldview of the post-WWII international order provided the necessary ideological foundation for many postcolonial states and their constitutional architecture. This ideology of the postcolonial 'liberal' state also justified the omission of any specific minority group protection in the constitutions of these postcolonial states, thereby reducing minority groups to individual units of citizenry. In other words, the ideology of the postcolonial 'liberal' state worked through the ideological mode of operation of fragmentation.

In the Indian context, the ideology of the liberal state is expressed primarily in 'egalitarianism' and 'secularism'. The Indian nation was essentially conceived as a political community united by its commitment to the common political ideals of secularism, democracy, rights, equality, and justice.[29] In this political imagination, minority rights naturally appeared as a distraction – something with the potential to undercut the liberal values that the postcolonial Indian state was set to be defined by. Given that citizenship in the postcolonial liberal state was characterised primarily by equal individual rights, the proposition of safeguarding minorities was deemed inappropriate as 'it was thought to compromise its commitment to not discriminate between its citizens on the basis of their caste, creed or community'.[30] The addition of secularism to this liberal egalitarianism made it normatively even more unreasonable to concede special rights to religious minorities.

Pandit Govind Ballabh Pant represented the liberal vision of the postcolonial Indian state most succinctly during the Constituent Assembly debates. Criticising the 'morbid tendency' in Indian politics to highlight communities in political

[29] Rochana Bajpai, 'Minority Rights in the Indian Constitutional Assembly Debates, 1946-1950' (2002) Queen Elizabeth House Working Paper Series, University of Oxford, 30, 12-13. See also Shabnum Tejani, 'Between Inequality and Identity: The Indian Constituent Assembly and Religious Difference' (2013) 33(3) South Asia Research 205-221.

[30] *Ibid*., 13.

arrangements, Pant reminded the Assembly that the individual citizens constitute the backbone of the state. It is citizens that form communities, and 'the individual as such is essentially the core of all mechanisms and means and devices that are adopted for securing progress and advancement'.[31] Long before the provisions for minority rights were hastily removed from the draft constitution, Damodar Swarup Seth questioned the legitimacy of constitutional protection of religious minorities in a secular state:

> [I]n a secular state minorities based on religion or community should not be recognised. If they are given recognition then I submit that we cannot claim that ours is a secular state. Recognition of minorities based on religion or community is the very negation of secularism.[32]

Sardar Patel echoed the vision of secular India when he informed the Assembly of the removal of all safeguards for religious minorities: 'this Constitution of India, of free India, of a secular India will not hereafter be disfigured by any provision on a communal basis'.[33]

When the provisions for reservations for minorities were finally removed from the constitution, R. K. Sidhva, as a member of the minority Parsee community, described the occasion as a moment of historic victory and national pride, given that Indian constitution has 'kept no room for communalism and that we are in the true sense of the word a secular State'.[34] A number of other members of the Assembly from all religious backgrounds celebrated the secular nature of the constitution, although a handful of speakers did regret the absence of any clear recognition of religious minorities in the constitution.[35] The Assembly member Ajit Prasad Jain summarised the liberal position of the Indian constitution vis-à-vis minorities in the following words:

> The minorities have been guaranteed freedom of religion and freedom to develop their culture, language and script, but in matters of political rights, there is no discrimination either in their favour or against them. The minorities therefore should have nothing to fear or be apprehensive about their future. It is in that sense that we have established what is popularly known as a secular State.[36]

Thus, with this liberal vision of secular India, all references to religious minorities were removed from the constitution. The only groups that were given some protection were the scheduled castes and scheduled tribes. As noted in the preceding section, these two groups were not treated as minorities; the protection was offered on the basis of their socio-economic backwardness. The Anglo-Indian community was also allowed to continue with the privileges they happened to enjoy under the

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31 *CAD*, vol. II, para. 2.15.24 (24 January 1947).
32 *CAD*, vol. VII, para. 7.69.59 (8 December 1948).
33 *CAD*, vol. X, para. 10.151.144 (14 October 1949).
34 *CAD*, vol. VIII, para. 8.92.3 (26 May 1949).
35 See generally, *CAD*, vol. XI, para. 11.158.3–11.164.44 (17-23 November 1949). Cf. *CAD*, vol. XI, para. 11.164.43 (23 November 1949).
36 *CAD*, vol. XI, para. 11.162.167 (22 November 1949).

