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Contributors

Professor Md. Rizwanul Islam
Department of Law, North South University

and **Nafiz Ahmed**
Lecturer, Department of Law, North South University

ABM Asrafuzzaman
Assistant Professor, Department of Law, University of Dhaka

Mohammad Golam Sarwar
Assistant Professor, Department of Law, University of Dhaka

and **ABM Asrafuzzaman**
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District Legal Aid Officer (Senior Assistant Judge), Dhaka

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The Co-operative Societies Law in Bangladesh: From Hope of Autonomy to Dependence

Md. Rizwanul Islam* and Nafiz Ahmed**

Abstract: *The framers of the Constitution of the People's Republic of Bangladesh have clearly demonstrated their intention to provide for an autonomous and democratically controlled co-operative societies movement for propelling the economic development of those who are directly dependent on the relevant industries. However, this article finds that co-operative societies law in Bangladesh have clearly drifted from ensuring the autonomy of members and the existing legal framework hardly reflects the intention of the framers of the Constitution and the principles upon which the co-operative societies movement is founded. A thorough analysis of the existing legal framework shows that the bureaucratic control over the co-operative societies granted by the laws has set the bureaucrats on the driver's seat instead of the members. This paper argues some of the existing statutory provisions on co-operative societies in Bangladesh may be re-thought.*

Keywords: Bangladesh, Co-operative society, Bureaucracy, Administrative law.

1. Background

The framers of the Constitution of Bangladesh have underscored the importance of co-operative societies in clear terms. Article 13(b) of the Constitution of Bangladesh provides for three different kinds of ownership: state, co-operative, and personal. The framers of the Constitution of Bangladesh clearly envisioned co-operative societies as a means to economic upliftment of the people of Bangladesh. The father of the nation, Sheikh Mujibur Rahman, himself envisioned the co-operative initiatives as means of economic emancipation of the smallholding farmers, carpenters, fishers, working-class etc. by the accumulation of capital and other factors of production and the industrialization of rural Bangladesh.[1] Sheikh Mujibur Rahman was perceived as the ultimate hero of the

* Professor, Department of Law, North South University.
** Lecturer Department of Law, North South University. The authors gratefully acknowledge the research assistance of Mashrur Ahmed Zidane. The paper is a substantially revised version of a study commissioned by the Association for Land Reforms and Development (ALRD), Bangladesh.

[1] Bangabandhu Shiekh Mujibur Rahman, 'Speech at Bangladesh National Co-operative Union Conference' (Dhaka, 3 June 1972) <http://www.sfdf.org.bd/site/page/c473555e-25ac-4f8c-be7f-

nation after the liberation war and his leadership during the constitution drafting period went unquestioned.[2] Opposition in the constituent assembly was close to no-existent when the Constitution was adopted.[3] Huq credits the fast passage of the Constitution to his great influence among other factors.[4] Thus, one may safely claim based on historical facts that Sheikh Mujibur Rahman's and the constituent assembly's visions for the Constitution were identical. However, he was also acutely aware of the vested interest groups acting like termites and undermining the true potential of the co-operative societies.[5] He wanted to ensure that the co-operative movement would be led by real farmers, fishermen, carpenters, workers and not by the rich sections of the community masquerading as farmers, fishers, carpenters, workers etc.[6] The current government too in its Vision 2021, hails the co-operative movement for pioneering the introduction of rural credit programmes for farmers.[7] However, most observers would possibly agree that the vision of the framers of the Constitution is yet to be achieved. And this article argues that a key contributing factor to this less than expected achievement of the co-operative initiatives in Bangladesh is the legal regime on co-operative societies in Bangladesh. In particular, the paper finds that too much bureaucratic control within the existing legal framework undermines the vision of the framers of the Constitution and is also antithetical to the fundamental governing principles of the co-operative societies.

2. What is a Co-operative Society?

A co-operative society may be defined as '[a]n organization or enterprise (as a store) owned by those who use its services.'[8] A co-operative society may be formed to pool the resources of its members together with the members taking a much more active role than shareholders in limited liability companies. It is a voluntary organisation set up by the members for their own welfare. Almost all countries have co-operative societies in one form or another, but the Nordic countries with their emphasis on the welfare expenditure seem to emphasise more

ccb7bfe2753c/> accessed 2 August 2021. [Unofficial English translation by the authors].

2 Rounaq Jahan, 'Bangladesh in 1972: Nation Building in a New State' (1973) 13(2) *Asian Survey* 199, 207.

3 ibid 203.

4 Abul Fazl Huq, 'Constitution-Making in Bangladesh' (1973) 46(1) *Pacific Affairs* 59, 70-71.

5 ibid.

6 Bangabandhu Shiekh Mujibur Rahman (n 3).

7 General Economics Division, Planning Commission. *Perspective Plan of Bangladesh, 2010-2021:Making Vision 2021, A Reality* (Government of the Peoples' Republic of Bangladesh, 2012) 33-34 <http://bangladesh.gov.bd/sites/default/files/files/bangladesh.gov.bd/page/6dca6a2a_9857_4656_bce6_139584b7f160/Perspective-Plan-of-Bangladesh.pdf> accessed 4 August 2021.

8 Bryan A Garner (ed), *Black's Law Dictionary* (10th edn, Thomson Reuters 2014) 409.

on the co-operative societies of workers and farmers.[9] It may be active in many economic sectors – agriculture, food, finance, health care etc.

3. The Scope of the Article

This article seeks to explore how existing co-operative laws may be reformed to ensure more robust growth of the co-operative initiatives in Bangladesh and play a role in alleviating poverty and contribute to the overall economic development of Bangladesh. The article does not purport that legal reform alone can work for the co-operative societies in Bangladesh to usher in a new era. However, as a scholarly legal work, it concentrates on the potential legal reform and tries to demonstrate how that may help the co-operative initiatives in Bangladesh to work for the benefits of the intended beneficiaries and the overall economy of Bangladesh, extra-legal factors are beyond its scope.

The article analyses the legal framework of the co-operative societies in Bangladesh. Although the article is not a thorough comparative analysis among laws of various countries; in some cases, parallels have been drawn to the relevant legal provisions of neighbouring countries to demonstrate the regressive movement of the law. It also touches on the comparative analysis between the current legal framework and the previous legal framework of Bangladesh and demonstrates the regressive development of the statutory regime. To assess the compatibility of the law with the ethos of internationally recognised principles of the co-operative societies movement, the article also draws on the International Labour Organisation (ILO) Recommendation no 193 on the Promotion of Cooperatives of 2002 (Recommendation 193) which is based on the co-operative principles as developed by the International Co-operative Alliance (ICA). This article's focus is on the co-operative societies comprising of members from the marginalised sections of the community. While the analysis of the paper revolves around Bangladesh, due to the similarity of legal provisions, its analysis may be of interest to a broader readership in neighbouring Commonwealth countries such as India, Nepal, and Sri Lanka. This is not to imply that the underlying motivations in the law on co-operative societies are identical. However, this is to imply that the due to the similarity in the socio-economic conditions and the legal provisions, one may have some appeal to the study of the paper.

4. Analysis of the Relevant Law

4.1 Broad Power to Avoid the Law

The law grants the government an unfettered power to intervene in any co-operative society by taking an exemption from the operation of the Co-operative

[9] Jacques Defourny and Marthe Nyssens, 'Social Enterprise in Europe: At the Crossroads of Market, Public Policies and Third Sector' (2010) 29 *Policy and Society* 231, 233.

Societies Act of 2001.[10] Section 4 of the Act states:

> The government, may, in the public interest, by a notification in the Official Gazette -
>
> a. Exempt, a co-operative society or all co-operative societies of a class, upon a condition or without any condition as specified in the notification, from all or any provision of this Act or any Rule framed under the Act;
>
> b. Order that any provision of this law any Rule framed under the Act, will apply subject to any condition as specified in the notification.

While the law is couched in a permissive language and ideally it should only be used in very special circumstances, it is not difficult to see how in practice this may seriously not only undermine the independence of the members of a co-operative society, but can be opposed to the very notion of the rule of law. In essence, this Section allows the government to operate beyond the bounds of law under the cloak of public interest, if it chooses to do so, and there is no guarantee that such a power would be benevolent in all cases. By using this Section, the executive can ignore all or any provisions of the Act or the Co-operative Societies Rules 2004. For example, the government may take away the license of a co-operative society, can withhold a general committee, remove one or all members of the managing committee, can appoint anyone in the managing committee, can extend the duration of an interim management committee, or even order winding up of a co-operative society. For doing any of these, all the executive has to do is profess that its action is based on the public interest and circulate a Gazette notification.

While granting power through a legislation, using terms such as 'public interest' or 'public policy' can be troublesome as it can be ambiguous. Legislations in many jurisdiction and several academic works have at times demonstrated various ways of defining public interest which lacked uniformity[11]. The Co-operative Societies Act of 2001 does not provide any definition of 'public interest'. However, while dealing with a different matter, the Appellate Division of the Supreme Court of Bangladesh (AD) in *World Tel Bangladesh Ltd v Bangladesh and Ors*,[12] observed:

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[10] Cooperative Societies Act 2001 (Act No. 47 of 2001) (BD).

[11] Edwin Rekosh, 'Who Defines the Public Interest' (2005) 2(2) *SUR International Journal of Human Rights* 167, 169-70.

[12] *World Tel Bangladesh Ltd v Bangladesh and Ors* (2005) 11 BLC (AD) 37 (Supreme Court of Bangladesh (SC), Appellate Division).

> The word 'public policy' is not easy to define but may include any injustice, oppression, restraint of liberty, commerce and natural or legal right, whatever tends to the obstruction of justice or to the violation of the statute an whatever against good morals when made the object of a contract and therefore void and not susceptible of enforcement.[13]

The High Court Division of the Supreme Court of Bangladesh (HCD) in *Chittagong Port Authority v. Ananda Shipyard and Slipways Ltd*,[14] also made some observations which may shed some light on how the judiciary of Bangladesh may interpret this term. The HCD observed that '[p]ublic policy of Bangladesh means the principles and standard regarded by legislature or by Court as being of fundamental concern to the state and whole of the society.'[15] The HCD also observed that an action can be considered contrary to public interest if it contradicts the fundamental policy of Bangladesh, the interest of Bangladesh, justice or morality, or if it patently illegal.[16] Use of words such as 'justice' or 'morality' or 'interest' creates a considerably broad scope of interpreting the term 'public interest' which consequently grants a very wide power to the government. In a similar manner, the Appellate Division of the Supreme Court of Bangladesh (AD) observed in *Mofizur Rahman Khan v Bangladesh*, observed that '[l]earned Attorney-General has also contended that an action taken by Government or public authorities shall be presumed to have been taken bonafide unless the contrary is established by the person complaining of it ... We do not find anything to disagree on these views.'[17]

Thus, taken in this light, the Government would appear to have a wider latitude in applying this provision in practice. Invoking exemption is not a hypothetical scenario. In *S.M. Delwar Hossain and Ors v. Bangladesh and Ors*,[18] the government used this power to exempt from the operation of sub-section (5) and (7) of Section 18 of the Act, i.e., to not apply the legal provisions on the interim managing committee of a co-operative society. However, despite invoking the provision in a situation where the members of the co-operative society were apparently divided into different factions, the exemption from the provision of law did not seem to facilitate a prompt resolution as the AD's judgement in the case reveals a series of cases fought regarding the duration of the interim management committee, voters list, and the propriety of elections of the managing committee.

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[13] ibid 35.

[14] *Chittagong Port Authority v. Ananda Shipyard and Slipways Ltd* (2012) 32 BLD (HCD) 120 (Supreme Court of Bangladesh (SC), High Court Division).

[15] ibid 37.

[16] ibid.

[17] (1982) 2 BLD (AD) 120 [32] (Supreme Court of Bangladesh (SC), Appellate Division).

[18] *S.M. Delwar Hossain and Ors v. Bangladesh and Ors* (2009) 61 DLR (AD) 59 (Supreme Court of Bangladesh (SC), Appellate Division).

The decision of the executive may be challenged by invoking the writ jurisdiction of the HCD, since they are functions in connection with the affairs of the Republic.[19] But even by the time the writ petition is settled, there may be substantial damage incurred to the co-operative society. Also, the common law courts are often reluctant to interfere with such actions when the legislation in question grants the executive the power to give exemptions.[20] Thus, this Section, as it stands now, should be radically altered. As a bare minimum, some form of approval of the existing members of the society should be a pre-condition of the application of this provision by the executive. The law should also enumerate an exhaustive list as to what kind of situations, the executive may apply this Section. For example, a deadlock situation in the management committee or among general members may potentially be a proper ground where the government's interference for a limited period could be allowed for the sake of smooth management of a co-operative society. The law should not also give the executive a blank cheque to provide an exemption from all or any provision of the Act or Rules for an indefinite period, rather it should specify from which provisions the exemption may be sought and for how long that should be sought.

4.2 Extensive Bureaucratic Control in the Registration Process

In spelling out the three forms of property ownership, Article 13 of the Constitution states that '[t]he people shall own or control the instruments and means of production and distribution.' It is true that in Article 13(b), the Constitution says that the 'ownership by co-operatives on behalf of their members within such limits as may be prescribed by law' and thus, gives the Parliament the right to formulate laws on governing the co-operative ownership. However, nonetheless, the initial part of the Article implies that framers of the Constitution envisioned control of the people in the ownership of property by the co-operative societies. The scope of Article 13 of the Constitution had been examined by the HCD in *Md. Ismail & Others v. Bangladesh & Others*,[21] where multiple writ petitions were filed in the HCD challenging the acquisition of land by the government in favour of a co-operative society to build homes for the homeless under a government plan. The HCD observed:

> When the Government acquires land for its own purpose or for the purpose of a statutory body then the scope of enquiry into public purpose is limited. Co-operative ownership however, is not State ownership nor is a public enterprise. Article 13 of our constitution recognises co-operative ownership as a form of ownership separate and distinct from State ownership and private ownership.

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[19] *Zainul Abidin v Multan Central Co-operative Bank Limited, Multan* (1966) 18 DLR 482 (Supreme Court of Pakistan).

[20] See for instance, the judgement of the Supreme Court of India in *State of West Bengal and Anr. v Rash Behari Sarkar and Anr* (1993) 1 SCC 479 (Supreme Court of India).

[21] *Md. Ismail & Others v. Bangladesh & Others* (1981) 1 BLD (HCD) 407 (Supreme Court of Bangladesh (SC), High Court Division).

> When land is acquired by the Government for a Co-operative Society, it is an acquisition in favour of co-operative ownership, as distinct from State ownership and private ownership. Acquisition for a co-operative society is not per se an acquisition for a public purpose.[22]

Article 13 of the Constitution is included in its part II i.e. the fundamental principles of state policy which are not judicially enforceable. However, Article 8(2) of the Constitution itself proclaims,

> The principles set out in this Part [fundamental principles of state policy] 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.[23]

Justice Latifur Rahaman in *Kudrat-E-Elahi Panir v. Bangladesh and Another*,[24] has observed that '[t]hese … fundamental principles of State policy are in the nature of instrument of instructions to the Government to implement these principles by legislation so that the nation as a whole can achieve certain ultimate ends by the actions of the Government.' Thus, while the provision contained in Article 13 of the Constitution is not judicially enforceable, they embody an instruction to the government to enforce them by law. Hence, at the outset, it may be argued that the framers of the Constitution viewed the government body entrusted with the function of overseeing the co-operatives more as a facilitator than as a regulator.

If we read the registration related provisions of the Co-operative Societies Act of 2001,[25] we would notice that the government officials overseeing the registration of co-operative societies hold too much power. Section of the Act provides that A co-operative society in Bangladesh cannot operate without registering under the Co-operative Societies Act of 2001, which means even if a group of persons want to operate as a co-operative society without looking up to the government for any capital, credit, or any special privileges offered by law or policy to the registered co-operative societies, they cannot legally do this.

The relevant provision of Section 10(2) requires that the respective government officer in whose office the application for registration of a co-operative society has been lodged must complete the assessment of the application on compliance with laws on registration within 60 days from the lodgement.[26] If the Registrar refuses the registration, the applicant has an administrative remedy. The applicant may apply, within 30 days of the receipt of the decision of rejection, to

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[22] ibid 19.

[23] Constitution of the People's Republic of Bangladesh, art 8(2).

[24] (1992) 44 DLR (AD) 319 (Supreme Court of Bangladesh (SC), Appellate Division).

[25] Co-operative Societies Act 2001 (BD) s 9.

[26] Co-operative Societies Act 2001 (BD), s10(2).

the superior officer in the co-operative department for an assessment of the refusal to register.[27] In those cases in which the Director General of the Co-operative Department is the registering authority, the applicant has no right to appeal, but a mere petition for review (i.e. to the same Director General) may be lodged. Under Section 10(5) of the Act, the decision of the respective public officer regarding the appeal or review is final.

The law does not state how the registering authority would assess the application for registration; it only requires that the respective public officer has to be satisfied that the application is valid under the law. However, if the government official declines registration, then she/he needs to state reason/s in black and white. If the members of a proposed co-operative society are aggrieved by the decision of non-registration rendered by the officials of the Co-operative Department, even then they have no legal right to lodge an application to the civil court for assessing the propriety of the refusal to register as is clearly spelt out in Section 52(7). The division of the adjudicating power between the Registrar and civil courts is spelt out in the as explained in following observation of the HCD in *Kazi Md. Siraj and others v. Bangladesh and others*:[28]

> From the plain reading of Section 50 it is clear like anything that the Registrar of the Co-operative Societies has been empowered to dispose of all kinds of disputes including election dispute of the societies and if any party is aggrieved of by the Order under Section 50, he can file appeal [provided it is not barred by Section 52(7)] under Section 52 of the Rules to the District Judge, who is the final authority in the matter of disputes under Co-operative Societies Rules.[29]

As regarding the rejection of application for registration, there is no remedy in the civil court, an aggrieved person may file a writ petition to the HCD. However, the settled jurisprudence on this point may stand in the way of a successful invocation of the writ jurisdiction. The HCD in its writ jurisdiction is mainly concerned with legal questions, factual matters which warrant the court to engage with detailed factual and evidentiary questions are not generally amenable to the writ jurisdictions of the HCD.[30] And in any case, while the remedy of the writ petition should be a prompt one compared to that of a civil suit, the cost of

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[27] ibid, s10(4).

[28] *Kazi Md. Siraj and others v. Bangladesh and others* (2006) 26 BLD (HCD) 153 (Supreme Court of Bangladesh (SC), High Court Division).

[29] ibid 155.

[30] *Abdul Hamid Khan v Miah Nurul Islam and others* (1990) 42 DLR (HCD) 49 (Supreme Court of Bangladesh (SC), High Court Division); see *also, Shamsunnahar Salam and others v Mohammad Wahidur Rahman and others* (1999) 51 DLR (AD) 232 [15] (Supreme Court of Bangladesh (SC), Appellate Division), where the Court held states- '[h]owever extraordinary its powers, a writ Court cannot and should not decide any disputed question of fact which requires evidence to be taken for settlement.' *Cf* S. *Mohsin Sharif, v. The Govt. of the Peoples Republic of Bangladesh* (1975) 27 DLR (HCD) 186 (Supreme Court of Bangladesh (SC), High Court Division).

a writ petition may be prohibitive for many co-operative societies consisting of members from the marginalised sections of the community. Thus, they may have no real judicial redress regarding the refusal of registration.

It is to be noted that such a bar on the interference by the civil courts in matters decided by the Registrar was present in Section 133 of the Co-operative Societies Ordinance of 1984,[31] which was the primary instrument dealing with matters relating to the co-operative societies of Bangladesh before the current statute repealed that. On this issue of exclusive jurisdiction of the bureaucrats in the Co-operative Department, the HCD in *Co-operative Society Limited and others v. Subash Chandra Lala, Advocate and others*,[32] held:

> From the above quoted provisions of law, it will appear that if there is any dispute touching the business or affairs of a Co-operative society, between the parties as mentioned in clause (a) to (d) of Section 86, then that dispute shall be referred to the Registrar of the Co-operative Societies and that the jurisdiction of the Civil Court in that respect has been ousted by Section 133 of *Chittagong Urban* the Ordinance. From this provisions [sic] of the said Ordinance, it appears that there are two requirements of a dispute for reference to the Registrar of the Co-operative Societies in respect of which the civil Court shall have no jurisdiction. One is that the dispute must be touching the business or affairs of a co-operative society and the second is that the parties to the dispute must be the society and its managing committee or any officer or any member or past members and others as enumerated in Clause (a) to (d) Section 86.[33]

However, the Co-operative Societies Ordinance of 1984 allowed the Registrar to stay the proceedings before her/him and refer any dispute presented before her/him which involved complicated question of law or facts, to the District Judge or call upon one of the parties to institute a civil suit.[34] The year 1984, in which the Ordinance was adopted, falls under the regime of Lieutenant-General Hussain Muhammad Ershad who came to power in 1982 through a military *coup d'etat* and ruled until 1990.[35] One cannot help but feel a bit concerned observing that a democratic parliament intended there to be less involvement of the judiciary and paid less heed to the maintenance of check and balance than a military junta regime did.

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[31] Co-operative Societies Ordinance 1984 (BD), s 133 stated:
Save as provided in this Ordinance, no Civil or Revenue Court shall have any jurisdiction in respect of (a) the registration of a co-operative society or its by-laws or of an Amendment of its by-laws; or (b) the dissolution of a managing committee and the management of the society on dissolution thereof: or (c) any dispute required under Section 86 to be referred to the Registrar; or (d) any matter concerned with the winding up and dissolution of a cooperative society.

[32] *Co-operative Society Limited and others v. Subash Chandra Lala, Advocate and others* (1994) 14 BLD (HCD) 342 (Supreme Court of Bangladesh (SC), High Court Division).

[33] ibid 10.

[34] Co-operative Societies Ordinance 1984 (BD), s 89.

[35] Talukder Maniruzzaman, 'The Fall of the Military Dictator: 1991 Elections and the Prospect of Civilian Rule in Bangladesh' (1992) 65(2) *Pacific Affairs* 203.

4.3 Avoiding any Conflict of Interest

In the existing law of Bangladesh, there is no provision to ensure that members of the management committee avoid a conflict of interest situation. To appreciate the pitfalls of this absence, we may look into comparable provisions of the neighbouring West Bengal province of India.[36] Section 15(1) of the West Bengal Co-operative Societies Act of 2006,[37] states that '[n]o Co-operative society, the bye-laws of which permit admission as its member of a person carrying on transaction or business of the same kind or nature as carried on by its, shall be registered…' The object of this provision is quite self-evident as it seeks to prevent any potential conflict of interest between a member's personal business and that of the co-operative society. The same concept is applicable to most private companies where shareholders are not generally allowed to run any business competing with that of the company's business.[38] The Co-operative Societies Rules of 1987, made under the Co-operative Societies Ordinance of 1984 of Bangladesh mandated that '[n]o person who is a member of any primary society shall be admitted to membership of any other such society than a co-operative land mortgage bank.'[39] Similarly, the Partnership Act of 1932 as in force in Bangladesh also frowns on partners carrying on a business competing with that of the partnership firm. Section 16(b) of the Partnership Act of 1932 states that subject to any contract between the partners, 'if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business.' Thus, it is clear that a partner in a partnership firm can only run a business competing with that of the firm subject to an express contractual arrangement with the other partners.

The Co-operative Societies Act, 2001 or the Co-operative Societies Rules, 2004 of Bangladesh does not have any similar condition. The Act merely requires a member to be at least 18 years of age and to subscribe for at least one share in

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[36] One may contend that at the time when West Bengal Parliament passed this law, the communists were in power in West Bengal, and a law passed by that regime would not be replicable in Bangladesh which is ruled under capitalist political parties. However, such a contention seems to be unpersuasive as the provision which has not been amended by the subsequent non-communist government in West Bengal. And also, as explained below, some of the other laws in Bangladesh and precedent also emphasises the importance of avoidance of conflict of interest.

[37] The West Bengal Cooperative Societies Act 2006 (Ind).

[38] *Sidebottom v. Kershaw, Leese & Co* [1920] 1 Chapter 154 (The Court of Appeal 1920). In this case, in a private company in which majority of the shares were owned by the directors, the articles of association was altered empowering directors to compel any shareholder with a competing business to transfer their shares at their respective fair value to nominees of the directors. *Sidebottom*, a minority shareholder with a competing business, sued for a declaration invalidating the special resolution altering the articles of association. The court refused to intervene as it found no *mala fide* in the special **r**esolution altering the articles of association.

[39] Co-operative Societies Rules 1987 (BD) r 10(2).

the co-operative and allow anyone under 18 years of age to become an associate member if her/his guardian stands as a guarantor for the minor associate member. It is conceivable that members of many farming or similar kind of co-operative societies among rural communities of the less affluent sections of the community may not be willing to give up their personal, professional activities competing with that of the co-operative society. However, for members of the management committee or at least the chairperson of the committee, a restriction on running any personal business competing to that of the firm should be seriously considered by the lawmakers. This should mean that the members of the management committee would be more dedicated in accomplishing the objectives of the co-operative society and the risk of them acting in their personal interest at the detriment of the co-operative society would be diminished.

4.4 Meddling in the Management of the Co-operative Societies

In various ways, the law provides for significant scope for bureaucratic interference in the management of a co-operative society. A co-operative society is a collectivist enterprise as ideally its authority should lie with its members and to ensure such internal control its structure should be significantly different from that of other enterprises.[40] As per Section 18(1), the managing committee of a co-operative society operates like that of a board of directors of company; they retain all powers in relation to the management of the co-operative society save those powers which are reserved for the members of the society in a general meeting as per the charter of the society. Under, rule 23 of the Cooperative Societies Rules 2004, The number of members of the management committee would be fixed by the bye-law of the society, but it can only be 6/9/12. However, Co-operative Societies Act 2001, proviso to sec 18 (2), if in a society the government has more than 50 per cent capital contribution or more than 50 per cent of the loan or advance made to the society or stands as a guarantor of a loan disbursed to the society, the government or the Registrar would nominate one-third of the members in the management committee. While because of the financial contribution of the government, it having a fixed percentage of representatives in the committee is natural, such representation may somewhat corrode the co-operative values of member autonomy. Furthermore, the government's stake, in this case, should not be equated with that of a shareholder or creditor to a company, as the government's action in this sphere (particularly for small rural co-operative societies) is dictated by rendering public benefit. Such a motive of public benefit is clearly manifested in Rule 77(1) of the Co-operative Societies Rules of 2004.[41] For this reason, the law may be amended to reduce the number of government nominated members in

[40] Sharit K. Bhowmik, 'Participation and Control: Study of a Co-operative Tea Factory in the Nilgiris' (1997) 32 *Economic & Political Weekly*, A-106.

[41] Cooperative Societies Rules 2004 (BD), r 77(1) states:

the management committee of co-operative societies. Doing this would mean less external influence on the members of the co-operative society.

On this matter, regard may be had to Section 32(b) of the West Bengal Co-operative Societies Act, 2006 which provides that in co-operative societies in which the state government is a subscriber, guarantor, or provider of loan or grant, 'the State Government or any authority specified by it may nominate one person on the board [equivalent to the management committee] or change them or fill up any casual vacancy of a nominated member.' Thus, the government there retains only the right to nominate one member in the committee, and even that right is not exercisable in co-operative societies consisting of any self-help group members. The 'self-help group' as defined in Section 2(60) of the Act means a group of persons of five to twenty in number coming from different families and belonging to the economically weaker sections of the society having their residential addresses within a contiguous place working for effective implementation of viable economic activities. Thus, co-operative societies consisting of marginalised sections of the community in West Bengal would be free of the governmental nominee in the management irrespective of the government's financial contribution. The introduction of a provision along this line can go a long way in enhancing the self-governance in co-operative societies in underprivileged sections of the community.

Section 18(5) of the Co-operative Societies Act, 2001 stipulates that the managing committee of a co-operative society cannot be elected in due time, the existing managing committee would stand dissolved and the Registrar would form an interim committee to work for 120 days. The members of the

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The government can by granting loan through purchasing share or in any other form provide economic assistance to a co-operative society for the following purposes, namely: -

(a) for producing commodities by the members of the society or for easing the marketing of their products;
(b) to run a framing or industrial establishment by the society;
(c) for paying off any prior loan owed by the members of the society; purchase or development of loan by the members or implementing any project for the interest of the members of the society for farming;
(d) for building any homestead by the society or its members;
(e) for paying off any prior loan taken by the society as per its bye-law;
(f) to bear the cost of salary of any worker appointed for orderly and adept management of the society;
(g) for partial or complete indemnification of any loss occurring to the company due to an event beyond the control of the society;
(h) for collection and distribution of any consumable goods in view of an order of the government; and
(i) for poverty eradication.

interim committee would be from among members of the respective co-operative society as well as bureaucrats. While the proportion of government nominated members in the management committee is mentioned in the law, the proportion of the members and bureaucrats in the interim management committee is not specifically mentioned neither in the Act nor in the Rules. The issue of numbers aside, to what extent these bureaucrats would have any real interest or expertise in the management (albeit temporarily) of the co-operative society is susceptible to question. Again, since the law does not have any specific requirement on this, there is even a potential possible that only members with a close connection to the political party in power would sneak in the interim management committee which would run counter to the principle of 'democratic member control' of co-operative societies.[42] To bring about a change to this, some form of approval of the members in a general meeting as a pre-condition for appointment in the management committee may be introduced.

Sub-sections 1 and 2 of Section 19 stipulate the conditions for holding a position in the management committee - as being of at least 21 years old; a member of the respective society; not being a convict or defaulter of any loan disbursed by a co-operative society, bank, or financial institution; not holding an office of profit or being an employee of a member of the managing committee or a member of the respective society; not being absent in two annual general meetings in the preceding 3 years etc. Rather curiously, Section 19(3) of the Act provides that when the Government would have shares (not necessarily the majority of shares) in a co-operative society and it would nominate members in the society's managing committee, none of the above aforementioned disqualifications would apply to them. This provision seems to defy logic and principles of sound management of a co-operative society. If members having shares (thus a real pecuniary stake) would stand to be disqualified on the aforementioned grounds, it is curious that why the government appointed members in the management committee who would typically have no personal stake in the respective co-operative society would not be so. On this issue of ousting members from the respective managing

[42] Section 18(7) of the Co-operative Societies Act, 2001 of Bangladesh imposes a restriction on the re-appointment of a person in an interim managing committee after she/he has served in the previous interim managing committee once. It has been claimed in literature that this provision is a legal limitation and in practice, because of this legal provision, required number of public officers cannot be found for being appointed in an interim managing committee. See also, Mohammad Hosen and Nehar Ranjan Roy, 'Management of Cooperative Society: Challenges to and Solutions for Good Governance' (2014) 17 *Journal of Cooperative Organization and Managemet* http://www.ti-bangladesh.org/beta3/images/2014/fr_ds_Cooperative_study_14_bn.pdf (last visited 21 July 2021). However, we argue here that this restriction is a welcome one upholding the concept of democratic management as it limits the scope for re-appointment of persons (even though only in an interim managing committee and that too can be defeated by a resort to Section 4) who are not elected by the respective members of the society.

committee, if we point to the relevant provision of the Indian federal law, we would note that the nominees of the Government in the board (equivalent to the managing committee of co-operative societies in Bangladesh) are not given any special exemption regarding disqualifications.[43] A similar provision regarding the nomination of members by the government was also present in section 28 of the Co-operative Societies Ordinance 1984 of Bangladesh, however, it did not exempt the government nominated members from the disqualification.

The power of bureaucrats is not limited to the nomination of members in the interim management committee, but they also are granted quite sweeping powers in expelling elected members of the managing committee. Proviso to sec 22(1) of the Co-operative Societies Act 2001, in those co-operative societies in which the government has one-third of the total shares or the government is a creditor or a guarantor of a loan disbursed to that society, the Registrar of the Co-operative Department, based on a finding that one or more of the members of the managing committee are flouting any provision of the Act or a provision of the society's bye-law and by that the interest of the members of the society is harmed or leading it on to the brink of bankruptcy; the Registrar may remove the responsible member of the managing committee or may even dissolve the entire committee without having to hold any meeting of the members. Obviously, the action should only be triggered by mismanagement in the co-operative society. That being said, this provision is seemingly objectionable on several counts.

The government having one-third share is only a minority stake in the co-operative society, where the general members are still a majority. Also, ideally in a co-operative society the vote should be allocated in accordance with the one person one vote principle instead of one share one vote principle like corporate bodies.[44] Thus, this provision, in some ways, can be termed as a rule of minority over majority. When one or members of the managing committee would mismanage the affairs of the co-operative society, their action would not only harm the interest of the government but also that of the ordinary members of the co-operative society and for this reason, the total absence of the voice of ordinary members in ousting one or more members of the managing committee is curious. The law does not even grant an expelled member of the managing committee a right to seek judicial scrutiny of the expulsion from the committee. Under section 22(6) of the Co-operative Societies Act, 2001, an ousted member of a managing committee dissolved by the Registrar (irrespective of the government being a member/creditor or guarantor of a loan or not) can only apply to the superior authority for a review of the expulsion or dissolution of the committee. They are

[43] The Multi-State Co-operative Societies Act 2002 (Ind) s 48.

[44] Roger Spear, '*Governance in Democratic Member-Based Organisations*', (2004) 75(1) *Annals Public and Cooperative Economics* 33, 42.

bereft of any right to file a civil suit questioning this administrative exercise of power by the bureaucrats.

Under the federal law in India, i.e. Section of 47 of the Multi-State Co-operative Societies Act 2002, expelling a member of the board (equivalent to the managing committee of the co-operative society in Bangladesh) who is elected by the members of the co-operative society even when she/he 'has acted adversely to the interests of the co-operative' can only be done by the members of the respective co-operative society. Clearly, this is a provision which is compatible with and respectful of the autonomy of members- a key principle of the co-operative initiatives. Section 45 of the Cooperatives Act of 2017 of Nepal also upholds the ethos of the member autonomy and vests the power of expulsion of a member of the board (equivalent to a managing committee in Bangladesh).[45]

Article 2 of the ILO Recommendation 193 has defined a co-operative as 'an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise.' The inclusion of autonomy and democratic control in the definition of co-operative societies shows that these are two of the basic characteristics of co-operatives. Additionally, democratic member control,[46]

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[45] Cooperatives Act 2017 (Nepal) s 45 reads as below:

(1) General Meeting may by a resolution adopted by its majority remove a director from the office of a director in any of the following circumstances: -

a) In case he/she incurs loss or damage to the concerned Cooperative Organization by committing fiscal embezzlement;

b) In case he/she discloses confidentiality of transaction of the concerned Cooperative Organization in an unauthorized manner;

c) In case he/she involves in the same nature of business or transaction with the concerned Cooperative Organization in a competitive manner;

d) In case he/she commits any act against the interests of the concerned Cooperative Organization;

e) In case he/she is physically or mentally incapable to work; and

f) In case any director does not have qualifications referred to in this Act, Rules or Byelaws framed under this Act.

(2) Before adopting a resolution to remove any director is removed from the office, such a director shall be provided with reasonable opportunity to defend himself or herself at the General Meeting.

(3) In case any director fails to submit his or her defense within the period referred to in sub-Section (2), or in case his or her defense is not satisfactory, the General Meeting may remove him or her from the office thereafter.

The text is extracted from Nepal Law Commission's Website http://www.lawcommission.gov.np/en/wp-content/uploads/2019/06/Cooperatives-Act-2017-final-Eng-version-Dec-21-2018-1.pdf (last visited April 21, 2021).

[46] The 2nd Principle of the International Co-Operative Alliance: Statement on the Co-Operative Identity states, Co-operatives are democratic organizations controlled by their members, who actively participate in setting their policies and making decisions. Men and women serving as

and autonomy and independence,[47] are two of the seven principles of co-operatives observed by the ICA in its Statement on the Co-Operative Identity.[48] The principles of ICA are also inherited in the major international instruments dealing with the co-operative societies, such as the Recommendation 193. The intention to prevent intervention of the government in the autonomy and democratic process of co-operative societies is thus apparent. Any deviation from these principles are incompatible with the fundamental principles of the co-operative movement.

4.5 Control of Public Officials in Winding up Co-operative Societies

Just like the case of registration, regarding the cancellation of registration or liquidation of a co-operative society, the bureaucrats in the Co-operative Department have extensive power, and this matter too is beyond the jurisdiction of civil courts as provided in Section 52(7) of the Co-operative Societies Act 2001. If upon an inquiry based on annual audit of the cooperative societies accounts under Section 43 of the Co-operative Societies Act of 2001 or on the basis of a field-level officer's report, the Registrar feels that the society needs to wound up, she/he can order that without the need for any consent of the members of the co-operative society.[49] This power of the Registrar is not contingent on the government having any share or other forms of capital injection in the co-operative society. This provision runs against paragraph 6(c) of ILO Recommendation No. 193 which requires that governments would 'provide for the adoption of measures for the oversight of cooperatives, on terms appropriate to their nature and functions, which respect their autonomy, and are in accordance with national law and practice, and which are no less favourable than those applicable to other forms of enterprise and social organization.' The reading of Section 204 of the Companies Act of 1994 makes it clearer, as it is provided that if on the basis of a document or audit etc. an investigation is conducted and the report following such investigation satisfies the government that the company (both private and public) should be wound up, the government would ask the Registrar of Joint Stock Companies to submit a petition for winding up. Thus, in a similar situation, for winding up a company, the RJSC does not have the final say on the winding up, and the court has an ultimate say

elected representatives are accountable to the membership. In primary co-operatives members have equal voting rights (one member, one vote) and co-operatives at other levels are organized in a democratic manner.

[47] The 4th Principle of the International Co-Operative Alliance: Statement on the Co-Operative Identity connotes, '[c]o-operatives are autonomous, self-help organizations controlled by their members. If they enter into agreements with other organizations, including governments, or raise capital from external sources, they do so on terms that ensure democratic control by their members and maintain their co-operative autonomy.'

[48] The 2nd Principle of the International Co-Operative Alliance: Statement on the Co-Operative Identity.

[49] Co-operative Societies Act 2001 (BD) s 53(a).

on the winding up. Thus, it appears that the law does not treat the winding up of co-operative societies on terms equal to that of a company. This disparity between the laws regulating the winding up process of a company and a co-operative society shows that the companies and the co-operatives are not receiving similar treatment from the government while conducting their businesses. The law on this point should be reformed in that winding up decision (unless it is approved by the members in the general meeting), would be referred to the civil court.

4.6 Lack of Scope for Members to Seek Criminal Remedies Directly

Section 86(1) of the Co-operative Societies Act 2001, enacts that all offences committed in violation of the Act are non-cognizable. Section 86(2) provides that a member of a co-operative society or even that of a management committee cannot file a criminal case without prior written permission from the Co-operative Registrar or a person authorised by the Registrar. The restriction applies irrespective of whether the government has any financial contribution in the respective co-operative society or not. The application of this provision may be exemplified by a reported case. In *M Francis P Rojario alias Babu v. State*,[50] a member of a co-operative society filed a complaint case against the members of the managing committee accusing them of selling society's property in contravention of its charter and misappropriating a substantial portion of the consideration money. The Chief Metropolitan Magistrate, upon examination of the complaint, sent it to the police for treating it as a first information report. The accused members of the managing committee filed a case under Section 561A of Code of Criminal Procedure of 1898,[51] arguing that the case is liable to be quashed.

The HCD held that the offence alleged to be committed by the petitioners is punishable under Section 83 of the Co-operative Societies Act of 2001 and it could only be prosecuted after an inquiry conducted by the Registrar of the Co-operative Societies or someone authorised by the Registrar as per Rule 159 of the Co-operative Societies Rules of 2004. Since no complaint was filed in compliance with this procedure, the criminal proceedings have not followed the law. Thus, it upheld the petition of the accused members of the management committee and quashed the case.

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[50] *Francis P Rojario alias Babu v. State* (2010) 62 DLR (HCD) 355 (Supreme Court of Bangladesh (SC), High Court Division).

[51] Code of Criminal Procedure 1898 (BD) s 561 states:

> Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court Division to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

This provision is often used by accused in criminal cases when they feel that the accusation against them is unfounded.

This provision of the Co-operative Societies Act of 2001 identically mirrors Section 136 of the Co-operative Societies Ordinance of 1984, and the spirit of both the provisions were highlighted by the HCD in *Md. Rafiqul Alam, M.D. Dhaka Mercantile Co-Operative Bank Ltd. v. The State*,[52] by observing that-

> The Ordinance and the Act clearly suggest that the Registrar is the administrative Head of the Department and is in control of all the cooperative societies who shall audit or cause to be audited by some persons authorized by him, the accounts of every registered society once at least every co-operative year, so that in case of any irregularity or embezzlement of the fund by any member, he shall be in a position to exercise his discretionary power whether or not legal action should be taken against him under Law in the facts of the given case. Whatever Act the petitioner had committed were in the conduct of the business of the society in exercise of his discretionary powers and therefore, Section 86 of the Act which corresponds to Section 136 of the Ordinance attracted which had ousted the jurisdiction of the Criminal Court in respect of dispute contained in Section 8353

On this point, if we note Section 105 of the Multi-State Co-operative Societies Act of 2002 of India we would notice that a member of the co-operative society can file a case in the court directly.[54] Section 150 of the West Bengal Co-operative Societies Act of 2006 though in line with the Bangladeshi law makes the offences under the Act non-cognizable and requires the cases to be filed upon approval of the Registrar, makes an important distinction.[55] Under this Section, the offence of dishonest misappropriation of moveable property of a co-operative society is cognizable.

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[52] *Md. Rafiqul Alam, M.D. Dhaka Mercantile Co-Operative Bank Ltd. v. The State* (2004) 24 BLD (HCD) 632 (Supreme Court of Bangladesh (SC), High Court Division).

[53] ibid 8.

[54] Multi-State Co-operative Societies Act 2002, sec 105 proclaims "[n]o prosecution for offences under section 104 shall be instituted except on a complaint filed in writing by a member of a multi-state co-operative society or by the Central Registrar in the competent court."

[55] West Bengal Co-operative Societies Act 2006 (Ind), sec 150 reads as below:

(1) No court inferior to the court of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence under this Act.

(2) For the purpose of the Code of Criminal Procedure, 1973 (2 of 1974) every offence under this Act shall be deemed to be non-cognizable.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence punishable under section 403 of the Indian Penal Code, 1860 (45 of 1860) in respect of any movable property of a Co-operative society shall he cognizable.

(4) No prosecution shall be instituted under this Act, without the previous sanction of the Registrar.

(5) A prosecution under this Act shall be instituted by the Registrar or any person authorised by him in this behalf. All expenses for a prosecution Instituted on the request of a Co-operative society shall be borne by or recoverable from such Co-operative society.

The existing Bangladeshi legal provision of inquiry regarding the misappropriation of money or other financial mishandling as stipulated in Sections 83, and 86 read with Rule 159 of the Co-operative Societies Rules of 2004 by the Registrar or someone authorised by the Registrar may be founded on two considerations. One may be a desire to avoid frivolous or vexatious suits by any disgruntled faction of the co-operative society, and the other may be using the Government officials as a filter for cases going to the criminal courts. However, when a member of a co-operative society would have a genuine grievance, there seems to be no compelling reason for her/him to wait for the inquiry by the Government officials to be completed first. From a policy standpoint, the offences punishable under the Act would be hurting the interests of the members of a co-operative society, and thus, it seems illogical that they would have to obtain an authorisation from the Registrar or any other designated government official to file a criminal case for prosecuting that. For instance, if a person is a victim of criminal misappropriation of property or criminal breach of trust, she/he can directly file a criminal case without the need for any approval from any authority. So, when a member or some members of a co-operative society are filing a case for offences such as criminal breach of trust or criminal misappropriation of property, they should not need any prior approval of the relevant government functionaries. Creating a hurdle between an aggrieved member and the criminal courts can be seen as putting forth a barrier to the victim'saccess to justice.

4.7 Misusing the Umbrella of Co-operative Society for Grabbing Grants and Privileges

Co-operative societies in many jurisdictions have become an important factor in government policy making and earned the title of 'policy vehicle'.[56] Some policy or legal instruments of the Government of Bangladesh stipulates that some special rights such as the right to obtain lease or some other form of allotment of publicly held land will only be open to a registered co-operative society. In this regard, rule 71 of the Land Management Manual of 1990 provides that when a singular parcel of 20 acres of *khas* land would be available for settlement, they have to be allotted to a Farmers' Co-operative Society. Rule 5(1) of the *Government Jalmahal* Management Policy of 2009 provides that any Government owned *jalmahal* with an area of more than 20 acres cannot be allotted to any individual or unregistered ogranisation and would be allocated only to registered fishermen's co-operative societies. Rule 4 stipulates that in allocating *jalmahal* with an area of up to 20 acres, registered co-operative societies consisting of young fishermen (whose members are aged between 18 to 35 years) would have to be given preference.

[56] Norman M. Saleh & Noradiva Hamzah, 'Co-operative Governance and the Public Interest: Between Control and Autonomy' (2017) 51 *Jurnal Pengurusan* 209, 211.

There is some allegation that sometimes bureaucrats who are vested with the responsibility to assess the competence of the applicants for registration of a co-operative society get compromised by bribe or other inducement or political pressure and allow registration of a co-operative society with a particular class of members although some of its members may not fall in the respective class.[57]

The point may be exemplified by the reported case of *Md. Monirul Islam v. Bijoy Halder, President Lohamari Matshajibi Samabaya Samity Ltd. and Others*,[58] the petitioner claimed that the grant of lease of a *jalmahal* (a fishery) to a co-operative society named, Daipukuria Union Matshajibi Samabaya Samity Ltd (DUMSSL) was illegal. This is because DUMSSL consisted of businessmen as can be gleaned from their profession as mentioned in the voter list and hence, the co-operative society consisting of non-fisherman rendering the society ineligible to get the lease under the *Jalmahal* Management Policy of 2009.

As indicated above, the relevant policy provides that if any society consists of any member who is not a real fisherman then the society will be ineligible to get lease of a *jalmahal*. The policy defines a real fisherman as someone who catches and sells fish from a natural source, and that is his main source of livelihood. The HCD upheld their petition and asked the District *Jalmahal* Management Committee to grant the lease to the petitioner. However, on appeal, the AD found that the direction of the HCD to grant a lease in favour of one of the two remaining societies was also incompatible with the requirement of the *Jalmahal* Management Policy of 2009 as some of the members of those two societies were also businessmen/farmers as per the voters' list. Hence, the AD ordered the *Jalmahal* Management Committee to start the process afresh to lease out the respective *jalmahal* as per the policy. This case epitomises limitation of the registration process of the co-operative societies in that none of the contending co-operative societies were actually consisted of the eligible members, i.e., true fishers.

This is a tricky issue for the policymakers. While on one hand, these provisions are desirable and should facilitate co-operative initiatives, on the other hand, when the government officials are vested with the sole regulatory powers relating to registration of co-operative societies, it is imaginable that they may succumb more easily to the pressure of vested quarters. Under the current law, there is only provision for challenging the non-registration, there is no provision for challenging the wrongful registration of a co-operative society. However, a mere option for challenging the registration of a co-operative society to a government official in the Co-operative Department or her/his superior officer may have little

[57] Hosen and Roy (n 42) 27-28.

[58] (2013) 42 CLC (AD) (Supreme Court of Bangladesh (SC), Appellate Division).

value. To counter this, a provision may be inserted in the Co-operative Societies Act of 2001 that when any group of persons are aggrieved by the registration of a co-operative society, they can directly file an objection petition to the civil court challenging the legality of the registration by the officials of the Co-operative Department.

An additional means of restricting this can be the adoption of a provision along the line of sub-section 3 and 4 of Section 15 of the West Bengal Co-operative Societies Act of *2006.* Sub-section 3 states that a co-operative society established solely for the promotion of the economic interests of any particular community, class or group of people through any specific activity would not be registered if the bye-laws of the society permit admission as its members of persons excluding those to be directly benefited such activity. Sub-section 4 states that a co-operative society established by tribal people or farmers or females exclusively for their benefit must not admit as its member a person who does not belong to the respective group. Provisions along this line may be introduced in the *Co-operative Societies Act*, 2001.

5. Conclusion

It may be fair to observe that at every stage of the operation of co-operative societies, there is an omnipresence of the government apparatus. This over-reliance on the government regulators has arguably meant that members of co-operative societies have not taken as active a role in the management of co-operative society as they should. In similar legal frameworks, the role of the Registrar has been held to be the 'centre of the picture' instead of the members of the societies for whose benefit the co-operative movement was initiated and the its role has been compared with the power of life and death over a co-operative society.[59] This cannot be congenial for a proper development of co-operative societies culture in Bangladesh. Thus, there is little wonder that members of co-operative society would tend to act more like depositors hoping to thrive on interests on deposits and grants from the government in co-operative societies and less as members taking an active part in the management of activities of their respective co-operative society. After all, unlike the investors in a company, the members of a co-operative society are expected to take an active part in running their co-operative enterprise. To make the co-operative initiatives in Bangladesh more vibrant, the policymakers should empower the members of the co-operative societies more.

[59] Timothy Akomolede and Ebenezer.T. Yebisi, 'A Critic of the Legal Framework for the Incorporation of Cooperative Societies in Nigeria' (2015) 39 *Journal of. Law Policy and Globalization* 16.

The role of the Co-operative Department of Bangladesh should be more of a facilitator of co-operative initiatives in Bangladesh and less of a regulator. Once the Co-operative Department officials would be less encumbered by the burdens of regulating the co-operative societies, their resources may be better spent in awareness raising and training of the members about their respective rights and duties in relation to their respective co-operative societies. More power vested in the members themselves and less regulatory control of the government officials of the Co-operative Department should encourage the members of co-operative societies to take a more vocal role in the management of their respective societies which would live up to the true spirit of the co-operative society movement. Too much control of the Co-operative Department on co-operative societies would stymie the growth of the co-operative initiatives and run counter to the cooperative values such as democratic member control; member economic participation; and autonomy. And as this article shows, it also does not live up to the vision of the framers of the Constitution and implies a regressive step towards greater external influence on member's a co-operative society.

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Gender Equity in Bangladesh Agriculture: Legal and Policy Vacuums to Fulfill SDG Obligations

A B M Asrafuzzaman*

Abstract: *Agriculture plays a significant role in increasing GDP (Gross Domestic Product) in Bangladesh. Though male farmers dominate the agriculture sector, the participation of women in agriculture is increasing day by day. Due to inherent lacunae in agricultural policies and legal framework, the agriculture sector of Bangladesh has not yet developed a gender-responsive way to uphold women's rights, environment, climate change, human rights and other SDGs issues. Though direct and indirect participation of women workers in agriculture is even more than male workers, most of them are out of the purview of the formal agricultural sector because of such defective policies and laws. Most of the laws are age- old and inadequate to address farmer-owned businesses and farmers' human rights issues properly. Therefore, the agriculture sector is not rising in a way required to address SDG priority to attain gender parity. Farmer-owned businesses have a significant impact on eight other SDG goals related to ending poverty, gender discrimination, inequality, environmental degradation, tackling climate change, and promoting and ensuring healthy lives.[1] Thus, the legal structure and policies relating to female-owned farm businesses will be effective and appropriate only when they incorporate and focus on gender equality, education, women empowerment, environment, climate change issues, and other fundamental human rights to fulfill SDG dreams. To explore these, the paper analyzes present agriculture policies, legislations, and the nexus between SDG and agriculture. It also recommends measures that may improve existing legal structures of agriculture by addressing human rights, gender parity, environment, climate change and principles of equality within the legal framework of farmer-owned businesses in Bangladesh to fulfill obligations under SDGs.*

Keywords: Bangladesh agriculture, Gender equity, Policy vacuum, SDGs.

* Assistant Professor, Department of Law, University of Dhaka, Bangladesh.

[1] Mathew Abraham and Prabhu Pingali , 'Transforming Smallholder Agriculture to Achieve the SDGs', in Sergio Gomez y Paloma Laura Riesgo Kamel Louhichi (eds), *The Role of Smallholder Farms in Food and Nutrition Security*, Springer, 174 , ISSN, 978-3-030-42148-9 (eBook)< https://doi.org/10.1007/978-3-030-42148-9. https://library.oapen.org/bitstream/handle/20.500.12657/39585/2020_Book_TheRoleOfSmallholderFarmsInFoo.pdf?sequence=1#page=176> accessed 24 March 2022.

1. Introduction

The economy of Bangladesh has a deep-rooted connection with its agriculture. The agriculture sector contributes 13.32% to its GDP [2], and absorbs a significant portion (39 % in 2018) of its total labour force[3]. Participation of women in agriculture (59% in 2018) remains even higher. However, a large segment of our rural women is still engaged in un-paid agricultural activities that are not counted in labor force participation survey. Further, women receive lower agricultural wages than their male counterparts.[4] Due to inherent shortcomings in agricultural policies and legal framework, the agriculture sector of Bangladesh has not yet developed a gender-responsive way to uphold women's rights, environment, climate change, and other SDGs issues. Though more than half of the total agricultural workers are women, most of them are out of the purview of the formal agricultural sector because of such defective policies and laws. Therefore, women involved in agriculture are often deprived of benefits or advantages provided through supportive laws and policies to promote formal agriculture.

A few legal structures and policies are available to address the special need of female lead farmhouses in Bangladesh. However, most are dated and lack adequate provisions to address farmer-owned businesses and farmers' human rights issues properly. That is why the agriculture sector is not developing in a way required to address SDG priority to attain gender parity. Further, the fundamental objective of SDGs is to end hunger and malnutrition and double agricultural productivity and incomes of small-scale farmers— which is directly connected to small farm production.[5] Farmer-owned businesses, on the other hand, have a significant impact on eight other SDG goals related to ending poverty, gender discrimination, inequality, environmental degradation, tackling climate change, and promoting and ensuring healthy lives.[6] Thus, the legal structure and

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[2] *Bangladesh statistics 2019* (Bangladesh Bureau of Statistics, 2019) <https://bbs.portal.gov.bd/sites/default/files/files/bbs.portal.gov.bd/page/a1d32f13_8553_44f1_92e6_8ff80a4ff82e/2020-05-15-09-25-dccb5193f34eb8e9ed1780511e55c2cf.pdf > accessed 15 February 2022.

[3] The World Bank. 'Employment in Agriculture- Bangladesh' (*ILOSTAT Database*, January 2021) <https://data.worldbank.org/indicator/SL.AGR.EMPL.ZS?end=2019&locations=B-D&start=1991> accessed 14 June 2022.

[4] Bangladesh Bureau of Statistics. 'Gender based Employment and Wage' (*Policy Brief*, Issue 2, May 2021) <http://bbs.portal.gov.bd/sites/default/files/files/bbs.portal.gov.bd/page/4c7eb0f0_e780_4686_b546_b4fa0a8889a5/2021-05-16-09-14-4b18b6a036c8d9ad87930d0705deb7bd.pdf> accessed 14 June 2022.

[5] United Nations. 'Goal 2: Zero Hunger' (*Sustainable Development Goals*, 2022) <https://www.un.org/sustainabledevelopment/hunger/> accessed 13 February 2022.

[6] Mathew Abraham and Prabhu Pingali, 'Transforming Smallholder Agriculture to Achieve the SDGs', in Sergio Gomez y Paloma Laura Riesgo Kamel Louhichi (eds), *The Role of Smallholder Farms in Food and Nutrition Security* (Springer 2020, 174).

policies relating to female-owned farm businesses will be effective only when they incorporate gender equality, education, women empowerment, environment, climate change issues, and other fundamental human rights to fulfill SDG dreams.

To explore these and other related issues, Part 1 of this paper explores the relevant history of legal structures available for farmer-owned businesses in Bangladesh. Part 2 analyzes present agriculture policies in Bangladesh. Part 3 evaluates the gender sensitivity of agriculture policies in Bangladesh. Part 4 discusses current primary legislations available for farmer-owned businesses in Bangladesh. Part 5 discusses the nexus between SDG and agriculture. Part 6 depicts the role of agriculture organizations in developing the agriculture sector. Part 7 examines gender inclusivity and related SDGs issues within primary legislation, policies and agriculture organizations. The last part of this paper recommends measures that may improve existing legal structures of agriculture by addressing human rights, gender parity, environment, climate change and principles of equality within the legal framework of farmer-owned businesses in Bangladesh to fulfill obligations under SDGs.

2. History of Legal Structure for Agriculture in Bangladesh

Agriculture is the prime and dominant source of income for most people living in rural areas of Bangladesh. Approximately 77.3% of the country's total population depends directly or indirectly on agriculture for their livelihood.[7] About 63% of the labor force is involved in the agriculture sector, of which about 57% is engaged in the crop sub-sector alone.[8] Before the independence of Bangladesh, the agriculture sector was primarily governed by the set of statutes enacted by the British rulers and the then Government of West Pakistan.

The Government of Bangladesh has also formulated policies such as the National Fisheries Policy 1998, National Integrated Pest Management Policy 2002, National Livestock Development Policy 2007, Government Jalmahal (Water Area) Management Policy 2009, National-Women Development Policy-2011, National Agriculture Policy 2013, National Seed Policy, National Water Policy, to develop the farmer-owned business. Furthermore, to run the agriculture sector smoothly and assist the people involved in the farmer-owned business, the Government of Bangladesh has established the Bangladesh

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[7] Abul Kashem, 'Agriculture' (Banglapedia: National Encyclopedia of Bangladesh, 18 June 2021) <https://en.banglapedia.org/index.php/Agriculture> accessed 29 April 2022.

[8] Ministry of Agriculture, 'Introduction', *National Integrated Pest Management Policy* (Ministry of Agriculture 2002) <http://fpmu.gov.bd/agridrupal/sites/default/files/National_IPM_Policy_2002.pdf> accessed 21 March 2022.

Agriculture Development Corporation, Department of Livestock, Department of Fisheries, Social Development Fund, and other agricultural organizations. These various initiatives play a significant role in improving the respective sectors of agriculture. However, despite establishing these institutions, the Government took different effective mechanisms considering the circumstances occasionally. For example, after independence, the Government continued to support agricultural mechanization by large-scale irrigation facilities by establishing Deep Tube Wells and renting out Low Lift Pumps to farmer groups. In addition, through the Bangladesh Agricultural Development Corporation, the Government of Bangladesh provided diesel for irrigation pumps at a subsidized rate of 75%.[9]

The objective of this paper is to examine whether various agricultural policies formulated by the Government can sufficiently address the gender issues and provide a framework for gender equity in Bangladesh agriculture.

3. National Policies in Bangladesh Promoting Gender-Sensitive Agriculture

As discussed above, to boost its agriculture sector, the Government of Bangladesh has formulated policies to bring positive change in the agriculture arena. Though these policies are neither legally binding nor mandatory, they form the basis of government actions that the Government must consider when making any decision, passing or amending a law or discharging its function. Following are the implications of policies regarding agriculture in Bangladesh. As the Constitution of Bangladesh provides positive discrimination, especially for the advancement of women and other backward sections of the society, various agricultural policies taken by governments from time to time also have some underpinning on gender parity in agriculture. This section will summarize the significant agricultural policies to identify gender parity in Agriculture.

3.1 The National Agriculture Policy 2018 [10]

The National Agriculture Policy is a milestone in developing the agricultural sector in Bangladesh. Its objective is to cope with the current challenges and needs of the agriculture sector in Bangladesh. The main objective of this policy is to ensure food security and improve socio-economic conditions of people by increasing productivity and production of crops, farmers' income, crop diversification,

[9] Mahabub Hossain, 'The impact of shallow tube wells and boro rice on food security in Bangladesh' 00917 *IFPRI Discussion Paper* (Washington DC, March 2022) <http://www.ifpri.org/sites/default/files/publications/ifpridp00917.pdf> accessed 21 March 2022.

[10] Ministry of Agriculture. 'Main Objectives' *The National Agriculture Policy 2018* (Ministry of Agriculture, Government of Bangladesh 2018) <https://bangladeshbiosafety.org/wp-content/uploads/2021/03/National-Agricullture-Policy_2018_English.pdf> accessed 28 January 2022.

providing nutritious and safe food production, improving the marketing system, and ensuring productive agriculture and adequate consumption of natural resources.[11] It aims to ensure profitable agriculture, nutrition and food security in Bangladesh with a special focus on enhanced investment in agricultural research and extension, technology transfer, mechanization, specialized agriculture, ICT, marketing of agricultural products, women empowerment and nano-technology.[12] In addition, it provides significant facilities to women to encourage them in the agriculture sector.[13]

Article 9.2 of the National Agriculture Policy set research priority to explore the way out to remove barriers and enhance the participation of women in Agriculture. Further, to promote women's role in agricultural decision-making, Article 14.3 includes a provision for the inclusion of a 'Government nominated women representative' in every union, thana, district and national agricultural credit committee. It further suggests a mandatory inclusion of women representatives among other elected members of the union and thana agriculture credit committees. However, as discussed, women are already involved in various unpaid agricultural activities. Therefore, an explicit provision of research to enhance women's engagement in 'paid agricultural activities' might better impact attaining the MDG target of gender equality in this regard.

Article 18 of the policy has set an explicit provision for women, including separate agricultural extension programs for women involved in field-level agriculture. In addition, it also suggests extension services to promote other forward linkage activities such as the production of horticulture seeds, establishment and management of cottage industries etc.

3.2 The National Women Development Policy 2011 [14]

This policy incorporates provisions to eliminate all forms of discrimination between men and women.[15] In addition, the National Women Development Policy 2011 has chalked out four specific guidelines to improve the participation of women in agriculture.

It advocates for the empowerment of women in the agricultural sector by

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[11] ibid, s 2.2.

[12] ibid, preamble.

[13] ibid, s 13.

[14] Ministry of Women and Children Affairs. *The National Women Development Policy 2011* (Ministry of Women and Children Affairs, Government of the People's Republic of Bangladesh 2011) <http://dwa.gov.bd/site/page/6a4ce1a7-44cd-4fe3-a74a-41b96fd9b599/National-Women%20Development%20Policy-2011English.pdf > accessed 2 February 2022.

[15] ibid, Part II, 16.8, 16.10.

- Enhance recognition of women's agricultural activities. Though not mentioned explicitly, the tone is to recognize women's unpaid agricultural activities as economic activities so that women's contributions to agriculture become more explicit and better accessible through policy interventions.
- removing wage discrimination
- ensuring equal opportunity to access agricultural inputs (e.g. fertilizer, seed, farmer's card, and credit) etc. and
- removing bottlenecks of participation due to climate change or other natural disasters.[16]

Thus, Part II, section 31of this policy has a clear mandate to promote women's farmers by advocating women's equal access to agriculture, removing wage gap and providing equal facilities to women farmers. It also emphasizes the significance of the participation of women farmers in achieving food security and economic development.

3.3 The National Fisheries Policy 1998 [17] and The National Livestock Development Policy 2007 [18]

The National Fisheries Policy inserts provisions to enhance fisheries production, maintain ecological balance, conserve biodiversity, and ensure public health by providing recreational facilities and by providing various incentives to the farmers in this sector.[19] Part 7.3 of this policy has a special provision encouraging women in fish culture and training.[20] This kind of provision may contribute significantly in ensuring equal rights of women farmers in this sector. However, this policy lacks any initiatives to further SDG obligations and other human rights issues of women.

Women's participation in livestock and poultry sector increased from 43% in 1987 to 51% in 2000 which further increased to 69% in 2008 and Women's engagement

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[16] ibid, Part 31.2, 3, 4.

[17] Ministry of Fisheries and Livestock. *National Fisheries Policy 1998* (Ministry of Fisheries and Livestorc, Government of the People's Republic of Bangladesh 1998) <http://qamdhaka.fisheries.gov.bd/sites/default/files/files/qamdhaka.fisheries. gov.bd/policies/d09c6509_d6a1_4d86_bae5_a88803a1bc12/National%20Fisheries%20Policy%201998%20English.pdf> accessed 4 February 2022.

[18] Ministry of Fisheries and Livestock. *National livestock development policy 2007* (Ministry of Fisheries and Livestock, Government of the People's Republic of Bangladesh 2007) <http://nda.erd.gov.bd/files/1/Publications/Sectoral%20Policies%20and%20Plans/Livestock_Policy_Final.pdf> accessed 5 February 2022.

[19] Ministries of Fisheries and Livestock (n 17) Part 3.

[20] ibid, Part 7.3.

in homestead gardening has also increased.[21] Therefore, National Livestock Development policy remains vital for women. However, this policy does not even mention the word 'women' a single time.

3.4 Developing National SDG Action Plan under the 8th Five Year Plan [22]

The Government of Bangladesh has taken a five-year plan to implement specific targets to fulfill obligations under SDGs. The fundamental vision of the eighth plan is proposed as "Promoting Prosperity Fostering Inclusiveness.[23] The core objective of this plan is to make Bangladesh a happy and prosperous nation. In this welfare state, everyone can lead a standard life and enjoy social, economic, political, cultural and human rights.[24] It has incorporated details provisions for fostering livestock and poultry sectors by using modern technology, developing modern livestock policies, adopting suitable poultry technologies, improving the breeding of national calf, heifer, sheep, and cattle, increasing bull production for milk and meat, introducing insurances for livestock, and creating awareness as to public health.

This policy has a great plan to foster multiple areas of agriculture by using modern technology and upholding the human rights of every person involved in farming. However, it does not insert a single specific provision for the empowerment of women in this sector.

3.5 National Sustainable Development Strategy 2010-21 (NSDS) [25]

The NSDS (2010-21) has acknowledged five Strategic Priority Areas along with

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[21] W. Jaim and Mahabub Hossain, 'Women's Participation in Agriculture in Bangladesh: Trends, Determinants and Impact on Livelihoods' (Dynamics of Rural Livelihoods and Poverty in South Asia, 7th Asian Society of Agricultural Economists (ASAE) International Conference, Hanoi, Vietnam, October 13-15, 2011) <https://ageconsearch.umn.edu/record/290424/files/pre_session3_W%20M%20H%20Jaim_Bangladesh.pdf > accessed 12 June 2022.

[22] Department of Livestock. 'Developing National SDG Action Plan under 8th Five Year Plan' (Department of Livestock, Ministry of Fisheries and Livestock, Government of the People's Republic of Bangladesh, March 2021) <http://dls.portal.gov.bd/sites/default/files/files/dls.portal.gov.bd/page/69d52bdc_ad7f_46ec_aba6_e72e7896fb37/2021-03-11-21-47-45169d4ff8de333f4604f42fcd6a45ec.pdf> accessed 6 February 2022.

[23] Shamsul Alam, 'Implementation of 8th Plan towards achieving SDGs: Building partnership' The Financial Express, (Dhaka, 28 January 2020) < https://thefinancialexpress.com.bd/views/implementation-of-8th-plan-towards-achieving-sdgs-building-partnership-1580222944> accessed 20 April 2022.

[24] ibid.

[25] National Designated Authority to GCF, 'National Sustainable Development Strategy (NSDS) 2010-21' (Economic Relations Division, Ministry of Finance, Government of the People's Republic of Bangladesh, 2013) <http://nda.erd.gov.bd/en/c/publication/national-sustainable-development-strategy-nsds-2010-2021> accessed 7 February 2022.

three cross-cutting areas to achieve its specified dreams and address the long-standing sustainability issue of productive resources. The strategic priority areas include continuous economic growth, the progress of priority sectors, social security and protection, environment, natural resources and disaster management.[26] The three significant issues that will flourish the sustainable development of priority areas include disaster risk minimization and climate, good governance and gender.[27] The Sustainable Development Monitoring Council will be the supreme body to screen and estimate the improvement of the implementation of NSDS.[28] It admits crucial challenges of various sectors of agriculture.[29] It detects challenges like climate change, environmental issues, low production of livestock products, lack of access to credit, market and electricity and lack of education and training of entrepreneurs.[30] It also recommends strategies to overcome those challenges by improving infrastructure, rural electrification, better physical and electronic communication services, education, training and skill formation, technological upgrading, access to market, rural financial services, and business development services for all, including women and the poor.[31] It recognizes that the contribution of the agriculture sector, which includes crops, livestock, fisheries and forestry, to GDP has been declining over time.[32]

Though this strategy has a significant plan to upgrade and overcome various services and challenges that are vital for different sectors of agriculture, it does not have any specific mandate to focus on women farmers only. It only inserts a provision that all services shall be provided for all including women. It is assumed that this kind of provision is not enough to flourish for women in the agriculture sector.

4. Gender Sensitivity of Agriculture Polices in Bangladesh: An Appraisal

Most of the policies regarding agriculture have special provisions to empower women in this sector. First, they provide that women must be given the decision-making power in agriculture management so that they are encouraged to engage in this sector.[33] Second, they advocate that women must be given equal opportunity to receive agricultural assistance and use technology in agriculture.[34] Third, they

[26] ibid, Preamble.

[27] ibid.

[28] ibid.

[29] ibid, Executive Summary.

[30] ibid.

[31] ibid.

[32] ibid, s 3.3.1.

[33] ibid 13, Part II, 16.8, 16.10.

[34] ibid, Preamble.

allow women to participate in training programs and credit programs to design to grow the capabilities and capacities of their farms. They also call for equal wages between male and female farmers.[35]

Though, in theory, policies are supposed to promote gender equality in the agricultural sector, women still face discrimination in practice. However, in practice, implementing these policies is a far cry. For example, Hindu women do not get any ownership over property by inheritance[36], and Muslim women generally get a half share as their male counterparts under *Hanafi* law.[37] In practice, there is still a wage gap between men and women farmers.[38] Moreover, in some cases, policies are enforced in a way that favors men only. For instance, men are granted access to storage space, drying floors, dryers, cleaning equipment, and related equipment and facilities over actual needs.[39] Furthermore, access is through custom services, lease, or lease-purchase arrangements, opportunities available only to men.[40] Thus, if the Government takes appropriate and robust steps to execute these policies or make these policies into laws, the women farmers of Bangladesh may get benefited tremendously, and that would help increase the number of successful women farmers in the agricultural sector who may play a crucial role in fulfilling obligations under SDGs.

Though policies regarding agriculture issues primarily focus on human rights, women empowerment, environment, climate change and SDGs issue to a large extent, women have been given little special advantages under these policies. Moreover, they are non-binding in nature. Thus, it is very much easy to ignore the obligations under these policies. However, suppose the Government takes initiatives to implement these policies through its action. In that case, it may bring a significant result to fulfill the demand for the country's nutrition and

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[35] FAO. *The National Agriculture Policy 2013* (Ministry of Agriculture, Government of the People's Republic of Bangladesh) Part 12 < http://extwprlegs1.fao.org/docs/pdf/bgd183265.pdf> accessed 22 May 2022.

[36] Apurba Magumder, 'Hindu women's right to inheritance' *The Daily Star* (Dhaka, August 24, 2021) <https://www.thedailystar.net/law-our-rights/news/hindu-womens-right-inheritance-2159216> accessed 20 February 2022.

[37] Muhammad Ekramul Haque, *Islamic Law of Inheritance Rules and Calculation* (1st edn, London College of Legal Studies, Dhaka, Bangladesh 2016) 50.

[38] Mustazur Rahman, and Md. Al-Hasan, *Explaining Pro-Women Gender Wage Gap in Bangladesh* (Center for Policy Dialogue, Dhaka 2021) <http://library.fes.de/pdf-files/bueros/bangladesch/19132.pdf> accessed 21 February 2022.

[39] National Designated Authority to GCF. *The National Seed Policy* - 2013(Ministry of Agriculture,Government of the People's republic of Bangladesh 2013) Part 11.3.4. <https://moa.portal.gov.bd/sites/default/files/files/moa.portal.gov.bd/policies/4e465eac_1da9_48b0_91e2_f2c07d54ae63/NSP.pdf> accessed 22 April 2022.

[40] ibid.

ensure farmers' economic development. Thus, the Government should take robust action to develop the agriculture sector by inserting mandatory provisions in laws and regulations to meet SDG challenges.

5. Nexus between a Gender-Sensitive Agriculture and SDGs

There is a close and causal connection between agriculture and sustainable development. Sustainable agriculture may play a significant role in guaranteeing sustainable development. As food security and nutrition are a dire necessity for the lives of people and the planet, sustainable agriculture that provides plenty of food and nutrition can assist in achieving multiple SDGs, including zero poverty, zero hunger, good health and wellbeing. Adequately nourished, children can learn quickly and easily, people can lead healthy, happy and productive lives, and societies can prosper and develop in all respect.

With the growth of huge populations, the demands for large quantities of food and nutrition have increased over time in Bangladesh.[41] By fostering our land and implementing sustainable agriculture, the current and next generations will be capable of feeding an increasing population.[42] Agriculture, covering crops, livestock, aquaculture, fisheries and forests, is the major financial segment for many countries and supplies the key basis of food and income for the marginal poor.[43] Sustainable food and agriculture have a great potential to rejuvenate the rural landscape, bring inclusive growth to countries and drive positive change right across the 2030 Agenda.[44] Economic development policies include small-holder agriculturalists that unswervingly contribute to SDG 2, which focuses on ending hunger, realizing food security and promoting sustainable agriculture.[45]

Improving agricultural productivity and household incomes reduces poverty and global nutritional challenges.[46] The significance of agriculture and nutrition pervades goals and targets enshrined in SDGs.[47] The whole scheme of

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[41] FAO. *Transforming Food and Agriculture to Achieve the SDGs, 20 interconnected actions to guide decision-makers* (Food and Agriculture Organization, Rome 2018) < https://www.fao.org/3/I9900EN/i9900en.pdf > accessed 11 April 2022.

[42] ibid.

[43] ibid.

[44] ibid.

[45] Mathew Abraham and Prabhu Pingali, 'Transforming Smallholder Agriculture to Achieve the SDGs', in Sergio Gomez y Paloma, Laura Riesgo and Kamel Louhichi (eds), *The Role of Smallholder Farms in Food and Nutrition Security* (Open, Springer 2020) 173.

[46] ibid.

[47] Chelsey R. Canavan, MSPH, Lauren Graybill, MSc, Wafaie Fawzi, MBBS, and Joyce Kinabo, PhD, 'The SDGs Will Require Integrated Agriculture, Nutrition, and Health at the Community Level' (2016) 37(1) *Food and Nutrition Bulletin* 113 <https://journals.sagepub.com/doi/

SDG emphasizes poverty reduction and health improvement, and they are more subtly entangled with issues of equity and equality, education, and women's empowerment.[48] They are unquestionably connected to water and sanitation, economic growth, energy and infrastructure, urbanization, and governance.[49] And they will be important determinants of climate change and sustainability.[50]

Mainstreaming sustainable food and agriculture into national development strategies may assist in fulfilling all these targets of SDGs. However, once we attain premier goals like poverty reduction and zero hunger, our next target becomes gender equality, which is depicted as goal five in SDG. Therefore, achieving gender-sensitive agricultural policies is also essential to fulfill our SDG commitments. Further, investment in the agricultural sector reduces hunger and malnutrition and addresses challenges like poverty; water and energy use; climate change that, in many cases, more adversely affect women. Under this context, the next chapter analyzes and demonstrates how these agricultural policies and SDG commitment to attain gender parity in agriculture are reflected in different national legislations affecting agriculture.

6. Primary Legislations in Bangladesh Promoting Gender-Sensitive Agriculture

Following its independence in 1971, Bangladesh inherited all laws that were in force in Pakistan.[51] Among others, they included the Land Improvement Loans Act 1883, the Private Fisheries Protection Act 1889, and the Agricultural and Sanitary Improvement Act 1920, which were related to the regulation of the farmer-owned business.[52] As the population grew, the governments of Bangladesh attempted to reinforce the national economy by mobilizing more resources as agricultural credit to meet the rising necessity of farmers. In addition, more branches of nationalized banks and agencies were set up in rural areas.[53]

Thus, specialized banks like the Bangladesh Krishi Bank and Sonali Bank and entities like Bangladesh Rural Development Board joined efforts to meet the needs

full/10.1177/0379572115626617> accessed 12 February 2022.

[48] ibid.

[49] ibid.

[50] ibid.

[51] The Bangladesh (Adaptation of Existing Laws) Order, 1972 (President's Order) (President's Order No. 48 of 1972) <http://bdlaws.minlaw.gov.bd/act-details-388.html> accessed 27 April 2022.

[52] Agricultural and Sanitary Improvement Act 1920 (BD) <http://bdlaws.minlaw.gov.bd/laws-of-bangladesh.html> accessed 28 April 2022.

[53] ibid.

of farmers.[54] Furthermore, as the Government continued to realize the importance of agriculture, it passed various laws, including the *Bangladesh Krishi (Agricultural) Bank Order 1973*, *Alienation of Land (Distressed Circumstances) (Restoration) Ordinance 1976, Bangladesh Animal and Animal Product Quarantine Act 2005* to face and manage the modern challenges of the agriculture sector.

The following laws and regulations were passed and implemented in Bangladesh to address issues regarding agriculture. The core objective of these regulations is to develop the agriculture sector and support farmers, and some even include a provision requiring equal treatment among men and women. If these laws and regulations are analyzed critically, they may reveal how much they address women's rights, human rights, environment, climate change and SDGs issues. It is to be noted that while analyzing primary legislation, only significant laws are analyzed in this paper.

6.1 The Land Improvement Loans Act 1883 [55]

This Act provides government loans to farmers and farmer-owned coops for agricultural improvements.[56] It states that loans shall be granted to any person to improve the land.[57] The term 'any person" in section 4(1) includes males and females. Thus, this Act intends to assist any person involved in a farmer-owned business regardless of gender. However, this Act does not have any specific objective of providing loans to women farmers under favourable conditions. This Act does not even mention the term 'women' anywhere in it.

6.2 The Agricultural and Sanitary Improvement Act 1920 [58]

The provisions of this Act relate to constructing drainage and other works to improve agricultural and sanitary conditions.[59] Any person can apply to improve agricultural conditions under this Act.[60] Any person aggrieved due to such improvements act of agriculture and sanitary conditions may apply for compensation to the proper authority.[61] Therefore, prima facie, this Act also gives

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[54] ibid.

[55] The Land Improvement Loans Act, 1883 (BD) Act No XIX of 1883 of Bangladesh <http://bdlaws.minlaw.gov.bd/search.html?year=1883&actNo=&partNo=&chapterNo=&sectionNo=> accessed 21 April 2022.

[56] ibid, Preamble.

[57] ibid, s 4(1).

[58] The Agricultural and Sanitary Improvement Act 1920 (BD) < http://bdlaws.minlaw.gov.bd/act-117.html?hl=1> accessed 22 January 2022.

[59] ibid, Preamble.

[60] ibid, s 3.

[61] ibid, s 23.

any person, irrespective of gender, to apply for the improvement of conditions which is necessary to upgrade their farmer-owned business. However, it does not have any provision which gives women any special facilities. It shows that it has no objective to empower women in the agriculture sector on a priority basis.

6.3 The Agricultural Debtors Act 1935 [62]

The primary purpose of this Act is to provide relief for agricultural debt and amend the law governing the relations between agrarian debtors and their creditors.[63] Except for the principal amount, the farmers may get relief from the interest on their principal amount of agricultural loan.[64] Any person, irrespective of gender, may get relieved from the interest of a loan under this Act. It has provisions to establish a debt settlement board comprising a chairman and board members but no mandatory provision to include women.[65] Though from the previous discussion of policies regarding agriculture, it is required that women's representations must be ensured in every committee formed under agricultural legislation, this Act is totally silent as to this. This Act also does not mention any privileges or any special right for women to empower them in the agriculture sector and use the term women even a single time.

6.4 The Bangladesh Krishi (Agricultural) Bank Order 1973 [66]

The Bangladesh Krishi Bank was established under this Order. This bank provides credit services to agriculturists for agriculture purposes and persons engaged in cottage industries and other allied industries in remote as well as urban areas for the purpose of such industries.[67] It contains provisions to give preference to the credit needs of small cultivators, including any such farmers who involve a crop sharer (*bargader*).[68] Though women can apply for services, none are favorable enough to attract women to the agricultural sector. This Act does not contain any provision which can empower women especially in the agriculture sector.

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[62] The Agricultural Debtors Act 1935 (BD) <http://bdlaws.minlaw.gov.bd/act-details-169.htm> accessed 24 January 2022.

[63] ibid.

[64] ibid, s 23.

[65] ibid, s 3.

[66] The Bangladesh Krishi Bank Order 1973 (President's Order) <http://bdlaws.minlaw.gov.bd/act-details-454.html> accessed 27 January 2022.

[67] ibid, s 15.

[68] ibid, s 17.

6.5 The Bangladesh Agricultural Research Council (BARC) Act 2012 [69]

The establishment and formulation of the Bangladesh Agricultural Research Council (BARC) Act 2012 is a milestone in strengthening the National Agriculture Research System (NARS)[70] in Bangladesh. NARS system in Bangladesh is working on the challenges like the development of high-yielding, stress-tolerant, hybrid and transgenic crop varieties for rising the production and productivity; soil health management, development of the cropping pattern, water-saving technologies, farm machinery, post-harvest management, distribution of appropriate technologies, women's participation in agriculture etc., for life on land goal and the goal - for climate-resilient agriculture how the various programs viz., precision agriculture, crop modelling, ICT in agriculture etc., are being promoted.[71] It also provides that there shall be a governing body to govern the BARC.[72] However, there is no special provision to include women in that governing body. It also does not contain any provision regarding women's rights issues in the agriculture sector.

7. Government Organizations, Non-Government Organizations (NGOs) and Co-operative Agriculture

The Government of Bangladesh has established significant numbers of agricultural institutions to assist farmers that are playing a pivotal role in developing the agricultural sector. It is worthy to mention here that in analyzing the role of agriculture organization, only significant organizations are discussed below.

The Bangladesh Agricultural Development Corporation is an autonomous government body established under the Bangladesh Agricultural Development Corporation Ordinance 1961.[73] It manages the agricultural inputs *i.e.* agricultural seeds, non-nitrogen fertilizer, and minor irrigation facilities to farmers of Bangladesh.[74] Its main objective is to increase agricultural production in Bangladesh.[75] The main functions of this corporation are to provide agricultural supplies and other facilities either free of cost or at a subsidized rate and to grant

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[69] The Bangladesh Agricultural Research Council (BARC) Act 2012 <http://barc.portal.gov.bd/sites/default/files/files/barc.portal.gov.bd/page/e576be41_2636_4da5_90f9_ed13ef703a15/2020-12-23-15-34-cf06ecf25701e4e1bfe039c87c161912.pdf> accessed 28 January 2022.

[70] ibid, s 3.

[71] ibid, s 9.

[72] ibid, s 6.

[73] Laws of Bangladesh, Act No XXXVII of 1961 of Bangladesh <http://bdlaws.minlaw.gov.bd/act-320/section-16363.html> accessed 26 January 2022.

[74] Bangladesh Agricultural Development Corporation <http://www.badc.gov.bd/site/page/1643c1ee-3ea5-4485-8202-40139a094a47/-> accessed 7 February 2022.

[75] The Bangladesh Agricultural Development Corporation Ordinance 1961, preamble.

loans in favorable conditions. The Department of Fisheries plays a significant role in developing fisheries through research, and by supplying modern technology and credit facilities to the farmers involved in this sector.[76]

The Social Development Fund is dedicated to increase livelihood opportunities of the poor by organizing them in producer groups, co-operatives or federations, and improving their market, business orientation, and forward and backward linkages in the market systems.[77] It enables the poor, and particularly women, to build, secure, and use social assets to improve their well-being. It also empowers women to reduce vulnerabilities, create new opportunities, exercise their rights, and play a more active role in society.[78] It especially focuses on women's empowerment in agriculture by engaging them in the livestock business, farming, fisheries, etc. The Department of Livestock provides valuable advice to farmers in response to their questions and assists farmers in guiding their projects.[79] Most organizations do not have any mandate to empower women in the agriculture sector. Only a few organizations have a specific agenda to empower women in the agriculture sector. Many organizations do not even use the term 'women' anywhere in their functions and plan.

8. Evaluation of the Agricultural Legal Structure

Once we have visited our agricultural policies and considered our SDG commitments to attain gender parity in agriculture, the next task is to pest pose agriculture policies with different national laws affecting agriculture. The purpose is to examine the extent to which national laws may or may not reflect national policy and SDG priority to attain gender parity in agriculture.

As is demonstrated throughout Section 6, the agriculture sector of Bangladesh is being governed by a set of age-old laws where there are no explicit provisions touching human rights, environment, climate change, women's empowerment and obviously no SDG issues. It is worthy of mentioning that there are no special provisions offering women any particular facility to encourage them in the agriculture sector. It is explicit from these legal structures that they regulate credit, loans, and other kinds of technical facilities only. So far, the author knows that there is no legal structure to organize farmers closely for agricultural production, which can fulfill or further human rights like environmental protection, nutrition demand, health care, women empowerment and SDGs issues involved in the agriculture sector.

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[76] Department of Fisheries of Bangladesh <http://www.fisheries.gov.bd/site/page/43ce3767-3981-4248-99bd-d321b6e3a7e5/-> accessed 8 February 2022.

[77] The Social Development Fund <https://www.sdfbd.org/> accessed 9 February 2022.

[78] ibid.

[79] The Department of Livestock <http://www.dls.gov.bd/> accessed 10 February 2022.

Except for this, some Acts have provisions for the formation of a committee for the distribution of facilities or regulation or monitoring of specific agricultural issues. However, there are no specific guidelines regarding the appointment of women as chairman and members of such committees. Therefore, women may be deprived of getting appointed as a member of the committee due to a lack of special provisions for their appointment, which may likely result in an all-male board. The lack of women's representation in such committees may frustrate the interest of women farmers because such male-dominated committees may decide a way that may serve the interest of the male farmers only. Similarly, there is no provision in those Acts providing loans at more favorable terms for women farmers. Though there is no direct, explicit provision which discriminates between male and female farmers, there is no provision which offers special advantages to women farmers or encourages them to engage in agriculture.

Where women are in a vulnerable position, they deserve more protection. Considering this thought, most current laws like National Human Rights Commission Act 2009[80] have inserted special provisions for the appointment of women members in the said commission. Particularly where women's rights are in question, they are given special preference or rights like the reservation of 50 seats in the parliament for women.[81] In the rural area of Bangladesh, about 30 per cent of women are somehow involved in the fish sector.[82] Thus, women should be given special facilities in this sector equally with men under laws so that they are empowered to flourish in this sector. As the Government can validly insert special provisions in legislation to empower women in any sphere of State[83], it can give special facilities to them by passing laws that may encourage them to engage on a large scale in the agriculture sector. Nonetheless, as the significant policies regarding agriculture advocate for the empowerment of women in the agriculture sector by providing special facilities to them, the Government should take appropriate action to execute those policies by passing gender- friendly agriculture laws.

The government agricultural organizations play an essential role in developing the agriculture sector or farmer-owned businesses in Bangladesh. However, most organizations are not concerned about empowering women in the agriculture sector. A few institutions have a mandate to empower women in farmer-owned

[80] The National Human Rights Commission Act 2009 (BD) <http://bdlaws.minlaw.gov.bd/act-details-1023.html> accessed 17 February 2022.

[81] The Constitution of the People's Republic of Bangladesh, 17th Amendment, 8th July 2018.

[82] Mehedi Hasan, 'Women's Empowerment and their Role in Fisheries Development in Bangladesh' (*BDFish Feature*, 5 Octover 2020) <https://en.bdfish.org/2010/10/women-empowerment-role-fisheries-development-bangladesh/> accessed 19 February 2022.

[83] The Constitution of the People's Republic of Bangladesh, art 28.

businesses. However, they do not have specific mandates to encourage women in this sector. As women form about half of the total population, it may be impossible to think about actual development in this sector by keeping them out or within the four corners of the house or leaving them behind.

Further, some co-operatives, national and international NGOs are playing a significant role in developing the agriculture as well as human rights, environment, climate change and SDGs issues involved in this sector by closely working with farmers, especially females. For example, BRAC and HEIFER are doing significant functions in developing livestock and other agriculture sectors by closely connecting with the farmers. They also play a role in protecting the environment, fulfilling the family's nutrition demands and empowering women.[84]

Similarly, by inventing and making production and distribution systems, offering excellent seeds at just prices, and evolving better crop varieties and practices, BRAC is improving various sectors of agriculture.[85] It also promotes human rights by developing and distributing climate-smart agricultural technologies and rising markets that inspire entrepreneurship and assist the country in becoming self-reliant in food production.[86] HEIFER Bangladesh's Beef and Dairy Value Chain Program connects and empowers local women farmers.[87] They provide tools and education, enabling women farmers to boost their incomes and reliably feed their families and communities as they bring more quantities of milk and beef to market.[88] Thus, like the co-operative, national and international NGOs, if the Government works closely with the farmers, that may assist Bangladesh in attaining its goals in the agriculture sector and fulfilling its obligation under the SDGs.

9. Recommendations

Though many legal structures are available to regulate and develop the agricultural sector, they are flawed when it relates to equalizing the industry for women. They also lack or less focus on human rights, environmental, climate change and SDGs issues. Most of the legal structures are dated and do not have sufficient provisions to face the current challenges. As stated above, the primary regulations cover

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[84] BRAC. 'Solutions for Social Challenges and Surplus for Greater Impact' (*The Good Feed*, 2022) <https://www.brac.net/program/agriculture-food-security/> accessed 25 February 2022.

[85] ibid.

[86] ibid.

[87] HEIFER Internatioal. 'Farmer Owned Cooperatives in Bangladesh Driving Economic Growth' (*Bangladesh*, 2022) <https://www.heifer.org/about-us/where-we-work/bangladesh.html> accessed 27 February 2022.

[88] ibid.

only a few areas of the agriculture sector but not the empowerment of women and gender equality issues. Most of the vital issues of agriculture like women empowerment, environment, climate change and SDGs are covered by different non-binding policies.

Another problem is that though few provisions deal with gender equality and women empowerment issues within the legal framework, they are not properly implemented by the Government or its agents. Women make up about half of the total population in Bangladesh, and many women are actively involved in the agriculture sector. Nonetheless, they are not given special attention. The fundamental target of SDGs is that no one should be left behind.[89] It is the duty of the Government to enact gender-inclusive laws and policies to fulfill the obligations under SDGs.[90] Therefore, if proper initiatives are not taken to focus on women on a priority basis, developing the agriculture sector up to the benchmark may be implausible. Thus, given the flaws in laws, policies, and functions of Government organizations and NGOs, if the Government of Bangladesh takes the following steps in cooperation with the national and international NGOs, the agriculture sector may be developed, and women may be encouraged to contribute to this sector to fulfill the dreams of SDGs.

- The existing laws relating to agriculture shall be amended, modified, or upgraded to cope with the current challenges and needs of this sector.
- Policies shall be made into law as early as possible, or the Government shall take robust actions to implement policies as soon as possible.
- The Government may allow national and international NGOs to make the farmers, especially women, aware of their rights under the legal structures of Bangladesh so that they can avail those rights as an entitlement.
- The Government can either itself or, in collaboration with national and international NGOs, arrange special training programs for the women to make them aware that they have equal rights and access to all facilities provided by the Government to promote agriculture.
- The Government, in cooperation with national and international NGOs, shall provide sufficient credit facilities schemes for the vulnerable as well as women farmers to fulfill its obligation under the agricultural legal structures.

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[89] UN Sustainable Development Group. 'Operationalizing leaving no one behind' (*Universal Values*, March 2022) SDGs, < https://unsdg.un.org/resources/leaving-no-one-behind-unsdg-operational-guide-un-country-teams> accessed 28 April 2022.

[90] UN Women. 'Goal 5:Achieve gender equality and empower all women and girls' (*Women and the SDG*) , <https://www.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-5-gender-equality> accessed 18 April 2022.