British rule, but it was argued that they were not a religious community and, hence, this exception did not challenge the secular nature of the Indian state.

The constitutional secular ideology of the Indian nation faced a different challenge when it came to the Hindu nationalist demand for cow protection. Throughout the nineteenth and early twentieth centuries, cow protection was an issue of grave concern in Hindu nationalist politics and in the communal tension between the Hindu and Muslim communities. Against that backdrop, during the Constituent Assembly debates, demands were made for specific constitutional provisions protecting the cow.[37] As late as 1948, Thakur Das Bhargava demanded a constitutional guarantee that the state shall endeavour to modernise agriculture and animal husbandry and shall take steps for preserving and improving the breeds of cattle and prohibit the slaughter of cow and other useful cattle.[38]

Although in his demand Bhargava relied mainly on an economic case for prohibiting cow slaughter,[39] in the Assembly discussion on the proposal, a number of members specifically highlighted the religious impetus behind the need for cow protection. Seth Govind Das, for example, added religious and cultural grounds to the economic case and demanded a prohibition on the slaughter of cows of any age and kind. Identifying 'cow protection' as a majoritarian Hindu and therefore Indian cultural issue, along with questions of national language, national script, and national anthem, he argued that 'Swaraj' – self-rule – would have no meaning to people without protection for this culture.[40] Similarly, acknowledging the religious aspect of 'cow protection', Shibban Lal Saxena argued that if thirty crores of the Indian population – that is, three hundred million – feel that this cow protection should be incorporated in the laws of the country, the Assembly should not ignore this simply because it is a religious issue.[41] That view was shared by Raghu Vira Dhulekar, who even claimed:

> Our Hindu society, or our Indian society, has included the cow in our fold. It is just like our mother. In fact it is more than our mother. I can declare from this platform that there are thousands of persons who will not run at a man to kill that man for their mother or wife or children, but they will run at a man if that man does not want to protect the cow or wants to kill her.[42]

As ideas of the Hindu society and the Indian nation thus merged, Muslim League representatives in the Assembly took the issue of cow protection as a useful tool for exposing the ambivalence of the liberal secular rhetoric that was flying high in the Assembly to deny concessions to religious minorities. Z. H. Lari, for example, urged the majority make their demand in clear religious terms and asserted that the Muslim minorities would respect that demand, given that Islam did not specifically require

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37 See, *CAD*, vol. V, para.5.46.44 (30 august 1947); *CAD*,vol. VII para. 7.49.81 (5 November 1948).

1. 38 *CAD, vol. VII, para. 7.59.85 (24 November 1948).*
2. 39 *Ibid., para. 7.59.92 (24 November 1948).*

40 *Ibid.*, paras. 7.59.102-1010 (24 November 1948).

3. 41 *Ibid., para. 7.59.136 (24 November 1948).*

42 *Ibid.*, para. 7.59.148 (24 November 1948).

the sacrifice of cows.[43] Syed Muhammad Saadulla, too, expressed his sympathy with the Hindu majority demand for cow protection as a *religious* matter and advised the majority to 'come out in the open and say directly that "[t]his is part of our religion. The cow should be protected from slaughter and therefore we want its provision either in the Fundamental Rights or in the Directive Principles"', but condemned those, who, in his opinion, put the question on the economic front and thereby attempted to satisfy the ingrained Hindu feeling against cow slaughter by the backdoor.[44]

Bhargava's proposal was finally adopted. The Constitution of India indeed declares, as one of the directive principles of the state, that measures will be taken to prohibit the slaughter of cows.[45] Paradoxically, according to the US Department of Agriculture, India is currently the fourth-largest beef-exporting country in the world.[46] In contrast, a total of 63 cow vigilante attacks by Hindu fundamentalists occurred in India between 2010 and mid-2017, which saw 28 Indians (24 of them Muslims) killed and 124 injured.[47] Cow vigilante activities increased sharply after Narendra Modi's government, with its Hindutva ideology, came to power in 2014, but as the preceding discussion reveals, even the 'secular' constitution could not avoid some sort of accommodation for cow protection.