- Each policy and law formulated by the Government regarding agriculture must have a special focus on women empowerment, gender equality, environment, climate change and SDGs issues.
- The Government shall ensure that women have equal rights and opportunities to access all facilities with male farmers provided by it or national and international NGOs.
- The Government itself or in cooperation with national and international NGOs shall encourage women to participate in agriculture by providing special facilities to them.
- The Government shall provide special soft loans to women farmers under favorable conditions.
- The Government must include the provisions regarding fundamental human rights issues, gender equality, climate change issue, environment and SDGs issue at the time of passing, modifying or amending laws and policies regarding agriculture.
- The Government may pass an Act to work closely with the farmers in collaboration with the national and international NGOs to promote and develop the agricultural sector in Bangladesh.
- The Government may execute *"Green Revolution Technologies"*[91] in agriculture through a legal framework to address SDGs.

10. Conclusion

Laws relating to farmer-owned businesses have been left behind in the agriculture sector, significantly increasing Gross Domestic Product (GDP) and per capita income of Bangladesh. Most people, including women of the total population, are involved in the agriculture sector, but legislatures did not pay much more attention to passing updated laws to regulate this sector. As a result, most laws governing agriculture issues are outdated and insignificant to address the current challenges and needs of farmers or agriculturalists. Though the Acts of the parliament regarding this area shall create positive discrimination between male and female farmers in providing and distributing facilities and advantages, they do not have any special provision for the effective engagement of women in agriculture. Most of the laws are completely blank regarding women's rights and environmental and climate change issues involved in agriculture. They also have no provisions to comply with the obligations under SDGs. It is worth mentioning

[91] The Green Revolution refers to a transformative 20th-century agricultural project that utilized plant genetics, modern irrigation systems, and chemical fertilizers and pesticides to increase food production and reduce poverty and hunger in developing countries. < https://www.treehugger.com/agriculture-4846039 > accessed 4 April 2022.

that policies regarding agriculture are sophisticated and a bit suitable to address the present demands of agriculture, but they are not enforceable or binding. They also include provisions regarding human rights, women empowerment, environmental protection and climate change issues that may pave the way for the legislature to pass an Act providing solid legal structures to fulfil the demands of SDGs. However, legislatures have not made any effort to modify, amend or pass laws to cope with SDGs' obligations. Therefore, it is high time to amend the age-old laws and pass new laws relating to farmer-owned businesses to boost this sector in Bangladesh and fulfil the SDGs' dreams.

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Recent Trends of Judicial Activism for the Advancement of Muslim Family Laws in Bangladesh: A Critical Appraisal

Mohammad Golam Sarwar*
ABM Asrafuzzaman**

Abstract: *The aim of this paper is to analyse the trends of judiciary towards the development of Muslim family law in Bangladesh particularly in the areas of restitution of conjugal rights and maintenance. While analysing the trends, the paper underscores the role and significance of judicial activism in developing new principles considering the changes in the society. The paper highlights the progressive interpretations and approaches of the judiciary that not only uphold the constitutional principle of equality and non-discrimination but also contribute to uplift the position of women in the society. The paper also indicates a static and conservative approach of the judiciary in few cases which could have been dealt with more positively. The paper suggests to develop a consistent and coherent pattern of judicial activism in order to make the Muslim family law pragmatic and effective.*

Keywords: Judicial activism, Family law, Progressive interpretation, Women's rights, Gender equality*, Ijtihad.*

1. Introduction

The static and immutable doctrines of Muslim family law are facing constant challenges to keep the pace with society.[1] The changing circumstances and social needs in relation to family matters interfered with the inevitable sacred laws. Therefore, harmonizing the traditional Islamic principles with the needs of progressive society became crucial.[2] Here comes the tool of judicial activism, which contributes significantly to introducing new principles on different issues of

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

[1] Alamgir Muhammad Serajuddin, 'Judicial Activism and Family Law in Bangladesh' Professor Mahfuza Khanam and Barrister Shafique Ahmed Trust Fund Lecture delivered at the Asiatic Society of Bangladesh, 2009, Dhaka, Bangladesh.

[2] Alamgir Muhammad Serajuddin, *Shari'a Law and Society: Tradition and Changes in South Asia,* Oxford University Press (reprinted), 2001, First published by Asiatic Society of Bangladesh (1999). 12 & 338.

Muslim family law, taking into account the related social developments.[3] It is to be noted that in order to understand the teachings of Muslim family law in a particular region, the historical and geographical along with political dimensions need to be taken into account[4] that can largely be maintained by judicial activism. In this regard, this paper aims to critically analyze the trends in changing judicial discourse towards the development of Muslim family law, particularly in the context of Bangladesh. It is worth mentioning that the classical Sharia law on family relations while carrying the legacy of patriarchal cultural contexts, leads to legal and social discrimination. Bangladesh is not an exception. However, the judiciary often came forward with its bold decisions to remove inequity and injustice, particularly against the women, and contributed to developing the new discourse of Muslim family law with a more liberal interpretation of *Sharia*.[5] Though judicial activism also has not escaped criticism, this paper submits that the role of the activist judiciary cannot be ignored rather it needs to be flourished. It is to be noted that while analyzing the trends of the judiciary, two significant issues, among others, of family relations, namely Restitution of Conjugal Rights and Maintenance, are analyzed in this paper.

2. Significance of Judicial Activism

Judicial activism is considered as an active tool for engineering social change.[6] A court, while examining a case, encompasses inherent authority to unveil the changing social and economic conditions to expand the horizon of the individual's rights.[7] The question might arise, why social and economic conditions are matters of concern in relation to the judiciary? The answer is that the court can translate and interpret the meaning of law considering its social and economic dimensions that lead to settling the disputes and ensuring justice.[8] Not only that, the judiciary, while taking an activist approach, is also turning into a source of new principles or policies meeting the aspirations of the people.[9] In this regard, Krishna Iyer, J. (1980), one of the eminent exponents of Judicial Activism, remarked that:

"every new decision on every new situation is a development on the law. Law does not stand still. It moves continually. Once this is recognized, then the task of the Judge is put on a higher plane. He must consciously seek *to mould the law so as to*

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[3] Serajuddin (n1).

[4] Abdullahi Ahmed An-Naim, *Islamic Family Law in a Changing World: A Global Resource Book* (London Zed Books Limited 2002) 20.

[5] ibid.

[6] T. Anant and Jaivir Singh, 'An Economic Analysis of Judicial Activism' (2002) Vol. 37(43) *Economic and Political Weekly* 4433-4439.

[7] ibid 4433.

[8] Serajuddin (n1).

[9] R. Shunmugasundara, 'Judicial activism and overreach In India' <http://core.ac.uk/download/pdf/112282.pdf.> accessed 29 April, 2022.

serve the needs of the time. He must not be a mere mechanic, a mere working mason, laying brick on brick, without thought to the overall design. He must be an architect-thinking of the structure as a whole-building for society, a system of law which is strong, durable and just. It is on his work that civilized society itself depends"[10].

> Another important aspect of judicial activism is that it works as an empowering tool to raise the voice of unheard people and mobilize the disadvantaged sections of the society in terms of fighting against their grievances.[11] From the above discussion, it can be deduced that judicial activism, on the one hand, contributes to developing new principles or modifying the age-old principles taking into account the vast changes in society and on the other hand, it is working as an empowering tool for the downtrodden segments of the society.[12]

3. Judicial Activism in Muslim Family Law

It is undeniable in the context of today's Muslim world that women are the worst victims of discrimination that occurs mostly within the family.[13] Injustice and discrimination within the family are critically significant because of the fact that the centrality of the family dictated by male dominion causes an adverse impact on the lives of women.[14] To address this concern, the classical *sharia* law on family relations, while carrying patriarchal dogmas, has led to legal and social discrimination, which was supposed to maintain gender equality and social justice.[15]

The history of gender inequality and the subjugation of women can be traced back to the ninth and tenth centuries, where Muslim jurists mostly relied on orthodox authoritative texts without considering the context.[16] Before the independence of the Indian subcontinent in 1947, the application of the English doctrine of precedent and the Sharia doctrine of taqlid made the Sharia law and society stagnant, which failed to respond to changing social values and attitudes.[17] In this backdrop, it was questioned that was family law immutable from that which God, the Qur'an, Muhammed, and Islamic jurisprudential scholars had written, or

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[10] *Fuzlunbi* v *K. Khader Vali and Anr,* AIR 1980 SC 1730. (A case concerning the maintenance rights of divorced Muslim wife). (Emphasis added). Cited in Serajuddin (n1). Also in http://indiankanoon.org/doc/1719467/ (Paragraph 4). accessed 29 April 2022.

[11] In the landmark case of *Bihar Legal Support Society* v *The Chief Justice Of India & Anr* 1987 AIR 38, 1987 SCR (1) 295, the court considered it as an obligation to assist the deprived and vulnerable sections of society in the process of realizing their economic and social entitlements. Cited in Serajuddin, Judicial Activism and Family Law in Bangladesh (n1).See also <http://indiankanoon.org/doc/1041403/ > accessed 29 April 2022.

[12] Serajuddin (n1).

[13] Zainah Anwar and Jana S. Rumminger, 'Justice and Equality in Muslim Family Laws: Challenges, Possibilities, and Strategies for Reform' (2007) 64 *Wash. & Lee Law Review* 1529.

[14] ibid 1531.

[15] Serajuddin (n1).

[16] Anwar and Rumminger (n 7) 1537.

[17] Serajuddin (n 2) 16.

was it flexible to modern needs?[18] Here it can be submitted that since the teachings of Islamic law possess inherent plurality having different views on a particular legal problem, so it is suitable for the primary objective of judicial activism that seeks for a wider dimension of justice.[19] It is noted that the judicial interpretation of Muslim Family Law is primarily based on the text of quran and the teachings of prophet. However, the diversity of schools of muslim law offer different views on a particular legal problem while allowing the scope of consensus (*ijma*) or juristic disagreement (*ikhtilaf*) in a given context.[20] Such interpretative diversity facilitates the modern judges to exercise *ijtihad* or judicial activism in order to to formulate a situation-specific decisive rule.[21]

In this regard, two significant steps contributed to bring some progressive changes in the area of Sharia law in the then subcontinent.[22] These were, namely, the introduction of the English principle of equity and, most notably, a flexible and liberal interpretation to eradicate the hardship caused by the strict application of laws.[23] With these developments, judges started to underscore the wider social context of the litigating parties while resolving conflicts.[24] While settling marital disputes, the *qadis* (the then judges) attempted with utmost commitment to prevent the breakdown of relationships so as to maintain social reality and continue to live together amicably.[25] The above discussion leads us to believe that judicial activism signifies a progressive effort to remove discriminations and disabilities by employing creative interpretation of laws and policies.[26]

4. Trends of Judicial Activism in Bangladesh

Coming to the context of Bangladesh, it has been found that judicial activism has contributed to the amelioration of the position of women going beyond the traditional construction of Sharia.[27] After the independence of Bangladesh in 1971, the judiciary, while following the developments of earlier years, attempted to interpret traditional principles of Islamic law liberally in order to meet social realities.[28] In addition, it

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[18] Nadya Haider, 'Islamic Legal Reform: The Case of Pakistan and Family Law' (2000) 12 *Yale Journal of Law and Feminism* 288.

[19] Ridwanul Haque and Md. Morshed Mahmud Khan, 'Judicial Activism and Islamic Family Law: A Socio-legal evaluation of recent trends in Bangladesh' (2007) 14 *Islamic law and society* 206.

[20] ibid 206.

[21] ibid, 207.

[22] Serajuddin (n 2) 16.

[23] ibid 16.

[24] Wael B. Hallaq, *Introduction to Islamic Law* (Cambridge University Press 2009) 12.

[25] ibid 12.

[26] Serajuddin (n1).

[27] ibid 204.

[28] ibid 213.

has been observed in a number of family law cases that the judges of Bangladesh expressed deep concern while addressing the plight of women and children.[29] The contribution of the judiciary towards the development of new principles on different issues of Muslim family law is remarkable. It is also argued that the judiciary, over the years, has taken the role of the social and legal institution while dealing with family issues over the years.[30] The following part of this paper will address two areas of family law while addressing the trends of the judiciary in Bangladesh.

4.1 Restitution of Conjugal Rights

Under a marital relationship, the spouses are entitled to each other's companionship as of right, and this companionship includes the unity of their lives and fortunes.[31] The concept of restitution of conjugal rights comes as a remedy which allows both husband and wife to institute a suit for restitution who is deprived of companionship from the other without any proper reason.[32] Though this principle is apparently considered a remedial tool to prevent the breakdown of relationships, in reality, the practice of this right resulted in discrimination against wives because this right was primarily perceived as the right of the husband.[33] The principle of restitution of conjugal rights is also significant on the ground that this is the first English principle which had been infiltrated into the domain of personal law in British India.[34] The reasoning behind this infiltration was articulated by Syed Ameer Ali, a leading Indian jurist of Sharia Law, who pointed out that since the English judges were ignorant about sharia law and its language, they were reluctant to give effect to the rules of Muslim law rather they invoked English law and sometimes even Hindu law[35] "either to cut down or to explain away the meaning of Mahommedan law".[36] It is also apparent from the decision of the Calcutta High court in the case of *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum,*[37] where the court refused to follow the sharia law on restitution of conjugal rights and decided the

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[29] ibid 217.

[30] Anisur Rahman, 'Development of Muslim Family Law in Bangladesh: Empowerment or streamlining of women?' 2 <http://ssrn.com/abstract=2171810>. accessed 05 May 2022.

[31] Shahnaz Huda, 'The Confusing Conundrum of the Law of Restitution of Conjugal Rights Under Muslim Law in Bangladesh' (2014) 10(2) *Journal of Islamic State Practices in International Law* 116.

[32] ibid 116.

[33] ibid 116.

[34] Faustina Pereira, *The Fractured Scales: The Search for a Uniform Personal Code* (First Published STREE, Calcutta 2002) 208. <https://www.google.co.uk/search?tbo=p&tbm=bks&q=isbn:8185604517>. accessed 06 May, 2022.

[35] Serajuddin (n 2) 13.

[36] Syed Ameer Ali, *Mahommedan Law*, Vol I (4th edn, London 1912; reprint New Delhi, (1985).

[37] (1867) 11 Moores Indian Appeals, Published in Fyzee, Cases 281 -302.

issue on the basis of English law.[38] This sort of imposed infiltration threatened the essence of sharia law, which had an adverse impact on the practical operation of Muslim law.

Coming to the practical implications of this principle, it has been found that the practice of restitution of conjugal rights led to the suffering of wives, making them vulnerable in the hands of their husbands.[39] It has also been argued that the idea of compelling a wife to join her husband is a Christian idea which was treated as an ecclesiastical remedy, but in undivided India, this remedy was being used mainly by the husband. [40] In addition, it has been observed that since the husband possesses the unilateral authority of divorce, this right of restitution of conjugal rights would always be used against the wife, even though this right is supposed to be exercised by both.[41]

However, the judiciary in Bangladesh took positive steps to prevent the misuse of this principle by taking spirit from the principles of social welfare, equality before the law and equal protection of the law.[42] In this regard, the landmark case is *Nelly Zaman* v *Gias Uddin Khan*[43] where the court, while recognizing the social change that has been taken place in the last couple of decades, observed that the forcible application of restitution of conjugal rights against the wife who is unwilling to live with her husband has become outmoded and disregards the principles of equality before the law and equal protection law guaranteed by the constitution of Bangladesh[44] for both men and women.[45] It is worthy to mention that the court while considering the practical position of women, underscored that since the constitution of Bangladesh has guaranteed equal rights to all men and women in all spheres of state and public life[46], the husband's unfettered right in relation to the exercising restitution of conjugal rights would be violative to the constitution.[47] In this regard, it is submitted that the approach of the judiciary is remarkable because, firstly, it came forward to address a principle of Islamic law, that is, restitution of conjugal rights, by unveiling its weakness in terms of its application or in other words it can be explained that though this principle urges for the equal footing of both husband and wife, but in reality, it is found to be impractical influenced by the dominated social position of men, that has been observed in the above case and

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38 Serajuddin (n 2) 14.

39 Rahman (n 30) 24.

40 Pereira (n 34) 208.

41 Rahman (n 30) 24.

42 ibid 24.

43 34 DLR, HCD, 221. Cited in Rahman (n 30).

44 The Constitution of the People's Republic of Bangladesh, art 27 and 31.

45 Rahman (n 30) 25.

46 Constitution of Bangladesh (n 44) art 28(2).

47 Rahman (n 30) 25.

Secondly while dealing with a case of Muslim personal law the court referred the constitutional principles which not only showed the linkage between Muslim law and constitutional values but also guaranteed the constitutional rights of equality and non-discrimination[48] considering the practical position of women in relation to both personal and public sphere. This submission is also supported on the ground that the constitution, by its nature, generally deals with the public sphere, and its reference to personal issues is found to be rare, but in the above case, the judges took a bold step to use constitutional principle in relation to personal matters for the sake of protection of women rights.[49] The judiciary in this regard has contributed to advance 'social welfare' arguments towards women.[50] In a later case of *Hosne Ara Begum* v *Alhaj Md Rezaul Karim*[51] the court recognized the cruelty of conduct of a husband as valid ground for his wife to nullify the exercise of restitution of conjugal rights claimed by husband.[52] Here the court offered a wider interpretation of the term 'cruelty' indicating that 'cruelty' does not mean only physical torture; in a well to do family compelling the wife to-do any domestic work is also can be treated as cruelty.[53] However, despite all these progressive judgements, the matrimonial rights of women still remain in a fragile state.

The story does not end here because we find the reverse position of the judiciary in other cases. In the cases of *Md. Chan Mia* v *Rupanahar*[54] and *Hosna Jahan (Munna)* v *Md. Shajahan (Shaju)*[55], the High Court pointed out that restitution of conjugal rights are reciprocal and therefore not in violation of any of the provision of the constitution.[56] In this regard, it can be said that the position in relation to the status of restitution of conjugal rights is not clear yet rather seems to be confusing with the presence of conflicting decisions of the Courts.[57] In the case of *Mrs Sherin v Alhaj Md Ismail* [58] wife pronounced divorced in the exercise of *talak-i- tawfiz,* and thereafter husband filed suit for restitution of conjugal rights. The family court decreed in favour of the husband, and thereby wife moved ultimately to High Court Division (HCD). The HCD held that where

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[48] Constitution of Bangladesh (n 44) Art 27 and 28.

[49] Tahrat Naushaba Shahid, 'Islam and Women in the Constitution of Bangladesh: The impact of Family Laws for Women' 2013, Policy brief published by The Foundation for Law, Justice and Society, 6. http://www.fljs.org/files/publications/Tahrat.pdf. Accessed 08 May 2022.

[50] Jamila A Chowdhury, 'Pro-women Metamorphosis in Legal Discourses on Matrimonial Rights: Is Family Mediation a speedway to reap its fruits?' (2012) 23(2) Dhaka University Studies Part F 144.

[51] (1991) 43 DLR 543 (HCD).

[52] Chowdhury (n50) 144.

[53] Rahman (n 30) 17.

[54] 1998, 6 BLT, HCD P. 92. Cited in Rahman (n 30).

[55] 1998, 18 BLD, HCD, P. 321. Cited in Rahman (n 30).

[56] Shahid, (n 50) 6. Also in Rahman (n 30) 26.

[57] Huda (n 31) 119.

[58] 51 DLR 1999(HCD) 512

the divorce is valid, the decree of restitution of conjugal rights should not be ordered by the court as it may amount to a forceful bond which is contrary to the principles enshrined in Articles 27 and 31 of the constitution of Bangladesh.[59]

It is mention-worthy to describe cases from India in relation to the restitution of conjugal rights since they represented a similar approach to the judiciary. In the case of *T. Sareetha v. T. Venkata Subbaiah*[60], Judge Choudary of the Andhra Pradesh High Court observed that the remedy of "restitution of conjugal rights provided in the *Hindu Marriages Act of 1955* was a savage and barbarous remedy violating the right to privacy and human dignity guaranteed by and contained in Article 21 of our Constitution."[61] The judge went on to opine that this measure "deprives a woman of control over her choice as to when and by whom the various parts of her body should be allowed to be sensed" and "makes the unwilling victim's body a soulless and a joyless vehicle for bringing to existence another human being"[62]. In this case, the practicality of subordinated position of women was underscored, and the remedy of restitution of conjugal rights was considered an oppressive tool operated by the husband.[63] However, quite frustratingly, the Supreme Court reversed the decision of the High Court, praising the remedy of restitution since *it "serves a social purpose as an aid to the prevention of breakup of marriage",* and the court, in this regard, referred the religious duty of Hindu wife to surrender to her husband and to live in the matrimonial home.[64]

On the other hand, in *Itwary v* Asgari[65] the court held that cruelty on the part of the husband disentitles him to get a decree for restitution of conjugal rights. It opines that an abusive husband's second marriage may be considered as cruelty to the first wife. Therefore, the Indian Supreme Court rejected such a husband's prayer for a decree of restitution of conjugal rights.[66] In the case of *Sushila Bai* v. *Prem Narain Rai*[67]*,* the court observed that while a husband left his wife in her father's home without maintaining any connection with her, it would be considered as withdrawing from her society and the decree of restitution shall be passed. In *R. Natarjan* v. *Sujatha Vasudevan* case, the court opined that 'if a wife is asking to live separately from husband's aged parents, it does not amount to a reasonable excuse of withdrawal and the wife can be granted a decree for restitution of conjugal rights'.

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[59] ibid.

[60] 1983, A.I.R. (A.P.) 356. Cited in Martha C. Nussbaum, *Sex and Social Justice* (Oxford University Press 1999) 4.

[61] Martha C. Nussbaum, *Sex and Social Justice* (Oxford University Press 1999) 4.

[62] ibid 4.

[63] ibid 4.

[64] AIR (SC) 92 152 (1984) Cited in Nussbaum (n 62) 92.

[65] AIR 1960 ALL 684

[66] ibid.

[67] AIR 1985.

In this backdrop, it is submitted that though the cases mentioned above were decided by principles of Islamic law and Hindu law in Bangladesh and India, the final outcomes of both situations carry the same legacy. In both contexts, the position of the judiciary regarding the application of the principle of restitution of conjugal rights is found to be diverse that varies from case to case.

4.2 Maintenance

Maintenance is the lawful right of the wife where the husband is legally obliged to provide food, clothing, accommodation and other necessities of life- based on context. The rights and obligations of maintenance of women by husbands derived from the quranic texts. The most relevant quranic verse stipulates that 'Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means.[68] The Prophet (PBUH) preached in his last sermon that 'Show piety to women, you have taken them in trust of God and have had them made lawful for you to enjoy by the word of god and it is your duty to provide for them and clothe them according to decent custom'.[69] The issue of maintenance of wives in the discourse of Muslim family law carries special significance since it imposes responsibility on the husbands to maintain their wives who are not able to earn their own living on account of social taboo.[70] It is also important because maintenance is a parameter by which the attitude of husbands towards their wives can be assessed on the one hand, and the social and economic position of the women, on the other hand, can be scrutinized in a given society.

Unfortunately, the legal and judicial response relating to maintenance in the context of Bangladesh fails to reflect a concrete mark of development rather it shows a confusing scenario of ups and downs, particularly from the viewpoints of the judiciary.[71] The legal aspect of maintenance in the context of Bangladesh is a combination of various sources, including codified law, local traditions and traditional Muslim law.[72] In fact, the issue of maintenance, being part of Muslim personal law in the South Asian context, is influenced by formal and informal plural normative orders that include secular, religious, customary and patriarchal norms.[73] It is worthy to mention that in the context of Bangladesh, women being marginalized by an intensely hierarchal system of gender relations are often left without maintenance rights.[74]

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[68] Al Quran 4:34, Translated by Yusuf Ali.

[69] Jamal J. Nasir, *The Islamic Law of Personal Status* (Brill 2009) 107.

[70] Serajuddin (n 2) 276.

[71] Haque and Khan (n 19) 234.

[72] Taslima Monsoor, 'Maintenance to Muslim Wives: The Legal connotations' (1998) 9(1) *The Dhaka Universities Studies*, Part F 63-86.

[73] Ayesha Shahid, 'Post-Divorce Maintenance for Muslim Women In Pakistan and Bangladesh: A Comparative Perspective' 2013, *International Journal or Law, Policy and the Family,* 27(2), 197-213.

[74] Taslima Monsoor and Raihanah Abdullah, 'Muslim Women in Bangladesh and Malaysia' (2010)

The rights of maintenance of Muslim wives can be divided into two segments (i) Past Maintenance and (ii) Post Divorce Maintenance.[75] The difficulty in the case of past maintenance lies on the ground that a decree awarding maintenance to her is enforceable only from the date of the decree, not from the day cause of action arose that causes serious hardship to the needy wife who has been expelled from the matrimonial house without sufficient cause.[76] The trend of the court in the case of past maintenance was objectionable on the ground that it did not allow past arrears of maintenance unless the claim was based on a specific agreement like *Kabinama* or a decree of the court.[77] In the case of *Rustam Ali v. Jamila Khatun*[78], the High Court Division of the Supreme Court refused to grant past maintenance to the wife, which was allowed earlier by the lower court as the wife was not staying with her husband.[79] The reasoning in this regard went on to assert that the wife, while refusing to cohabit with the husband, became *nashuza* or disobedient, which was considered as a *prima facie* ground for refusing maintenance.[80] In this case, the court failed to underscore the background circumstances that propelled the wife to stay away from the husband, and at the same time, this decision represented a strong desire to control the movements of wives.[81] In a subsequent case,[82] the attitude of the court was changed, though minimally, and allowed the maintenance based on an '*appropriate case'*.[83]

However, the issue of past maintenance was finally settled in the landmark case of *Jamila Khatun v. Rustom Ali,*[84] where the Appellate Division of the Supreme Court of Bangladesh came up with a progressive mind by recognizing the right to past maintenance to the wife and overturned the orthodox ruling of High Court Division in the *Rustom Ali v. Jamila Khatun* Case.[85] While coming to this forward-looking and positive decision, the Appellate Division took reliance on a leading case of Pakistan that was *Sardar Muhammad v. Nasima Bibi*[86] which

21(2) *The Dhaka University Studies*, Part F 40.

[75] Sharmin Akhter, 'Protecting Divorced Muslim Women's Rights through Maintenance: A Comparative analysis based on the present legislative reforms among the Muslim Community' (2012) 3 *The Northern University Journal of Law* 31 <www.banglajol.info/index.php/NUJL/article/download/18393/12903.> accessed 06 May 2022.

[76] Serajuddin (n 2) 294.

[77] Monsoor (n 74) 80 see also, in Akhter (n 75) 32.

[78] 43 DLR, 1991, HCD 301. Cited in Monsoor (n 74) 80. Akhter (n 75) 32.

[79] Monsoor (n 74) 80, Also Akhter (n 75) 32. And Serajuddin (n 2) 304.

[80] Monsoor (n 74) 80.

[81] ibid 80.

[82] *Sirajul Islam* v. *Helena Begum* 48 DLR 1991 HCD 48. Cited in Monsoor (n 74) 80.

[83] Monsoor (n 73) 80. Emphasis added.

[84] *Jamila Khatun* V. *Rustom Ali,* 48 DLR (AD) 1996, 110. Cited in *Serajuddin, Shari'a Law and Society* (n 2) 305.

[85] Haque and Khan (n 19) 222. Also Serajuddin (n 2) 305 And Monsoor (n 74) 81.

[86] PLD 1996 (WP) Lahore 703. Cited in Haque and Khan (n 20) 222.

also granted past maintenance in favour of the wife.[87] The decision of *Jamila Khatun* was well appreciated and celebrated on the ground that it introduced a policy of disapproving the unhealthy tendency of consulting ancient texts going beyond the reference of modern situations, and the decision also welcomed the

judicial activism by way of neo-*ijtihad.*[88] In this regard, it is worthy to add that the Appellate Division (1996) in the *Jamila Khatun* case, while supporting the deviation from the age-old texts, noted that:

> Although the view taken in Sardar Muhammad's Case does not literally embrace the exposition of Hanafi Law in Baillie's *Digest* and Hamilton's translation of *Hedaya*, and advances closer to the Shafi school of thought, we find that the advance by way of *ijtihad*[89] has been made in the right direction with strong reasons so far undisputed and of course within the bounds of Sunni Law.[90]

So, the latest position of the judiciary regarding past maintenance indicated its progressive and developmental trends with a view to advancing the rights of women in accordance with the needs of time and society.[91]

The second issue regarding maintenance is the post-divorce maintenance for Muslim divorcees, which is another significant and debated area where trends in the judiciary deserve to be critically analyzed. While it was settled that the husband is obliged to provide maintenance during the subsistence of marriage and during the *iddat*[92] period, there was no concrete norms as to whether the husband is bound to provide maintenance beyond the period of *iddat*.[93]

In this regard, the landmark case in the context of Bangladesh is *Hefzur Rahman v. Shamsun Nahar Begum*[94] , where the High Court Division took legal interest on its own to scrutinize the issue of whether the divorced wife could have claimed maintenance beyond the *iddat* period.[95] While addressing this issue, the court felt to decide first whether it had jurisdiction to interpret the relevant Quranic verses and accordingly, it assumed the jurisdiction on the ground that the Quran itself allowed the construction of its verses considering the given context.[96]

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87 Haque and Khan (n 19) 222.

88 ibid 223.

89 '*Ijtihad'* literally means endeavour or "seli-exertion . In legal usage, it means formulation of new rules on the basis of evidence.

90 *Jamila Khatun* V. *Rustom Ali*, 48 DLR (AD) 1996, 110 at 115. Cited in Serajuddin (n 2) 305. see also Haque and Khan (n.19) 223.

91 Haque and Khan (n 19) 223.

92 *Iddat* denotes the period that a divorced wife must wait three months before she can lawfully another man. discussed in Haque and Khan (n 19) 225.

93 Monsoor (n 74) 81.

94 47 DLR (1995) 54. Cited in Serajuddin (n 2) 320.

95 Serajuddin (n 2) 305.

96 ibid 320.

The court also referred in this regard to the famous observations of Muammad Shafi, J, in *Mst. Rashida Begum v. Shahab Din* 1960[97]:

> …Reading and Understanding the Quran implies the interpretation of it …which must be in the light of existing circumstances and the changing needs of the world…[98]

After that, the court, while considering the literal meaning of Quranic Verse II: 241: "for divorced women maintenance (should be provided) on a reasonable (scale)"[99] opined that the Muslim husband is bound to provide maintenance to his divorced wife beyond the period of *iddat* until her remarriage or death.[100] This enlightening judgment was considered as a glaring example of judicial activism that made it possible to bring new developments in the discourse of Muslim family law.[101]

However, the Appellate Division (AD), overruled the decision of the High Court Division (HCD) on the ground that under sharia law husband is not bound to provide maintenance after the *iddat* period, and the ruling of HCD violates the principles observed by Muslim jurists for 1400 years.[102] Here, the AD, while referring to the Quranic verse 2: 241, held that the word *mataa* used in this verse was understood as a consolatory gift or compensation, not as maintenance and being a gift; it has never been judicially enforceable.[103]

In addition, in order to justify the nullity of the HCD ruling, the AD referred to an old case of *Aga Mahomed v. Koolsom Bee Bee* (1897) 24 I. A. 196, where the Privy Council did not approve the construction of the Quran that opposed the express rulings of commentators of great antiquity and high authority.[104] In this regard, the position of the Privy Council can be scrutinized on two points firstly, the Privy Council, by another observation, allowed the interpretation of sharia law, though exceptionally, if it was expedient to confirm substantial justice and secondly, the Judges of Privy Council being non-Muslims were anxious and reluctant to decide legal issues taking viewpoints of Muslim Jurists.[105]

Here, this paper submits that the AD in Bangladesh could have taken into account the aforesaid exceptional view of the Privy Council (on the ground of confirming substantial justice) while interpreting a present-day case of Muslim family law disregarding the unjustified stand of the then-British Judges. But it is

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97 PLD 1960 Lahore, 1142 at 1153.

98 Serajuddin (n 2) 322.

99 This is the version of Abdullah Yusuf Ali. Cited in Serajuddin (n 2) 322.

100 Haque and Khan (n 19) 225.

101 Shahid (n 73) 210.

102 Haque and Khan (n 19) 225. see also Shahid (n 73) 210.

103 Serajuddin (n 2) 323.

104 ibid 321.

105 ibid 15.

unfortunate that the decision of AD based on orthodox legal texts frustrated the earlier developments by HCD, ignoring progressive interpretations and taking the advancement of Islamic law one step back.[106] Though the comment of AD in relation to making statutory provisions of *mataa* for mitigating the sufferings of destitute wives was considered a positive approach of the court[107], in reality, this suggestive comment has not been appreciated to date by many scholars in Bangladesh.[108]

The position of India regarding the issue of post-divorce maintenance is very much commendable, from which Bangladesh could have learned in order to protect the rights of women relating to maintenance. In the famous case of *M. Ahmed Khan v. Shah Banu Begum*[109] , the judges, while applying the secular interpretation of Islamic texts, granted the right of post-divorce maintenance to the divorced wife beyond the *iddat* period till remarriage.[110] This progressive judgement was considered a virtual death warrant on sharia law and created an unprecedented debate and controversy among the majority of the Muslim Community.[111] Consequently, the legislature stepped in to pass the *Muslim Women (Protection of Rights on Divorce) Act, (1986)* which inserted provisions for the maintenance of divorced Muslim women during and after the period of *iddat*.[112] This Act placed the liability of maintaining a divorced woman who is unable to maintain herself on her children, parents and other relatives entitled to inherit her property on her death and failing them on the State *Wakf* Boards. While it was argued that this Act weakened the judgement of *Shah Banu* and denied the right of Muslim divorcees to maintenance from their former husbands[113], another landmark case in this regard came up with progressive judgments. Here, the historic judgment in the case of *Daniel Latifi* v. *Union of India*[114] was considered as a glaring example of judicial activism in statuary Muslim family law, which not only displaced the belief mentioned above that the Act fails to protect the right of post-divorce maintenance but also confirmed the right to receive such maintenance from their former husbands under the very Act.[115] In a recent case of *Jubair Ahmad v* Ishrat Bano*[116]* the Supreme Court held that 'A Muslim husband is

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[106] Haque and Khan (n 19) 225.

[107] Serajuddin (n 2) 323.

[108] Haque and Khan (n 19) 226.

[109] AIR 1985 SC 945. Cited in Serajuddin, Shari'a Law and Society (n 2) 317 see also Prof. Ashok Wadje, 'Maintenance Right of Muslim Wife: Perspective, Issues and Need for Reformation' 7 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266018> accessed 06 May 2022.

[110] Wadje (n 109) 13. see aslo Monsoor (n 74) 82.

[111] Serajuddin (n 2) 319.

[112] Serajuddin (n 2) 319. see also Wadje (n 109) 13.

[113] Wadje (n.109) 13.

[114] 2001, 7 SCC740. Cited in Haque and Khan (n 19) 227.

[115] Haque and Khan (n 19) 227.

[116] 2019, Criminal Revision No. – 2509 of 2014 < https://indiankanoon.org/doc/139688509/> accessed 03 August 2022.

liable to make a reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act,1986.'

It is evident that judgments in India contributed significantly by liberally interpreting 'a reasonable and fair' provision that may extend the consideration for a wife beyond the iddat period. Such progressive interpretation can extend the right of post divorced maintenance to the destitute wives without violating the spirit of Muslim personal law.[117] However, what is reasonable and fair need to be defined further. It is also apparent that while the Indian judiciary is aiming for continuous development of personal laws, the judiciary in Bangladesh remains a bit static, at least in a few issues which could have been dealt with more positively.

5. Conclusion

The majority of decisions discussed above concerning restitution of conjugal rights and maintenance portrayed the pivotal role of judicial activism both in developing the discourse of Muslim family law as well as safeguarding the rights of women from patriarchal dominations. While the decisions relating to restitution of conjugal rights prompted for ensuring equality and non-discrimination, in case of maintenance, they underscored the economic value of legal rights for women. These judgements cumulatively fostered the social and economic position of women in the context of Bangladesh.

In addition, these decisions also about the pluralistic aspects of sharia law that help to interpret religious texts considering the needs of present day context.[118] It is worthy to mention that the judges of Bangladesh, while dealing with the rights of women, have developed a gender-sensitive approach that reflects their justice consciousness with respect to rights under sharia law.[119] However, a closer scrutinization of a few of the cases discussed above revealed that the judiciary has yet to develop a consistent and coherent pattern of judicial activism rather, there exists still conservative and traditional trends alongside the activist and progressive movements.[120] Sometimes the judiciary was found reluctant to reconstruct the sharia law considering social realities which could have been dealt with justice-promoting interpretations.[121] Despite the criticism the judiciary is encountering in a few cases, it is submitted that the responsibility still lies on the active judiciary to deal with the plurality of judicial discourses with a view to making the Muslim Family law more pragmatic and timely.

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[117] Shahid, 'Post-Divorce Maintenance for Muslim Women In Pakistan and Bangladesh' (n 74) 212.

[118] Serajuddin (n 2) 338.

[119] Haque and Khan (n 19) 223.

[120] ibid 234.

[121] ibid 224.

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Deradicalisation Regulations and Violation of Human Rights: A Few Instances from China and Sri Lanka

Khandaker Farzana Rahman*
Md. Nazmul Arefin**

Abstract: *Given the gravity of crimes of violent extremism and the heightened securitisation associated with it, preventive or counter-terrorism measures have often led to the abuse of power,infringement of justice, and polarisation in the society. As part of countering terrorism,'deradicalisation' regulations and practices need to affirm the protection and promotion of human rights. Unfortunately, though this was a consistent proposition by the United Nations (UN), several nations have failed to observe human rights monitoring in their designated 'deradicalisation' regulations. This paper, relying on the secondary scholarships and reports of media, the UN and other human rights organisations, has reviewed how states may violate the human rights of the members of targeted communities under the disguise of 'deradicalisation'. In this regard, the paper has used a few instances from China and Sri Lanka to illustrate the matter more precisely. The objective of the article is to highlight how a lack of theorisation of human rights in deradicalisation may lead countries to end up with politically motivated 'deradicalisation' frameworks that contradict UN mandate and other national and international human rights safeguards.*

Keywords: Counter-terrorism, Radicalisation, Deradicalisation, Human rights violation, Violent extremism.

1. Introduction

Terrorism is being studied by historians, social scientists, lawmakers and psychologists for many years.[1] The juggernauts of the post-9/11 world, however, have forced the legal domains to put increasing emphasis on both terrorism and counter terrorism (CT) issues. Critical legal studies on the concepts like criminal

* Assistant Professor, Department of Criminology, University of Dhaka.
** Lecturer, Department of Sociology, Dhaka College, Dhaka.

[1] Walter Laqueur and Christopher Wall, *The Future of Terrorism : ISIS, Al-Qaeda, and the Alt-Right* (Thomas Dunne Books 2018).

justice and human rights relating to terrorism and CT has grown rapidly in recent years. Discourses of Preventing Violent Extremism (PVE) and Countering Violent Extremism (CVE) are developed at the root of extensive high level legal and policy decisions and practices. [2] In addition, according to the report of the Fortieth Session of the UN General Assembly, the post-9/11 period has seen as ''the emergence of new entities intrinsic to the global counter-terrorism architecture, whose relationship to traditional regulatory bodies and oversight remain opaque and underregulated''[3].

It is observed in 2020 by Fionnuala Ní Aoláin, the UN Special Rapporteur on the protection and promotion of human rights and fundamental freedoms that, -

"Prevention is an important and necessary tool but it will only be effective when it is practiced in a way that protects and affirms rights of people. …Current approaches to prevent terrorism seems to lead to lack of a consistent rule of law or human rights grounding. …Large-scale violations of the rights of religious and ethnic minorities are being enabled by "deradicalisation' policies and practices" [4]

Further, according to a report by the UN Human Rights Council, contemporary PVE and CVE measures often have significant effects on human rights issues and the rule of law[5]. The report asserts that good practices in national plans (i.e. Switzerland, Austria, Canada, Finland) for the prevention and countering of violent extremism largely depends on a strong and meaningful incorporation of a human rights framework.[6] Unfortunately, deradicalisation programs, which are essentially developed in the CT realm towards peacefully moving the radicals away from violent extremism, are now widely questioned legally for the targeted usage of PVE and violation of human rights by the authorities especially in China and Sri Lanka.[7]

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[2] UN Human Rights Council. *Human rights impact of policies and practices aimed at preventing and countering violent extremism* (Report of the Special Rapporteur, A/HRC/43/46, 2020) para 2.

[3] UN Human Rights Council. *Impact of Measures to Address Terrorism and Violent Extremism on Civic Space and the Rights of Civil Society Actors and Human Rights Defenders* (Report of the Special Rapporteur, A/HRC/40/52, 2019) p 2.

[4] UN News, 'Violent extremism prevention 'only effective' if human rights are enshrined' (*UN News*, 4 March 2020) <https://news.un.org/en/story/2020/03/1058681> accessed 19 March 2022.

[5] UN Human Rights Council. (n2).

[6] ibid 18.

[7] International Commission of Jurists, 'Sri Lanka: 'De-radicalization' regulations should be immediately withdrawn'(*ICJ*, 18 March 2021) <https://www.icj.org/sri-lank-de-radicalization-regulations-should-be-immediately-withdrawn/> accessed 19 March 2022.

Against this background, this paper aims to discuss that irrespective of the General Assembly Resolution on the prevention of terrorism in compliance with international human rights frameworks and international humanitarian law, many states apply deradicalisation regulations which often are politically instrumentalised, and consequently are violating fundamental human rights of the participants and families of the detained people. The paper has a special focus on some examples using China and Sri Lanka as case studies. The paper relies mostly on secondary sources of literature which is its major limitation as well, hence this study would pave the path to develop further studies on the issues of protecting and promoting human rights in the deradicalisation strategies in the context of international and national law as there is insufficiency of literature on deradicalisation programs in different national contexts. The article is organised into seven parts: after this introduction, in the second part we briefly reviewed the scholarships around the concepts radicalisation and deradicalisation. To provide a succinct map of different deradicalisation measures, we also have attempted to outline different deradicalisation intervention tools and approaches by juxtaposing different relevant literature. Part three summarised the UN perspectives on how states may violate human rights in the name of various deradicalisation programs. Part four and five demonstrated our prior arguments by quoting country specific examples from China and Sri Lanka, respectively. In the last part we conclude by discussing the theoretical vacuum in this field and suggesting the way forwards in this regard.

2. Radicalisation and Deradicalisation: An Overview

Radicalisation is a complex and multi-layered term[8] which is now mainly perceived as a process by which people adopt the path to extremism[9]. Though previously policy makers, researchers and academics meant it as the 'root' causes' of terrorism[10], today, the concept of radicalisation is mainly understood as the staircases to violence and destruction. For example, the European Commission defines it as a way of accepting views and ideas that might ultimately pave the way to acts of extremism. It is undeniable that 'radicalisation' is still widely used with conceptual unclarity in the terrorism discourses, but as a heuristic tool it immensely helpsto capture the processes through which individuals move from a primary stage of becoming an extremist to eventually engaging in terrorism and

[8] Tahir Abbas, *Countering Violent Extremism: The International Deradicalization Agenda* (I.B. TAURIS 2021) 30.

[9] Daniel Koehler, 'Terminology and Definitions' in Stig Jarle Hansen and Stian Lid (eds), *Routledge Handbook of Deradicalisation and Disengagement* (Routledge 2020).

[10] Peter Neumann (n 12).

political 'violence'.[11]

By the same token, the term 'deradicalisation' remains contested and unclear in existing researches and inconsistently used with other terms[12]:

Table 1: Terminologies of deradicalisation used by different researchers

Synonymous terminology	Listed by
i. Rehabilitation ii. Reconciliation iii. Amnesty iv. Reform v. Demobilisation vi. Counseling vii. Deprogramming viii. Disbandment ix. Dialogue	John Horgan and Max Taylor (2011)[13]
i. Reintegration ii. Re-education iii. Disaffiliation iv. Debiasing v. Desistance (primary, secondaryand tertiary)	Daniel Koehler (2016)[14]

Source: Adapted from John Horgan and Max Taylor (2011) ; Daniel Koehler (2020)

As radicalisation can take many forms, all the interchangeable terms related to deradicalisation commonly describe ''interventions that aim to increase the resilience and reduce the vulnerabilities of radicalised subjects through a diverse range of measures''[15]. Most importantly, the question is how this deradicalisation function may be implemented in reality. Theories of deradicalisation have

[11] Tahir Abbas (n 8) 30.

[12] Mary Beth Altier, Christian N Thoroughgood and John G Horgan, 'Turning away from terrorism: Lessons from psychology, sociology, and criminology' (2014) 51(5) *Journal of Peace Research* < DOI: 10.1177/0022343314535946> accessed 23 March 2012.

[13] John Horgan and Max Taylor, 'Disengagement, deradicalisation, and the arc of terrorism: Future directions for research' in R. Coolsaet (ed), *Jihadi Terrorism and the Radicalisation Challenge: European and American Experiences* (Farnham 2011).

[14] Daniel Koehler, *Understanding Deradicalization. Methods, Tools and Programs for Countering Violent Extremism* (Routledge 2017).

[15] Tahir Abbas (n 8) 120.

suggested a wide spectrum of intervening activities, methods, approaches and tools to change extremist behavior.[16] The deradicalisation regulations and practices are differed from country to country in approach and objectives. Though many government officials of different countries often claim that their programs aimed at PVE and CVE are successful, but they are generally unsuccessful to provide concrete evidence pressed against their claims.[17]

Based on the work of Leiden University Professor Tahir Abbas[18] and founding director of the GIRDS[19] Daniel Koehler[20] nine deradicalisation intervention tools and approaches are outlined below.

Table 2: Different approaches of deradicalisation

Tool/Approach	Description of interventions
Ideational	• Targets the ideas and values of participants. • Involves theological refutation of ideas and slegitimisation of other ideas within a religious framework. • Activities include counter-theology, counter-ideology and debate. • Involves violent extremist leaders, mentors, imams, caseworkers and religious leaders.
Material	• Provides material support to detainees i.e. of finding them a home or employment. • Dissolves the material reliance of individuals on VE networks.
Pastoral	• Takes the form of mentoring in the pre-crime space. • In the prison context, detainees receive pastoral care through caseworkers and imams.
Vocational	• Prepares offenders to reintegrate into society with skills development and educational attainment.

[16] ibid 127.

[17] UN Human Rights Council. (A/HRC/40/52) 6.

[18] Tahir Abbas (n 10) 127.

[19] Stands for 'German Institute on Radicalization and De-Radicalization Studies'.

[20] Daniel Koehler (n 14) 227-228.

Psychology	• Involves psycho-profiling and assessment of individuals. • Provides participants or detainees with support, for example, counselling and therapy.
Social	• Aids the family of the captured terrorist • Gets family and friends increasingly involved in the dis-engagement process.
Sanctioning	• Sanctions about the reintegration of offenders back into society which is contingent on mandatory participation in various interventions. • Takes the form of threats, removal of privileges or the threat of punitive responses in some non-democratic regimes.
Victimological	• Involves Victim-Perpetrator Dialogue (VPD) by bringing program participants into contact with victims of their own actions or of those acts of violence perpetrated by former comrades. • Provides new perspectives and understanding for other human beings, cultures, worldviews, and lifestyles.
Sports	• Help the participants to regain structure in their life and daily routine by involvement in sports that can help one to find new positive energy, release pressure, aggression, and frustration, gain new perspectives, and find renewed self-confidence.

Source: Adapted from Daniel Koehler (2020) ; Tahir Abbas (2021)

3. Human Rights Violation though Deradicalisation Programs: From an UN Lens

As mentioned in section two, the term‘radicalisation’ so as ‘deradicalisation’ is still widely used with conceptual unclarity. The deradicalisation framework largely depends on the individual country’s willingness to soft approaches of prevention of extremism while complying with principles of human rights and its local resources. Many countries as mentioned earlier initiated good practices of deradicalisation in national context. For instance, In Bangladesh, the law enforcements work for disengagement so that the person does not meet or communicate with his/her associates and develop rehabilitation strategies, i.e.

assisting with financial support or job.[21] The militants are also provided with phycological counselling and group meetings with guardians are organised by the officials to expediate the process of social integration.

Hence, the lack of definitional clarity often increases the chances of targeted human rights violation in the name of PVE and/or CVE. In absence of such legal framework, in many instances, ethnic minorities are being often subject to maltreatment which are evident in the concerns of human rights defenders. The Human Rights Watch (HRW), being profoundly concerned, rightfully declared it as follows:

> …the lack of definitional clarity around concepts such as 'extremism' and 'deradicalisation' is often used as a cloak for sweeping rights violations. Restrictive policies and programs are often based more on stereotypes than science. In numerous jurisdictions, these restrictions are not subject to legal oversight or challenge before independent tribunals. 'Prevention' is often used as an excuse to target those who have committed no crime. Many laws and programs abuse those who lack any intent to commit any act of violence. This overreach can violate the rights of entire communities based on nothing other than their identity, language, culture or religion..[22]

After reviewing several key reports of UN Human Rights Council, this paper briefly outlined the nature of human right violations that may take place due to a widespread and indiscriminate use of deradicalisation and CT laws, policies and practice on the targeted ethnic groups:

- Firstly, due to the active and passive effects of CT regulations and practice, women and girls are bearing the heavy and unseen burdens[23]PVE and CVE programs often propagate the cultures of misogyny, discrimination, and gender biases. The justification of the use of force, 'masculine' traits and behaviors are entertained which altogether perpetuate gender inequality.[24]
- Further, issues like disruptive arrests, inappropriate treatments and behavior, exposure of bodies and vilification of beliefs and clothing are causing psychological trauma and stigma for women and children in their homes[25].

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[21] Mohammad Jamil Khan, 'Deradicalisation to eliminate militancy' *The Daily Star* (Online version, 28 December 2020) < https://www.thedailystar.net/city/news/deradicalisation-eliminate-militancy-2018365 > accessed 19 March 2022.

[22] Human Rights Watch. 'UN rights body should reject misuse of "deradicalization" agenda as pretext for violations' (*HRM*, 4 March 2020) <https://www.hrw.org/news/2020/03/05/un-rights-body-should-reject-misuse-deradicalization-agenda-pretext-violations> accessed 19 March 2022.

[23] UN Human Rights Council. *Human Rights Impact of Counter-Terrorism and Countering (Violent) Extremism Policies and Practices on The Rights of Women, Girls and The Family* (Report of the Special Rapporteur, A/HRC/46/36, 2021) 4.

[24] ibid 6.

[25] ibid 12.

- Fortunately, Human rights defenders who are challenging the root causes of terrorism within the narratives of (regional) conflict, corruption, and inadequate access to resources are targeted at alarming rates.[26] The PVE and CVE programs are increasingly functioning as the device to silence and shrinking the scope of the society 'actors'.[27]
- However, in several parts of the world, civic space is shrinking[28]; negative labeling[29] and stigmatisation of civil society is used as a tool in elimination of civic space[30].
- Expansive CT regulations, on the other hand, are resulting in displacement, alteration and changes in the lives of (targeted) communities.[31]
- Surveillance, particularly mass surveillance used for CT purposes, is severely disrupting the right to privacy**.** New technologies and data collection methods for deradicalisation programs severely impact minorities.[32]
- For instance, unlawful use of CT measures shows patterns of targeting whole families and disordered the stability of the family unit.[33]
- Furthermore, due to the provisional detention related sentences and increasing administrative measures after the criminal sentences, familial interaction and human rights are significantly impacted.[34] CT regulations are distorting the very construction of the family.[35]
- Owing to the stigma of being identified as a suspect "extremist" or a terrorist or an accomplice, many people and their family members are bearing extraordinary fears and costs in society. [36]
- At its extreme, cumulative administrative measures may even affect people's rights to residence, impose restraints on the right to movement, and restrictions on worship.[37]

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[26] ibid 7.

[27] ibid 16.

[28] ibid.

[29] Such as (supporters of) "terrorists" & "violent extremists", "threats to national security" and "enemies of the State". And these labeling legitimizes the adoption of further restrictive measures.

[30] UN Human Rights Council. (A/HRC/40/52) 61.

[31] UN Human Rights Council. (A/HRC/46/36) 10.

[32] ibid 11.

[33] ibid.

[34] ibid.

[35] ibid 22.

[36] ibid 20.

[37] ibid 25.

- As a part of the process of familialisation of terrorism[38], the capacity of the targeted households in accessing rights to education, freedom of work, health, religion and other social entitlements may also be curtailed.[39]
- Last but not least, violation of customary international law is commonly seen because of arbitrary deprivation of citizenship and widespread use of citizenship stripping.[40]

4. Case of China: Acts of Repression against 'Xinjiang's Muslims under the Disguise of Deradicalisation

The Muslim 'Uyghurs' an indigenous group and ethnic majority of the Xinjiang region of China is often subject to violence in the name of deradicalisation programs. Initially ethinic group Han Chinese pursued to control its natural resources in Xinjiang and this economically motivated influx stirred up resentment among the local Uighurs.[41] After the 2009 ethnic violence between the Uyghurs and the Han Chinese, China has found their (terrorist) enemy--subsequently, counter-terrorism strategies became a dominant discourse in the Chinese political milieu.[42]

To 'control and demonise the 'Uyghurs'[43], China had imported the concept 'deradicalisation' and through the sanction of various national and local laws they are using it as a vital organ of their counter-terrorism efforts.[44] Zhang Chunxian, Chinese Communist Party (CCP) Secretary of the Xinjiang Region, for the first time, used the term 'deradicalisation' in January 2012.[45] Later on, in May 2013, Xinjiang's CCP Committee issued the strategy of deradicalisation as 'policy document' named "Several Guiding Opinions on Further Suppressing Illegal Religious Activities and Combating the Infiltration of Religious Extremism in Accordance with Law".[46] As a part of the furthering deradicalisation process,

[38] ibid 26.

[39] ibid.

[40] ibid 23.

[41] Tania Branigan, 'Ethnic violence in China leaves 140 dead' *The Guardian* (London, 6 July 2009).

[42] Pinelopi Apostolou, "Dance your way out of Islam'- China covers atrocities under 'preventive, educational measures" (*leidenlawblog*, 11 Nov 2020) < https://leidenlawblog.nl/articles/dance-your-way-out-of-islam-china-covers-atrocities-under-preventive-educational-measures> accessed 19 March 2022.

[43] Sheena C. Greitens, Myunghee Lee and Emir Yazici, 'Counterterrorism and Preventive Repression: China's Changing Strategy in Xinjiang' (2020) 44(3) *International Security* <https://doi.org/10.1162/ISEC_a_00368> accessed 23 March 2022.

[44] Zunyou Zhou, 'Chinese Strategy for De-radicalization' (2017) 31(6) *Terrorism and Political Violence* <https://doi.org/10.1080/09546553.2017.1330199> accessed 22 March 2012.

[45] ibid.

[46] ibid.

in 2014, the policy document was supplemented by another policy guideline entitled "Several Opinions on Further Strengthening and Improving the Work with regard to Islam". However, both of the policy documents can be termed as classified party regulations in its nature and not open and accessible to the general public.[47] The "Strike Hard Campaign against Violent Terrorism" was launched against Uyghurs and Turkic Muslims in the Xinjiang in May of 2014. [48] To call a spade a spade, through these regulations, President Xi Jinping promulgated a so-called "People's War on Terror", which has deeply fragmented the society and transformed Xinjiang into a digital police state.[49]

It is now widely addressed and condemned that in the name of deradicalisation programs, the Chinese government is operating surveillance, systematic detention, and limitations on the right to movement against the Uyghur, Kazakh, and Kyrgyz minorities.[50] For the ideological transformation of the suspected would-be terrorists, the government has established a network of 're-education' camps where 1 to 3 minorities—have been detained[51], constituting the 'largest mass-scale incarceration of ethno-religious minorities' since Second World War[52]. It is pointed out that around 5 to 10 percent of China's Uyghur population (1.5 million people) are imprisoned and forced into deradicalisation Programs.[53] Report by HRW shows that although people in Xinjiang consist only 1.5 percent of the total Chinese population, in the year 2017 alone, detainment of Uyghurs accounted for nearly 21 percent of all detentions in China.[54] There are few evidences that revealed the signs/stages of genocide and a widespread process of classification is going on against the detainees and their families to fragment the society. The leaked database – termed as the 'Karakax list' portrays that arrested individuals as well as their families are traced and classified by binary groupings—such as "trustworthy" or "not trustworthy," and; their attitudes

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47 ibid.

48 Human Rights Watch. 'Eradicating Ideological Viruses' (*HRW*, 9 Sep 2018) < https://www.hrw.org/report/2018/09/09/eradicating-ideological-viruses/chinas-campaign-repression-against-xinjiangs> accessed 19 March 2022.

49 The Guardian, 'China detains Uighurs for growing beards or visiting foreign websites, leak reveals' *The Guardian* (London, 18 Feb 2020).

50 Greitens, Lee and Yazici (n 43) 10.

51 ibid.

52 Ben Mauk, 'Inside Xinjiang's Prison State: Survivors of China's campaign of persecution reveal the scope of the devastation' (*The New Yorker*, 26 Feb 2021) <https://www.newyorker.com/news/a-reporter-at-large/china-xinjiang-prison-state-uighur-detention-camps-prisoner-testimony> accessed 23 March 2022.

53 Adrian Zenz and Rian Thum 2019 quoted in Greitens, Lee and Yazici (n 43)18.

54 Human Rights Watch (n 48).

are scategorised as "ordinary" or "good"; and even the households are graded as "light" or "heavy" religious atmospheres.[55]

Uyghur communities are seen as subjects of being criminalised through hate propaganda and depersonalised language such as eradicating tumorsor spraying chemicals on crops to kill the weeds are portrayed in different reports.[56] Observing the symptoms and elevation of the stages many states such as the USA, and Canada have marked China's conduct against the Uyghur people as 'genocide' in the international law.[57] The Human Rights Watch (HR) though not clear in its position, they confirmed appalling evidence of the established use of detention and torture. HRW and others have reported that in the re-education camps, the detainees are suffering from cruel, inhuman, and degrading treatments--such as forcibly deprived of sleep, prolonged shackling, hung from ceilings, strapped to metal chairs by the authorities including beating to death[58].

From other grounds, journalists, academics and UN experts have accused China of instrumentalising concentration and deradicalisation camps in severe violations of fundamental human rights against the Uighurs by means of forced labor, sexual violence, population control methods and sweeping surveillance.[59] Against all the evidence and allegations that the CCP government is implementing a structured system of abolishing Uyghur identity by applying torture and political indoctrination, the Chinese government is claiming that these are "lies and absurd allegations", rather their 'deradicalisation' program is the surgical process through which the 'tumor of terrorism' is successfully removed[60]. Withering away all the allegations and concerns of international community, in a seminar on "Counter-Terrorism, De-radicalization, and Human Rights Protection" held in 2020, the Chinese government objected against the accusations and claimed this as a part of its deradicalisation programs.

As outlined in previous section that due to dearth of definitional clarity of radicalisation and deradisation, the 'deradicalisation' policy in China is often

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55 The Guardian (n 49).

56 Rian Thum, 'What Really Happens in China's 'Re-education' Camps' *The New York Times* (New York, 15 May 2018).

57 Human Rights Watch, 'Break Their Lineage, Break Their Roots: China's Crimes against Humanity Targeting Uyghurs and Other Turkic Muslims' (*HRW*, 19 April 2021) <https://www.hrw.org/report/2021/04/19/break-their-lineage-break-their-roots/chinas-crimes-against-humanity-targeting#_ftn69> accessed 18 March 2022.

58 ibid.

59 Ryan P. Jones, 'MPs vote to label China's persecution of Uighurs a genocide' CBC News (Toronto, 22 Feb 2021).

60 Pinelopi Apostolou (n 42).

discriminatory against the ethinic minority Uighurs . There has also been no gender-specific aspects of disengagement, deradicalisation and reintegration efforts. Despite of governmental claims to rationalise its deradicalisation programs against the muslim minority,it is evident that mass survielience and restriction of their movement through keeping them in the detention centers and applying deradicasation strategies for the prisoners abruptly affect their right to privacy and other social, economic and political rights. This is an abosolute violation of the international customary law and International Bill of Rights especially Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights (1966). Again because of deradicalisation is an imported idea and there exists lack of transperanvcy maintained in the development and implementation of deradicalisation mechanism, it can be still considered as an experimental undertaking in context of China. Hence, it aims to implement a systematic humailiation of the ethinic minority rather than conducting an effective program to counter terrorism or to secure behaviuorol changes of militants convicted in the court of law.

5. Case of Sri Lanka: The Politics of 'Us vs Them' through PTA Law

After three decades of civil war in2009, the erstwhile President of Sri Lanka Rajapaksa declared the end of "terrorism" and ensured a regime that would address the minority grievances[61]. Like Professor Samarasinghe, many others around the world anticipated and contended that 'Sri Lanka would start afresh towards transitional justice, national reconciliation, peace building, accountability, and reconstruction'. [62] However the contemporary uprising of Sinhala Buddhist nationalism, ethnic conflict and religious violence, the new politics of 'Us vs Them' targeting the Muslims and other minorities have altogether fuelled up new political tensions in Sri Lanka. Historically, although, the CT rules in Sri Lanka mostly circled during the eradication of LTTE, after '2019 Easter bombings case' the country has entered into new paradigms of PVE and CVE. Subsequently, the November 2019 election of President Gotabaya Rajapaksa's government had strengthened the 'State-Buddhist Clergy' relationship and intensified the anti-Muslim rhetoric and action.[63] International Crisis Group reports that under

[61] Amresh Gunasingham, 'Countering violent extremism in Sri Lanka' in Rohan Gunaratna and Sabariah Hussin (eds), *Terrorist Deradicalisation in Global Contexts: Success, Failure and Continuity* (Routledge 2020).

[62] Sam de A. Samarasinghe, 'Sri Lanka: the challenge of postwar peacebuilding, state building, and nation building' in J. Coakley (ed), *Pathways from Ethnic Conflict: Institutional Redesign in Divided Societies* (Routledge 2010) .

[63] Ambika Satkunanathan, 'Deradicalisation regulations stoke more radicalisation in Sri Lanka'

draconian emergency and terrorism laws, police arrested more than two thousand Muslims even for merely having a Quran or other religious things at residence.[64] As a part of the previously failed religion-based populist politics, the electoral policy of seeking Sinhala vote-banks through vilification of Muslims gained additional and ugly momentum[65].

In 2021, through a gazette notification[66], President Gotabaya Rajapaksa unveiled and publicised "Prevention of Terrorism (Deradicalisation from holding violent extremist religious ideology), Regulations No. 01 of 2021".[67] This gazette had reinforced the existing draconian provisions of the 'Prevention of Terrorism Act (PTA)'. Likewise China, the regulations were designed in the name of 're-education' to detain anyone accused of causing "acts of violence or religious, racial or communal disharmony or feelings of ill will or hostility between different communities or racial or religious groups"[68] and to be in different centres i.e., for rehabilitation or reintegration for up to two years without trial.[69] This regulation allowing detention of people without trial is nothing but blatant violation of 'international legal obligations and Sri Lanka's own constitutional guarantees (under Article 13 of the national Constitution)'.[70] Worryingly, forgetting their long history of communal violence and civil war, Sri Lanka has embarked on a similar path of China leading to arbitrary enforcement against Muslims.

Human rights activists have raised deep concerns as the PTA law does not adhere to national and international human rights standards. Report reveals that the pattern of arrests is inhumane—individuals are detained from their residence, place of works, or during travelling, families are not served any arrest receipt or information of place of detention center, then family and lawyers are prohibited to contact for months after the detention'.[71] The findings of the Sri Lankan

(*East Asia Forum*, 30 Nov 2021) <https://www.eastasiaforum.org/2021/11/30/deradicalisation-regulations-stoke-more-radicalisation-in-sri-lanka/> accessed 24 March 2022.

64 Alan Keenan, '"One Country, One Law": The Sri Lankan State's Hostility toward Muslims Grows Deeper' (*International Crisis Group*, 23 Dec 2021) <https://www.crisisgroup.org/asia/south-asia/sri-lanka/%E2%80%9Cone-country-one-law%E2%80%9D-sri-lankan-states-hostility-toward-muslims-grows-deeper> accessed 19 March 2022.

65 ibid.

66 It is alleged by the Human Rights Commission of Sri Lanka that the "regulations" were dictated by the executive without the engagement of Parliament.

67 International Commission of Jurists (n 7).

68 Alan Keenan (n 64).

69 International Commission of Jurists (n 7).

70 ibid.

71 Ambika Satkunanathan (n 63).

Human Rights Commission reveal the worrying figures that 'overwhelming majority (83 per cent men, 100 per cent women) were tortured after their arrest and around 90 per cent male & 100 per cent female detainees were forced to sign confessions, and the content of the document which they were made to sign were unknown to them as they were written in Sinhala'.[72] Upon the backlash of human rights activists at home and abroad and legal petitions[73]; an interim order has been issued by Sri Lankan's Apex Court suspending the operation of the regulations. The petitioners alleged that the deradicalisation regulations are not properly placed before parliament and detrimentally affecting to the major safeguards of human rights such as 'national supreme law, international human rights paradigm, and justice of the people'[74].

Thus looking upon in earlier sections, it can be clearly stated that like China, Sri lanka has also to some extents failed to comply with its international obligations towards human rights framework and its own Consituional protection that affirmes procedural rights for an accused. The counter terrorism law allows for imprisonment for two years without trial for the radicalised accuseds as well as the PTA rules require people to surrender or are being arrested on suspicion of using words or signs of violence to be handed over to police station after a report submitted to the Defence Minister. This is a gross violation of Rights to fair trial and legal representation guaranteed by the International Covenant on Economic, Social and Cultural Rights (1966). Nonetheless Sri lanka also overlooked the gender aspects of women detainees which should be one of the prior focuses in complying with human rights obligations. Thus the evidence comes to the forefont of the civil society how Sri lanka failed to address the root causes of extremism and muslims are often subject of hate propaganda and illegal detention.

6. Conclusion

Deradicalisation programs, popularly initiated in contemporary legal systems are geared toward peacefully moving militants from terrorism. Many western countries have been trying to set a standard to initiate deradicalisation programs whilst Bangladesh has also recently initiated positive motion for deradicalisation through disengagement from militant surroundings and phycological motivation.

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[72] ibid.

[73] Fundamental Rights petition filed by former commissioner of Human Rights Commission of Sri Lanka (HRCSL) Ambika Satkunanathan, challenging the legality of the Deradicalization Regulations .

[74] Daily Mirror, 'SC suspends the operation of Deradicalization Regulations' *Daily Mirror* (Colombo, 5 August 2021).

Regrettably, many countries are running deradicalisation programs in different names with vagueness of the laws, targeted ethno-religious stereotyping, and intentional vilification. In this paper we have taken a few instances from China and Srilanka to demonstrate this concern. In one or two instances, we have taken positive examples from Bangladesh to highlight the available alternate paths that, along with good practices in many other countries, can be considered to develop a global legal framework in this regard. However, still much works have to be done with a view to improving theories and practices of deradicalisation under a uniform framework.

This paper argues that due to lack of universal theorisation of deradicalisation and development of legal frameworks, states in their own interests initiate own deradicalisation practices that undermine the efficacy of the counter terrorism. Without objective assessment and adequate incorporation of human rights insurances deradicalisation regulations are merely seen as instruments of intensifying state security apparatus[75] like in China and Sri Lanka. While China has a secret deradicalisation program strategy, its sole application against the Uyghur people has been highly questioned. Similarly, Sri Lanka has been skepticised for inhumane arrests of Muslim individuals under the PTA law where they are subject to deprivation of rights and basic entitlement in detention centers.

The paper confirms that both the states though in the name of deradicalisation initiate various laws and policies to disengazement from extremism, still they should comply with their international obligation to protect and promote human rights in applying deradicalised programs. Even though these aim to address to reform the detained terrorists or potential radicalised persons, a holistic approach must be undertaken considering different attributes such as, gender, age, background of people involved in radicalisation.

This exploratory paper is solely dependent on the secondary scholarships and works of renowned human rights organisations and commentators on an issue with immense importance for global peace and justice. Though this dependency could be the prime limitation of this work, nevertheless, it can foster superior studies and new approaches towards theoretical development of 'deradicalisation' incorporating human rights agenda. Based on our discussion and analysis above, we suggest that states need to focus their efforts on the implementation of deradicalisation programs as holistic, effective and sustainable approach which could include the protection of human rights, transparency of

[75] Ambika Satkunanathan (n 63).

CT laws and mitigating collective grievances of the community that is usually capitalised by the extremist outfits in the process of radicalisation. In light of state sovereignty, national interest and security, the state is obliged to prevent and combat terrorism while also respecting human rights of the people who are or have been engaged in militant activities.

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Efficacy & Implementation Gaps in the 'Core Environmental Laws' of Bangladesh: An Overview

Bahreen Khan*

Abstract: *Environmental concerns are cross-cutting in nature, touching all sector-specific actions. In recent decades, Bangladesh has been experiencing with loads of environmental issues, leading to persistent deteriorating environmental state. Consequently, the cause of 'environment conservation' has been felt to realize and the primary responsibility vests on the Ministry of Environment, Forest and Climate Change and the Department of Environment. Accordingly, the country is in the constant process of internalizing the international environmental commitments into its national regulatory regime. Approximately two hundred national legal instruments are linked, to some extent, with the diverse aspects of environmental governance. Despite the specific responsibilities as allocated to the different governmental agencies through abundant environmental laws, their implementation status is far behind the international standards. Multiple and interconnected reasons fuel the environmental anarchies, obstructing to ensure the sound environmental management in Bangladesh and a threat to sustainable development. Most importantly, the non-integration of various environmental concerns into the developmental action agendas, at the planning, implementing and monitoring stage is the overarching cause. As 'right to environment' and 'environmental justice' depend on effective environmental legal and policy instruments, this article predominantly attempts to provide an overview of the statutory provisions, efficacy and implementation gaps in those environmental legislations of Bangladesh which are so far officially recognized as 'core environmental laws'.*

Keywords: Environment conservation, Environmental issue, Environmental law, Implementation gap, Sound environmental management.

1. Introduction

The state of global environment has diminished to a great extent since the convivial of industrial revolution and has been impacting on the quality of life[1]. Consequently,

* Bahreen Khan, Assistant Professor, Department of Law and Justice, Southeast University, Dhaka; Advocate, Supreme Court of Bangladesh; and Member, Executive Committee, Bangladesh Environmental Lawyers Association (BELA).

ensuring 'environment conservation' becomes a cross-cutting area of concern for all sector-specific initiatives around the globe. A good numbers of international environmental legal instruments, i.e. multilateral environmental agreements (MEAs), customary international laws, environmental principles and case laws, are in place, to deal with various environmental issues and their management aspects.

Following the global path, Bangladesh, as a party to many MEAs, is striving on the cause. To halt and recover from the environmental degradation, it has echoed, to some extent, the MEAs commitments into the national arena. Nearly 200 domestic legal and policy instruments are operative in Bangladesh, touching various management aspects of natural environment, natural resources and eco-system, either directly or indirectly; of them around 180 laws are mostly associated with environmental regulatory regime[2]. However, out of those, only 10 core laws have recognized as 'environmental law' through gazette notification, till date, leaving many significant ones.

1.1 Objectives

The main objectives of this research are to: -

a. Outline the salient provisions of 10 'core environmental laws' of Bangladesh which are currently recognized as 'environmental laws' through gazette notification.
b. Identify the implementation gaps in and assess the efficacy of these 10 laws.
c. Prescribe few recommendations while summarizing the study findings.

1.2 Methodology

To undertake this qualitative research, analyses have been done of the primary and secondary documents namely, laws, case decisions, journal articles and various reports of organizations and news media. A brief description on the environmental issues and the evolution of environmental laws in Bangladesh has also been given to depict the environmental perceptions.

[1] Farhan Ahmed, *et al,* 'The environmental impact of industrialization and direct foreign investment: empirical evidence from Asia-Pacific region' (2022) Environ Sci Pollut Res, <https://link.springer.com/article/10.1007/s11356-021-17560-w> accessed 20 January 2022.

[2] Mohiuddin Farooque, *et al*, '*Laws Regulating Environment in Bangladesh*' (4th edn., BELA 2020).

1.3 Significance and Limitation

The findings of the article will help the policy makers consider bringing future legal reforms necessary to bridge the gaps and to enhance their efficacy, leading to secure environmental rights and justice in Bangladesh. Moreover, the study will increase the legal knowledge base of various stakeholders who are associated with environmental governance, the academics and the researchers.

The article, however, has not shed light on many other significant laws of Bangladesh, which are equally crucial for sound environmental governance as those are not yet officially recognized as 'environmental laws'.

2. Glimpse of Environmental Issues and Other Cross-cutting Concerns in Bangladesh

Despite the presence of many laws to regulate environmental aspects, the state of natural environment and the diversities in the natural resources pool of Bangladesh have constantly been degrading over the period of time and especially during post-independence era. The ominous country profile in terms of environmental management is evident from various world indexes. Bangladesh has ranked 162 out of 180 in the 2020 report of the environmental performance index (EPI) of the world[3] and has placed first position in the 2021 most polluted country list[4]. To speed up the economic growth, the country has switched from agro-based initiative to mass industrialization, resulting to succumb gross environmental pollution and health hazard[5]. Consequently, in recent decades, due to the presence of plethora environmental issues, ensuring sound environmental management has surfaced as a serious concern for Bangladesh. The lion's share of environmental issues of Bangladesh derives from multiple sources of pollution, indiscriminate industrialization, haphazard urban and rural planning, encroachment of public properties, eco-system degradation, habitat loss, deforestation, loss of biodiversity, conversion of agricultural lands for other use and improper waste disposal.

Other significant connected natural and man-made concerns include managing huge human population pressure, along with *Rohinghya* influx, within the little land space; recurrence of natural calamities due to funnel shaped

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[3] EPI 2020, Result,<https://epi.yale.edu/epi-results/2020/component/epi> accessed 25 January 2022.

[4] World Population Review. 'Most Polluted Countries 2022' <https://worldpopulationreview.com/country-rankings/most-polluted-countries> accessed 22 March 2022.

[5] Md. Jamal Uddin, Yeon-Koo Jeong, 'Urban river pollution in Bangladesh during last 40 years: Potential public health and ecological risk, present policy, and future prospects toward smart water management' (2021) 7(2) *Heliyon* < https://doi.org/10.1016/j.heliyon.2021.e06107> accessed 26 January 2022.

and low-lying geographical position of Bangladesh[6]; and the impact of global climate change (CC). Bangladesh has ranked 7 among 181 climate vulnerable countries[7], contrary to its insignificant contribution to the cause. The climate issue may pose a threat to the timely achievement of the sustainable development goals (SDGs)[8].World's projected temperature rise is 2.7°C by the end of this century[9], which will exacerbate the adverse impact on Bangladesh's economy and sustainability. However, Bangladesh has ranked 109 out of 165 countries in the overall performance of SDG Index 2021[10]. Coping with all these intrinsic issues at post Covid-19 pandemic era may come as a greater challenge for Bangladesh, regarding its trajectory to consistent economic growth, keeping social cohesion and ensuring sound environmental management[11]. The nexus among the institutional incapacities, malpractices and statutory limitations may help germinate a complex situation in the environmental governance.

In the 'rat race' of becoming an upper middle income country, the 'business as usual' approach, is commonly practiced in Bangladesh[12]. Putting due regard to the notion 'environment conservation' per se, is often ignored and remains as a mere rhetoric, in practice, principally due to politician-polluter nexus. As a consequence, while taking decisions for a project or program, the 'top-down approach' (taking decision by top officials for implementing at lower level)

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[6] Reach Report, 'Climate Change and Natural Hazards in Bangladesh Show the Need to Focus on Vulnerable Populations', 22 January 2020 < https://www.reach-initiative.org> accessed 23 November 2021.

[7] David Eckstein, et al, Germanwatch, 'Global Climate Risk Index 2020', *Briefing paper* (*German watch*, December 2019) <https://germanwatch.org/sites/default/files/20-2-01e%20Global%20Climate%20Risk%20Index%202020_16.pdf accessed 28 November 2021.

[8] Citizen's Platform for SDGs, Bangladesh, 'Bridging Climate Actions and Sustainable Development Goals of Bangladesh', Brief, Aug.17, No.6, <http://www.icccad.net/wp-content/uploads/2018/03/Citizen%E2%80%99s> accessed 26 December 2021.

[9] UN Climate Press Release, 25 October 2021, <https://unfccc.int/news/updated-ndc-synthesis-report-worrying-trends-confirmed> accessed 31 October 2021.

[10] Rankings, Sustainable Development Report, <https://dashboards.sdgindex.org/rankings> , accessed 23 March 2022.

[11] UNICEF Bangladesh, 2020 Report, 'Tackling the Covid-19 social and economic crisis in Bangladesh: Providing universal, lifecycle social security transfers to protect lives and bolster economic recovery' <https://www.unicef.org/bangladesh/media/5256/file/%20Tackling%20the%20COVID-19%20economic%20crisis%20in%20Bangladesh.pdf%20.pdf> accessed 26 January 2022.

[12] Adam Smith International. 'Towards a Transition to Green Growth in Bangladesh' under the project 'Promoting Green Economy in Bangladesh' (2015-2018) < https://adamsmithinternational.com/projects> accessed 25 November 2021.

happens mostly and the 'bottom-up approach' (sending proposals from the lower level to the top level) is often bypassed, which reflects the dishonor to 'environmental democracy' as the concerns of the local people are ignored where the project or program is to be implemented.

3. Chronicle of Cascading MEAs into National Legal Instruments

Following the global call of 'environment conservation', Bangladesh, as part of its 'common responsibility', pledges to work on the cause. It is gradually cascading the MEAs commitments into various national legal instruments. Some national legal instruments, concerning the natural resource management, which were enacted during the British and Pakistan regimes, are still operative; for example, the Forest Act 1927, the Protection and Conservation of Fish Act 1950. The wave of global environmental activism, created through notable UN conferences, namely the Conference on Human Environment 1972 and the Conference on Environment and Development 1992, had guided Bangladesh to set up numerous institutions and to frame new laws, rules, policies, etc. Through endorsing the global action agenda of SDGs 2015, Bangladesh has redirected its aspirations and priorities to match with it.

The country has shifted from 'environment pollution control oriented approach' to 'environment conservation oriented approach' by enacting the Bangladesh Environment Conservation Act 1995, repealing the Environmental Pollution Control Ordinance 1977. The new National Environment Policy 2018 has replaced the 1992 one. A dedicated ministry, namely the Ministry of Environment, Forest and Climate Change (MoEFCC) was created in 1989 to protect the natural environment of Bangladesh. The Department of Environment (DoE) and the Forest Department, are the two significant arms of the MoEFCC and are responsible to implement their own statutory commitments. Several other ministries and their subordinate agencies, for example Ministry of Water Resources, Ministry of Agriculture, the Bangladesh Water Development Board, Department of Fisheries, various local government agencies, also undertake many sector-specific projects and programs which are pertinent to the diverse aspects of environmental management. The integration of 'environment conservation' into all relevant policy instruments and their applications are absolutely crucial to pursue a sound regulatory mechanism but remains as a great challenge.

4. Key Provisions and Implementation Gaps in 'Core Environmental Laws' of Bangladesh

It is already mentioned that around 180 domestic laws are either explicitly or implicitly connected with environmental management in Bangladesh. The DoE publication on environmental laws of 2019 has listed 21 national legal instruments as environmental laws unofficially. But under this heading, the key provisions of only 10 laws and their implementation gaps are discussed as these are so far officially recognized as 'environmental laws' through gazette notifications. Hence, these 10 laws can be considered as the 'core environmental laws'.

4.1 Bangladesh Environment Conservation Act (BECA) 1995

BECA is the parent law, aiming at environment conservation, development of environmental standard and to control and mitigate environmental pollution. The DoE is created and empowered through BECA to perform an array of functions[13]. Its Director General has given unfettered power to fulfill the objectives of BECA, applying his discretion; but his qualification is not declared. The specific functions include to: coordinate DoE activities with other agencies; give directions to prevent any probable accidents that may degrade environment; ensure sound management of hazardous substance through regulating its manufacture, use, export, import, disposal, etc.; conduct and assist other agencies in the environmental research; enter, search and examine any place or equipment for pollution control and sample collection; collect and disseminate environmental information; advice the government to avoid using polluting substances; examine the standard of drinking water; warn any industry/establishment to stop, regulate or prohibit any harmful activity, to direct cutting their utility connections, to issue orders to close the establishment for its non-compliance; declare an ecologically critical area (ECA) with a list of prohibited activities and to develop a management plan for its restoration; take various actions on vehicular pollution, use of polythene, hill cutting, hazardous waste management, ship breaking, filling up of wetlands, considering these activities as injurious to public health and degrade the environment and eco-system; issue an environmental clearance (ECl) to initiate/continue/expand an industrial operation/project; assess the damage done to ecosystem by any accident/occurrence; take corrective measures to mitigate emission of excessive pollutant; conduct a public hearing upon any complaint; issue environmental directives, time to time.

BECA has not explicitly recognized 'right to environment' as a right. It reflects few established and emerging international environmental principles,

[13] Bangladesh Environment Conservation Act 1995, ss 4-13.

namely principle of harm prevention, polluter pays principle and principle of environmental impact assessment (EIA). But few significant ones, such as the principle of sustainable development, wise use principle, 3R principle and principle of intergenerational equity, are yet to reflect. BECA seems to focus curative measures mainly than focusing preventive measures; covers minimally and implicitly the forest and biodiversity issues, through declaring 'ECA' and assessing the damage to ecosystem. It allows ship breaking activity instead of prohibiting it, resulting to deteriorate the environmental quality and causing an irreparable loss to the ecosystem due to weak law enforcement mechanisms[14]. BECA justifies the razing of hills and filling up of wetlands, with the label 'national interest' without interpreting the term. Such vagueness in law, provokes adopting unfair means to get such label by the vested interest groups; supplemented by the relaxed application of transparency and accountability, it results to exacerbate the situation. The rampant use of polythene bags, emission of hazardous smoke by industries and vehicles, illegal grabbing of wetlands, open spaces, cutting of hills for housing and other activities, ecosystem degradation through the disposal of untreated industrial wastes have become common practices.

The mode of doing public hearing is missing in BECA. But it permits[15] to: prefer an appeal, challenging DoE decision, to the government, without defining the term 'government'; file cases for environmental offence and compensation, either by the DoE or by an aggrieved person; inflict punishments ranging from fine of Taka 5,000 to 1,000,000, or imprisonment for 1 to10 years or with both. However, the punishments are faulty against the recurrent offenders of environmental crimes, as imprisonment is a mere option against the fine and no instance of imposing imprisonment for any duration is found yet. Besides, the punishment is equal for natural person and body corporate which should be revised. Moreover, BECA limits the maximum punishments of offences committed under various Rules made under it, as fine of Taka 200,000 or imprisonment for 2 years or with both[16] which is insufficient at present context. It gives immunity[17] to the personnel for their actions taken in 'good faith' but remains silent about their omissions in taking timely and appropriate steps, leading to provoke malpractice. The DoE has currently 45 offices throughout Bangladesh. Its insufficient logistics supports and manpower and many vacancies in its approved posts, projects contradiction to its vast realm of activities assigned by BECA. With only two laboratories, in

[14] NGO Shipbreaking Platform, 'The Problem' < https://shipbreakingplatform.org/our-work/the-problem/> accessed 26 January 2022.

[15] ibid, s 14, 15(1), 15A, 17.

[16] ibid, s 15(2).

[17] ibid, s 18.

Dhaka and Chattogram, it cannot serve effectively, requiring more for other parts of Bangladesh. Therefore, adequate equipping of the DoE is required to perform its statutory obligation under BECA.

4.2 Rules Framed Under BECA

For proper realizing the objectives of BECA, seven Rules have been framed, till date. These Rules deal with specific environmental issues and their management aspects, which are briefly discussed here. It is worth mentioning that Rules on electronic waste management is finalized and Rules on poly chlorinated biphenyls (PCB) is under consideration to be framed. However, rules for EIA and public hearing/participation should get attention for framing.

4.2.1 Environment Conservation Rules (ECR) 1997

ECR mainly focuses on the procedure of obtaining an ECl for different industrial activities categorizing as Green, Orange-A, Orange-B and Red[18], based on their intensity and levels of impacts on environment. The Red ones require submitting more documents for DoE's assessment than other ones, such as, no objection certificate (NOC) from the local authority, initial environmental examination, environmental management plan, contingency plan, EIA report, site clearance (unless situating within a designated export processing zone), etc. An ECl is issued for three years (Green listed) and one year (Orange-A, Orange-B and Red listed) with fees ranging from Taka 1,500 to 500,000[19]. Violations of ECR requirements are often reported as most of the industrial establishments have no effluent treatment plants (ETPs) or are not running their ETPs and discharging harmful untreated effluents into environment, some are established in residential areas (which is prohibited) or creating noise or emitting smoke or odor beyond the permitted levels; even the tannery industries which have shifted to Savar from Hajaribag, Dhaka are running without ECl for last 10 years[20] and some are getting EIA and ECl through bribing the DoE officials[21].

ECR sets the standards of environmental quality of air, water, odor and sound; fixes the emission limits of different types of vehicles and sewage discharge, gaseous

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[18] Environment Conservation Rules 1997, r. 7, schdl. 1.

[19] ibid, r 8, 14, schdl. 13, 14.

[20] Rashidul Hasan, 'Savar Tannery Estate Must Shut Down' *Daily Star* (Environment Supplement, Online, 30 November 2021) < https://www.thedailystar.net/news/bangladesh/elections/news/savar-tannery-estate-must-shut-down-2905911> accessed 29 January 2022.

[21] Editorial, 'Department of Pollution or Collusion?' *The Daily Star* (Online, 06 January 2022). <https://www.thedailystar.net/views/editorial/news/department-pollution-and-collusion-2933791> accessed 27 January 2022.

and liquid wastes from various industrial activities[22]. It also mentions different procedures[23] to: declare an ECA; control air pollution through infrastructural construction; seek a relief from any damage done to the ecosystem; serve notice for sample collection; obtain 'pollution under control certificate' for vehicles.

ECR was last amended in 2021 but still has some gaps. It lacks provisions on consultation with local people, before renewing the ECl, to assess any suffering caused by such activities; misses the procedure of NOC procurement and the details of the modes and criteria of doing and approving an EIA (no separate EIA rules exists till date); has nothing about soil standards, light and thermal pollution; has nothing about the consequence of the failure to dispose applications in time. Few activities listed under Orange-B category are equally harmful like the Red ones, for example, carbon rod, printing ink, stone crushing, ship breaking, battery assembling, re-rolling, etc. Activities not mentioned in ECR, like sand and stone extraction need to be inserted. So, ECR amendment is vital to ensure expected implementation.

4.2.2 Ozone Layer Depleting Substance (Control) Rules 2004

Bangladesh is bound to mirror the Vienna Convention for the Protection of the Ozone Layer 1985, the Montreal Protocol on Substances that Deplete the Ozone Layer (MP) 1987 and the latest Kigali Amendment 2016 at domestic level. This Rules enumerates detailed procedures to control the use and phase out of 96 types of ozone depleting substances (ODS), commonly found in various products including air conditioning units of vehicles, refrigerator, heater, air cooler, dehumidifier, compressor, aerosol, fire extinguisher, insulation panel, pre-polymer, etc.

ODS Rules prohibits to: produce, use, export/import, sell/project, collect, distribute, store ODS containing products; establish/expand ODS manufacturing process (unless specifically exempted for specific period, having ECl, to give specific services)[24]. It mandates to: obtain ECl for manufacture, export and import of compressors having ODS; keep and submit proper records to the DoE by the manufacturer, importer, exporter, seller of ODS and compressors; issue/cancel a licence/permit; submit an annual report of the Ozone Cell, DoE to the government; exempt its application for any lab, research or other purpose, if authorized under any rules[25].

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[22] Environment Conservation Rules 1997, r. 12, 13, schdl. 2-12.

[23] ibid, r 3-6, 7A, form 4.

[24] Ozone Layer Depleting Substances (Control) Rules 2004, r. 4-9, schdl. 1-5.

[25] ibid, r 10-15, schdl. 6-9.

Schedule 2 provides different base years and the maximum amount of ODS import and use; the timeframe of ODS phasing out, from 1987 to 2031; allows ODS use and import, falling under group VI of the MP, necessary for servicing of refrigeration and air conditioning, till 2040. Schedule 3 restricts the terminal uses of numerous groups of ODS; allows 19 types of ODS related activities with different timelines; allows manufacturing of any essential product, servicing of any firefighting device, manufacturing and charging of any automobile's air conditioner, manufacturing of refrigeration and air conditioning (except compressors), till 2031, servicing of any refrigeration and air conditioning, till 2041.

Rule 16 directs to punish, following Section 15(1) of BECA (maximum imprisonment for 10 years or fine up to Taka 1,000,000 or both), however, the provisions of Section 15(2) of BECA bars imposing imprisonment beyond 2 years or fine beyond Taka 200,000 or both, for committing an offence mentioned in any Rules made under BECA. Therefore, an amendment of ODS Rules or BECA or both is required to lift the contradiction in legal provisions. Regarding the compliance of the MP, Bangladesh has awarded from international organizations and is aiming to reduce 67.5% of HCFC by 2025[26]. Therefore, regular and proper monitoring of ODS phase out by the duty bearers is essential to bring expected result within the fixed timeline.

4.2.3 Noise Pollution (Control) Rules 2006

This Rules is enacted to control noise pollution (NP). It specifies the limits and timing of making noise but exempts sound of airplane, train, ambulance, any religious functions, any governmental actions during natural calamities, etc. NP Rules requires to: put signboards of five types of areas, namely residential, commercial, industrial, mixed and silent area; examine by the DoE, the sound level of a confined and an open space; follow the maximum sound limits (ranging from 40 to 75 decibel) in those five areas during day (6am to 9pm) and night (9pm to 6am) times; limit sounds (ranging from 85 to 100 decibel) from the silencer pipes of mechanized vehicles and boats. It prohibits to: exceed the permitted sound limits, for events like wedding, sports, fairs, social, cultural, political nature in the open or semi-open spaces, over 5 hours and beyond 10pm, unless relaxed by authorities (except silent areas); use vehicle horns making excessive sounds and prohibited horns in silent areas[27]. However, Rule 12 allows making excessive sounds with instruments (except silent areas) for national, local or statutory

[26] BBS. 'Bangladesh Working Successfully to Protect Ozone Layer: Shahab', (*News Agency of Bangladesh*, 18 September 2021) < https://www.bssnews.net/news/18019> accessed 28 January 2022.

[27] Noise Pollution (Control) Rules 2006, rr 4-9, schdl. 1-4.

body's election, from the date of declaring the election schedule till 48 hours prior to the election date, following the directions of the Election Commission or other relevant authorities.

In picnic venues, the use of instruments creating excessive noise is permitted from 9am to 5pm; but not permitted while going to or returning from picnic venues, during prayer time, in unauthorized picnic spots, or even in the designated picnic spot (i.e. spots situated at least 1km beyond a residential area) if the noise may impede the breeding ground of any wildlife[28]. Rule 11 prohibits using stone crusher and mixture machines within 500 metres of the outskirt of a residential area and building construction machines, from 7pm to 7am, inside any residential area. In the silent area, the use of building construction machine (but not stone crusher and mixture machine) may be permitted for the duration, approved by the local authorities. It requires taking steps by: the owner/occupier of any confined place not to transmit the sound produced therein to its adjacent areas, or to cross the permitted sound limit; the factory/industry owner to prevent or reduce any injury caused to the workers/visitors by NP, created by an activity or machines of the industry. It directs to apply Sections 7, 8 and 10 of BECA for causing or possibility to cause injury through NP[29].