Also, in line with liberal egalitarian philosophy, special protection for the scheduled castes and scheduled tribes was explained only as a transitional measure, available for a limited period of time. This is a classic liberal dilemma with any deviation – as, for example, in affirmative action policies – from the principle of equality and non-discrimination. Hence, by definition all such policies have to be temporary and transitional: as soon as the group members in question achieve equality with the rest of the society, such special measures need to end. This solution makes affirmative action policies normatively coherent with the liberal core values of equality and non-discrimination. The time-limited safeguards that the Indian constitutiongrants to the tribal communities and the scheduled castes follow this logic and simultaneously underscore the liberal underpinning of the internal political organisation of the postcolonial state. When members of the assembly asked for better protection for the tribal communities in India, Sardar Patel expressed his frustration thus:

> Is it the intention of people to defend the cause of the tribals to keep the tribes permanently in their present state? […] I think that it should be our

[43] *Ibid.*, para. 7.59.151-153 (24 November 1948).
[44] *Ibid.*, para. 7.59.154-157 (24 November 1948).
[45] See, the Constitution of India 1952, Art 48.
[46] Katharina Buchholz, 'The Biggest Exporters of Beef in the World' (*Statista*, 27 April 2021) <https://www.statista.com/chart/19122/biggest-exporters-of-beef/> accessed 24 November 2021.
[47] Tommy Wilkes and Roli Srivastava, 'Protests held across India after attacks against Muslims' (*Reuters*, 28 June 2017) <https://www.reuters.com/article/india-protests-idINKBN19J2C3> accessed 26 February 2021.

> endeavour […] not keep them as tribes, so that, 10 years hence, when the Fundamental Rights are reconsidered, the word *'tribes'* may be removed altogether, when they would have come up to our level. It is not befitting India's civilization to provide for tribes.[48]

The liberal agenda of 'progress' and assimilation can hardly be ignored here.

IV. CONCLUSION

The foregoing story about how the vision of the postcolonial Indian state as discussed in the Constituent Assembly debates shaped the normative position of minorities in the Indian constitution is not peculiar to India. A close reading of Bangladeshi Constituent Assembly debates equally exposes the way ethnic minority groups have been marginalised in the process of creating the 'national' and 'liberal' Bangladeshi state and also how such marginalisation has been legitimised in the name of national unity and the liberal principles of equality and non-discrimination.[49]

Thus, a critical examination of the postcolonial state as an ideology reveals how it serves to establish and sustain relations of domination by the political majority over vulnerable minority groups through a number of modes of ideological operation. In the anticolonial nationalist discourse and the political imagination of the postcolonial order, the vision of the postcolonial state appeared as the natural and obvious choice. This ideological operation of reification by the postcolonial state essentialised the 'state-form' so far as the political emancipation of the colonial state was concerned. Closely related to this phenomenon is the ideological mode of legitimation, and the postcolonial state operated vis-à-vis minorities within that mode too. Once established as the only legitimate outcome of decolonisation, the relations of domination between the majority and the minority become perpetual. Similarly, at the micro level, the ideology of the national state relied on unification as a mode of operation, while the ideology of the liberal state depended on fragmentation – diffusing minority groups into liberal individual citizens of the hostile state. In other words, a critical examination of the postcolonial state as an ideology helps us understand how the visions of the postcolonial 'national' and 'liberal' state establish and sustain asymmetric power relations to marginalise minorities in these states but at the same time justify and gloss over such marginalisation.

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[48] *CAD*, vol. III, para. 3.19.152 (30 April 1947).

[49] For details, see Shahabuddin, *Minorities and the Making of Postcolonial States in International Law* (Cambridge University Press 2021) 121-136, 186-195.