The non-application of this Rules is evident from daily life. The residents of metropolitan cities, big townships, especially school going children and elderly persons, are the worst sufferers of various types of NP such as shrill horns, heavy noises from building constructions, etc. The punishment, stated in Rule 18, is insignificant, rather incites creating NP, as no minimum punishment is mentioned; the maximum punishments are imprisonments ranging from one to six months or fines not exceeding Taka 10,000 or with both. Hence, its penal provisions need an amendment to get appropriate remedy. The necessity to change this Rules is imperative as the NP of Dhaka has elevated triple times from the permissible limit[30].

4.2.4 Medical Waste (Management and Processing) Rules 2008

This Rules regulates matters regarding the safe management and processing of medical wastes (MW) emanating from various medical service outlets in Bangladesh. It defines 'MW' as any solid, liquid, gaseous and radioactive

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[28] ibid, r 10.

[29] ibid, rr 13-17.

[30] , 'Dhaka's sound pollution triple to tolerable level' *The Daily Star* (Online, 29 April 2021) <https://www.thedailystar.net/city/news/dhakas-sound-pollution-triple-tolerable-level-2085641>, accessed 29 January 2022 .

substance which harms the environment through its emission, release or dumping from any activity of medical treatment, prevention, diagnosis, research and also wastes mentioned in Schedule 1; 'MW processing' means the collection, segregation, packaging, destruction, incineration, treatment, refine and disposal of MW; 'MW management' means the transportation, storage, record keeping, review, observation and supervision of MW[31]. Schedule 1 mentions 11 types of MW and different modes of treatment, refining, destruction, disposal mechanisms.

The divisional 'Authority' is to: issue, renew/cancel licences for MW management and processing; supervise the activities of and give directions to the licencee/occupier; collect and publicize information on MW pollution; submit an annual report to the MoEFCC, through DoE, on MW management activities[32]. The decision of the 'Appellate Authority' is final and binding; and a 'National Advisory Committee' advises the government to frame guidelines on MW management and processing[33].

The MW occupier must take approval from the appropriate Authority to: opt disposal method for pit method disposal, use the incinerator, having proper fume emission facilities; shred or puncture saline/urine/blood bags, pipes and other plastic products to stop their re-use. Rule 5 compels taking licence for i. segregation, packaging, storage, destruction and incineration, ii. collection and transportation, and iii. treatment, refining and disposal, unless done by the local government authorities (LGA); and a 'provisional licence' to assess one's competency. Rule 6 obliges MW occupier to take various steps to: not to cause any adverse impact on human health and environment; destroy and refine MW in non-infectious way, following the 'ideal standard', mentioned in Schedule 6; train his personnel to ensure their safety; notify steps for accident prevention and submit an annual report of the amount and types of MW to the Authority; keep records for at least three years; be liable, legally and financially, for ensuring environmentally sound management and processing of MW.

Rule 7 prohibits keeping MW beyond 48 hours or mixing with other wastes. It requires to: keep various MW at their production sites in 6 different colour coded covered plastic containers, projecting 10 different WHO approved labels of symbols, prior to their storage, transportation, treatment and destruction, following Schedule 3 and 4; transport MW in designated vehicles for treatment, in the covered and labelled containers showing additional information, as per

[31] Medical Waste (Management and Processing) Rules, rr 2 (e), (f), (g).

[32] ibid, r 3-4.

[33] ibid, rr 15-16.

Schedule 5; store in an isolated, earmarked and protected place/rooms, having sufficient air ventilation and water supply facilities, ensuring locking of the unused rooms and allowing restricted access; transport the refined/treated MW in due time and manner, as directed by the Authority; notify LGA about the safe disposal of treated or untreated hazardous MW, in the designated dumping place, before MW destruction and incineration.

Regarding MW treatment, refining and disposal, Rule 9 and 10 direct the occupier to: undertake activities within the time and the standard, mentioned in Schedule 6, using appropriate technology, personal protective equipment (PPE) and paying service charge; depict in easy Bangla, necessary information and instructions on MW containers; dispose of hazardous MW in non-infectious manner; assist the DoE personnel to perform his functions. The punishment, under Rule 11, is imprisonment for maximum two years or fine of maximum Taka 10,000 or with both. Rule 12 compels submitting a written report of DoE to file a case, which contradicts Section 15A and 17 of BECA. Hence its amendment, permitting direct access to court, is required to erase such contradiction in laws.

In practice, MW is often found dumped into common waste bins or in household waste disposal grounds and it poses a grave threat to human health of poor waste collectors while collecting for sale or re-use and spread infections into the environment[34]. Managing massive volume of plastic MW is a threat to human health and natural ecosystem in the Covid-19 pandemic[35]; currently the MW generates 6.8 times higher than pre-pandemic period[36]. The strict implementation and monitoring of this Rules is imperative but also challenging. The divisional Authorities are not functional; the competency of the licencee and compliance of all safety mechanisms; designating dumping sites for MW are yet to be ensured through proper monitoring. However, no law utters any consequence of non-monitoring, rather immunity is given in disguise of 'good faith'.

4.2.5 Hazardous and Ship Breaking Wastes Management Rules 2011

Bangladesh has stepped into large scale industrialization and is generating harmful industrial wastes. This Rules regulates different types of hazardous substance

[34] Bahreen Khan, 'Managing the Medical Wastes in Bangladesh: Review of Current Legal Mechanisms', in Mizanur Rahman (ed.), '*Human Rights and Environment*' (ELCOP, December 2011) 97, 99.

[35] Muhmmad Mainuddin Patwary and ATM Zakir Hossain, *Covid-19 Impacts on Waste in Bangladesh* (Jagrata Jubo Sangha 2021) <https://ipen.org/sites/default/files/documents/final_jjs_covid_waste_report_29_june_2021.pdf>, accessed 26 January 2022.

[36] Uttama Barua and Dipita Hossain, 'A review of the medical waste management system at Covid-19 situation in Bangladesh', Journal of Material Cycles and Waste Management, 23, 2087-2100 (2021), <https://doi.org/10.1007/s10163-021-01291-8>, accessed 30 January 2022.

(HS), hazardous wastes (HW) and ship breaking (SB) wastes. It defines HW as a waste which, due to its natural, physical, chemical, reactive, toxic, flammable, explosive or corrosive characteristics, either individually or through contact with other HS or HW, may cause damage to human health or environment and include (i) wastes listed in Schedule 2 column 3; (ii) wastes, the ingredients of which are composed of one or more of the substances listed in Schedule 3, having a concentration level of either equal or above of the standard, mentioned in Schedule 3; (iii) wastes mentioned in List A or List B of Schedule 4 Part 1, exhibiting the HS characteristics, mentioned in Schedule 4 Part 2.

The National Technical Committee (NTC) is created to recommend on the overall management of HW including to: approve the import/export, transportation across the country; set the procedure to identify the HW characteristics; publish, disseminate and implement the guidelines to reduce HW production; identify HW processing, storage and disposal sites; issue public notice and conduct public hearing. A Management Cell is created to: collect and preserve all data and information on HW; prepare and submit an annual report to the NTC. This Rules obliges the DoE to[37]: conduct inspections on safety assessment and on accident; submit an annual report on major accidents to the MoEFCC; review, verify the safety information report; issue an ECl, following ECR 1997.

The HW operator is required[38] to: preserve HW properly, train personnel and aware local people on accident prevention; keep records of use, manufacture, sale, supply and disposal; ensure availability of safety equipment; submit to the DoE: a preliminary safety report, an annual safety assessment report, a contingency plan, an annual report on HW production and disposal, notify any accident within 48 hours of occurrence and prepare a safety data sheet for DoE review. Rule 20 prohibits the producer/operator to: sell, transfer any non-ferrous metal waste, use oil or waste oil (mentioned in Schedule 13) to anyone who has no ECl for 120 days; gift, handover, transfer, sell HW oil (exceeding the limit mentioned in Schedule 14) without incinerating in the HW incinerator; possess HW oil without an ECl; store HW for more than 90 days of its production. The operator/producer, the recycler, re-refiner and incinerator operator of non-ferrous metal HW, waste oil (mentioned in Schedule 14) are compelled to submit annual reports and to follow environmentally sound technology or process while doing activities.

Regarding the import and export, Rule 14 mandates to: take ECl from the DoE, before the opening of Letter of Credit and the shipment of HS or DoE may

[37] Hazardous and Ship Breaking Management Rules 2011 [BD], r. 7, 10, 12, 15.

[38] ibid, rr 5-12, schdl. 5-9.

relax its conditions, if export requires for lack of necessary processing/refining facilities; keep the records, by the importer, of imported HS (following Schedule 9) for DoE review during collecting sample from the store, while transporting or in use. Rule 15 prohibits issuing ECl for import of: any HW into Bangladesh; any article consisting of HW ingredients (mentioned in Schedule10); any ship for breaking, enlisted as hazardous by the Green Peace; any ocean going ship, oil taker, fishing trawler for breaking, having no approval of its HS pre-cleaning completion. This Rules prohibits granting any import/export licence/permit of a HS, before getting the ECl; requires following the Basel Convention; compels the exporter to take return and where return is not possible, to destroy it at the cost of the importer/exporter, following all safety measures, if illegal movement of HS/HW is proved[39].

For managing the SB wastes, Rule 19 directs to: follow the ECR 1997, the DoE guidelines of SB; take ECl for the ship and the SB yard; submit a report, upon conducting a pre-assessment of ship containing HS amount and nature, by an impartial expert team; keep necessary records of safety information of HS (following Schedule 11), HW buying/selling and disposal; take precautionary measures for HW handling; provide necessary training and PPE to the personnel; submit a contingency plan to the DoE (following Schedule 12); aware local people about accident hazards; keep the records for at least three years from its final disposal date.

The Rules directs following the Bangladesh Labour Act 2006 to ensure the occupational health, safety, welfare and compensation for accident of the workers and the BECA for compensating environmental harms. The SB waste disposal directions of this Rules are seldom practiced and violations are frequently reported[40]. This Rules covers some important aspects of HW management under the Basel Convention but is silent about the Stockholm Convention on persistent organic pollutants (POPs). So, it requires an amendment to include provisions of POPs Convention, especially the timelines to ban and phase-out HW. Its complete application depends on the regular monitoring and taking stringent actions against the violators. This Rules should impose a strict liability upon the HW operators and SB yard owners for causing massive harm to the ecosystem. Besides, The Bangladesh Ship Recycling Act 2018 and the Ship Breaking and Recycling Rules 2011 also regulate SB activities but these are not officially recognized as 'environmental laws'.

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[39] ibid, rr 16-18.

[40] Human Rights at Sea. 'Bangladesh Supreme Court Denounces Illegalities and Lack of Transparency in Shipbreaking Sector' (*Press Release*, 19 November 2019) <https://www.humanrightsatsea.org/bangladesh-supreme-court-denounces-illegalities-and-lack-transparency-shipbreaking-sector> accessed 08 February 2022.

4.2.6 Bangladesh Biosafety Rules 2012

This Rules urges taking safety measures to undertake activities associated with bio technology and genetic engineering. Four different committee run under this Rules namely, National Biosafety Committee, Biosafety Core Committee, Institutional Biosafety Committee, Field-level Biosafety Committee. Rule 3 allows the import, export, production, sale, purchase and commercial use and marketing of products made from genetically modified organisms (GMO), taking approvals from the MoEFCC, Ministry of Commerce, Ministry of Agriculture or other concerned authorities, complying the National Export and Import Policy, the Biosafety Guidelines 2007 and any other rules. Any research or project on GMO must follow the Biosafety Guidelines, unless it contradicts with any law; the package containing GM products must display the details and labelling of the GMO from which it derives[41]. However, GMO labelling is mostly not found in Bangladesh.

It requires to: seek assistance by the committee or the DoE from relevant organizations, for any accident or occurrence caused due to the use of GMO or GM products which may lead to harm to environment, human health or biodiversity; notify steps taken for mitigation by the concerned person, organization; impose fine for negligence[42]. Rule 8 directs the authorized person, organization to: prepare a contingency plan to deal any emergency situation, accident inside and outside of the GMO field trial area, consulting and engaging local people; notify and furnish relevant information to the committee to review the impacts and implementation of activities. As per Rule 9, the GMO or GMO products manufacturer, exporter, importer, dealer, supplier and retailer will be held liable for polluting the environment or damaging the ecosystem unless his direct connection disproves. Punishments under this Rules is imprisonment for maximum two years or maximum fine of Taka 10,000 or both; it allows administrative appeal and institutional revision; and it directs the DoE or the committee to submit a biannual report to the government[43].

Due to technological advancement, GM products are being produced but requires enough caution. The indiscriminate use of GMO, without maintaining all safety aspects, may cause serious and long-lasting impact on environment, ecosystem, biodiversity and human health. The debate encircling GMO safety is often highlighted[44]; the use of glyphosate rich Roundup in agriculture is already

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41 Bangladesh Biosafety Rules, rr 4-5.

42 ibid, rr 6-7.

43 ibid, rr 10-13.

44 Marina Qutab, 'How do GMOs impact people and the environment-and do they produce more food?' <https://www.onegreenplanet.org/environment/how-do-gmos-impact-people-and-the-

challenged through a PIL[45]. Therefore, the rigorous application of this Rules is required, however, ensuring its intensive monitoring remains as a big challenge.

4.2.7 Ecologically Critical Area (ECA) Management Rules 2016

This Rules creates six different committee (local to national) to ensure ecosystem restoration of ECA[46]. Before recommending to declare an ECA, Rule 4 requires the National Committee (NC) to consider various factors including, the current situation and reasons of degradation of nature, biodiversity, forest, wetland, wildlife habitats, mangrove, protected areas and coasts of that specific area; potential threats to and remedial approach towards native and migratory species; other existing conditions, if declared for that area by other law; livelihood, religious and social culture of local people; any establishment, monument or site of cultural, historical or archaeological importance, etc. The NC may: recommend an alternative livelihood plan for the ECA dependant people; supervise the implementation of ECA development plan.

It requires the DoE[47] to: evaluate village conservation group (VCG)'s achievement in taking, implementing schemes/projects and maintaining infrastructures or facilities; prepare an annual list of VCG (contributed significantly) to give incentives; fix the prohibited activities inside the ECA, considering and assessing the factors or the damage caused to environment and ecosystem; approve changing the nature of ECA, if necessitates; adopt a guideline, consulting all relevant ministries, to manage any '*Sairat Mohal*' inside the ECA; develop a site specific Development Plan for the ECA; allow public-private management, assessment, investigation, survey or research by any private individual, paying fees; submit an annual evaluation report and an ecological report in every five years of the ECA. Rule 27 provides punishments of maximum imprisonment of two years or maximum fine of Taka 200,000 or both.

The Government has declared 13 ECAs till date and listed 9 prohibited activities. However, the application of this Rules is not at all satisfactory, for example the Buriganga River is in a moribund situation, the St. Martin Island, country's only coral island is engulfed with severe ecological degradation by indiscriminate tourism activities. Numerous PILs have been filed to protect ECAs[48].

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environment/> accessed 01 February 2022.

[45] Bangladesh Environmental Lawyers Association and Others v. Bangladesh and Others, Writ Petition 14614 of 2019.

[46] Ecologically Critical Area Management Rules 2016, rr 4, 6, 8, 9, 12-13.

[47] ibid, rr 15-22, 25-28.

[48] See, for example, Writ Petitions #10703 0f 2011; #3676 of 2010; #3503 of 2009; #6848 of 2009.

Hence, its strict enforcement and monitoring by the committee and the DoE must be done to notice palpable changes for restoring sound ecosystem.

4.3 Environment Court (EC) Act 2010

This Act is enacted to ensure speedy justice, through establishing three types of environment courts, to enforce the 'environmental law' as defined and recognized in Section 2(c), namely, this EC Act, BECA, any Rules made under EC Act or BECA, any other law and rules as framed by the government through gazette notification to fulfill the purpose of this Act. So, only the ten laws which are discussed under current broad heading of this research article are recognized as 'environmental laws', providing a very narrow definition, leaving many other pertinent laws to get such official recognition including, the Forest Act 1927, Protection and Conservation of Fish Act 1950, Open Space Act 2000, Bangladesh Wildlife Act 2012, Bangladesh Water Act 2013, National Commission for River Protection Act 2013, Bangladesh Biodiversity Act 2017, Bangladesh Ship Breaking Processing Act 2018. Therefore, it is absolutely crucial to declare a bulk of laws as 'environmental law' officially to come within the ambit of EC Act.

The special magistrate court (SMC) entertains only those offences under an 'environmental law' for which maximum punishment is fine of Taka 5,000,00 or imprisonment of 5 years or both, upon filing a case before it or filing an *ejahar* (First Information Report) to the police station, following the Criminal Procedure Code (CrPC) 1898; besides administering a mobile court by executive magistrate[49]. The EC addresses both the environmental offences and the compensation claim for any environmental damage under an 'environmental law', following CrPC and the Code of Civil Procedure (CPC); it can inspect the site of offence before passing an order[50].

These courts: get 180 days usually for case disposal, which may extend for another 90 to 180 days; may order to spend the fine to incur the costs of the case or to pay compensation to the victim; may punish the offender with maximum imprisonment of 5 years or fine of Taka 500,000, for violating court's direction, counting it as a separate offence; may dispose up cases through compromise, for the first time offence violating Sections 4(2&3) and 5(4) of BECA, upon depositing an amount of minimum Taka 50,000 and submitting a compliance report or giving an undertaking to the DoE of no future committing[51]. The environment appellate

[49] Environment Court Act 2010, s. 5-6, 9, 12(11) .

[50] ibid, ss 4, 7, 14, 17.

[51] ibid, ss 8, 10, 14-15, 18.

court (EAC) deals with appeals and revisions made before it[52] within 30 days of the date of pronouncing the judgment by the SMC or the EC. These courts should have authority to impose any rigorous punishment to the corporate offenders for causing environmental degradation, treating as their strict liability. The EC Act bars direct access to these courts, requires filing cases through the written report of inspectors which clearly contradicts BECA[53].

This Act aims to provide speedy justice, however, allows around 275 days for case disposal. The responsibilities of these courts are additional to their usual responsibilities as a civil or a criminal court, which delay in getting environmental justice. Like the National Green Tribunals of India, these courts should be entrusted with exclusive responsibilities to ensure speedy remedy. These courts should be authorized following any procedure, besides CPC and CrPC, to step out of 'window-dressing approach' and allowing 'wiggle-room' to ensure prompt and efficacious justice[54]. Moreover, they have little or no expertise in dealing with such technical issues, which a specialized court requires. The law is silent to co-opt technical experts as members or to make a panel of judges, comprising of environmental/technical experts to ensure efficacious remedy.

These courts must be allowed with epistolary jurisdiction, taking *suo moto* cases to actualize environmental justice, besides amending the law to allow direct access to justice; should recognize the peremptory norms of international law, accommodating environmental principles[55]. Considering its complexity to apply, the DoE mostly imposes fines through mobile court instead of filing cases in these courts due to the bureaucratic procedural formalities; all have resulted to paucity of cases comparing to the occurrences of environmental offences[56]. Therefore, these anomalies and gaps in the EC Act need an urgent amendment to make these courts functional.

4.4 Brick Manufacturing and Brick Kilns Establishment (Control) Act (BMBKEA) 2013

With the rapid urbanization and industrialization in Bangladesh, the brick demand

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[52] ibid, ss 19-20.

[53] ibid, rr 6(3), 7(4), 12.

[54] Md. Ahsan Habib, 'Reflections on environmental adjudication regime of Bangladesh', BDLD 12 June 2015, <https://bdlawdigest.org/bangladesh-environment-court-act-2010.html> accessed on 07 February 2022.

[55] ibid.

[56] Masrur Salekin, 'Restricted access to environmental justice' *The Business Standard* (Supplement, Online 27 January 2022) <https://www.tbsnews.net/supplement/restricted-access-environmental-justice-363046> accessed 03 February 2022.

booms sharp. BMBKEA is enacted to stop the traditional brick burning methods as they pollute environment and damage ecosystem and biodiversity. It compels the brick kilns (BK) to obtain the ECl from the DoE and a licence (for three years) from the District Commissioner, upon recommended by the investigation committee[57]; licence is not required to manufacture blocks (not using sand, cement, fly ash or soil and not through burning). It directs[58] to: manufacture bricks in the BK as designated by this law, having modern technology to reduce air pollution and are energy efficient; fix the numbers of BK of a particular area; manufacture hollow bricks and blocks of certain amount, as an alternative of bricks; use imported coals of certain standard (not exceeding the amount of ash, mercury, Sulphur, etc.); use soils of any derelict pond, lake and abandoned land, taking due approval; release the liquid and gaseous wastes from BK, following the ECR 1997; suspend/cancel the licence, if violates its conditions or commits an offence under BMBKEA or founds harmful to environment or human health; inspect any BK without notice to assess, examine, verify records, or to collect samples.

BMBKEA prohibits[59] to: use the soil of agricultural land or hill as raw material of brick; use of firewood in BK; establish BK inside and around the prohibited areas (i.e. any residential, reserved, commercial, city corporation, municipal, *upazilla sadars* areas*,* agricultural land, ECA, government or private owned forests, sanctuaries, wetlands and degraded air shed areas), any place not designated for BK by the hill district authority, any special establishment or structure, railroad, educational or research institution, hospital or clinic, at a distance ranging from half to two kilometer of that area/structure, after the enforcement of BMBKEA; issue ECl and licences to establish BK or to continue operation, inside the prohibited areas; export bricks, violating the Export Policy Order of Bangladesh.

The Act provides no minimum punishment; the maximum punishment is imprisonment for 1 to 5 years or fine of Taka 100,000 to 2,000,000 or with both[60]. The offences are non-cognizable and bailable, in nature; can be dealt by the mobile court and by the EC, following the CrPC and the Information and Communication Technology Act, 2006, if necessary[61]. The law was amended last in 2019 for its better application, however, the situation has not changed significantly. The prime cause of air pollution of Bangladesh results from illegal

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[57] Brick Manufacturing and Brick Kiln Establishment (Control) Act 2013, ss 4, 9.

[58] ibid, ss 4A, 5(2) (3), 5A, 7, 7A, 11, 13.

[59] ibid, ss 5(1), 6, 8, 8A.

[60] ibid, ss 14-18.

[61] ibid, ss 19, 21, 23.

BK operations; even the direction of the high court to shut down such BK is not following[62]. The local influential people are mainly the owners of traditional BK, operating those disregarding legal provisions. Sometimes these vested interest groups 'manage', 'manipulate' or 'intimidate' the inspectors, who usually monitor the implementation of BMBKEA. Moreover, allocating suitable places for BK, as per this law, is tough because of the close proximity of each prohibited area. The law misses to describe any procedure to take approval from the appropriate authority; define the term appropriate authority; and to mention the specific standard of coal. BMBKEA should allow giving incentives to BK owners who maintain the international standard and to persons who help identify the offenders. A rules, under BMBKEA, with necessary details is needed to ensure its proper application and to curb air pollution through the traditional BK.

5. Efficacy of 'Core Environmental Laws' of Bangladesh

In the previous heading, the major gaps in the 'core environmental laws' have been depicted while explicating the vital provisions of these laws. In this head, a short view as to the efficacy of these 'core environmental laws' is discussed.

To assess the efficacy of a law, it is required to check the quality of the law, its comprehensiveness and the ability to achieve its intended benefits. For that, some factors need to be perused, including the text's structure and content, its timely implement ability using the legal and administrative system, at what rate its purpose is being served against the violators and most importantly, whether it brings intended change in the society or delivers real-life results[63].

All of these 'core environmental laws' though have specific objectives to fulfill, however, their efficacy is somewhat debatable. To keep in mind that these laws have been enacted to accommodate the basic provisions of MEAs of which Bangladesh is a party. But few significant requirements under different MEAs have yet to reflect; for example, the HW phase out mechanism under the Stockholm Convention 2001 is missing in the HW Rules 2011, no Rules on EIA is framed yet, and the established environmental general principles are not incorporated in their texts.

It is not meant that these laws are completely ineffective, rather found less

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[62] 'Operation of illegal brick kilns must stop' *New Age* (Opinion, Online, 04 February 2022) <https://www.newagebd.net/article/161772/operation-of-illegal-brick-kilns-must-stop> accessed 5 February 2022.

[63] Maria Mousmouti, 'The 'effectiveness' test as a tool for law reform',(2014) (Special Issue) 2(1) *IALS Student Law Review* 4-8 <https://sas-space.sas.ac.uk/5752/1/2116-3099-1-SM.pdf> accessed 17 May 2022.

efficacious due to their textual gaps and/or for want of necessary capacity of the implementing institutions to initiate and monitor actions, consistently. It is worth mentioning that Article 18A of the Constitution of the Peoples republic of Bangladesh 1972 obliges the State to conserve and develop environment, to ensure the protection and safety of natural resources, biodiversity, wetland, forest and wildlife for the benefit of present and future citizens. Moreover, the 'right to life' as enshrined in Article 31 and 32 of the Bangladesh Constitution through the judicial interpretation now recognized as 'right to healthy environment'[64]. Unfortunately, such recognition has not been expressly reflected in any of these laws, which otherwise proves less emphasize on securing people's right, rather leaves a scope for the implementing agencies to use it as a plea.

The textual gaps of these laws, in other way, corroborate their less effectiveness, as they hinder the smooth implementation process and achieving expected results. Sometimes, using such gaps, the vested interest groups do and continue malpractice. The punishments under these laws are improper for the corporate and repetitive violators; some laws have no minimum punishments, for example, the NP Rules, leading to the recurrence of offences. The textual contradictions in these laws are making them less useful; for example, BECA allows direct access to court, whereas none of its Rules and the EC Act endorse it. Moreover, the EC Act provides a narrow definition of 'environmental law'; courts have no exclusive jurisdiction to entertain environmental cases, resulting to pile up of cases and delaying the justice; its intention to provide speedy justice is compromised as it permits around 275 days for case disposal, forcing the DoE towards mobile courts. The implementation of BMBKEA is frustrating; the offences are non-cognizable and bailable, resulting repetitive violation and placing Bangladesh as one of the top air polluter countries in the world.

Besides, the institutional gaps, in terms of resource allocation, weaker enforcement and monitoring mechanisms, backed by the relaxed good governance, in many cases, jeopardize accomplishing the goals of these laws. With the continued violation of laws, without quick and appropriate intervention or with biased application, will lead to deteriorate the state of environmental components, deprive people from 'right to environment' and sustainable living standards. Consequently, such deprivation may rise social unrest.

Therefore, it can be said that these 'core environmental laws' need intensive perusal to enhance their efficacy along with building necessary capacity of the implementing institutions. The legal system in the lower judiciary of Bangladesh

[64] *Dr. Mohiuddin Farooque v. Bangladesh and Others,* 48 DLR (HCD), 438.

is complex and time consuming, which sometimes discourages victims to resort it. Alternately, writ petition in the form of public interest litigation (PIL) is being filed in the High Court Division, as a better option to get quick remedy than filing cases before the lower courts[65]. However, without their timely and complete enforcement, the benefits of the judgments, would remain far to accomplish, rather illusive.

6. Findings and Recommendations

In the previous headings, the salient provisions of 10 officially recognized 'core environmental laws', are described, their implementation gaps are analyzed and their efficacy is assessed. Based on that, the major study findings along with recommendations are mentioned as follows:

a. The state of environment of Bangladesh is diminishing at an alarming rate as evidenced from the latest EPI 2021. Bangladesh has topped the 'polluted country list' for the last few years. Bangladesh has few inbuilt limitations including, little land space, huge human population and extreme dependence on natural resources. In such backdrop, the impact of global CC and the aftershock of Covid-19 may further aggravate country's environmental situation and delay in achieving the SDG targets. So, an effective global/regional cooperation can help reduce and eliminate the external factors, impacting the internal ones adversely.

b. The environmental issues are manifold, posing different challenges for all sector specific developments in Bangladesh. The most common and persistent environmental issues include the pollution of air, water and soil; encroachment of public properties; ecosystem degradation; resource depletion; improper waste management, biodiversity loss, etc. To graduate as an upper middle income country, Bangladesh has taken numerous developmental projects, mostly bypassing the environmental considerations. Hence, prioritizing and integrating 'environment conservation' in developmental agendas are vital. The current 'stop-gap approach' in environmental management needs replacement by concrete, comprehensive sustainable governance mechanism to realize 'environmental democracy'.

c. Bangladesh is committed to reflect the MEAs obligations into its national laws, necessitating to identify MEAs which are yet to be accommodated in the domestic laws. Around 200 national legal instruments cover, either explicitly or implicitly, the environmental management and governance. Of these, only 10 core legal instruments are so far officially recognized as 'environmental laws' through

[65] Abdullah Al Faruque, *Environmental Law: Global and Bangladesh Context* (1st edn, New Warsi Book Corporation 2017) 223.

gazette notification. Thus, it is imperative to declare officially more pertinent national laws as 'environmental laws' and to enact laws to control high-impacting issues, like air pollution and plastic pollution, disposal of e-waste and several chemical wastes.

d. The MoEFCC and the DoE are primarily responsible to protect the environment of Bangladesh. Despite its enormous statutory power, the DoE has significant lacking in logistics, manpower, upgraded lab facilities, own fund source. It depends mostly on foreign funding, focuses mainly on 'project oriented approach' than 'program oriented approach' and depends heavily on mobile courts to enforce 'environmental laws'. Institutional malpractice is a great concern. Several governmental institutions work for environmental management; it is tough to ensure smooth coordination among them and to establish institutional good governance. Therefore, a systematic plan of action with proper chain of command is required to ensure better institutional performance and 'one-stop environmental service' should be considered.

e. Neither the Constitution of Bangladesh nor the domestic laws has explicitly recognized the notion 'right to environment'. 'Environment conservation' is recognized in the Constitution as a fundamental principle of state policy and 'right to healthy environment' has been recognized by the judicial interpretation of 'right to life'. The superior courts give redresses to environmental anomalies, through the PILs as the lower court system is time consuming and complex. So, 'right to healthy environment' should be recognized directly both in the Constitution as a fundamental right and also in the 'core environmental laws'. The environmental general principles and the newly globally defined term 'ecocide' should also be reflected in these laws to enhance their efficacy.

f. BECA is the umbrella law, empowering the DoE for environment conservation. This law needs proper amendment to cater the needs of the DoE. More preventive provisions should be inserted; some provisions need clarification; more rules are required to adopt for BECA's proper application. The punishments mentioned in BECA should be increased and be different for punishing the natural offender and the body corporate.

g. Altogether seven Rules have been made till date, under BECA, covering different aspects of 'environment conservation'. The ECR sets the environmental standards of air, water and odor; fixes the emission limits of various types of solid, liquid and gaseous wastes; provides details of ECl taking procedure for four different colour groups activities. But it needs an amendment to add more activities under those four groups and to shift some activities from Orange-B to Red. The ODS Rules provides different timelines to manufacture, use and import/

export of ODS; has contradictory punishment provisions with BECA, requiring an amendment for clarification. The MW Rules obliges to identify, segregate various types of MW and their disposal. It bars on direct access to justice, contradicting the BECA provision which must be amended. The HW Rules describes the liabilities of the operator/user of different HW, focusing the Basel Convention; requirements under the Stockholm Convention need to be covered in this Rules. The Biosafety Rules empowers different committee to oversee the research on GM products; compels obtaining import approval and putting GMO labels on packages.

However, common people are ignorant about GMO, requiring this Rules' wide awareness and strict monitoring. The ECA Rules directs various committee to prepare and implement ECA restoration plan and site-specific development plan; but its relaxed implementation evidences from the poor state of the declared ECAs, the Buriganga and Sitalakkhya Rivers, for example. So, its stringent compliance is the only remedy for which ensuring institutional good governance is crucial. The NP Rules provides lists of prohibited activities that cause sounds inside and around various zones; specifies the permitted sound limits and timing. Its enforcement is mostly ignored due to lack of monitoring, plus it provides petty punishment with no minimum limit; hence, it needs an amendment.

h. The EC Act narrowly defines the term 'environmental law', excluding bulk of significant laws from its ambit; the courts are entrusted with responsibilities as additional to their regular tasks, in contrast with providing speedy justice as its objective. The Act negates any direct access to courts, contradicting with BECA provision. Hence, necessary reform is vital to make this law functional.

i. The provisions of the BMBKEA regarding the placement of BK are practically tough to implement, as the country is densely populated with small land size. The local influential people and political leaders apply undue influence to issue, suspend and cancel licences, in most cases. Therefore, this law needs an amendment to provide incentives to people for identifying crimes and to ensure strict enforcement.

j. Most of these 'core environmental laws' have no minimum punishments and nominal fine is only given rather imposing imprisonment; the offences generally bailable; the terms 'actions taken in good faith' in the laws otherwise incite doing or allowing malpractice. Relax monitoring accelerates committing environmental harms and hinders realizing 'right to environment'. Consequences of the duty bearer's omission or negligence is missing in these laws. Hence, all the gaps in these laws, as discussed in previous chapters, must be addressed to ensure sound environmental management and to make laws more effective.

7. Conclusion

The natural environment of Bangladesh is in an abysmal condition as a consequence of multiple factors including, resource depletion, encroachment of public property, ecosystem onslaught, plethora of pollution, unregulated developmental activities and the impact of global CC. Bangladesh has enacted many laws and created plenty governmental organizations to establish sound environmental governance. However, there are substantial gaps in these laws, hindering their effective implementation process. Being the prime duty bearers, the MoEFCC and the DoE are loaded with challenges to maintain a minimum level of environmental standards. Proper inter-governmental coordination, public participation, integrating environmental concerns into respective policies and action agendas are necessary to ensure 'environmental democracy'. As 'environment conservation' is a cross-sectoral matter, all pertinent ministries and agencies necessitate capacity development to apply their far sight in accomplishing the SDGs, to ensure 'right to environment' and to practice environmental good governance.

Therefore, Bangladesh needs to enact and harmonize necessary national policy instruments at par with the MEAs, considering the 'anthropocentric' and 'eco-centric' approaches. A thorough review of the existing national legal and administrative frameworks is crucial to bridge the implementation gaps in the environmental regulatory regime. The 'core environmental laws', as recognized through gazette notifications, need revision to equip the concerned institutions effectively in performing their statutory functions. Other significant laws which are closely associated with various environmental aspects, especially with natural resources exploitation and ecosystem service, should be officially recognized as 'environmental laws'. The development of comprehensive legal tools, their timely and neutral implementation will help establish environmental rights and promote sustainable living conditions in Bangladesh.

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The Paris Agreement on Climate Change: Efficiency of Mitigation Obligation

Md. Jahid-Al-Mamun*

Abstract: *The 'Paris Climate Treaty' is the first MEA (Multilateral Environmental Agreement) which imposes mitigation obligations not only on developed countries but also on developing country Parties. The Agreement actually extended the mitigation obligations enshrined under the UNFCCC and the Kyoto Protocol. It has created a universal binding obligation to take domestic actions to achieve the target of reducing emissions of GHG set out by the domestic ("bottom-up") process. PA has recognized the best available science to carry on mitigation actions. It requires the Parties to undertake a continuous planning process to mitigate climate change impacts set out in NDC every five years. This Agreement requires a more ambitious NDC containing progression of mitigation commitment from the previous NDC. Though a 'mandatory enforcement mechanism' or 'penalty for non-compliance with mitigation obligations is absent in the Agreement, the mandatory procedural obligation makes us optimistic that the target will be achieved. The information relating to mitigation actions is subject to technical expert review. For assessing the overall and collective progress towards achieving the PA's long-term mitigation goals, the Agreement requires a "global stocktake" in 2023 and after that time in every five years. There is a "transparent, non-adversarial and non-punitive" expert-based measure to facilitate compliance with provisions containing mitigation obligations. Many Parties are committed to shifting to renewable energy and imposing a carbon tax in their NDCs to achieve their desired mitigation pledges. Many countries have started to invest in cheaper zero-carbon goods and services. When such cheaper zero-carbon goods and services capture the market, then the mitigation target will be fulfilled easily. PA is a universal consensual document. Though it is confronted with many challenges, its strong foundation and efficient mitigation obligation make us optimistic that the overall mitigation targets will be achieved and that mother earth will be safe from being "hell". This paper shall discuss the mitigation goal and nature of the mitigation obligation under the PA and finally analyze the efficiency of the mitigation strategy.*

Keywords: Climate Change, Paris Agreement, Mitigation Obligation, Mitigation Goal.

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* Lecturer Land Management & Law, Jagannath University.

1. Introduction

A big number of 195 countries had negotiated the historic Paris Agreement (hereinafter PA) with a view to address the serious problem caused by climate change which has been termed as a great legal success. But some scholars termed it as a political or executive agreement that can visibly do nothing to mitigate climate change. As they pointed out, the PA, unlike the previously effective Kyoto Protocol, has not imposed mandatory mitigation obligation upon the member countries. Fewer of them are hopeful. They think that countries shall fulfill their self-determined contributions to mitigate climate change more than mandatory obligations. They think uniform participation in the global fight against the problem shall successfully reach the targeted goal. The other group of scholars are not satisfied with their expectation. They are concerned that if countries are allowed to set their own contribution, then they set lower goals than their potential.

Against the backdrop, this paper shall examine the strength of the opinion of the two groups. This paper shall discuss the mitigation goal and nature of the mitigation obligation under the PA and finally analyze the efficiency of the mitigation strategy.

1.1 Climate Change as the Common Concern of Mankind

Climate Change and its adverse consequences on the earth have been acknowledged as the common concern of humankind.[1] The phrase 'common concern of humankind' denotes a framework to address global problems. Those problems which transcend the boundary of one single country and for which a collective response is required are treated as common concerns of humankind.[2] Climate Change is such a concern of mankind as it does not respect national boundaries.

It has been claimed by the archaeologists and scientists that adverse impact of climate change was one of the major causes for the destruction of the major civilizations like *Mohenjo-daro & Harappan Civilization.*[3] Yuval Noah Harari in his book *Sapiens: A Brief History of Humankind*[4] has rightly mentioned the horrific effect of climate change and predicted that climate change shall be one

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[1] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 31 ILM 849 (1992) (UNFCCC), preamble; Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), preamble.

[2] Dinah Shelton, 'Common Concern of Humanity' (2009) 39(2) *Environmental Law and Policy* 83.

[3] William J. Burroughs, *Climate Change in Prehistory The End of Reign of Chaos* (Cambridge University Press, 2005) 254-255.

[4] Yuval N. Harari, *Sapiens: A Brief History of Humankind* (Harper 2015).

of the reasons of extinction of the earth. Human actions may make the world as 'heaven' or 'hell'. Climate Change has been considered in today's world as not only the 'common concern for mankind as a whole', but also concern for all the living and non-living beings.

The fatal consequences of adverse effects of climate change have started to become more apparent only after the mid-20th century, and which raised widespread global voice and awareness on climate issues. New reports from different parts of the world have continuously alarmed us about the adverse impact of climate change. It's the proper time to mitigate and soften the adverse effect of climate change. The *IPCC Report 2018* after discussing the horrific effects of climate change, has emphasized that the acceleration of 'far reaching, multilevel and cross sectoral' actions can mitigate climate related risks.[5] The climate regime is continuously trying to invent new ways which will effectively mitigate climate change. For these reasons, climate change may now be considered with the final examination for mankind as a whole, which is going on. Actually, the existence of this civilization is fully dependent on the outcome of the examination. There is no preparatory time for the exam. The Paris Climate Treaty is like the question paper. The existence of the civilization is fully dependent upon how we follow the provisions of the PA.

1.2 General Mitigation Goal under the PA

Article 2.1.b of PA sets out two goals i.e. 'holding the increase in global average temperature *well below 2°C* above pre industrial levels' (i), and 'pursuing *efforts to* limit the temperature increase to below 1.5°C'[6]. So, it is clear that the PA has aimed at keeping the global temperature below 2°C, though it will try to keep the temperature below 1.5°C.

The objects of setting 2°C-1.5°C mitigation goal are twofold; setting 2°C to make the PA as viable, rather than mere aspirational agreement as it was practically difficult for many countries to achieve (i); and setting 1.5°C efforts with a view to send a message to the countries with capacity to take more ambitious actions (ii).[7]

Article 4 of the Agreement has contained the provisions of how to reach the 'long-term temperature goal' as set out in Article 2. The goal is to be achieved

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[5] Valérie Masson-Delmotte and others (eds), *Global Warming of 1.5°* (IPCC 2018) 7 <https://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf> accessed 2 November 2020.

[6] ibid.

[7] Jorge E Viñuales, 'The Paris Climate Agreement: An Initial Examination' (2015) 6 *C-EENRG Working Papers* 2.

through *'global peaking* of GHG emissions as early as possible and speedy reduction thereafter which aims to ensure a balance between the anthropogenic GHG emission by source and their removals by sinks within 2050'.[8] For that purpose, the emission reduction will be in accordance with the 'best available science'.[9] Article 4 has also recognized the 'principle of equity, sustainable development and efforts to eradicate poverty'.[10]

1.3 NDC Approach of Climate Mitigation under the PA

After the journey of PA, INDC may be the most pronouncing phrase in the field of climate change. Sophie Yeo has rightly said that 'the UN is the world of many acronyms, but there is one in particular that is likely to dominate climate policy [for the last eight months:] (is) INDC'.[11] The term 'NDC' stands for 'Nationally Determined Contribution' which is the fundamental element for the implementation of PA. It is the heart of PA and the achievement of its long term mitigation target. It embodied the member's will to reduce national emissions and take adaptation measures for the impact of climate change.[12] It is the national climate plan highlighting national climate actions which includes climate related goals, policies, measures undertaken by a government in response to climate change 'as a contribution to global climate action'.[13] The mitigation obligation in PA is based on the soft principle of bottom up submission of NDC by the parties.[14]

The PA has imposed an obligation on all States to submit NDC as it is a common responsibility.[15] It does not exclude developing countries like Kyoto Protocol.[16] But the PA has recognized the developing parties' necessity of support for the implementation.[17] Like Montreal Protocol[18], PA has embodied

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[8] Paris Agreement (n 1) art 4.1.

[9] ibid.

[10] ibid.

[11] Sophie Yeo, 'Explainer: What are 'Intended Nationally Determined Contributions'?' (*CarbonBrief,* 31 March 2015) <https://www.carbonbrief.org/explainer-what-are-intended-nationally-determined-contributions> accessed 2 November 2020.

[12] UNCCCC, 'Nationally Determined Contributions (NDCs)' <https://unfccc.int/process/the-paris-agreement/nationally-determined-contributions/ndc-registry> accessed 2 November 2020.

[13] UNFCCC, 'NDC Spotlight' <https://unfccc.int/process/the-paris-agreement/nationally-determined-contributions/ndc-spotlight> accessed 2 November 2020.

[14] Paris Agreement (n 1) art 4.2.

[15] ibid, art 3.

[16] According to their non-inclusion in Annex B of the Kyoto Protocol and Annex I of the UNFCCC.

[17] Paris Agreement (n 1) art 3.

[18] Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September1987,

the 'principle of equity' and the 'common but differentiated responsibilities and respective capabilities' in the implementation of the agreement.[19] The PA has potentially a review mechanism for inclusion of parties in a category who will be entitled to the benefit of CBDR.[20] PA has not determined the developing and developed status of member countries. This agreement has asked its member parties to act according to its capabilities. It has cast more discretion to the parties to take mitigation actions in accordance with its capabilities. This new system will be good when the parties mentioned as 'developing countries' takes more burden. But this system has a great risk to be exploited. The Parties may rank themselves down to avoid extreme burden.[21]

The provision of 'self-determination' of mitigation goals has great value in the climate change regime. It is the concerned country who may know better about their capability. It allows them to set a target to which they are capable of reaching. This system will be more compilable as the parties cannot blow hot and cold from the same mouth. The self-assessed mitigation target will play a role of estoppel. They will be stopped from non-compliance. The PA has introduced a reputational mechanism of 'naming and shaming' in the place of mandatory financial mechanism. No country wants to lose the confidence of other states and to be seen as international laggards.

Article 4.3 of the PA requires that the successive NDC of each party has to represent progression from the current NDC. For example, if Country 'X' has pledged to mitigate 20% emission reductions in its first NDC, it will have to pledge to reduce more than 20% in its successive NDCs. The risk behind this provision is that the Party may avoid the extreme burden by initially lowering its goal. As PA requires that Party's NDC will reflect 'highest possible ambition'[22], it could be and should be subject to scrutiny for avoiding the misuse. The INDC submitted before PA shall be NDC when the member states ratify it and no regression is allowed from the first NDC.[23] The State Parties are bound to provide information

entered into force 1 January 1989) 26 ILM 1550 (hereinafter Montreal Protocol), art 5.

[19] Paris Agreement (n 1) art 2.2.

[20] Rachel Boyte, 'Common but Differentiated Responsibilities: Adjusting the "Developing" / "Developed" Dichotomy in International Environmental Law' (2010) 14 *New Zealand Journal of International Law* 65, 87.

[21] Michaela Danneman, 'The Paris Agreement's Compliance Mechanism' (Graduate Thesis, Stockholm University 2016) 32 <https://su.diva-portal.org/smash/get/diva2:1049560/FULLTEXT01.pdf> accessed 2 November 2020.

[22] Paris Agreement (n 1) art 4.3.

[23] Decision 1/CP.19, Further advancing the Durban Platform, UN Doc FCCC/CP/2013/10/Add.1 (31 January 2014), para 2(b) <https://unfccc.int/sites/default/files/resource/docs/2013/cop19/eng/10a01.pdf> accessed 2 November 2020.

necessary for clarity, transparency and understanding in communicating their NDCs.[24] The APA[25] is duty bound to provide guidance for it to be ensured and the CMA[26] will adopt it.[27]

The parties to PA are duty bound to submit their NDCs in every five years until the mitigation target is achieved. Each and every NDC will not be regressive in mitigation target from its previous one meaning the NDC is to be updated in every five years.[28] PA requires NDCs to be recorded in a public registry with a view to provide information necessary for clarity, transparency and understanding.[29] This mandatory obligation has given an opportunity for other states or civil society to evaluate the implementation of it as it ensures transparency and openness.

It is the obligation of the CMA to take the implementation of the Agreement periodically with a view to assess the collective endeavour to achieve the overall mitigation goal which is called 'global stock take'.[30] The global stock take is to be held every five years and the first global stocktake will be held in 2023.[31]

2. Challenges of Mitigation Obligation under PA

2.1 The Temperature Limit of 2°C-1.5°C is Not Sufficient to Avoid Climate Anomalies

The PA is aimed to reduce the global average temperature 'well below' 2°C and to pursue efforts to limit it to 1.5°C. The word 'well below' is a vague term. There should be a clarification whether it is 1.9°C, or 1.8°C, or 1.7°C, or 1.6°C. Scientists have expressed great concern that even if the goal is achieved, the result will be devastating.[32]

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[24] Paris Agreement (n 1) art 4.8.

[25] Ad-hoc Working Group on the Paris Agreement.

[26] Conference of the Parties serving as the meeting of the Parties on the Paris Agreement.

[27] UNFCCC Decision 1/CP.21, Adoption of the Paris Agreement, UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016), paras 26-28.

[28] Paris Agreement (n 1) arts 4.3, 4.9.

[29] ibid, arts 4.12, 4.8.

[30] ibid, art 14.1.

[31] ibid art 14.2.

[32] 'What would a Global Warming Increase of 1.5C be Like?' *The Guardian* (International Edition, 16 June 2016) <https://www.theguardian.com/environment/2016/jun/16/what-would-a-global-warming-increase-of-15c-be-like> accessed 26 November 2020; Matt McGrath, 'What does 1.5C Mean in a Warming World?' *BBC* (2 October 2018) <https://www.bbc.com/news/science-environment-45678338> accessed 26 November 2020.

Even if the global climate goal '2°C-1.5°C' is met, some types of extreme weather events which are specially related to extreme heat shall be more severe and frequent.[33] *The IPCC Report 2018* has shown that the climate related risks are higher for the global warming of 1.5°C-2°C.[34] This level of temperature will certainly increase floods, droughts and wildfires.[35] It will cause rising of sea levels. Sea levels rising will be responsible for coastal flooding, salinization of water supplies. It will badly affect tourism, fisheries and coastal erosion.[36] It will also impose an adverse impact on food security.[37]

A recent report by ICIMOD[38] has alarmed that even if the global temperature is kept below 1.5°C, the one third glacier of Himalaya shall be melted. It will be two thirds if the temperature will be 2°C. It will cause the increase of glacier mass.[39] It will cause extreme weather which will threaten 200 crore people of Bangladesh, India, Pakistan, Nepal, Bhutan, Tibet and adjacent regions.[40]

2.2 The Mitigation Pledges in the INDCs are Insufficient

There is a gap between the overall goal of PA and the mitigation pledges of INDCs. Even if the mitigation pledges under the INDCs are fulfilled, it will not be able to stop the temperature from increasing between 2.2°C- 3.4°C by 2100 from the pre-industrial levels.[41] The Draft Decision of the PA itself notes that pledges submitted so far by the countries will not be enough to reverse the upward trend of global emissions.[42]

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[33] Christopher B. Field and others (eds), 'Climate Change 2014: Impacts, Adaptation, and Vulnerability' (Cambridge University Press 2014) 12 <https://www.ipcc.ch/site/assets/uploads/2018/03/ar5 _wgII_spm_en-1.pdf> accessed 2 November 2020.

[34] Masson-Delmotte and others (n 5) 7.

[35] OECD, The Implementing The Paris Agreement: Remaining Challenges and The Role of the OECD (Meeting of the OECD Council at Ministerial Level: Paris, 30-31 May 2018) 5 <https://www.oecd.org/mcm-2018/documents/C-MIN-2018-12-EN.pdf> accessed 26 November 2020.

[36] Christopher B. Field and others (eds) (n 33) 1-32.

[37] T Wheeler and Von Braun, 'Climate Change Impacts on Global Food Security' (2013) 341 (6145) *Science* 508-513 <https://pubmed.ncbi.nlm.nih.gov/23908229/> accessed 2 November 2020.

[38] International Center for Integrated Mountain Development.

[39] Philippus Wester and others (eds), *The Hindu Kush Himalaya Assessment: Mountains, Climate Change, Sustainability and People* (Springer 2019) 58.

[40] ibid 60.

[41] See, the Climate Action Tracker Website <http://climateactiontracker.org/global.html> accessed 2 November 2020.

[42] UNFCCC, Aggregate effect of the intended nationally determined contributions: an update, UN Doc FCCC/CP/2016/2 (2 May 2016) <https://unfccc.int/resource/docs/2016/cop22/eng/02.pdf> accessed 26 November 2020.

2.3 Ambiguity of Principle of CBDR Leads Lowering Mitigation Pledge

The mitigation obligation under the PA is based on the principle of common but differentiated responsibilities (CBDR) and respective capabilities. The term 'respective capabilities' is not clear. The Kyoto Protocol (KP) grouped the country parties into Annex I and Annex II according to their capabilities, but the PA has not done so. It leads to ambiguity. As to determine the national circumstances and capabilities, there is a room for different interpretation.[43] Parties are allowed to interpret their capabilities. There is a great risk of lowering mitigation pledges by the parties than their real situation.

2.4 Non-binding Nature of Obligation

The more binding and centralized obligation of an agreement compel states to implement domestic policies to meet international commitment.[44] Greater abidingness implies serious pledges to comply with, greater the cost of non-compliance (loss of reputation in global community, loss of co-operation by other states, sanctions etc.), triggering domestic policies to comply with international obligation, and engaging domestic institutions with international agreement.[45] The greater abidingness ensures greater implementation.

PA does not impose a penalty for non-compliance with the mitigation obligation which is a very daunting issue.[46] Though there is some procedural abidingness, the PA is a non-binding instrument. It makes it meaningless.[47] Some scholars claim that only uniform participation will not really contribute to diminish the antagonistic effect of climate change. The symptom has already been seen. From the claim of the LDC, specially the SIDS LDC, the mitigation obligation should have and must have binding effect. The economy which is built up by the cost of climate must bear the cost of mitigation. They should take the burden for their 'culpability', not according to 'capacity'.

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[43] Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65(2) International and Comparative Law Quarterly 511.

[44] Kal Raustiala, 'Form and substance in international agreements' (2005) 99 AJIL 581, 592.

[45] Ian Brownlie, *Principles of Public International Law* (7th edn OUP 2008) 45-49.

[46] 'Climate Action Tracker Statement: Paris Agreement: Near-Term Actions Do Not Match Long Term Purpose but Stage Is Set to Ramp up Climate Action' Climate Action Tracker (12 December 2015) <http://climateactiontracker.org/assets/publications/briefing-papers/CAT_COP21_ParisAgreement-statement.pdf> accessed 2 November 2020.

[47] Marc Morano,'UN Paris Climate Pact Remains Non-Binding, Meaningless' Climate Depot (1 September 2016) <https://www.climatedepot.com/2016/09/01/un-paris-climate-pact-remains-non-binding-meaningless> accessed 26 November 2020.

The absence of any authoritative compliance mechanism renders the implementation of mitigation obligation under PA confusing. There is no sanction or penalty for non-compliance by any State. Article 15 talks only about facilitation and promotion of implementation.[48]The textual framework of the PA also makes the specific obligation weak, as the soft nature of words used in the treaty such as 'may', 'should' or 'encouraged' do not constitute any positive obligation.[49] Though the Parties are bound to prepare, communicate and update their NDCs, there is no strict mandate to implement the exact contents of the NDCs.[50]According to Article 4.2 of PA, parties are only obliged to 'pursue' measures 'with the aim of achieving the objectives of their NDCs'. This implies that they don't have to fulfill the NDCs but only to make efforts towards achieving their respective targets. The flexibility mechanism of the PA is paving the opportunity for countries to adopt an evasive National Mitigation Plan.[51] Due to such problems, a serious question of efficiency of mitigation obligations, which are non-binding and voluntary in practice, has arisen.

2.5 Undue Privilege to the Emerging Economy

The world has seen drastic changes in the GHG emission scenario within the few decades contrary to 1990s, when the UNFCCC adopted it. The world has witnessed that some developing countries like China, India and Brazil are now being the largest global GHG emitter countries.[52] Some of them have emerged as the world's biggest economy in terms of GDP. They are now more capable to shoulder the burden of highly expensive initiative. In this scenario, it is not fair to impose the whole burden of mobilizing the GCF ($100 billion annually) only on the developed country parties excluding the emerging economic giant.[53]

It is true that the developing countries can claim contribution from the developed countries for their historical culpability for climate change. Since

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[48] Paris Agreement (n 1) art 15.

[49] Lavanya Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations' (2016) 28 *Oxford Journal of Environmental Law* 337–358.

[50] Ralph Bodle, Lena Donat, and Matthias Duwe, *The Paris Agreement: Analysis, Assessment and Outlook* (Berlin, Ecologic Institute 2016) <https://www.ecologic.eu/sites/files/event/2016/ecologic_institute_2016_paris_agreement_assessment.pdf> accessed 2 November 2020.

[51] John Gibbons, 'Ireland's staggering hypocrisy on climate change' *The Guardian* (International Edition Online, 26 Jul 2017) <https://www.theguardian.com/environment/2017/jul/26/irelands-staggering-hypocrisy-on-climate-change> accessed 2 November 2020.

[52] 'Global Greenhouse Gas Emissions Data' (US Environmental Protection Agency Website) <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data> accessed 2 November 2020.

[53] Paris Agreement (n 1) art 9.

the beginning of industrial revolution, the developed countries have emitted huge GHG for development. For this reason, they should shoulder the burden in accordance with the principle of 'common but differentiated responsibilities and respective capabilities'. But the complex global politics should also be considered. It is also true that the developed country may renounce shouldering the burden. The US's withdrawal from PA is a glaring example in this respect. It is also true that the economy of many developed countries has shrunk. For these reasons, the traditional 'Developed vs Developing' burden sharing model should be redefined to make it more balanced and rational.

2.6 Inadequate Financing

Financing is the blood and flesh to carry on a projected activity. It lies in the heart of implementation of mitigation actions. Funds by developed countries enhance the capacity to run mitigation actions. Article 9 of the PA read with the Paris Decision requires the developed members to contribute only $100 billion annually. It is very insufficient to carry on mitigation action worldwide. GCF has been proved to be inadequate to mitigate total global mitigation costs.[54] Even, it is not sufficient to fulfill the needs of India to carry on its mitigation pledges which is estimated to exceed $2.5 trillion.[55] Whole world will get nothing after giving it to India. The small amount which is not even binding has been proved to be very insufficient.

The developed parties make delays to provide the insufficient funds which hamper the overall mitigation goal of PA. The US's withdrawal from PA has worsened the situation. The US has contributed to GCF only 1 billion dollar, the other 2 billion pledged amount is now practically not achievable.[56]

The task of approval of funds to developing countries is more challengeable. The most challenging part is to disburse them. Only 150 million dollar has been released up to December 2017.[57] Corruption by the government of most

[54] 'Paris pledges not enough, additional action needed to slow climate change: top scientists' Climate Policy Observer (30 September 2016) <http://climateobserver.org/the-truth-about-climate-change-report-paris-indcs/> accessed 2 November 2020.

[55] 'Here are India's INDC Objectives and How Much It Will Cost' Indian Express (2 October 2015) <http://indianexpress.com/article/india/india-news-india/here-are-indias-indc-objectives-and-how-much-it-willcost/> accessed 2 November 2020.

[56] Michael Slezak, 'Barack Obama transfers $500m to Green Climate Fund in attempt to protect Paris deal' The Guardian (18 January 2017) <https://www.theguardian.com/us-news/2017/jan/18/barack-obama-transfers-500m-to-green-climate-fund-in-attempt-to-protect-paris-deal> accessed 2 November 2020.

[57] Fatima Arkin, 'The Green Climate Fund commits billions, but falls short on disbursements' *Devex* (9 May 2018) <https://www.devex.com/news/the-green-climate-fund-commits-billions-but-falls-short-ondisbursements-92648> accessed 2 November 2020.

developing and LDCs are one of the biggest challenges ahead in the pathway of using the fund. The engagement of all stakeholders in the process may eradicate this problem and get a good result. On the other hand, GCF did not impose a clear ban on fossil fuel funding being confronted by Japan, China and Saudi Arabia.[58] This failure to ban climate funds on fossil fuel may lead the funding to be used in a wrong gateway. It has caused major hindrance in achieving mitigation goals.

2.7 Lack of Technology and Resource is an Impediment for Developing Countries

It has been evident that most developing country Parties have faced serious technical and resource problems in preparing INDCs. A recent report shows that about 79% of the countries have faced minor or major problems in preparing their INDCs and it caused delays.[59] Among them, 29% countries have delayed in submitting their INDCs.[60] Two third countries have faced serious problems in the assessment of technical options, impacts of climate change and necessary financial support.[61] To enhance the capacity of the developing countries for the implementation of their mitigation pledges, proper technical assistance and financial support should be provided with. There should be specific guidelines how the support shall be provided with. As all Parties are not in a uniform situation, they need 'tailor made assistance' instead of a fixed 'one-size-fits-all' approach.[62]

2.8 Hindrance to Fulfill Commitment in Domestic Level

The implementation of mitigation obligations depends on many things. The government of a country has to balance between its mitigation commitments with the interests of its citizens. Sometimes, the domestic circumstances hinder a government from fulfilling its mitigation pledges. *Lucas Bergkamp*[63] has argued that the fulfillment of individual mitigation pledges depends largely on the

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[58] 'UN green climate fund can be spent on coal-fired power generation' *The Guardian* (29 March 2015) <https://www.theguardian.com/environment/2015/mar/29/un-green-climate-fund-can-bespent-on-coal-fired-power-generation> accessed 2 November 2020.

[59] Marie Kurdziel, Thomas Day, Frauke Roeser, Heiner von Lüpke, Lisa Herrmann and Inga Zachow, *Challenges and lessons learned in the preparation of Intended Nationally Determined Contributions* (INDCs) (New Climate Institute 2016) 3.

[60] Mengpin Ge and Kelly Levin, 'What's Changing As Countries Turn INDCs into NDCs?' Inter Press Service (23 April 2018) <http://www.ipsnews.net/2018/04/whats-changing-countries-turn-indcs-ndcs/> accessed 2 November 2020.

[61] ibid.

[62] 'Intended Nationally Determined Contributions (INDCS): sharing lessons and resources' <https://cdkn.org/indc/?loclang=en_gb> accessed 2 November 2020.

[63] Lucas Bergkamp, 'The Paris Agreement on Climate Change: A Risk Regulation Perspective' (2016) 7 *European Journal of Risk Regulation* 35.

democracy of a country. The change in government may have impact on fulfillment of pledges since 'a sustained and credible commitment to PA's long term goals is incompatible with the vagaries of national politics driven by short term economic and other interests'.[64] The mitigation commitment by the Obama Administration and withdrawal from PA by the Trump Administration is the recent example of this argument. A group of US citizens has support for the withdrawal.

John Schellnhuber[65] has rightly observed that 'by 2025 we will have to have closed down all coal-fired power stations across the planet. That decarburization will not guarantee a rise of no more than 1.5°C but it will give us a chance. But even that is a tremendous task'.[66] It will be very difficult for many countries to comply with John Schellnhuber.

2.9. US's Withdrawal from PA: A Great Challenge

US President Donald Trump has declared his intention to withdraw from the PA on June 1, 2017. He claimed that the PA has posed draconian financial burden over US citizens.[67] Despite the withdrawal by the US, the second largest emitter country, from PA, whether this Agreement will be successful to mitigate climate change is a serious question to be considered. If the practice of withdrawal from PA spreads to other larger emitter countries, the result will be devastating. It is anticipated that the US withdrawal will impact adversely on flourishing the global climate regime.[68] The Obama administration has pledged to contribute $3 billion to GCF of which it paid only $1 billion. After withdrawal, the Trump administration has cancelled the remaining fund. The small size climate fund will certainly fail to fulfill the needs of developing countries and the scientific research community. The US's withdrawal will impose more mitigation obligations upon the other countries to reach the targets. When the US fails or refuses to fulfil its mitigation pledges, the other countries might follow its step and reverse their position. The disease is contagious, health is not. This practice has a great risk of destroying the 'principle of cooperation' which is the basement of PA. Sunstein[69]

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[64] ibid 36.

[65] John Schellnhuber is the Director of Potsdam Institute for Climate Impact Research.

[66] Robin McKie, 'Scientists warn world will miss key climate target' *The Guardian* (6 August 2016) <https://www.theguardian.com/science/2016/aug/06/global-warming-target-miss-scientists-warn> accessed 2 November 2020.

[67] See Kevin Liptak & Jim Acosta, 'Trump on Paris Accord: "We're Getting Out" *Cable News Network* (2 June 2017) <https://perma.cc/CX93-J226> accessed 2 November 2020.

[68] Yong-Xianga Zhang, and others, 'The Withdrawal of the U.S. from the Paris Agreement and its Impact on Global Climate Change Governance' (2017) 8 *Advances in Climate Change Research* 213, 215.

[69] Cass Sunstein, 'Of Montreal and Kyoto: A Tale of Two Protocols', (2007) 31 *Harvard Environmental Law Review* 1, 4.

has rightly stated that 'the behaviour of the nations is interdependent, and whether nations are willing to make significant reductions in greenhouse gas emissions might be endogenous to the behaviour of the United States in particular. If the world's leading emitter is unwilling to make reductions, other nations might be reluctant to do so'.[70]

3. Strengths of PA to Kick-out the Above Challenges with Some Recommendations

Against all the challenges, this part will critically explain the possibilities of PA to achieve its long term goal, the strength of mitigation obligation under PA to fight against the challenges discussed above.

3.1 The Uniform Acceptance Leads to Psychological Norms of Conformity

The PA has been accepted unanimously. 197 countries have signed the agreement among whom 188 countries have ratified it. Universal acceptance is a strong psychological norm which will influence the Parties to comply with their commitment. The fulfillment of their mitigation pledge will be their 'win' and failing to do so will be their 'lose'. The 'win' and 'lose' situation will have a strong impact on their mitigation actions. Arden Rowel and Josephine van Jaben[71] has touched the issue that 'Paris Agreement, incorporates virtually universal political buy-in--presents the opportunity of setting psychologically powerful norms'.[72] Uniform actions create a psychological impact which compels a person to comply with the community-set rules.[73]

3.2 The Power of Bottom-up Mitigation Obligation

The Climate Change issue is not purely a legal issue but a hybrid issue of law, science and politics and political economy. It has been said that the Party's emission reduction target depends on political aim rather than legal obligation.[74] In international relations, all parties are sovereign. They have every right to, and not to, enter into international treaty as well as to withdraw from a treaty. So, it is quite difficult to impose binding mitigation obligations on a party. Wolfgang[75]

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[70] ibid.

[71] Arden Rowell and Josephine van Zeben, 'A New Status Quo: The Psychological Impact of the Paris Agreement on Climate Change' (2016) 7 *European Journal of Risk Regulation* 49.

[72] ibid 52.

[73] ibid.

[74] Charlotte Streck, Moritz von Unger and Paul Keenlyside, 'The Paris Agreement: A New Beginning' (2016) 13 *Journal for European Environmental & Planning Law* 5.

[75] Wolfgang Obergassel (né Sterk), Christof Arens, Lukas Hermwille, Nico Kreibich, Florian Mersmann, Hermann E. Ott, and Hanna Wang-Helmreich, *Phoenix from the Ashes — An Analysis*

has supported the soft law nature of climate change agreement like PA. He has said that:

> International agreement can go as far as the countries are prepared to do. The national determination of contributions opens space for policy-makers to better marry their climate change efforts with their national development discourse and planning.[76]

The PA has reflected these realities. The larger emitter China did not want to enter into a legally binding agreement. The US did not sign the KP and Canada has withdrawn from it due to it's top-down mitigation approach. It hampers the overall object of KP and makes it somewhat inactive. Due to the bottom-up mitigation approach, the PA has been accepted universally. Parties are allowed to set their own mitigation commitment which they will try to attain. This approach has been seen to be very effective. The mitigation pledges in the NDCs play a role of 'name-and-shame' mechanism.[77] To lead the mitigation governance and for the fear of admonition, the parties are undertaking vigilant actions to achieve the goal. The 'transparent, non-adversarial and non- punitive measures' shall have great success.[78]

More importantly, though the 'top-down' approach in any climate accord sounds good but in reality, it doesn't work in the complex political sphere of the present world. *Gwynne Taraska*[79] has nicely stated that '[i]n an ideal world, we might want a top-down style with legally binding commitments, but realistically that doesn't bring parties to the table'.[80]

3.3 The Procedural Part is Binding

The inadequacy of NDCs and mitigation goals, the insufficiency of funds and resources fall within the purview of procedural obligation. A review of the PA shows that the procedural part of PA is binding.[81] Parties are bound to sit for

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of the Paris Agreement to the United Nations Framework Convention on Climate Change (Germany, Wuppertal Institute 2016) 39, 43.

[76] ibid.

[77] Jennifer Jacquet and Dale Jamieson, 'Soft but Significant Power in the Paris Agreement' (2016) 6 *Nature Climate Change* 643, 645.

[78] Ezgi Ediboglu, 'The Paris Agreement: Effectiveness Analysis of the New UN Climate Change Regime' (2017) 17 UC *Dublin Law Review* 180.

[79] Gwynne Taraska is the Associate Director of Energy Policy at the Center for American Progress.

[80] Jack Fitzpatrick, 'Is Paris Climate Accord "Kyoto 2.0"?' *Morning Consult* (April 21, 2016) <https://morningconsult.com/2016/04/21/paris-climate-agreement-kyoto-2-0/> accessed 2 November 2020.

[81] Tess Bridgeman, 'Paris Is a Binding Agreement: Here's Why That Matters' *Just Security* (June 4, 2017) <https://www.justsecurity.org/41705/paris-binding-agreement-matters> accessed 2 November 2020.

meetings, update PA, make rules etc. These will be able to remove the problem regarding the mitigation goals, insufficiency of NDCs and will ensure transfer of technology, capacity building, and financing for carrying on mitigation obligations. As discussed earlier, most of the provisions of PA containing mitigation obligations use 'shall' and thus is binding. Parties are bound to take mitigation actions though the result is not binding.\

3.4 Overambitious NDCs and More Effective Outcomes

The PA requires the members to submit NDCs in every five years which will present progressive mitigation pledges with highest possible targets. It intends to avoid locking in insufficient ambition.[82] For example, if Bangladesh pledges to reduce 5% of emissions from 1990 levels in its first NDC, it will have to express its pledge of reducing more than 5% emission in its next NDC. If every country increases their mitigation pledge, that will have substantial contribution and make the regime effective.

3.5 'Listen and Learn' and 'Collective Responsibility'

The INDCs are public documents. Any party can review the data and progress of other Parties. The overambitious targets of one party may encourage another party to set a more ambitious pledge. The transparency mechanism can highlight the problems in each party's mitigation action. Any feedback by another party can assist the party in problem to correct it. It can establish a 'listen and learn' or 'self-correction' system. The developed parties may assist a developing party by finance, capacity building or technology transfer; if they find any defect which compels the party not to comply with the target. Climate change is a global problem which requires joint endeavor to reach the target. The bottom up and transparency approach of PA can establish 'collective responsibility' which will be more efficient to fight against climate change. The 'self-correction' and 'collective responsibility' concept has a great possibility of making mitigation obligation efficient.

3.6 Parties are Required to Justify Publicly Their Mitigation Commitment

The agreement is bottom-up, the Party to PA determines their mitigation contribution which is to be reflected in their highest possible contribution and the mitigation efforts are required to be informed in the global stock take.[83] In

[82] Mary J. Mace, 'Mitigation Commitment under Paris Agreement and the Way Forward' (2016) 6 *Climate Law* 21, 22.

[83] Paris Agreement (n 1) art 4.3, 4.9. Some have already begun to make assertions regarding the consistency of their efforts with 2 or 1.5°C targets.

practice, Parties cannot determine their mitigation commitment arbitrarily. They are required to justify that their mitigation pledge is sufficient to achieve the 2°C-1.5°C mitigation target. They are expected to provide sufficient information in respect of how they consider their pledge would align with global mitigation goals.[84] The requirement of public justification may influence them to set their highest possible mitigation pledge.

3.7 Domestic Pressure to Take Rationale Mitigation Actions

In 2016, Rabab Ali, a 7 years old Pakistani girl, approached the Supreme Court of Pakistan and asserted that the mitigation pledges by Pakistan in its INDC are insufficient and lack mitigation action. It is violating her right to life. The young girl has cast the eye of the world on the relation between climate change mitigation and intergenerational equity, right to life, dignity, property and equal protection of law. She prayed to court for asking the federal government to rewrite the INDC including comprehensive mitigation pledges.[85] The case is pending before the Pakistani Supreme Court.

In another lawsuit, Thompson, a New Zealand law graduate has approached the High Court of Wellington challenging the legality and reasonableness of mitigation pledges in the INDC of NZ. Though the Court dismissed it on the ground that the INDC contained reasonable mitigation pledge, they observed that the Environment Minister of NZ should consider the latest IPCC report in setting 2050 goal.[86] Thompson has planned to appeal.[87]

The cases have a great sign in compelling the government for setting reasonable mitigation pledges in their NDCs and complying with them which is rightly echoed in the voice of *Professor Tracy Bach*, who noted that 'a potentially potent route for assuring national accountability for the NDCs pledged under international law'.[88]

The world has witnessed that the promises to take enthusiastic action on

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[84] UNFCCC Decision 1/CP.21 (n 27) para. 27 <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf> accessed 2 November 2020; Paris Agreement, article 4.8.

[85] *Ali v Federation of Pakistan* (Supreme Court of Pakistan, 2016) 1 <https://www.elaw.org/ system/files/Pakistan%20Climate%20Case-FINAL.pdf> accessed 2 November 2020.

[86] *Thomson v Minister for Climate Change Issues* (High Court of NZ, 2017) <http://www.courtsofnz. govt.nz/cases/thomson-v-the-minister-forclimate-change-issues/@@images/fileDecision?r=642.38115004> accessed 2 November 2020.

[87] 'Law Student Loses Case Against Gout's Climate Policy' *Radio New Zealand* (2 November 2017) <https://www.radionz.co.nz/news/national/342953/law-studentloses-case-against -govt -s-climate-policy> accessed 2 November 2020.

[88] Tracy Bach, 'Human Rights in a Climate Changed World: The Impact of COP 21, Nationally Determined Contributions, and National Courts' (2016) 40 Vermont Law Review 561, 595.

climate change by Canada's new Liberal Party had partially contributed to their victory in the last national election. Many voters were aggrieved with the previous Conservative government's environmental policies, which appeared to them like cheating and evasive foot-dragging. Due to massive environmental awareness, public opinion in much of the developed world is genuinely concerned about climate change and stronger than ever.[89]

3.8 Greater Transparency and Regular Updating of Obligation will Pave the Way to Reach Mitigation Targets

The NDCs submitted by the Parties are to be recorded in the public registry of the secretariat.[90] Parties are required to account for their NDCs.[91] Parties are required to provide a national inventory report which will contain anthropogenic emission reduction by sources and removals by sinks of GHGs.[92] The Parties are also required to provide information necessary for evaluating progress of achieving NDCs.[93] The Parties are required to submit these information at least biennially.[94] A 'technical expert review' of submitted information and 'multilateral consideration of progress and achievement' of NDCs will enhance Party's mitigation capability.[95] A compliance body under the PA will ensure compliance with the provisions of the PA.[96] In addition to these mechanisms, the periodic stock taking starting from 2023 will review the collective mitigation efforts of the members and call them to update and enhance their actions.[97] The whole framework of PA will make the mitigation obligation more effective to achieve its goal.

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[89] 'The Paris climate deal is flawed – but an improvement on Kyoto' *The Globe and Mail* (14 December 2015) <https://www.theglobeandmail.com/opinion/editorials/the-paris-climate-deal-is-flawed-but-an-improvement-onkyoto/article27752355/> accessed 2 November 2020.

[90] Paris Agreement (n 1) art 4.12.

[91] ibid, art 4.13.

[92] ibid, art 13.7.

[93] ibid, art13.7.

[94] ibid, art 9.7; but see Decision 1/CP.21, Adoption of the Paris Agreement, UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016) para 90 <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf#page=2> accessed 26 November 2020 (providing flexibility to LDCs and SIDS).

[95] Mace (n 82) 37.

[96] Paris Agreement (n 1) art 15.

[97] COP Decision 1/CP.21 (n 94) paras 20, 25; Paris Agreement, art 14.

3.9 PA Has Recognized Science to Facilitate Implementation of Mitigation Obligation

Climate change is more scientific than a legal issue. Without science, we cannot even be introduced with climate change. The COPs faced enormous resistance in recognizing science. PA has recognized the role of IPCC and best available science. PA requires parties to prepare national inventory reports by good practice of methodologies accepted by IPCC.[98] This reliance on best available science has been reflected in Article 14 to assess collective progress of implementation, to set save temperature goal,[99] in the invitation of IPCC to make a special report on the impact of global temperature 1.5°C goal and GHG emission pathways.[100] The special report which has been published by the IPCC based on the best available science.[101] Reliance on science makes the whole mitigation strategy under the PA more efficient.

3.10 US's Obligation under CIL

Climate Change is a transboundary environmental issue and the concern of the whole mankind which requires mitigation actions by all the countries. The earth is 'one globe' and any derogatory actions by one state may cause damages to other states. The US must control and mitigate their emissions which are a threat to the global environment. Protection of the global environment has been considered as customary international law (CIL) by the decision of many celebrated cases.

The ICJ has recognized in *Legality of the Threats or Use of Nuclear Weapon Case* that '[t]he existence of general obligation of states to ensure that the activities within their own jurisdiction and control respect the environment of other states beyond national control'.[102]

Judge Weeramantry had decided in the *Gabcikovo Nagymaros case*[103] that '[t]here is substantial evidence to suggest that the general protection of the environment beyond national jurisdiction has been received as an obligations *erga omnes*'.[104] In *the Legality of the Threat or Use of Nuclear Weapon Case,*[105] he has observed in his dissenting opinion that:

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[98] Paris Agreement (n 1) art 13.7.

[99] Decision 1/CP.21 (n 94); Paris Agreement (n 1) arts 2, 4.

[100] Decision 1/CP.21 (n 94) para 21; Paris Agreement, arts 2, 4.

[101] Global Warming of 1.5° (n 5).

[102] Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) 1996 ICJ Reports 241-42.

[103] Gabčíkovo–Nagymaros Project (Hungary v Slovakia) 1997 ICJ Reports 7.

[104] ibid.

[105] Legality of the Threat or Use of Nuclear Weapons (n 102) 241-42.

> the global environment constitutes a huge, intricate, delicate, interconnected web in which a touch there or a palpation there sends tremors throughout the whole system. Obligations *erga omnes*, rules *jus cogens* and international crimes respond to the state of affairs by permitting environmental wrongs to be guarded against by all nations.[106]

Climate change is a trans-boundary environmental issue and it affects mankind as a whole. In light of the arguments and decisions, any state party suffering from climate anomaly can go international court against a climate escapist like US for its failure to prevent emission reductions on the ground of

'International custom' which has evidence of general practice and which is accepted as a law, is one of the sources of international law.[107] To qualify as a CIL, there must be state practice and *opinio juris*.[108] Since the adoption of the UNFCCC, all the countries in the world are trying to shift to vigilant climate governance. No state objected to mitigation. It is the substantive proof that mitigating climate change should be recognized as a CIL. Someone may argue that the period of practice is insufficient. To quote Akehurst[109] 'as regards the quantity of practice needed to create a customary rule, the number of States participating is more important than the frequency or duration of the practice'[110]. It was held in the *North Sea Continental Shelf Case t*hat 'the passage of only a short period of time is not necessarily … a bar to formation of new rule'[111] So, in light of the argument, it may be concluded that the mitigation obligation has fulfilled required qualifications to be a CIL. Thus, the US would not be able to escape mitigation obligations.

3.11 Climate Efficient Strategy in NDCs

By a critical analysis of NDCs submitted by the member Parties of PA, it has been seen that two-third Parties are shifting to renewable energy from fossil energy by providing financial incentives, one third of countries committed to improving

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[106] ibid; Similar observation on no-harm issues was made in earlier cases. Trail Smelter Case has established the principle of good neighborliness. A state cannot do anything in its territory which will cause injury to the territory of other states. In the Island of Palm Case, the PCIJ held that the right of territorial sovereignty has a corollary duty 'the obligation to protect within the territory the rights of other states'. The ICJ held in the Barcelona Traction Case that 'an essential distinction should be drawn between the obligations of state towards the international community as a whole… is the concern of all states….all states can be held to have a legal interest in their protection; they are obligations erga omnes'. See Trail Smelter Case (United States v Canada) (Awards in 1938 and 1941) 3 RIAA 1905; and Islands of Palmas Case (Netherlands v USA) 1928 PCIJ.

[107] Statute of the International Court of Justice (June 26, 1945) 33 UNTS 993 (ICJ Statute) art 38.

[108] Legality of the Threat or Use of Nuclear Weapons (n 102) 253; ibid article 38(1)(b).

[109] Michael Akehurst, 'Custom as a source of international law' (1974–75) 47 BYBIL 1.

[110] ibid 53.

[111] North Sea Continental Shelf (*Germany v Denmark, Germany v Netherlands*) 1969 ICJ Reports 3, 74.

industrial process to reduce GHG emissions, three countries committed to impose a carbon tax, and two countries propose to impose trade restriction on importation of inefficient energy.[112] For example, South Africa has proposed in its NDC to impose carbon tax, company level carbon budget, desired emission reduction outcome from some sectors.[113] Investment in renewable energy and energy efficiency is very important for de-carbonization.[114] In 2008, the renewable energy production was only 12.9% of primary energy, which will increase to 50% by 2050.[115] Renewable energy will be the dominant low carbon energy supply option by 2050.[116] Special report of IPCC on *Renewable Energy Sources and Climate Change Mitigation* shows that RE has large potential for GHG mitigation.[117] One the other hand, carbon pricing or carbon tax has been proved to be a very important tool to mitigate climate change keeping balance with GDP growth.[118] So, the innovative mitigation strategy of members appears to be realistic to attain the expected result.

3.12 Efficient Technology Enhances Mitigation

PA advocates for worldwide de-carbonization within the next few decades.[119] The potential harmful effect of climate change imposes an economic cost upon society.[120] This cost should be added with other costs of production. The growth of population, economic activity per capita, energy use per unit of economic activity,

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[112] Charles E Di Leva and Xiaoxin Shi, 'The Paris Agreement and the International Trade Regime: Considerations for Harmonization' (2016) 17 *Sustainable Development Law & Policy* 20.

[113] UNFCCC. 'South Africa's Intended Nationally Determined Contribution', 6 <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/South%20Africa%20First/South%20Africa.pdf> accessed 2 November 2020.

[114] *Renewable Energy and Energy Efficiency in Developing Countries: Contributions to Reducing Global Emissions* (UNEP 2017) <https://wedocs.unep.org/bitstream/handle/20.500.11822/22149/1_Gigaton_Third%20Report_EN.pdf> accessed 2 November 2020.

[115] Ottmar Edenhofer, Ramón Pichs Madruga, Youba Sokona, Kristin Seyboth, Patrick Eickemeier. Patrick Matschoss, Gerrit Hansen, Susanne Kadner, Steffen Schlömer, Timm Zwickel, Christoph von Stechow (eds), 'Renewable Energy Sources and Climate Change Mitigation Special Report of the Intergovernmental Panel on Climate Change' (Cambridge University Press 2012) 20 < https://www.ipcc.ch/site/assets/uploads/2018/03/SRREN_Full_Report-1.pdf> accessed 26 November 2020.

[116] ibid 21.

[117] ibid 22.

[118] 'Climate Change Strategy and Carbon Pricing' (Singapore, 20 March 2017) (National Climate Change Secretariat, Strategy Group (NCCS) Website) 10-14 <https://www.nccs.gov.sg/docs/default-source/default-document-library/climate-change-strategy-and-carbon-pricing.pdf> accessed 2 November 2020.

[119] Sebastian Oberthür, 'Where to go from Paris? The European Union in climate geopolitics' (2016) *Global Affairs* 1.

[120] See generally, Adam B Jaffe and others, 'A Tale of Two Market Failures: Technology and Environmental Policy' (2005) 54 *Ecological Economics* 164.

carbon intensity of energy used are the causes of GHG emissions. Improved technology can play a vital role in reducing GHG emissions and the cost of those reductions.[121] Greater technology innovation ensures greater social benefits which reduces the cost of mitigation. Success of a technology depends on innovation and adoption.[122] The success of a technology depends on the number of users. When the users are known to use technology and when it is cheap and available, then it captures the market. Governments can encourage adoption of technology by subsidizing it, adoption in their own operation, or by raising tariffs and nontariff barriers like technology not efficient for mitigation. When one technology is adopted generally, it will replace the existing technology.[123]

The energy efficient technology has been improving rapidly and becoming cheaper.[124] The glaring example of cost effectiveness of de-carbonization technologies is 'solar technology'.[125] By analyzing the NDCs, it has been evident that the Parties to PA are eager to accept efficient technology to achieve goals. For example, Germany is planning to reduce 85%-90% of its GHG emissions by 2050 depending on decarbonized technology.[126] When the technology becomes cheaper and easily available, more efficient than existing technology; then people will be attracted to use those. It is a matter of hope that the improved de-carbonization technology will replace the existing technology and facilitate the achievement of Paris Climate Goal.

4. Conclusion

There are many criticisms and challenges of the mitigation obligation under PA. Nothing in the world is 'perfect'. Then why should we expect 'super perfection' of mitigation obligation under PA? I think, the imperfections in mitigation

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[121] Adam B Jaffe, Richard G Newell and Robert N. Stavins, 'Energy Efficient Technologies and Climate Change Policies: Issues and Evidence' (1999) *Resources for the Future Climate Issue Brief* 19, 1 < https://media.rff.org/documents/RFF-CCIB-19.pdf > accessed 29 November 2020.

[122] Jaffe and others (n 120) 166.

[123] ibid.

[124] Frank Jotzo, 'Decarbonizing the World Economy' (2016) 7(3) *The Solutions Journal* 74-83 <https://www.thesolutionsjournal.com/article/5698/> accessed 2 November 2020; See also, Ying Li and Zofia Lukszo, 'The Cost-effective Pathways for Power Decarbonization: Llow-carbon Generation Technologies' (IEEE PES Asia-Pacific Power and Energy Engineering Conference (APPEEC), 7-10 December 2014.

[125] Cabe Atwell, 'The True Cost of Solar Energy' (*Power Electronics*, 7 February 2018) < https://www.electronicdesign.com/technologies/alternative-energy/article/21199501/the-true-cost-of-solar-energy> accessed 2 November 2020.

[126] 'Decarbonizing the German Transport Sector: The Mobility and Energy Transitions' (*Sustainable Transport in China*, 18 July 2018) <https://www.sustainabletransport.org/archives/6159> accessed 2 November 2020.

obligation compels the world community to rethink which may lead to more efficient solutions. PA is not static one, it is dynamic. As the world's climate has been changing day by day, new targets, principles, rules, systems, and scientific solutions are being evolved. The PA may incorporate those to pave a better way to reach the mitigation goal.

It is a great success of PA that it has brought the whole global community under a single umbrella with a view to march against climate change.[127] The universal acceptance of PA and universal commitment to reduce greenhouse gas emission has built a strong basement of the global climate regime. Previous MEAs dealing with the issue lack universal acceptance and are marked as 'ineffective'. However, the PA has a strong basement, and universal acceptance, it can solve challenges and problems by decision taken in meeting, negotiations and global consensus. The previous discussion has shown that almost all the countries, whether they are developed, developing, LDC or LDC SIDS; have been suffering or are in great threat due to climate change. Even, the US, who has withdrawn from PA, has suffered record colds which caused casualties to its citizens recently.[128] We are optimistic that the worldwide sufferings will compel the whole global community to sit in one table and solve the arising challenges and problems.

The international treaties dealing with climate change before PA have failed due to their binding nature. The approach 'to bind a sovereign' is faulty in international relations. The non-binding nature of mitigation obligation has a great chance to yield more results than the binding instruments. The PA may be compared with 'polling star' or 'shining moon' which is removing the darkness from the sky of the climate change regime. We are optimistic that the night will end, the sun will rise, the climate change regime will be enlightened, and mother earth will be free from the curse of climate change.

[127] Total of 185 countries have ratified the Agreement among 197 signatories State Parties.

[128] 'Death Toll Reaches 11 as US Suffers Record Cold' *VOA News* (31 January 2019) <https://www.voanews.com/a/united-states-record-cold/4767176.html> accessed 2 November 2020.

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Seat Theory in International Commercial Arbitration: Evolution from *Lex Loci Arbitri* to *Lex Arbitri*

Maksuda Sarker*

Abstract: *Despite the continual effort of the business community to intercept international commercial arbitration from the precinct of national laws and courts, complete detachment is neither possible nor desirable. International arbitrations are affined to a national jurisdiction through the 'seat theory' which serves a profusion of inevitable objects including imparting legal basis to the Award. While serving its purposes, 'seat theory' converts lex loci arbitri of the seat into lex arbitri of the arbitration which results in the inescapable consequence of binding the parties with the mandatory provisions of lex loci arbitri. This conversion often encounters criticism for curtailing party autonomy, the main driving force behind opting for arbitration. This article scrutinizes the intricacies involved in such conversion with a special focus on the amplitude of party autonomy in drafting lex arbitri. After unrolling the relationship between lex loci arbitri and lex arbitri in 'seat theory', the article concludes that the problem inheres in the indifference of the parties in choosing the seat and the overzealous attitude of some States toward controlling international arbitration. It proposes internationalization of the outlook of different States toward international commercial arbitration to liberate 'seat theory' for the condemnation of the opponents.*

Keywords: International commercial arbitration, Seat theory, Delocalized theory, *Lex loci arbitri, Lex arbitri.*

1. Introduction

Increased globalization of world trade and investment has resulted in an abundance of international commercial disputes.[1] As a method of commercial dispute resolution, arbitration has been in place from time immemorial. At its early stage, merchants arbitrated not because of any legal obligation but because

* Lecturer, Department of Law, Faculty of Security & Strategic Studies (FSSS), Bangladesh University of Professionals (BUP).

[1] Nigel Blackaby, Constantine Partasides, Alan Redfern, and J. Martin, *An Overview of International Arbitration* (6th edn, Oxford University Press 2015) para 1.01.

of the expectation of the business community, which desired the settler of their own cause to be one of them.[2] Since arbitration probably antedates all the former legal systems,[3] at its tender age, arbitration was informal, essentially private and witnessed freedom from the interference of the courts.[4] However, with the development of the modern concept of state sovereignty, states denied standing back- allowing a system of private justice to flourish without any control from the competent authority.[5] Naturally, the interested stakeholders, i.e., parties of arbitration and arbitrators, were initially skeptical of this approach, as it was an encroachment on the unfettered party autonomy in arbitration proceedings. In order to strike a balance between these opposing interests, i.e., the state's desire to control every arbitration proceeding within its territory and parties' inclination towards freedom from state regulation, 'seat theory' came into being.

'Seat theory' upholds state sovereignty by obliging every international arbitration, occurring within any state territory, to show due reverence to its domestic laws- applicable to international arbitration. On the other hand, the arbitration itself is immensely benefited from this theory as it imparts a legal basis to the award, which is inevitable for the enforcement of the award. 'Seat theory' serves these two-fold purposes by establishing a legal connection of the arbitral process with the seat of arbitration. The Geneva Protocol, 1923, was the first international legal instrument that expressly incorporated seat theory and made arbitral procedures subject to the will of the parties and the law of the country where the arbitration takes place.[6] Subsequently, both the *New York Convention, 1958,*[7] and UNCITRAL Model Law, 1985[8] have endorsed the same approach. Apparently, 'seat of arbitration', as mentioned in these instruments, gives a geographical connotation, but with the development of the international arbitration regime, presently it refers to the legal domicile of arbitration.

In the course of establishing a legal connection with the seat, 'seat theory' binds arbitration with *lex loci arbitri* (the law of the seat) and converts it into *lex arbitri* (law of the arbitration). This conversion has unavoidable consequences on the subsequent proceedings since mandatory provisions of *lex loci arbitri* become

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[2] Ealr S. Wolaver, 'The Historical Background of Commercial Arbitration' (1934) *83 University of Pennsylvania Law Review*133.

[3] ibid 132.

[4] Blackaby (n 1) para 1.05.

[5] ibid, para 1.15.

[6] Geneva Protocol on Arbitration Clauses 1923, art 2 (hereinafter Geneva Protocol).

[7] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, art VII (2) (hereinafter New York Convention).

[8] UNCITRAL Model Law on International Commercial Arbitration 1985, art 1(2) (hereinafter UNCITRAL Model Law 1985).

binding for the parties,[9] and they become obliged to bow to such provisions.[10] Because of such inevitable implications, proponents of 'delocalized theory'[11] often allege seat theory as repugnant to party autonomy.[12] But, in reality, 'seat theory' rather complements party autonomy and imparts many more advantages to the arbitral proceeding- in absence of which international arbitration will run the risk of being ineffective. The object of this article is to show the imperative role of seat theory in international commercial arbitration. To have a clear understanding of the theory, this article examines the process of converting *lex loci arbitri* into *lex arbitri*, and the extent of exercising party autonomy within such a process.

2. Concept of Seat Theory

Seat theory in international arbitration implies that the law of the place where the arbitration takes place governs international commercial arbitration.[13] In reality, it not only decides the law applicable to the arbitration process, but the competent court at the seat also exercises power over the proceeding as a consequence of the theory.[14] Because of its attachment to a particular state territory, it is also called the 'localized theory'.[15]

Generally, the law governing the arbitration is fundamentally different from the law governing the merit of the dispute.[16] However, until the 1970s, the law governing the merit of the dispute also governed the law of arbitration in England. The landmark decision of the House of Lords which established the independence of the law governing the arbitration (*lex arbitri*) is *James Millers & Partners Ltd. v. Whileworth Street Estates (Manchester) Ltd*, where the court opined that, though Scottish law governed the merit of the dispute, it was possible to choose

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[9] Blackaby (n 1) para 3.68.

[10] William W. Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32 *International Comparative Law Quarterly* 21, 23.

[11] Roy Goode, 'The Role of The Lex Loci Arbitri in International Commercial Arbitration' (2014) 17 *Arbitration International* 19, 21 (The author states that 'in international commercial arbitration, delocalized theory means that, the arbitral procedure and any resulting award are autonomous, unconnected to any national legal system and derive their force solely from the agreement of the parties').

[12] Andrew Barraclough and Waincymer Jeff, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6 *Melbourne Journal of International Law* 205, 206.

[13] Blackaby (n 1) para 3.35.

[14] Julian DM Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 172.

[15] Alexander J. Belohlavek,'Seat of Arbitration and Supporting and Supervising Function of Courts' (2015) *CYArb-CZECH (& CENTRAL EUROPEAN) YEARBOOK OF ARBITRATION: Interaction of Arbitration and Courts* 21, 26.

[16] Blackaby (n 1) para 3.37.

a different law for governing the arbitration procedure.[17] Subsequently, this distinction was reiterated in several other cases.[18] With time this severability of the *lex arbitri* resulted in two opposing theories, e.g., 'seat theory' and 'delocalized theory'- both dealing with the determination of *lex arbitri*. Unlike 'seat theory', 'delocalized theory' doesn't bind international arbitration with any territorial link, except in the enforcement stage.[19]

3. Seat of Arbitration: The Legal or Geographical Dichotomy

The term 'seat of arbitration' may sometimes generate confusion. Apparently, it sounds like the geographical link of arbitration with the place where proceedings take place. However, there is a distinction between the 'seat of the arbitration' and the 'physical venue of the proceedings',[20] which is not maintained when the same place serves both purposes. Yet, it becomes vivid if two or more than two places are engaged in the process. This distinction grew cautiously and prevailed in most international and national arbitration statutes.[21]

3.1 Seat of Arbitration v. Place of Hearing

The seat of arbitration is not merely determinative of the geographical location and indicates the territorial link between arbitration proceedings and law of the seat.[22] Consequently, it has a fundamental role in shaping the legal framework of international arbitration.[23] In reality, the importance lies in the geographical designation of the place, but whether or not to use the place geographically is left to the discretion of the parties. To ensure the convenience of the parties, there is no stringent rule that obliges all or any of the proceedings to occur therein. Consequently, it is possible that several or all the hearings are conducted elsewhere- the place designated by the parties for the hearing of the arbitral proceedings, i.e., the venue of arbitration. Hearings may even take place in more than one

[17] *James Millers & Partners Ltd. v. Whileworth Street Estates (Manchester) Ltd* (1970) 1 All ER 796.

[18] *Bank Millat v. Helleniki Techniki SA* [1984] QB 291,301;*Sumitomo Heavy Industries Ltd v. Oil and Natural Gas Commission* [1994]1 Lloyd's Rep. 45.

[19] Thilo Rensmann, 'Anational Arbitral Awards – Legal Phenomenon or Academic Phantom?' (1998) 15(2) *Journal of International Arbitration* 37.

[20] Alexander J Belohlavek, 'Importance of Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth' (2013) 31 *ASA Bulletin* 262, 282.

[21] UNCITRAL Model Law 1985, art 20(2); UNCITRAL Arbitration Rules 2010, r 18(2); The London Court of International Arbitration (LCIA) Rules 2014 (hereinafter LCIA Rules 2014) r 16.2; Singapore International Arbitration Center Rules 2016 (hereinafter SIAC Rules 2016), r 18.2; ICC Rules 2017, r 18(2).

[22] Blackaby (n 1) para 3.56.

[23] Gary Born, *International Arbitration: Law and Practice* (2nd edn, Kluwer Law International 2012) 105.

state,[24] but at the end, the seat of arbitration consolidates the whole process.[25]This distinction between the seat of arbitration and the place of hearing is maintained in prominent national and international arbitration legislation.[26] However, unless the parties agree otherwise, the venue generally coincides with the seat.[27] While the venue is selected based on the geographical location of a place, the arbitration law of the place concerned plays the most important role in choosing the seat.

3.2 Arbitration Law: The Prime Concern while Choosing the Seat

It is often argued that considering the geographical convenience and the neutrality of the place, a particular location is designated as the seat of arbitration, and as a consequence of the seat theory, *lex arbitri* takes an unexpected turn for the parties. Surprisingly, scholars like- Redfern and Hunter corroborated this allegation and gave the example of an English woman driving to France and binding herself with France traffic law to explain the situation.[28] This example sounds too harsh since seat theory permits the parties to go to a particular state- the place of hearing, and bind themselves by the law of another state by choosing the seat. Here, 'seat theory' assists the parties to bypass the national law of the 'place of hearing', and to make the law of their choice applicable to the proceeding by the prior designation of the 'seat of arbitration'. Therefore, the English woman can go to France, and be guided by the law of Sweden or any other country of her own choice.

In reality, the 'argument of convenience', i.e., the parties choose the seat considering the geographical location thereof, sounds justifiable in selecting the place of hearing but cannot be the sole driving force behind choosing the seat of arbitration. This is because parties can finish the entire proceeding without physically being at the seat. Hence, it sounds more tenable that parties most importantly consider the law of the place and agree on the seat of arbitration accordingly. In other words, the choice of law applicable to the arbitration results in the choice of the seat. This position has been echoed in the decision of the English Technology and Construction Court in *Breas of Doune Wind Farm (Scotland) v. Alfred McAlpine Business Services,* where the court clearly demonstrated that the parties' choice of law is determinative of the seat of arbitration.[29]

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[24] Belohlavek (n 20) 267.

[25] Born (n 23) 105.

[26] ibid (n 21).

[27] Indu Bhan, 'Seat versus Venue' (*The Financial Express Dhaka*, 27 February 2014) <https://www.financialexpress.com/archive/seat-versus-venue/1229641/> accessed 30 July 2020.

[28] Blackaby (n 1) para 3.63.

[29] *Breas of Doune Wind Farm (Scotland) v. Alfred McAlpine Business Services* [2008] EWHC 426 (TCC) (In this case the parties did not decide the seat of arbitration. The court deemed England as the juridical seat of arbitration owing to the fact that the parties referred to the application of English Arbitration Act, 1996).

Given these points, the proposition that parties choose the seat of arbitration, and applicable law follows therefrom seems to be the other way around, and the real scenario is that parties choose the law governing arbitration, and geographical attachment follows therefrom. Hence, while choosing the seat, the arbitration law of the concerned place is the major concern for the parties. Moreover, the freedom of not being physically present at the seat is turning 'seat theory' into a legal fiction from a geographical perspective.[30]

3.3 Seat of Arbitration: Is It Turning into a Legal Fiction?

At present, it is a common practice to insert a liberty clause in the arbitration agreement that permits the parties to conduct hearing in a place different from the seat.[31] Surprisingly, there is no guideline regarding the degree of geographical attachment required for seat theory's proper functioning. In a sense, it makes the seat of arbitration rather imaginary from the geographical perspective and turns it into a legal fiction. This tendency to confine the seat of arbitration to 'legal domicile of the proceeding' is specifically vivid in online arbitration and sports arbitration. In online arbitration, the parties and arbitrators mostly come from different places and conduct the proceeding through video call or other digital means. Therefore, they designate a particular place as the legal domicile of the arbitration. For example, under the Electronic Transaction Arbitration Rules of Hong Kong International Arbitration Center, the seat of arbitration will always remain fixed, i.e., Hong Kong special administrative reign.[32] Likewise, the geographical and legal connection is severed in the Court of Arbitration for Sports, working under the auspices of the International Council of Arbitration for Sports.[33] Under the arbitration legislation of the institution, i.e., The *Code of Sports-Related Arbitration, 2019*, the seat of arbitration always remains fixed.[34] Hearing need not take place at the seat in the strict geographical sense, rather a designation of the place as the seat is enough to connect the proceeding with its legal system, and consequently, seat theory can run effectively without any proceeding occurring therein. In online and sports arbitration, parties choose a particular place as seat of arbitration, not for taking advantage of its geographical location, and in practice, the hearings do not and are not even expected to occur therein.

This position converts seat theory into a legal fiction, devoid of any geographical consideration. Even where the arbitration law does not specifically

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[30] Belohlavek (n 20) 267.

[31] UNCITRAL Model Law 1985, art 17; ICC Rules of Arbitration 2017, r 18; The Code of Sports Related Arbitration 2019, r 28.

[32] Electronic Transaction Arbitration Rules of Hong Kong International Arbitration Center 2018, art 14.

[33] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, Cambridge University Press 2012) 63.

[34] The Code of Sports-related Arbitration 2019 (Switzerland), r 28.

mention a particular place as the seat, this approach is open for adoption- leaving the parties with the task to consider favorability of *lex arbitri* of the seat. This unique feature of seat theory, which gives the parties the flexibility of not holding the proceedings in the seat, has enhanced the appeal of the theory to the interested stakeholders. This malleability will ensure the smooth functioning of the theory in emergency situations, like COVID-19, where the whole world is at a standstill. In the present situation, though the parties are mostly unable to be physically present at the seat, international arbitration can function at its regular pace by taking full advantage of the seat theory.

However, the attempt to render seat theory into legal fiction runs some risk with it. For instance, in the case *The Titan Corporation (USA) v Alcatel Sit SA (France),*[35] the Swedish court denied jurisdiction to set aside an award, though Sweden was designated as the seat. Since no proceeding took place in Sweden, the Swedish court refused to acknowledge any territorial link and declared the proceeding to set aside the award outside its jurisdiction. At present, though countries with arbitration-friendly attitudes are unlikely to take such an extreme position, to avoid risk, it is suggested to hold at least some portion of the proceeding at the seat of arbitration. This is because, if the court at the seat denies jurisdiction, it is unlikely for any other court to exercise the same in the absence of specific agreement between the parties.[36]

4. Rationale of the Seat Theory

While determining the law applicable to the arbitration, the historical tendency has always been to establish a link between the legal system of the place of arbitration and the arbitral proceeding.[37] Several factors have reasoned this tendency, and seat theory emerged as a consequence.

4.1 Upholding State Sovereignty

Seat theory in international commercial arbitration is premised on the concept that every state is sovereign within its own territory, and possesses and exercises control over every incident occurring therein. Even international arbitration is no exception to this rule and must bow to the mandatory norms of the country in

[35] *The Titan Corporation (USA) v Alcatel Sit SA (France*) decision by the Svea Court of Appeal in Sweden rendered in 2005 in case no. t 1038-05; CITSA, YCA 2005= SIAR 2005. (In this case the place of arbitration chosen by the parties and stated in the award was Stockholm. However, neither the parties nor the dispute had any connection with Sweden. The arbitrator was from the U.K. and the hearings were held in London and Paris. The court concluded that the proceedings did not have such a connection to Sweden that the place of arbitration could be said to have been Stockholm).

[36] Goode (n 11) 26.

[37] Blackaby (n 1) para 3.35.

which it takes place.[38]This territorial concept acknowledges the exclusive right of the laws and competent court of the seat of arbitration to determine the legal effect of acts done (and consequently of arbitral awards) made within its borders.[39]

Based on this proposition, seat theory establishes a legal link between the seat of arbitration and the arbitral proceeding. In this connection, the counter-argument of the seat theory, which aims at cutting off this connection, sounds like urging the states to give away a part of its sovereignty. When the parties are designating a particular place as the seat of arbitration, they intend to take benefit of the arbitration-friendly legal system of the place, and it will be irrational to expect that a state will allow extracting benefits of using its '*lex loci arbitri'* without obliging to respect its mandatory legal rules.

4.2 Giving Legal Base to the Proceeding

The parties to the arbitration make an agreement to arbitrate, which is followed by conflict, initiation of arbitral proceedings, and delivery of the arbitral award. In order to have legal force, the agreement of the parties is dependent on recognition by law.[40]The point has been rightly put forward by Dr. Francis Mann while saying-'no person has the right or the power to act on any level other than that of municipal law.'[41] The importance of seat theory lies in the fact that it anchors the arbitral proceeding into an established legal system, i.e., of the seat.[42] As a matter of fact, it is possible to anchor human activity into the municipal legal system of a particular state without any physical attachment, of the person concerned, with that place. For instance, if a Bangladeshi citizen commits a crime while on board of a Bangladesh Biman flight that is roaming around the sky over Heathrow Airport and waiting for a landing signal, that person can still be prosecuted under the Penal Code of Bangladesh.[43] His physical absence from Bangladesh is no bar to anchor his act to the municipal law of Bangladesh. Likewise, physical attachment with the seat of arbitration is not mandatory for the proper functioning of seat theory.

Nevertheless, with the increased development of international law, it is possible to derive obligation without the apparent interference of a municipal legal system. For example, the ICSID (International Centre for Settlement

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[38] Park (n 10) 35.

[39] Goode (n 11) 24.

[40] ibid 29.

[41] Pieter Sanders (ed), *International Arbitration: Liber Amicorum for Martin Domke* (Nijhoff 1967).

[42] *Bank Mellat v. Helliniki Techniki* [1983] 3 All ER 428 CA (In this case the English House of Lords unanimously decided that despite suggestions to the contrary by some learned writers under other systems, English jurisprudence does not recognise the concept of arbitral procedure floating in trans-national firmament, unconnected with any municipal system of law).

[43] *Penal Code 1860* (Bangladesh) s 4.

of Investment Disputes) arbitration is not subject to any domestic law or the jurisdiction of any domestic court;[44] still, there are certain post-award remedies mentioned in the Convention itself.[45] This separation from municipal law has been possible because the Convention has established a supranational legal framework for the supranational award to be enforced and binds all members to recognize and enforce the award rendered by the ICSID tribunal under that legal system.[46]

Therefore, in order to make international arbitration free from the influence of seat theory, a supranational legal framework is required. Until such a framework develops, the connotation that mere agreement of the parties is enough to make the award enforceable is of no practical utility. This is because the proceeding cannot float in the air and produce a legally binding award. If this were possible, the agreement of the parties would have been enough to enforce the award as well. Consequently, enforcement of the award is contingent upon the connection with any state law,[47] which is most conveniently the law of the seat.[48] Since parties' agreement to arbitrate alone cannot produce an enforceable award,[49] seat theory provides the required legal basis by connecting the award with the law of the seat.[50] To avail this advantage of seat theory, different states can draft their arbitration legislation in line with the UNCITRAL Model Law, as the model law expressly incorporates seat theory.[51]

4.2.1 Availing Advantage of the Court's Supportive Power

Arbitration is a private dispute settlement procedure capable of resolving disputes like a court of justice. But, this does not bring arbitration to the same compartment as a court of law, and there is a thick line of distinction between these two systems of dispute resolution. Likewise, certain powers are peculiar to the court itself, and the arbitral tribunal cannot exercise them owing to policy reasons or some other grounds. Hence, some situations require the exercise of state power, typically for freezing property, temporary seizure of goods, and the tribunal is devoid of any such power.[52] For instance, the Argentina Code of Civil Procedure expressly deprives the tribunal of any power to give enforceable interim order,[53] and in

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[44] Convention on the Settlement of Investment Disputes between States and National of other States 1966, art 53 (hereinafter ICSID Convention).

[45] ibid, arts 49, 52.

[46] ibid, art 54.

[47] Goode (n 11) 29.

[48] ibid 30.

[49] ibid.

[50] Blackaby (n 1) para 3.84.

[51] UNCITRAL Model Law 1985, art 1(2).

[52] Belohlavek (n 20) 269.

[53] Argentina Code of Civil Procedure 1871, art 753 (the article states that, 'Arbitrators shall not

situations- warranting interim order, interference of the domestic court becomes inevitable. Otherwise, the long process of arbitration, with a huge investment of time and money, may turn standstill.

At present, considering the private nature of arbitration proceeding, there is an increased tendency of enhancing the power of the arbitral tribunals to issue interim orders. For instance, most of the major arbitration institutions have incorporated the provision of 'emergency arbitrators' to provide rapid interim relief before the constitution of the tribunal.[54] Though, in continuation of this favorable attitude, most modern institutional arbitration rules give the power of granting interim relief to the tribunal itself,[55] the assistance of the court is yet important. This is especially true, in cases where interim order involves the duty of third parties since arbitral tribunal usually lacks jurisdiction to bind third parties.[56] This rule has been reflected in the UNCITRAL model law[57] and all the state laws influenced by the model law. Therefore, instead of the arbitral tribunals having the power of giving interim relief, the role of the national courts remains inevitable here.

It is mentionable that there is no controversy as to the supportive role of the court of the seat in localization or delocalization theory. This is because when one speaks of delocalization it refers to removing the functions of the tribunal from the supervisory role of the national courts.[58] But, it is unlikely for any court to extend its support to any proceeding without subjecting the same to its supervisory power. Hence, the absence of seat theory in international commercial arbitration will result in the abolition of the supportive power of court at the seat, which may bring the consequence of rendering the entire proceeding nugatory.

4.2.2 Determining Nationality of the Award

Denial of the seat theory will result in the award being stateless. Being unconnected with the national legal system of any state, the award cannot belong to any nationality, e.g., Swiss, English, French or Australian award. Seat theory does the job of imparting nationality and determines the nature of the award from

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issue compulsory or enforcement measures, these shall be requested to the judge who shall give the aid of his jurisdiction for the faster and more effective operation of the arbitral process').

[54] LCIA Rules, r. 9B; Stockholm Chamber of Commerce Arbitration Rules (SCC Rules) r. 32(4) and Appendix II, r 3; ICC Rules, r 29(1) and Appendix V, r 1(2); International Centre for Dispute Resolution (ICDR) Arbitration Rules, r 6; SIAC Rules 2016, r 26(2), with proceedings governed by Sch. 1.

[55] UNCITRAL Model Law 1985, r 17; UNCITRAL Rules 2010, r 26; ICC Arbitration Rules 2012, r 28(1); LCIA Rules 2014, r 25; ICSID Rules, r 39.

[56] Blackaby (n 1) para 7.18.

[57] UNCITRAL Model Law 1985, art 17 (2).

[58] Jan Paulsson, 'The Extent of Independence of International Arbitration from the Law of the Situs' in Julian Lew (ed), *Contemporary Problems in International Arbitration* (Springer 1987) 141, 141.

a territorial perspective (the domicile or the nationality of the award).[59] Such determination bears great significance since a stateless award[60] may result in non-enforcement. This is because, at present, the *New York Convention, 1958,*[61]is the major international instrument for enforcing arbitral awards, and stateless awards do not come within its ambit. Till date, 164 states are parties to the Convention.[62] The legislative history of the Convention is contrary to its applicability to stateless award[63]. Consequently, the scope of the Convention is also limited to awards made in the territory of a state other than the enforcing state.[64]Apart from the *New York Convention, 1958*, bilateral and multilateral treaties take place between different states for mutual recognition of arbitral awards of the concerned jurisdictions.[65] Without seat theory, the award comes out of a blow, unconnected with any legal system, and therefore, is deprived of the protection of *New York Convention, 1958* or any other legal instrument concerning enforcement of award. It is mentionable that, so far, there is no bilateral or multilateral treaty that deals with the enforcement of stateless award. As the argument of the delocalized theory goes on, it aims at producing a stateless award.[66]Such a stateless award will face great difficulties in the enforcement stage. On the contrary, seat theory not only imparts legal basis and identity to the award, but also promotes enforceability by warranting nationality of the award.

4.2.3 Seat theory: Converting Lex Loci Arbitri into Lex Arbitri

Lex arbitri is the law governing arbitration, and the importance of seat theory lies in the fact that it plays an important role in shaping *lex arbitri* of a particular arbitration, taking place within the territory of the seat state. Seat theory performs this function by moulding *lex arbitri* into the structure of *lex loci arbitri*.[67] To understand this process of conversion, it is imperative to have a clear idea about the meaning of *lex loci arbitri*.

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[59] Belohlavek (n 20) 269.

[60] Goode (n 11) 21. (The author states that the term 'stateless award' in international commercial arbitration means that the arbitral procedure and any resulting award are autonomous, unconnected to any national legal system and derive their force solely from the agreement of the parties).

[61] Convention on the Recognition and Enforcement of Foreign Arbitral Award 1958.

[62] New York Convention 1958 <http://www.newyorkconvention.org/countries> accessed 10 August 2020.

[63] Albert Jan van den berg, *The New York Arbitration Convention of 1958*, (Kluwer Law and Taxation Publishers 1981) 37.

[64] New York Convention 1958, art 1(1).

[65] Moscow Convention 1972, art IV(1)(2); Panama Convention 1975, art 4; Riyadh Arab Convention 1985, art 37 etc.(all these conventions provide for mutual recognition and enforcement of Awards made in member states).

[66] Berthold Goldman, 'Les Conflits de Lois dans I'Arbitrage International de Droit Prive' (1963) 109 Re*cueils des Cours* 351.

[67] Park (n 10) 23.

(a) Meaning of Lex Loci Arbitri

The terms '*lex loci arbitri'* and '*lex arbitri'* are often used interchangeably in international commercial arbitration.[68] This is because, *lex loci arbitri* bears almost similar meaning as *lex arbitri* with the variation that *lex loci arbitri* is the totality of the generally applicable provisions, governing arbitration, in the state where it takes place. In other words, it is the combination of national law provisions of the seat governing international arbitration, and this combination of local curial norms is the main theme of *lex loci arbitri*.[69] Though it comprises all the available provisions of the law that applies to arbitration seated in any particular state, it is not essential that all such provisions must be applicable in any particular arbitration seated therein. While drafting *lex arbitri*, parties can change the non-mandatory provisions of *lex loci arbitri* while keeping the mandatory provisions un-tempered. Therefore, mandatory provisions will inevitably be part of *lex arbitri* but whether or not the directory provisions will be incorporated is for the parties to decide.

(b) Distinction between Lex Loci Arbitri and Lex Arbitri

Despite being very thin, the distinction between *lex arbitri* and *lex loci arbitri* is sturdy in the essence and purpose. For example, The *English Arbitration Act, 1996* is the *lex loci arbitri* for all arbitration seated in England, and the act altogether forms *lex loci arbitri* without any scope for variation. Nevertheless, the *lex arbitri* can be different, and the legal basis for such differentiation is present in the act itself when it approves substitution of the *lex loci arbitri* by any other law in cases where the provisions of the act are not mandatory in nature.[70] As a matter of fact, when allowing any other law, there is no qualifying limitation- leaving the parties with the freedom to combine even the law of any other state with that of England in order to design their desired *lex arbitri*. The following proposition will express the distinction between the two terms best:

Lex Loci Arbitri =	Totality of the domestic law (substantive + procedural provisions) applicable to international arbitration (mandatory + Directory provisions)
Lex Arbitri =	*Lex Loci Arbitri* (mandatory provisions) +/- *Lex Loci Arbitri* (Directory Provisions) +/- ***Rules added by parties*** (not derogatory to the mandatory provisions)

Since all the provisions of the *lex loci arbitri* are not binding upon the parties, they

[68] Alastair Henderson, 'Lex Arbitri, Procedural Law and the Seat of Arbitration: Unravelling the Law of the Arbitration Process' (2014) 26 *Singapore Academy of Law Journal* 886, 906.

[69] Park (n 10) 21.

[70] Arbitration Act 1996 (UK) s 4(5).

are free to draft their own rules governing the arbitration without derogating the mandatory provisions of the *lex loci arbitri*. Hence, seat theory keeps it open for the parties to draft their own unique *lex arbitri*.[71] This unique *lex arbitri* will contain within itself some elements of *lex loci arbitri* (which are mandatory in nature), but in place of the directory provisions, parties are at liberty to introduce their own rules. Likewise, it is open to the parties to endorse the directory provisions and turn entire *lex loci arbitri* into *lex arbitri*. Nevertheless, parties should remember that while opting out of *lex loci arbitri*, the mandatory and fundamental provisions should be respected since non-compliance therewith renders the proceedings and the award vulnerable to challenge.[72] Moreover, confusion may arise in differentiating mandatory provisions from non-mandatory ones since most *lex loci arbitri* do not contain any express list of mandatory provisions. Hence, it depends on the legislative interpretation and creates hardship for the parties.

(c) Conversion of Lex Loci Arbitri into Lex Arbitri

The country where the arbitration is seated, generally has legitimized authority over the proceeding, in the form of mandatory rules of *lex loci arbitri*. Because of the application of the seat theory, the distinction between the terminologies, i.e., *lex arbitri* & *lex loci arbitri* is not often maintained. Rather, localization theory identifies the law of the seat of arbitration (*lex loci arbitri)* with the law governing the arbitration (*lex arbitri*).[73] This is because, although the parties are free to substitute the non-mandatory provisions, their freedom is subject to the grant of *lex loci arbitri*. Hence, in case of mandatory provisions, *lex loci arbitri* reigns without any possibility of modification, whereas though loosely, in case of directory provisions, it reigns nonetheless.

Therefore, under seat theory, *lex loci arbitri* is ultimately taking the shape of *lex arbitri*. Modification is possible but only to the extent permitted by national arbitration law. Notably, substituting non-mandatory provisions is not equal to stepping out of the periphery of *lex loci arbitri* rather it's more like moving freely but within the boundary. A clear understanding *of lex arbitri* will further clarify the role of *lex loci arbitri* in international commercial arbitration.

5. *Lex Arbitri* in International Commercial Arbitration

As discussed earlier, international arbitral proceeding shares an inevitable legal link with the seat of arbitration. The role of *lex arbitri* is paramount in this regard since it is the medium which establishes and maintains such link. International commercial arbitration (ICA) is a complex process involving the application of different systems

[71] Henderson (n 68) 907.

[72] ibid 902.

[73] Belohlavek (n 20) 266.

of law governing different issues, and without any undue sophistication, it is possible to identify at least five systems of law having a bearing on ICA.[74] Among these five categories, law governing the arbitration, i.e., *lex arbitri* is one. An attempt to define *lex arbitri* is indeed a burdensome task, and is as illusionary as producing a universal consensus on world peace. This is because, the concept and ambit of *lex arbitri* vary from jurisdiction to jurisdiction, and effectively reflect the limits any legal system imposes on parties' freedom to choose the law governing arbitration procedure.[75] 'Seat theory' provides the mechanism which turns *lex loci arbitri* (law of the seat) into *lex arbitri* (law governing the arbitration) with a view to anchoring the proceeding to the legal system of the seat.

5.1 Meaning of Lex Arbitri

Since every state has its own standing on arbitration regulation, the content of *lex arbitri* cannot be determined with precision. Generally speaking, the basic framework for arbitration is properly called *lex arbitri*, which translates from Latin as the law of arbitration.[76] A renowned English judge, Steyn J., attempted to define *lex arbitri* in the case *Paul Smith Ltd v. H&S International Holding Inc*[77]in the following words:

> What then is the law governing the arbitration? It is …. a body of rules which sets a standard external to the arbitration agreement, the wishes of the parties, for the conduct of the arbitration.

Furthermore, while elaborating the meaning of *lex arbitri*, Steyn J gave an example of the court's power to issue interim measures and other powers (including supportive and supervisory) of the court. Here, it is mentionable that, historically the definition of *lex arbitri*, in English courts and scholarly writings, focuses exclusively on the relation of the arbitration proceeding to the outside world in general and in particular to the courts that may be deemed to have jurisdiction over the proceedings.[78] Since the judgment in the *Smith case* focuses mainly on the relation of the arbitration proceeding with the court at the seat, it excludes party autonomy as a source of *lex arbitri.* But, in the broader sense of the term, the intention of the parties' constitutes an equally important source of *lex arbitri* and plays a vital role in drafting the internal aspect of *lex arbitri* (procedural rules governing the arbitration).

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[74] Blackaby (n 1) para 3.07.

[75] Loukas Mistelis, 'Reality Test: Current State of Affairs in Theory and Practice Relating to Lex Arbitri' (2007) 17 *The American Review of International Arbitration* 155, 163.

[76] Henderson (n 68) 887.

[77] *Paul Smith Ltd v. H&S International Holding Inc* [1991] 2 Lloyd's Rep 127 (QBD).

[78] Mistelis (n 75) 163.

In contrast to the English approach, arbitration legislation of multiple countries refer *lex arbitri* to indicate something wider than the relationship between international arbitration and the court at the seat. In reality, divergent approaches of different countries have made it difficult and almost impossible to generate any universal definition of *lex arbitri*. This left the major institutional arbitration rules and the laws of the significant arbitration-friendly countries without an attempt to define the term. Hence, more often than not, arbitration legislations prefer to mention the issues covered by *lex arbitri* to picture its ambit.

5.2 Issues Covered within Lex Arbitri

In modern arbitration, *lex arbitri* has two components- internal *lex arbitri* and external *lex arbitri*.[79] Whereas, internal *lex arbitri* deals with the procedural matters governing arbitral proceedings, external *lex arbitri* determines the role of the competent court at the seat to the entire proceeding.[80] Internal and external components together form *lex arbitri* for any given arbitral proceeding.

In this regard, Dicey and Morris classified the functions of *lex arbitri* into three categories, and accordingly described the issues covered by it.[81] The first role embodies the procedural aspect, and serves the 'directory function' of *lex arbitri*.[82] However, with the increasing popularity of 'party autonomy' concept, this role of *lex arbitri* is losing its connection with the seat. Now-a-days parties can design their own procedural rule or designate the law of any institution or even of any other country as the applicable procedural law, provided that it does not derogate any mandatory legal provision of the seat.

Secondly, *lex arbitri* serves the 'supportive and supervisory' function, which encompasses power of granting interim relief and judicial review of the award.[83] As a matter of fact, this function is the center of difference between supporters of localization and delocalization theory.[84] While localization theory/ seat theory binds international arbitration with both supportive and supervisory function of *lex arbitri*, delocalization theory opts out of the supervisory role of the court at the seat.[85]The last role of *lex arbitri* is the 'mandatory function', and it determines the relationship between arbitration and public policy of the seat of arbitration.

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[79] ibid 165.

[80] ibid 156.

[81] Lord Collins and Jonathan Harris (eds), *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) 16-31.

[82] Henderson (n 68) 888.

[83] ibid.

[84] Belohlavek (n 20) 26.

[85] Jan Paulsson, 'Arbitration Unbound: Award Detached From the Law of its Country of Origin' (1981) 30 *International and Comparative Law Quarterly* 358, 367-71.

This role also attracts attention as it facilitates the social, religious, and other fundamental values of the seat at the cost of the international character of the award, and sometimes affects arbitral proceeding in unexpected ways. Since public policy differs from country to country, an award that is valid in one jurisdiction may be set aside in another,[86] and it is possible that public policy at the seat is totally unrelated to the international character of the arbitration. Because of this reason, a new tendency is developing, which emphasizes international public policy rather than that of the seat.[87]

As a matter of fact, in the controversy regarding seat theory, the external component of *lex arbitri* plays a more important role than the internal component. This is because internal *lex arbitri* generally keeps wide scope for the exercise of party autonomy.[88] In contrast, external *lex arbitri* is mostly mandatory in nature, and escaping from those provisions is almost impossible. For example, the *English Arbitration Act 1996*, gives a list of the mandatory provisions in Schedule 1,[89] and these provisions mostly deal with external *lex arbitri*.

5.3 Is Lex Arbitri Purely Procedural in Nature?

Divergent approaches in different states regarding its ambit have generated different, and sometimes opposing views regarding the scope of *lex arbitri*. For instance, English courts always maintain a restrictive attitude towards *lex arbitri,* and aims at focusing on the relationship between arbitration and the court at the seat,[90] which clearly doesn't fall within procedural issues. On the contrary, there has always been a tendency to recognize *lex arbitri* as a law governing the procedural aspects of arbitration in general. Probably this is because some of the popular seats of arbitration codify their arbitration laws in their code of civil procedure.[91] For example, Germany codifies its arbitration law in the German Code of Civil Procedure, France in the French Code of Civil Procedure, and this tendency of incorporating the law applicable to arbitration within the civil procedure code creates the misconception that *lex arbitri* deals only with procedural issues.[92] However, this idea is not true, and there are number of issues, which despite not being procedural in nature, fit within the ring of *lex arbitri*. Some of such issues are:

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[86] Blackaby (n 1) para 10.84.

[87] ibid.

[88] Henderson (n 68) 888.

[89] Arbitration Act 1996 (UK) s 4(1).

[90] Mistelis (n 75) 163.

[91] Blackaby (n 1) para 3.62.

[92] The Code of Civil Procedure 1877 (Germany) ss 1025-1066; the Code de procedure civile, arts 1442-1527 (arts 1504 ff dealing with international commercial arbitration).

5.3.1 Agreement to arbitrate

An agreement to arbitrate or a submission agreement is the foundation stone of international arbitration.[93] In the absence of such agreement, no arbitration can take place since it is the expression of parties' intent to arbitrate. Besides, an invalid agreement runs the risk of rendering the entire proceeding nugatory. For example, under the UNCITRAL Model Law, 1985, a void agreement is a ground for setting aside an award.[94] Moreover, the importance increases as invalidity of the agreement is also a ground for refusing the recognition and enforcement of the award both under the Model law, 1985[95] and the *New York Convention, 1958*.[96]

Apparently, the crucial question of validity of the arbitration agreement is subject to the law of the seat, i.e., *lex arbitri*, in the absence of any agreement to the contrary between the parties.[97] In this connection, the English court of Appeal held that in the absence of any express or implicit choice of law governing the agreement, the law of the seat having the closest and most real connection with the proceeding would be the law applicable to the arbitration agreement.[98] This decision has been subsequently followed in *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co. Ltd*.[99] Yet, there is an opposing view which advocates that the law applicable to the merit of the contract is the law governing the arbitration agreement. Supporters of this view base their argument on the fact that agreement to arbitrate being a part of the contract should be controlled by the law that governs the whole contract. But, given the fact that agreement to arbitrate is an independent contract within another contract, this argument doesn't sound tenable. Separability of the arbitration clause is a well-established principle in international arbitration,[100] and therefore, the law of the seat is the most relatable to the arbitration agreement. Consequently, the validity of the agreement to arbitrate, which is out and out a substantive question, is an issue covered by *lex arbitri*, provided that the parties have not agreed otherwise.

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[93] Blackaby (n 1) para 1.40.

[94] UNCITRAL Model Law 1985, art 34(2)(a)(i).

[95] ibid, art 36(1)(a)(i).

[96] New York Convention 1958, art V(1)(a).

[97] UNCITRAL Model Law 1985, arts 34, 35; New York Convention 1958, art V.

[98] *Sulamerica Cia Nacional de Seguros SA and ors v. Enesa Engenharia SA and ors*[2012] EWCA Civ 638.

[99] *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co. Ltd* [2013] EWHC 4071 (Comm).

[100] *Etablissements. Raymond Gosset v Frère Carapelli S.P.A.*, 7 May 1963 (Dalloz, 1963), 545 (In this case the French Court De Cassation recognized the doctrine of Separability of arbitration agreement, whether concluded separately or included in the contract to which it relates); see also *Prima Paint Co. v Flood Conklin Manufacturing Corporation* 388 US 395, 402 (1967).

5.3.2 Arbitrability

Theoretically, arbitration should be capable of resolving every dispute because it is the private counterpart of the court of justice, which has the authority to resolve any dispute. But in practice, since arbitration is a confidential proceeding, every state puts some limitation beyond which arbitration cannot step.[101] Therefore, each state decides the issues it wishes to keep exclusively to the jurisdiction of the court, and normally matters with public bearing are eliminated from the arbitrability criteria.

The question of arbitrability bears great significance since under the Model Law it can be a ground for setting aside the award.[102] Initially, the law of the seat, i.e., *lex arbitri,* determines the arbitrability of the dispute. However, the issue of arbitrability can arise afterward at the enforcement level as well, and both Model Law[103] and the *New York Convention, 1958*[104] empower the enforcing court to consider the issue and refuse recognition and enforcement if it's not arbitrable under the law of the enforcing state. Nevertheless, initially *lex arbitri* decides arbitrability of the dispute, and this decision carries great weight with it as annulment of the award at the seat of arbitration can be a ground for refusing enforcement both under Model Law[105] and the *New York Convention, 1958*.[106]

5.3.3 Finality of the award

One of the significant reasons for prioritizing arbitration over court proceeding is to resolve the dispute within the shortest possible time, and to achieve this object it is desirable that the decision of the tribunal shall be final, and will not be interfered by any court. However, the finality of the award depends on *lex arbitri* of a particular place, and the position substantially varies from country to country. For example, where the *English Arbitration Act, 1996* is applicable in any arbitration, the award may be subjected to more than one Appeal. Generally, under the English Arbitration Act 1996, an award can be appealed against on three grounds, i.e., want of jurisdiction,[107] serious procedural irregularity,[108] and Appeal on the point of law.[109] It is noteworthy that, among these three grounds, the first

[101] Blackaby (n 1) para 2.126.

[102] UNCITRAL Model Law 1985, art 34(2)(b)(i).

[103] ibid, art 36(1)(b)(i).

[104] New York Convention 1958, art V(2)(a).

[105] UNCITRAL Model Law 1985, art 36(1)(a)(v).

[106] New York Convention 1958, art V(1)(e).

[107] Arbitration Act 1996 (UK) s 67.

[108] ibid, s 68.

[109] ibid, s 69.

two are mandatory in nature, and an agreement abridging the right to challenge the award on these grounds is consequently invalid. On the other hand, the third ground is restricted to cases where the interpretation of any English law is the question at issue [110]and directory in nature- giving the parties the liberty to opt-out of the same.[111]Though UNCITRAL Model Law had a strong impression on drafting the arbitration law of England, [112]surprisingly *Arbitration Act of 1996* is in direct contrast with the Model Law in allowing the courts to set aside an award based on error of law.[113]

In ensuring the finality of the award, the most courageous step was taken by Belgium when it amended its arbitration law to exclude the jurisdiction of Belgian court to set aside an arbitral award rendered in Belgium unless one of the parties were Belgian citizen or resided therein or had a principal place of business therein.[114] Surprisingly, this hands-off approach was not welcomed by the interested stakeholders and resulted in the amendment of the provision.[115] In contrast, the current provision keeps the right to initiate a proceeding to set aside an award, but the parties are at liberty to contract out of this provision.[116]This approach is in consonance with the Model Law since it gives the right to initiate a proceeding to set aside the award, but instead of 'Shall', the law uses 'May' in the concerned article,[117] suggesting that this provision is non-mandatory in nature and parties can make themselves free from it by an agreement to that effect.

Apart from the above-mentioned issues, several other issues come within the ambit of *lex arbitri* which lack any procedural connotation. In reality, it is a complex system of interaction between procedural and substantive aspects of the arbitration, which takes different forms in different jurisdictions. Hence, it will be appropriate to consider *lex arbitri* as a combination of substantive and procedural issues. In this regard, Redfern and Hunter took the correct approach in avoiding an attempt to produce a definition of *lex arbitri*; rather they chose to give a list of issues that can come within the ambit of *lex arbitri* depending on the arbitration law of any given state.[118]

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[110] ibid.

[111] ibid.

[112] Goode (n 11) 20.

[113] UNCITRAL Model Law 1985, art 34.

[114] The Belgian Judicial Code (Amendment of article 1717, 27 March 1985).

[115] The Belgian Judicial Code 2013, art 1717.

[116] ibid.

[117] UNCITRAL Model Law 1985, art 34.

[118] Blackaby (n 1) para 3.36.

6. *Lex Arbitri* in Seat Theory: Extent of Party Autonomy

Seat theory associates *lex arbitri* with the seat of arbitration, and parties do not usually make an express choice of the laws applicable to their arbitration.[119] As discussed earlier, relevant arbitral law is the prime consideration while choosing the seat. Still, the theory often encounters criticism for curtailing party autonomy in the disguise of *lex arbitri*. In reality, seat theory patronizes party autonomy, which is the driving force behind opting for arbitration.

6.1 Party Autonomy while Choosing Mandatory Provisions

As mentioned earlier, arbitration law of a state plays the most important role in selecting the seat, and since parties are free to hold part of or the entire proceeding in a place other than the seat, the contention that legal effect follows geographical choice is not tenable. In practice, parties enjoy wide discretion in choosing the seat of arbitration, as there is no legal obligation requiring the parties to select a seat contrary to their intention. In this regard, parties are expected to be cautious in choosing the seat as severe legal impact will follow therefrom, and should avail them of the opportunity to exercise party autonomy- especially in ad hoc arbitration.[120]Moreover, the autonomy of the parties subsists in institutional arbitration as well, since most institutional arbitration rules pay tribute to party intention while choosing the seat.[121] In the case of careless failure to select the seat, the parties may become potential victims as unpredictable consequences may follow therefrom.[122]

Nevertheless, when parties fail to make any express agreement regarding the seat of arbitration, the decision is left to the tribunal in ad hoc arbitration[123] and in most institutional arbitration as well. Since the parties have selected the tribunal, it is presumed that the parties have impliedly chosen the seat in such a situation. Hence, impliedly or expressly, the choice remains with the parties to select the seat, which in turn means that parties are free to choose the mandatory provisions of *lex arbitri*. Though there is no scope to modify the mandatory provisions, parties are given numerous options since all states are open to them to select as a seat. Consequently, parties enjoy unfettered discretion in deciding the mandatory provisions of which state serve their purpose best. Hence, party autonomy

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[119] Henderson (n 68) 891.

[120] Belohlavek (n 20) 273.

[121] UNCITRAL Model Law 1985, art 20; ICC Rules 2012, r 18; LCIA Rules 2014, r 16 (all these articles leave it to the parties to determine the seat of arbitration and in default of the parties, transfer the power to the tribunal).

[122] Filip De Ly, 'The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning' (1991) 12 *Northwestern Journal of International Law &* Business 56.

[123] Belohlavek (n 20) 274.

is upheld in choosing the mandatory provisions of *lex arbitri*. Likewise, party autonomy also applies to directory provisions.

6.2 Party Autonomy while Choosing Directory Provisions

Concerning the directory provisions, the autonomy of the parties is much wider. Yet, it is subject to one restriction, i.e., the provisions selected by the parties should not violate the mandatory provisions of *lex arbitri*. For instance, in most jurisdictions, the procedural aspect of the *lex arbitri* falls within non-mandatory category and *lex arbitri* contains a default set of rules for conducting arbitration in that territory- available to assist the orderly progress of a case if the parties fail to make other arrangements through the adoption of standard (or other) arbitral rules.[124] Since internal *lex arbitri* (the procedural law of arbitration) hardly contains any mandatory provision, parties can substitute those rules, provided that the substituted provisions are not in violation of any mandatory provision.

An example of wide party autonomy in modifying *lex loci arbitri*- in order to create a unique *lex arbitri*, is the possibility to use a foreign procedural law. To explain it rightly, parties are free to arbitrate in country A and choose the procedural law of country B, provided that such modification is not inconsistent with mandatory provisions of country A. In this connection, in the case, *Naviera Amazonica Peruana SA v. Compania International de Suguros del Peru,* the English Court of Appeal upheld the validity of an agreement which makes the procedural law of a state, other than the seat, applicable to arbitration.[125] As stated earlier, most states take a liberal attitude towards internal *lex arbitri* (the procedural law of arbitration), and consequently, the parties may also choose the rules of any arbitral institution or may design their own rules. Therefore, though it is true that seat theory identifies *lex loci arbitri* with *lex arbitri*, an option is open to the parties to make their own convenient *lex arbitri,* keeping the mandatory provisions unimpaired.

7. Conclusion

From the time of its first insertion in the Geneva Protocol, seat theory has attracted much criticism because of its apparent paradoxical role of making an international proceeding subservient to a domestic legal system. Such criticism does not hold firm ground and erodes with the multiple benefits imparted by seat theory. This paper shows the inevitable role of seat theory in international commercial arbitration as it does the exigent task of giving a legal basis to the proceeding. Without such legal basis, the award will run the risk of being non-enforceable, frustrating the ultimate object of international arbitration. Controversy about

[124] Henderson (n 68) 888.

[125] *Naviera Amazonica Peruana SA v. Compania International de Suguros del Peru* [1988] 1 Lloyd's Rep 116 (In this case English procedural law was applied to an arbitration held in Lima, Peru).

seat theory revolves mainly around the process of turning *lex loci arbitri* into *lex arbitri,* and the consequences following therefrom.

This paper further shows that in the process of such conversion, reverence is shown to party autonomy in terms of both mandatory and directory provisions. The inconveniences of the theory often put forward by the opponents are not peculiar to the theory but to the arbitration law of some states and the indifference of the parties while choosing the seat. For the smooth functioning of the theory, without warranting any unpredictable consequences, different arbitration jurisdictions should maintain an international approach while drafting their *lex loci arbitri*. Besides, the court at the seat should not deal with an international proceeding with a domestic attitude. Such an arbitration-friendly approach will help seat theory to reconcile the opposing interests of the states and the parties to the proceeding.

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Arbitration under the Arbitration Act, 2001, Bangladesh: Procedural drawbacks and some plausible solutions

Md. Harun-Or-Rashid*

Abstract: *In today's world, parties in an agreement always want quick, cost-effective and fair dispute resolutions mechanism. As an alternative form of dispute resolution, arbitration is considered one of the most common and binding methods of dispute resolution between parties. In the current age of global movement towards the promotion of foreign investment in Bangladesh and keeping pace with the international business and international commercial arbitration law, Bangladesh is not lagging behind any more. As a part of the Indian subcontinent, the practice of Arbitration in Bangladesh has been being observed in various forms since the time immemorial. Nonetheless, a new arbitration law named as 'The Arbitration Act, 2001*[1] *was enacted consolidating both domestic and international commercial arbitration through repealing the British enacted 'The Arbitration (Protocol and Convention) Act, 1937', and 'The Arbitration Act, 1940'.*[2] *The new Act basically based on the Model Law on International Commercial Arbitration, 1985*[3]*, which generates a single and unified legal system for arbitration in Bangladesh. However, the much wanted model arbitration law is not free from flaws and in some extent it fails to meeting up the expectations of the parties in agreement, who want the fast and easy access to justice. The main purpose of this paper is to examine the existing arbitration law and procedures in Bangladesh, what are the enabling and constraining factors for ensuring access to justice in the mentioned process, and how it can be used effectively to resolve the shortcomings in a rapidly evolving arbitration process where parties' satisfaction is a key criterion.*

Keywords: Arbitration, Arbitration Act 2001, and Arbitral procedures in Bangladesh.

* Additional District and Sessions Judge, 1st Court of Settlement, Dhaka.

[1] The Act came into force on the 10th day of April, 2001, vide Notification No. SRO 87-Law/2001, dated 09-04-2001, Published in Bangladesh Gazette Extraordinary, dated 10-04-2001.

[2] Arbitration Act, 2001(Bangladesh) s 59(1).

[3] Samaha M Karim. 'Précis of a salient Act' *The Daily Star* (Dhaka, 16 August 2008) <https://.un-.org/sites/.un.org/files/media-documents//en/06-54671_ebook.pdf> accessed on: March 30, 2021.

1. Introduction

Dispute is inevitable in our daily lives. Since the time of civilization litigation is one of the oldest and most used methods to resolve dispute between the parties. However, due to globalization and the enhancement of global trade and commerce, the international commercial disputes requires to be resolved by exercising Alternative Dispute Resolution mechanisms such as Arbitration in an expeditious and effective manner against the prolonged mode of Justice delivery in courts.

The present Arbitration Act of 2001 was enacted through repealing the earlier Arbitration Act of 1940, which was highly influenced by the UNICITRAL Model Law. In fact, this Act was primarily enacted to meet the challenges that were not covered by the previous Arbitration Act. Since the commencement of this Act there has been a positive change in the ambiance of arbitration as well as in the business community in Bangladesh. A separate Bench of High Court Division of Bangladesh Supreme Court has been set up for disposing the matter relating to international commercial arbitration. To remove the existing flaws and for making a balance with the demand of the parties and the international commercial arbitration, the Act was modified in 2004. Such jurisdictive measures were necessary for keeping pace with the growing need of foreign investment in Bangladesh, especially in natural gas and power sectors. It is expected that the new Arbitration Act and its effective application as an alternative mode of delivery of justice will ease the pressure of already overburden courts and bring out a meaningful change, especially in the area of enforcement of foreign arbitral awards as provided in the New York Convention, to which Bangladesh is a party. So, this article shall examine the basic features of the Arbitration Act, 2001 and existing drawbacks in terms of applying the arbitration procedures depicted in the Arbitration Act, 2001. It will also explore the need for a more modern adjustment for resolving the disputes, especially commercial and financial disputes that can provide easier accessibility to parties who have disputes. Ultimately, this paper will propose a comprehensive recommendation for resolving the existing drawbacks in the arbitration mechanisms in Bangladesh.

While explain all these isses, the First Part of this paper will provide an introductory idea about the Arbitration Act, 2001 and the arbitration proceedings in Bangladesh. Basically, a preliminary overview about the whole topic will be given in this part. Then in the Second Part, this paper gives an overall idea and definition about the arbitration from various angles. In the Third Part, this paper gives a picture of historical development of arbitration in Bangladesh. In the Fourth Part, this paper illustrates the basic features of the Arbitration Act, 2001 and the arbitral proceedings in Bangladesh, and then the Part Five of this paper speaks about the composition of the arbitration tribunal. The existing drawbacks in the arbitration mechanisms in Bangladesh are discussed in Part Six

in this paper, and in the same way, in the Part Seven, this paper also examines the possible solutions to resolve the existing drawbacks in the Act and procedures. In concluding remarks, further research guidelines is to be given for fulfillment of this research paper and purpose in Part Eight.

2. Arbitration under the Arbitration Act 2001

The present Arbitration Act, 2001 does not define arbitration. According to the Section 2(m) of the Arbitration Act, 2001, Arbitration means any arbitration whether or not administered by permanent institution. Therefore, the Arbitration Act, 2001 indicates all types and nature of arbitration that should be resolved by following the relevant arbitration rules and procedures incorporated in the arbitral agreement or the common consensus of both of the parties in arbitral agreement.[4]

Arbitration may be categorized as domestic or international. In the same way, the Arbitration Act, 2001 distinguishes between international and domestic arbitration. If either of the parties to the dispute is a foreign entity, then the arbitration in question would be treated as international commercial arbitration. In contrast, if both the disputing parties are the citizen of Bangladesh as well as the dispute originates in Bangladesh, then the arbitration in question would be considered as domestic arbitration. Typically, when the parties are of different nationalities and/or when international trade interests are at stake, then it can be termed as international arbitration or foreign arbitration. This definition may vary depending on the governing laws of the concern parties and countries.

As per the section 2(c) of the Arbitration Act 2001, *"International Commercial Arbitration" means an Arbitration relating to disputes arising out of legal 'relationships, whether contractual or not, considered as commercial under the law in force in Bangladesh and where at least one of the parties is —*

a. "an individual who is a national of or habitually resident in, any country other than Bangladesh; or

b. a body corporate which is incorporated in any country other than Bangladesh; or

c. a company or an association or a body of individuals whose central management and control is exercised in any country other than Bangladesh, or

d. the Government of a foreign country."

Interestingly, from the plain reading of the mentioned definition of international commercial arbitration it seems that the commercial dispute between two Bangladeshi nationals takes places even in different states cannot be considered

[4] The Arbitration Act, 2001 (Bangladesh), s 2(m).

the subject matter of international arbitration under the Act.[5] Therefore, here the nationality of the disputing parties is the determining factor to define the nature of arbitration.[6] As per the Arbitration Act, 2001, if either of an international/ foreign element exists in the arbitral agreement, then for dealing with that issue the international arbitral rules and procedures enunciated in the Arbitration Act, 2001 shall be applied. If any procedure is not included in the agreement under dispute then as per the common consensus of the parties the concern country's arbitration laws and procedure is to be followed, or in applicable case, the rules of civil procedures shall be applied.

Arbitration may also be categorized as institutional or ad-hoc arbitration. In institutional arbitration, the enacted rules and frameworks of the concern institution are used to settle the dispute between the parties regarding arbitral agreement. It also can be termed as institution administered arbitration. On the other hand, in ad-hoc arbitration, the parties in the arbitral agreement themselves possess the full control and authority to determine the mechanisms and framework of arbitration such as the number of arbitrator, appointment of arbitrator, the forum of arbitration, etc.

3. History of Arbitration in Bangladesh

Arbitration is an ancient concept as its nature can be found in early sixth century B.C in Greek and Roman City States. Like this ancient concept, the arbitration has a long history in the Indian sub-continent. It can be traced in the forms of Puga', 'Srenis' and 'Kulas' collectively termed as arbitral tribunals since the Vedic times in British India which is found in the *Brhadaranayaka Upanishad*.[7]

However, as a part of the Indian subcontinent, the practice of arbitration in Bangladesh has been being observed since the time immemorial. Nevertheless, it is said that the *Panchayet* system was the early dawn of today's arbitration.

Later on, during the Muslim Periods (1206- 1857) 'Shalish' was established to the continuation of *Panchayet*. Shalish is not of the nature of arbitration as it predominately acted as the lowest tier of formal justice system. Though there is some fundamental difference between Salish and arbitration, nevertheless many argued that the nature of Salish is similar to today's arbitration in form.

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[5] The Law Review: The International Arbitration Review - Edition 9, Bangladesh: Available at: <https://thelawreviews.co.uk/title/the-oil-and-gas-law-review/bangladesh>. accessed March 25, 2021.

[6] ibid.

[7] "Puga: the local courts; Srenis: the people engaged in the same business and profession; Kulas: members concerned with the social matters of a particular community". See, Ashutosh Singh, 'Evolution of Arbitration in India and the Lack of Professionalism'.(*Pleasers*, 9 October 2021) <https://blog.ipleaders.in/evolution-arbitration-india-lack-of-professionalism/> accessed 20 July 2022.

However, the mentionable development of arbitration in the subcontinent was mainly occurred in during British regime. The High Court of Orissa, in the case of *State of Orissa and Others. v. Gangaram Chhapolia,*[8] depicted the successive developments and the codification of arbitration laws in the Indian subcontinent. As a part of Indian subcontinent, they were also applicable in Bengal (in today's Bangladesh).

The Bengal Regulations of 1772 and 1780 through inserting arbitration clause initiated the enactment of modern arbitration law in the subcontinent. Although these regulations did not vastly discuss about the mechanism of arbitration, nonetheless, a clause like "*in all cases of disputed accounts, it shall be recommended to the parties to submit the decision of their cause to arbitration, the award of which shall become a decree of the court"* paved the way of application of arbitration in the Indian subcontinent. Then Sir Elijah Impey's Regulation of 1781was enacted that provides only two clauses such as 1) "*the judges do recommend as so far as he can, without compulsion, prevail upon the parties to submit to the arbitration of one person to be mutually agreed upon by the parties*", and 2) "*no award of any arbitrator, or arbitrators be set aside except upon full proof, made by oath of two credible witnesses, that the arbitrators had been guilty of gross corruption or partiality in the cause in which they had made their award*."[9] Thereafter, on 27 June, 1787, the Second Regulation of the Administration of Justice was enacted containing the case transferring rule to the arbitration. In this mechanism, cases were transferred after taking consent of the parties in suit to resolve those cases by using the mechanism of arbitration. However, it did not contain any mechanisms to regulate the arbitration proceedings such as time and manner of arbitration.[10]

Like the Administration of Justice Regulation, the Regulation XVI of 1793 was promulgated containing the same provision of referral of suits to arbitration. However, there was an addendum containing the referred suits will be submitted to the Nizam for its decision.

Subsequently, the Regulations XXI of 1793, and XV of 1795 were issued which made further improvement to referring certain types of disputes (such as dispute relating to accounts, partnership, debts, non-performance of contracts, etc.) was to be resolved through arbitration. Basically, these regulations incorporated the provisions relating to reference of suit to arbitration, award, appointment of arbitrators, and rule for setting aside of the arbitral awards.[11]

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[8] 76 (AIR) 1982, Orissa 277.

[9] Law Commission of India, 76th Report. See also, *State Of Orissa And Ors. vs Gangaram Chhapolia And Anr <https://indiankanoon.org/doc/584642/>* accessed on July 30, 2021.

[10] Nripendra Nath. Sarkar,*Law of Arbitration in British India* (Vol. 6, The University Book Agency, India 2016).

[11] Naresh Markanda and Rajesh Markanda, *Law Relating to Arbitration and Conciliation* (Vol. 3, 9th Edn, Lexis Nexis, Delhi 2016).

The Regulation of 1793 was further improved by the Regulation VI of 1813 to resolve the land related litigation through arbitration.[12] Thereafter, the Regulation XXVII of 1814 was enacted containing the provision of arbitration, which allowed the advocate to act as arbitrators.[13] In the same way, the authority was given to the Revenue Officers and the Collectors by the Bengal Regulation VII of 1822 to refer the disputes relating to the rent and revenue to be resolved through arbitration.[14] Similarly, according to the Bengal Regulation IX of 1840, the Settlement Officers got the authority to refer disputes to arbitration.[15] Thereafter, the Civil Procedure Code for India, was enacted in 1859 (Act VIII of 1859) containing the Sections of 312 to 327, and discussed the issues of referring pending suits to arbitration, procedure for arbitration, arbitration without intervention of the courts.[16]

In 1882, the Act XIV of 1882, Sections 506 to 526 of the Code of Civil Procedure was amended as it is except the interpretation held in the case of *Pestonjee v. Manockjee* regarding revocation of submission of arbitration.[17] However, this Code did not indicate any provision for reference to arbitration of future disputes.

To solve the indicated issue, Indian Arbitration Act (IAA), 1899 was enacted modeled after the English Arbitration Act (EAA), 1889. In fact, the most of the sections of the EAA were similar to the IAA. However, the IAA was insufficient to meeting the needs of arbitration due to its limited jurisdictional application.[18]

To filling the mentioned gap, in 1908, the Code of Civil Procedure (CPC) was enacted and its Second Schedule included the provisions relating to the reference of suits to arbitration with and without the intervention of the courts.[19]

In 1940, the Indian Arbitration Act was enacted repelling the earlier Arbitration Act of 1899 and the provisions relating to the arbitration indicated in the Second Schedule of the CPC of 1908. This Act was based on the English Arbitration Act of 1934.[20]

After being independence in 1947, as a part of Pakistan (Bangladesh was termed as East Pakistan), and thereafter, being independence in 1971 as a country

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[12] Law Commission of India (n 10).

[13] Markanda and Naresh (n 11).

[14] Law Commission of India (n 10).

[15] ibid.

[16] Microsoft Word - Dissertation. (ssrn.com).

[17] Markanda and Naresh (n 11).

[18] Vikram Raghavan, 'New Horizons for Alternative Dispute Resolution in India – The New Arbitration Law of 1996' (1996) 13(4) *Journal of International Arbitration* 94-96.

[19] The Code of Civil Procedure 1908 (Bangladesh) Second Schedule, para 17-21.

[20] Law Commission of India, 76th Report.

named as Bangladesh, till the enactment of the new Arbitration Act of 2001, the Indian Arbitration Act of 1940 was applied for resolving the commercial disputes in Bangladesh.

4. Basic features of Arbitration Act, 2001 and the arbitral proceedings in Bangladesh

The Arbitration Act, 2001, which is based on the UNICITRAL Model Law, provides a uniform formula for both domestic and international commercial arbitration by consolidating the entire arbitration law in one single Act. It contains 59 sections in 14 chapters. As a modern law regarding domestic and international commercial dispute resolution through arbitration, this Act from its Chapter I to Chapter XIV sequentially states the issues of applicability and commencement of the Arbitration Act, general provisions, arbitration agreement, composition of arbitral tribunal, jurisdiction of arbitral tribunals, conduct of arbitral proceedings, making of arbitral award and termination of proceedings, recourse against arbitral award, enforcement of arbitral awards, recognition and enforcement of certain foreign arbitral awards, appeals, miscellaneous, supplementary provisions, and repeals and savings issue.[21]

A close examination of the whole Arbitration Act of 2001 that is, from introductory to savings clause the following basic topographies are comprehended:

a. This Act shall be applicable both in case of domestic and international commercial arbitration because in the preamble it has been stated that "*An Act to enact the law relating to international commercial arbitration, recognition and enforcement of foreign arbitral award and other arbitrations."*[22] In case of existence of any foreign element in an arbitration agreement then the international commercial arbitration would be applied. In all other case, domestic arbitration would be applicable. The nature of applying jurisdiction by the arbitral tribunal is comparatively flexible than to the UNICITRAL Model Law. Section 17 of Arbitration Act 2001 states *"...unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction on any questions including the following issues, namely –*
    - *whether there is existence of a valid arbitration agreement.*
    - *whether the Arbitral Tribunal is properly constituted;*
    - *whether the arbitration agreement is against the public policy;*
    - *whether the arbitration agreement is incapable of being performed; and,*
    - *whether the matters have been submitted to arbitration in accordance with the arbitration agreement."*

[21] Arbitration Act, 2001 (Bangladesh).

[22] ibid 1.

So, as per the Arbitration Act of 2001 the parties and arbitral tribunal enjoys more flexibility regarding the issue of jurisdiction.

b. The dispute at issue must be arisen out of a legal relationship, whether contractual or not, but considered as a commercial dispute under the law in force in Bangladesh because section 2(n) of the Arbitration Act of 2001 has stated that the *"arbitration agreement" means an agreement by the parties to submit to Arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*

c. The parties are free to appoint the number of arbitrators.[23] If the parties fail to fix the number of arbitrators, the tribunal is to consist of three arbitrators.[24] Unless otherwise agreed by the parties, where they appoint an even number of arbitrators, the appointed arbitrators shall jointly appoint an additional arbitrator who shall act as a chairman of the tribunal.[25] The parties may appoint an arbitrator or arbitrators of any nationality and the chairman of the tribunal may be of any nationality if the parties agreed upon it.[26] In respect of domestic arbitration the District Judge's Court, and in respect of international commercial arbitration the High Court Division of the Supreme Court of Bangladesh can intervene with a view to appointing an arbitrator/arbitrators on behalf of the parties as well as of the chairman of the arbitral tribunal within sixty days from the receipt of a party's application, to facilitate the arbitral process.[27] In the case of appointment of a sole arbitrator or third arbitrator in an international commercial arbitration, the Chief Justice or the Judge of the Supreme Court designated by the Chief Justice, as the case may be, may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.[28]

d. The Arbitration Act of 2001 follows the doctrine of severability that is partial agreement can be arbitrated if it is enforceable as per Arbitration Act. In that case, it can be considered as separate agreement for the purpose of determining the jurisdiction of the arbitral tribunal,[29]and arbitral agreement must be referred to the arbitration tribunal as per the mutual consensus of the parties in agreement.

e. Beside the Arbitration Act, parties can adopt other means like, mediation or

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[23] Arbitration Act 2001 (Bangladesh), (n 22) s 1.1.

[24] ibid, s 11.2.

[25] ibid, s 11.3.

[26] ibid, s 12.1.

[27] ibid, s 12.77.

[28] ibid, s 12.10.

[29] ibid, s 18.

conciliation to settle the dispute. As per section 22 of Arbitration Act, *"It shall not be incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute otherwise than by arbitration and with the agreement of all the parties, the arbitral tribunal may use mediation, conciliation or any other procedures at any time during the arbitral proceedings to encourage settlement.*

f. The parties in an arbitration agreement are free to choice the seat of the arbitration. If the parties fail to do so, the arbitration tribunal after considering the pros and cons and all other relevant circumstances shall fix the same.[30]

g. In the absence of the parties' consensus regarding the use of language in the arbitration proceedings, the tribunal can use any language as it deems fit and proper.[31]

h. The arbitration tribunal is free to follow rule of evidences or Code of Civil Procedure unless the parties' come to an agreement to do so for ends of justice.[32] Parties in arbitration possess the right to choice any arbitration rules or procedures.

i. The parties in agreement are free to choose any arbitration rules and legal system of any country regarding the subject matter of a dispute. If the parties in agreement are unable to do so then the tribunal shall follow appropriate rules and procedures for ensuring the justice.[33]

j. In an arbitration tribunal, the parties in the agreement have the right to choose a lawyer or any other representatives who can represent the issues of the parties before the tribunal.[34]

k. As per the amendment of the Arbitration Act in 2004 (Act II of 2004), now parties in agreement may seek interim order in the form of injunction or attachment of the subject matter in dispute to the arbitration tribunal or to court, and no appeal shall lie against that interim measures.[35]

l. The arbitration tribunal shall have the right to issue summon against any persons for appearing before it,[36] and settle the issue quickly, fairly and impartially after giving the parties to present their case in written and orally and appreciating the evidences adduced before it, and finally deciding the

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30 ibid, s 26.

31 ibid, s 24.3b.

32 ibid.

33 ibid, s 24.3b.

34 ibid, s 31.

35 ibid, s 21.

36 ibid, s 33.

matter by providing an award.[37] After having the notice if the parties fail to submit evidences, then the tribunal may operate in-absentia proceeding and make a default judgment on the basis of the earlier evidences adduced before it.[38]

m. The arbitration tribunal shall also give its award without undue delay and the award shall have the same effect like the decree in court of law. An award shall be made by the majority of the arbitrators and shall be in writing and signed by the majority number of arbitrators where the tribunal consists of more than one arbitrator.[39] The arbitration award can be challenged in the court only on specified grounds.[40] Section 43 of the Act clearly states that when an award is received by using the fraudulent or corrupt practice, or which is against the incumbent public policy of Bangladesh, or which violates the principles of natural justice, or if the tribunal acts beyond the terms of the submission, and deciding on matters which are legally not possible to arbitrate then the aggrieved party can file petition for setting aside the awards.

n. The Act makes provision for correction of award if any computational, or clerical, or typographical, or any other errors of a similar nature occurring in the award.[41] In terms of setting aside of the order of the arbitration tribunal, an appeal may be filled to the High Court Division of the Supreme Court of Bangladesh to setting aside the order of the arbitration tribunal or refusing to set aside an award, or refusing to recognize, or enforce any foreign arbitral award.[42]

o. If any award is given after following the New York Convention, that is, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, then that award is to be recognized and enforced as if it was passed from the local court of Bangladesh, which was embodied in Section 45 of the Arbitration Act, 2001. Nonetheless, the court may refuse to execute a foreign arbitral award for a certain reasons such as parties incapacity, invalid arbitration agreement, improper representation and proceedings, out of subject matter of arbitration, improper composition of arbitration tribunal, subject matter of arbitration is against the law and public policy specified in Section 46 of the mentioned Act.

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37 ibid, s 23.

38 ibid, s 35(4b).

39 ibid, s 38.

40 ibid, s 39.2.

41 ibid.

42 ibid, ss 44 and 48.

5. The composition of arbitration tribunal and the process of arbitration

In Bangladesh, there are two types of justice delivery mechanism for ensuring justice. Generally, for dispensation of civil justice (including commercial arbitration) the Code of Civil Procedure (CPC) of 1908 is applied, and for dispensation of criminal justice the Code of Criminal Procedure (CrPC) is applied. Here, the civil suits are administered according to the provisions of the CPC (including the enforcement mechanism of commercial arbitration awards) through traditional court proceedings. Unfortunately, there are no specialized or separate arbitration tribunals available in Bangladesh to arbitrate domestic and international commercial arbitration. Even, till today, there are no arbitration rules framed by the government of Bangladesh for commencing the arbitration proceedings according to the Arbitration Act, 2001. Here, the parties are at liberty to follow and adopt their own rules or choose any internationally recognized rules for settlement of dispute regarding arbitral agreement. In fact, the Arbitration Act, 2001 is a synchronized mechanism that is, combined with the private mechanism and certain intervention of court (court-supported arbitration).

In case of private arbitration, the parties are at liberty to choose any arbitrator(s) to settle their dispute. However, in certain cases of private arbitration, the Arbitration Act, 2001 considers the support of the court, especially, dealing of the interim measures,[43] appointment of arbitrators,[44] challenges of rules and procedure,[45] termination of arbitrator's mandate,[46]competence of arbitration tribunal to rule on its own jurisdiction,[47]assistance of the court regarding taking evidence,[48] setting aside arbitral award,[49] and recognition and enforcement of arbitral awards.[50]

Generally, if there is any arbitration clause in the arbitration agreement, then the parties may form private arbitration tribunal comprising retired justices of the High Court Division, or the Appellate Division to settle the issue. If either of the parties aggrieve from the mentioned award, then the aggrieved party may file application for setting aside the award. The Chief Justice of Bangladesh constitutes one or two benches of the High Court Division to try the cases regarding international commercial arbitration. In case of domestic arbitration, the District Judge of Dhaka tries the case and settles the arbitral agreement according to the Arbitration Act 2001.

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[43] ibid, s 7.

[44] ibid, s 12.

[45] ibid, s 14.

[46] ibid, s 15.

[47] ibid, s 17.

[48] ibid, s 33.

[49] ibid, s 42.

[50] ibid, ss 44 and 45.

The parties in arbitration agreement fix the number of arbitrator(s) for an arbitral proceeding, and if the parties fail to come to a common consensus as to the number of arbitrator then each party will appoint one arbitrator, and then the two arbitrators (from both parties) shall appoint the third arbitrator as the chairman of the arbitration tribunal.[51] Unless otherwise agreed by the parties, the arbitrator can be the citizen of any country. In case, if the parties fail to appoint the arbitrator within one month after receiving the request from either of the parties then the party must apply to the District Judge of Dhaka for appointing such arbitrator if the dispute is domestic in nature.

On the other hand, if the dispute relates to international commercial arbitration then the application for appointment of arbitrator(s) must be made to the Chief Justice of Bangladesh. In addition, if two arbitrators (from both the parties) fail to come to a consensus to appoint a third arbitrator, then again, in cases of international commercial arbitration the third arbitrator will be appointed by the Chief Justice of Bangladesh, or by his/her nominated judge of the High Court Division of the Supreme Court of Bangladesh. In case of domestic commercial arbitration, then the issue shall be settled by the District Judge of Dhaka. In both cases, the appointment must be made completed within 60 days from the date of receipt of the application in this regard. So, it can be said that the composition of the arbitration tribunal is mainly depends on the mutual and common consensus of the parties in agreement.

6. Existing legal and procedural drawbacks in the arbitration mechanisms in Bangladesh

Although the Arbitration Act 2001 has been enacted to resolve the problems in earlier Acts and to ensure access to justice in the domestic and international commercial arbitration, it not free from shortcomings. Already eighteen years have been passed since its enactment; nevertheless, it seems that arbitrations in Bangladesh are still struggling with following issues:

6.1 No Specialized Arbitration Tribunal/Court

At present, there are no specialized arbitration tribunals in Bangladesh. There is an Energy Regulatory Commission, which performs just like the arbitration tribunal to adjudicate disputes relating to energy. Moreover, the Arbitration Act 2001 does not authorize any other District Judge Courts in Bangladesh, except the District Judge Court of Dhaka to arbitrate in domestic arbitral agreement. Even there is no specialized arbitration court for trying commercial disputes in Bangladesh. Here, parties are free to file suits in formal courts, unless the parties come to an agreement to determine the disputes through arbitration.

[51] ibid, s 11.

6.2 No Mandatory Arbitration Provision

Like the United States of America, in Bangladesh, currently, there is no mandatory arbitration provision in the laws of Bangladesh for settlement of dispute through arbitration. Here, when the parties to an agreement insert an arbitration clause in their agreement, then it is considered as mandatory for the parties to settle the dispute through arbitration. In that case, the court shall hold the dispute instituted in formal court system and shall send the parties for arbitration.[52] According to Section 89B of the CPC, the parties to a suit can apply at any stage of the proceedings to the court for withdrawal of the suit on the ground that they shall refer the dispute(s) for settlement through arbitration.

6.3 No Central Management System

At present, in Bangladesh there is no central management system of the domestic and international commercial arbitration. Now, the parties of an arbitration agreement administer and manage their arbitration proceedings as per their choices. Whenever any arbitration award is challenged, then the issue comes to in the official record.

6.4 Lack of Rules for Arbitration Proceedings

After enactment of the Arbitration Act 2001, already eighteen years have been passed. Unfortunately, till today, the much expected arbitration rules are not been framed in Bangladesh. Here, the parties are at liberty to follow and adopt their own rules, or resort to any internationally recognized rules such SIAC, or HIAC, or ICC rules for arbitration. As a private institute, in Bangladesh, the Bangladesh International Arbitration Council (BIAC) has developed comprehensive rules of arbitration for settlement of disputes through arbitration. Any interested parties may select the BIAC rules as their preferred rules while writing the arbitration clause in the agreement.

6.5 Lack of Special Procedure to Dispose and Enforce A Arbitral Award

Currently, if any award is challenged in the formal court system, the rules of civil procedure will apply. There are no special rules or procedures to enforce an international or domestic arbitral awards in Bangladesh. So, parties have to assume rules of civil procedure cum civil justice delivery mechanism to enforce the arbitral awards in Bangladesh. As the civil justice delivery method is already overburdened with mounting arrears of cases, so using the civil rules and procedures for enforcing the arbitration awards would be an additional burden to the civil justice system in Bangladesh instead of ensuring access to justice.

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[52] ibid, ss. 7, 10.

6.6 Delay of Arbitration Proceedings

In fact, at present, there is no stipulated time to enforce the arbitration award in Bangladesh. For this reason, the enforcement mechanism of the arbitration award is very time-consuming. Moreover, for enforcing the award, parties have to adopt the civil court, which is already overburdened with thousands of cases. The delays and cost in the civil justice delivery mechanism in Bangladesh is the most vex and nerve-racking problem, which in fact, deters access to justice of the parties.

6.7 Lack of Definition of Public Policy

Currently, there is no 'public policy' definition in the Arbitration Act 2001. Due to this deficiency any aggrieved party can file application for setting aside the arbitration award which goes against the interest of public. Sometimes, it creates confusion to the courts regarding its interpretation. For example, an award may not be enforced if it is contrary to the public policy in Bangladesh. Due to this procedural requirement, the parties in an agreement need to go to the very civil justice delivery mechanism, which is already overburdened with delays.

6.8 Lack of Time Frame for Arbitration Procedure

The current Arbitration Act 2001 lacks the speedy arbitration procedures, which in fact, hinders the access to justice to the parties in arbitration proceedings. Due to this statutory limitation, the parties in arbitration proceedings always seek for a cost effective and easy accessible mechanism to settle their disputes within a shortest period of time.

6.9 Lack of Time Frame for Appointment of Arbitrator

Parties' discontent or disagreement regarding appointment of arbitrator is one of the most common problems in Bangladesh. This may be due to their ill-intention to make the process delay, or lack of knowledge regarding procedure of arbitration. As a result, the innocent party in domestic arbitration has to move to the District Judge Court, and in international commercial arbitration, has to move to the Chief Justice of Bangladesh for the appointment of the arbitrator. Due to lack of specialized arbitration court, this typically takes a long time in Bangladesh, and as a result, the overall access to justice in the arbitration process gets delayed and hindered.

6.10 Limitation of The Legal Provisions (The Principle of Territoriality)

The Arbitration Act 2001 follows the principle of territoriality regarding enforcement of the arbitral award rather than the principle of *lex arbitri* under which the award was rendered. According to the principle of territoriality and as per Section 3 of the Arbitration Act 2001, the arbitration which takes place within the territory of Bangladesh falls within the purview of the clause. On

the other hand, an international commercial arbitration takes place beyond the purview of the local jurisdiction of Bangladesh shall not come within the scope of Arbitration Act 2001. Moreover, the word of 'place… in Bangladesh' sometimes causes huge confusion as to its meaning and interpretation. In fact, this limitation of interpretation restricts the power of the court to issue interim order where the arbitration takes place outside the territorial jurisdiction of Bangladesh. In addition, it creates barrier to the aggrieved party to access to justice in the Arbitration proceeding of Bangladesh.

6.11 Interim Order

As per Section 7A of the Arbitration Act 2001, the arbitral tribunal, as an interim measure, may issue interim order in necessary and proper circumstances within the local jurisdiction of Bangladesh. Nevertheless, it does not provide any specific guidelines, or limitations regarding issuing of the same. Regarding this interim measure, the judiciary of Bangladesh has pronounced contradictory decisions. In *HRC Shipping Ltd v. MV X-Press Manaslu*, 58 DLR 185, the honorable High Court Division of the Supreme Court of Bangladesh held that the court can issue interim order where the seat of arbitration is outside the territory of Bangladesh. Conversely, in *STX Corporation Ltd v. Meghna Group of Industries Limited,* 64 DLR 550, the honorable High Court Division held that the provision of interim measure of this Act is not applicable to a foreign arbitration where the seat of arbitration is beyond the local jurisdiction of Bangladesh.

In support of the mentioned literary interpretation, the Court mainly relied on the decision given by the Appellate Division of the Supreme Court of Bangladesh in *Unicol Bangladesh v Maxwell,* 56 DLR (AD) p.166, and p.172, where the apex Court of Bangladesh held that according to the spirit of the Section 3(1) of the Arbitration Act, 2001, the application for interim measure is limited to the arbitration proceeding that seat of arbitration is within the boundary of Bangladesh. Recently the honorable High Court Division has reconsidered its earlier decision like the decision of the apex Court (Appellate Division of Bangladesh) and held in *Project Builders Ltd (PBL) v. China National Technical Import and Export Corporation and others reported,* 69 DLR 290, there is no scope to deviate from the provisions of Section 3 of the Arbitration Act of 2001. As a result, unless any revised order issued by the Appellate Division of the Supreme Court of Bangladesh, or any amendment in the legislation is done regarding the interim measures, currently there is no scope for the District Judge Court of Dhaka, and the High Court Division of the Bangladesh Supreme Court to issue the interim order in a foreign-seated arbitration proceeding.

6.12 More Requirements than Model Law

Although the Arbitration Act 2001 was enacted in Bangladesh with a vision to keep pace with the modern trends in international commercial arbitration, there are some aspects where the Act does not follow the requirements of the Model Law, or New York Convention. As for example, at present, if any applicant wants to file an application under this Act to execute a foreign arbitral award, then the applicant has to submit additional documents like, the original or authenticated copy of the arbitral award, an original or certified copy of the arbitration agreement and duly certified translations of such documents to ensure that the award is a foreign award. In fact, the ambit of the Arbitration Act 2001 is much narrower than either the Model Law or the New York Convention.

7. Plausible Recommendations for Resolving the Existing Drawbacks in the Arbitration Mechanisms in Bangladesh

As a rapidly growing economy and a potential destination for foreign investment, Bangladesh has already taken a right approach through enacting the Arbitration Act of 2001. Though the history of arbitration is not new in the legal system of Bangladesh, but in practical sense, the scope of application of arbitration mechanism is comparatively very limited like other developed nations. So, it is the right time to enhance use of arbitration mechanism as an alternative method for settlement of disputes beyond the traditional court adjudication process.

At present, in Bangladesh, there are two types of justice delivery mechanism: one is civil justice delivery system, and another one is criminal justice delivery system. In both cases it uses procedural laws for dispensation of justice through the litigation procedures. There is so separate or individual mechanism such as arbitration to settle the dispute beyond the jurisdiction of courts. Though in addition to the litigation procedures, there are village courts and the mediation system for delivery of justice, but those are subservient to the court proceedings. For this reasons, the present Judiciary of Bangladesh is caught in a vicious cycle of delays and backlog of cases.[53] Access for the poor, vulnerable and underprivileged to formal justice delivery system in Bangladesh is limited by a huge logjam of cases, and high litigation costs. In this case, a paradigm shifting approach may be helpful to get rid of from this problem. The Government of Bangladesh may enact new arbitration law, like the Uniform Arbitration Act in the USA, or may modify the existing Arbitration Act as a paradigm shifting approach to ensure more access to justice to the parties in agreement.

[53] M Shah Alam, 'A possible way out of backlog in our judiciary' *The Daily Star* (Dhaka, 16 April 2000).

Besides the mentioned paradigm shifting approach there needs to solve the existing drawbacks in the Arbitration Act 2001 and the arbitral procedures in Bangladesh to ensure access to justice to the parties in arbitration. For resolving the current barriers within the arbitration mechanisms in Bangladesh, the following plausible things may be worth considering:

a. At present, there are no arbitration rules of procedure for enforcing the domestic and international commercial arbitral award. Currently, if any award is challenged in the formal court system, the rules of civil procedure will apply. There are no special rules or procedures to enforce an international or domestic commercial arbitral awards in Bangladesh. The legislature should immediately enact the mentioned rules of procedure for ensuring access to justice in the Arbitration Act and arbitral tribunal in Bangladesh.

b. Currently, there is no specified or specialized arbitration tribunal, or fast-tract arbitration court to handle the disputes relating to arbitration. In addition, the dispensation of other types of cases, the same civil courts also perform the functions as an arbitration tribunal. This tendency creates extra burden to the concern courts and delays the whole justice delivery mechanism. So, immediately sufficient separate and specialized courts should be established both in the subordinate courts and in the Supreme Court of Bangladesh.

c. Interestingly the Arbitration Act 2001 allows the High Court Division (HCD) to set aside any arbitral award held in Bangladesh without authorizing any enforcement mechanism (though the High Court Division inherently possess this power without any application, nevertheless the Arbitration Act 2001 does not authorize any enforcement power to the HCD). On the other hand, the District Judge's Court of Dhaka possesses the authority of recognition and enforcement of arbitral award (both domestic and foreign arbitral awards). This situation sometimes creates confusion to the District Judge's Court regarding enforcement mechanism because the opportunist party sometimes adopt the process of setting aside of arbitral award to the HCD intentionally to delay the whole arbitration process. So, both the HCD and also the private arbitral tribunal should have the power of enforcement of arbitral award. This procedural deficiency should be resolved immediately to ensure parties' access to justice in the arbitration mechanism in Bangladesh.

d. Presently, though there are few private arbitration centers are established in Bangladesh, especially BIAC, nonetheless, they have no enforcement mechanism of arbitral award. If any arbitral award is issued from this center then for enforcing that award the winning/aggrieved party need to file application before the civil court, that is either the District Judge's Court of Dhaka, or the High Court Division of the Supreme Court of Bangladesh. In this circumstance, to keep pace with the Model Law, the private arbitral tribunal should also hold the same powers like the mentioned courts. In the same way,

the interim orders which were passed by the arbitral tribunal(s) should be enforceable as if they were issued for the said purposes from the mentioned courts. So, for improving the public confidence regarding arbitration process and existing conditions of the civil justice delivery system, and ultimately for ensuring access to justice of the parties in arbitration agreement, the mentioned drawbacks should be solved immediately through amending the Arbitration Act 2001.

e. Now, there is no specified time limit in the Arbitration Act 2001 for enforcing the arbitral award. For this reason, the enforcement mechanism of the arbitration award is costly and time-consuming. Moreover, for enforcing the award, parties have to assume the civil court, which is already overburdened with 3.3 million cases.[54] So, definite time frame should be incorporated within the Arbitration Act 2001 to ensure access to fair justice to the parties in arbitration.

f. Currently, there is no mandatory arbitration provision in the laws of Bangladesh for settlement of dispute through arbitration. For incorporating the mandatory arbitration procedure like USA, the parliament should immediately evaluate the mandatory arbitration provision in the context of Bangladesh, and if appropriate, then modify the Arbitration Act 2001 in this regard.

g. At present, in Bangladesh, there is no central management system of the domestic or international commercial arbitration. So, for ensuring access to fair justice in the arbitral tribunal and the Arbitration Act 2001, there needs to set up a central data-based and management system both in terms of domestic and international commercial arbitration.

h. Currently there is no 'public policy' definition in the Arbitration Act 2001. Due to this deficiency the parties, the arbitral tribunal, and the courts sometimes experience a serious confusion. So, the Government should introduce a set of principles, which would be considered as the principle of public policy through amending the current Arbitration Act 2001.

i. At present, parties' most often show their discontent or disagreement regarding appointment of arbitrator, and the issue of appointment ultimately goes to the civil court due to lack of special arbitral tribunal, and which consumes a huge time to select and appointment of an arbitrator. So, the selection of arbitrator through District Judge's Court, there should have definite time frame to ensure more access to justice.

[54] UNB. 'Law minister: Over 3.3m cases pending in courts' Dhaka Tribune (Online, January 16, 2018) < https://www.dhakatribune.com/bangladesh/court/2018/01/16/law-minister-3-3m-cases-pending-courts> Accessed 07 April 2019.

j. As per Section 7A of the Arbitration Act 2001, the arbitral tribunal has sufficient powers to issue interim order in necessary and proper circumstances. Nevertheless, it does not provide any specific guidelines, or limitations regarding issuing of the same. Regarding this interim measure, the judiciary of Bangladesh has pronounced contradictory decisions. So, unless getting any revised order from the apex court of Bangladesh, or any amendment in the legislation is done regarding the interim measures, presently, there is no scope for the Bangladeshi Courts or arbitral tribunal to issue the interim order in a foreign-seated arbitration proceeding. Therefore, immediate action is required in this regard for ensuring access to justice in the arbitration mechanism in Bangladesh.

k. The ambit of the Arbitration Act 2001 is much narrower than either the Model Law or the New York Convention because at present, if any applicant wants to file an application under this Act to execute a foreign seated arbitral award, then the applicant has to submit additional documents such as the original or authenticated copy of the arbitral award, an original or certified copy of the arbitration agreement and duly certified translations of such documents to ensure that the award is a foreign award. This process sometimes delays the enforcement mechanism. The legislature may consider this issue after sufficiently scrutinizing the pros and cons of the stakeholder's interest.

l. To ensure the greater efficiency and effectiveness in the existing arbitration procedure in Bangladesh, the views and perception of the Bar, Benches, and other stakeholders should be more focused and gripping regarding the international standard, values, norms and principles while settlement of dispute through arbitration. Moreover, during interpretation of arbitration clause, the concern courts should be more conscious about the spirit of Arbitration Act 2001 to keep pace with the global standard of arbitration. In this regard, not only the judiciary but also the other stakeholders should change their traditional mind-set of court adjudication.

m. To enhance the efficiency of the arbitration procedures in Bangladesh, the Government and other related bodies should come forward to promote the arbitration mechanism as a speedy, fair and easy accessible ADR mechanism. In this regards, some awareness programs like, training, seminar, symposium, and education regarding arbitration may be significantly helpful to the stakeholders.

n. Finally, as a modern law, the Arbitration Act 2001 would be an effective and efficient mechanism to settle the disputes through arbitration when all the mentioned stakeholders would do their jobs honestly and sincerely for the ultimate wellbeing of the disputants and their access to fair justice in the arbitration mechanism in Bangladesh.

8. Conclusion

As Bangladesh is a potential destination for foreign investment, so, for ensuring access to justice in the arbitration procedure in Bangladesh, now it is the perfect time to revise the Arbitration Act for resolving the existing challenges within the mechanism of arbitration. Of course, it's a matter of appreciation that Bangladesh has already made a significant development in the arena of arbitration through enacting the Arbitration Act, 2001; nonetheless it is not sufficient only to enact a law on arbitration. It's effective and efficient application to ensure access to justice in the domestic and international commercial arbitration process is much needed than its enactment. For overcoming the existing challenges and for ensuring access to justice in the Arbitration Act 2001 and the arbitral tribunal of Bangladesh, the Government of Bangladesh should incorporate the paradigm shifting approach along with other plausible recommendations in a coordinating way. So, the authority of Bangladesh, especially the Ministry of Law, Justice and Parliamentary Affairs should consider arbitration as a model approach in addition to the existing traditional dispute resolution mechanism to make the justice delivery system more meaningful, fair and easy accessible to all the stakeholders. In this regard, the every organs of the Government of Bangladesh along with other related stakeholders should come forward with coordinating mind to ensure access to fair justice in the whole fabrics of arbitration in Bangladesh. Moreover, for making the Arbitration Act 2001 and arbitral tribunal more effective and efficient, if needed, a real-world experience may be gathered from the existing arbitration mechanism of the USA. Finally, an advance research may also be done on the issues of cost and delays in the arbitration procedures in Bangladesh for making the arbitration mechanism as an efficient one, which in fact, would be beneficial to the people at large.

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Prospects and challenges of issuance of *Sukuk* in Bangladesh: Lessons from Malaysia for developing a comprehensive legal framework for Bangladesh

AKM Raquibul Hasan*

Abstract: *The introduction of Islamic Bond Sukuk in Bangladesh has created a new source of funding for the government and private sector. Favourable legal framework is necessary for the growth of Sukuk in Bangladesh. The core objective of this paper is to examine the domestic legal framework of Sukuk and to find out its compatibility with international standards, more particularly with the Malaysian regime. This paper offers a brief discussion on the prospects of Sukuk in Bangladesh and then outlines the challenges and limitations of Sukuk market. Part five of this article investigates the loopholes in the existing regulations in Bangladesh. Finally, this paper argues that while Bangladesh has established a regulatory guideline for prudential management of Sukuk, there is still room for improvement for efficient operation and effective management of Sukuk. Notably, this paper explores the Malaysian legal regime to find out the critical areas of reform in Sukuk regulations in Bangladesh.*

Keywords: Islamic Bond, *Sukuk,* Islamic financial regulation, Interest-free financial system.

1. Introduction

The Islamic finance industry is designed to assure revenues, develop innovative products and operate efficiently through a promise to "real-life, real-goods" financing, maintaining the guiding principles of *Shariah* law.[1] With the expansion of the interest-free banking system in the Muslim community as well as in the non-Muslim world, alternative investment tools also started to emerge in order to

* *District Legal Aid Officer(Senior Assistant Judge), Dhaka.*
** *This article is drawn and built upon themes articulated in an earlier paper which has been submitted to University of Melbourne as a research monograph of Master of Commercial Law.*

[1] Abdullah Abdullatef A Al Elsheikh and Joseph Tanega, 'Sukuk Structure and Its Regulatory Environment in the Kingdom of Saudi Arabia Analysis' (2011) 5 Law and Financial Markets Review 183, 183.

call the demand for interest-free financing.[2] For the past few decades, Islamic bond *Sukuk* has emerged as an alternative investment tool, also known as "interest-free bond application".[3]

Islamic bond *Sukuk*, was first introduced by Malaysia in 1990. Since then, it is increasingly on its direction to turn into a significant source of funding in terms of an interest-free financing model. *Sukuk* can be a new investment opportunity in Bangladesh. With a ninety per cent Muslim population, people here want to earn through *halal* instruments like *Sukuk* (Islamic Bond) based on Islamic *Shariah* and principles rather than a fixed interest rate (*Riba*).

Despite the phenomenal growth and increasing popularity of the Islamic finance industry in Bangladesh, *Sukuk* has no formal footprint here till 2020. Bangladesh has recently adopted a guideline titled 'Bangladesh Government Investment *Sukuk* Guidelines, 2020'(BGISG) on October 8, 2020, through a gazette notification.[4] With this new guideline, Bangladesh has introduced a regulatory framework of financial product *Sukuk* based on *Shariah* principles within the existing financial legal structure. The primary aim of introducing *Sukuk* is to raise funds and represent it as a possible cure for the ailing market.[5] It is to be noted that Bangladesh has already formulated a guideline for the operational model of *Sukuk*, however it is also undeniable that Bangladesh has so far very limited experience of *Sukuk* market system. This research paper will argue that the gaps and loopholes in the existing regulation might frustrate the core objective of *Sukuk* instrument in Bangladesh. This paper will seek to identify the existing challenges of regulatory framework, the problematic patterns and concerns related to *Shariah* compatibility of *Sukuk* and will also review the constraints and challenges of monitoring, dispute resolution, credit rating and appointment of advisors associated with *Sukuk*.

This research begins with the core features and utilization of *Sukuk* in the context of Bangladesh, then analyses the main features of regulatory framework of *Sukuk* in Bangladesh along with the challenges and limitations of the *Sukuk*, after that investigates the loopholes of the existing regulation and lastly, identifies key legal and institutional reform priorities for Bangladesh in order to formulate a comprehensive regulatory framework for *Sukuk* in Bangladesh. Malaysia is a pioneer in Islamic Banking and finance while Bangladesh is relatively a newcomer.

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[2] Elvan Z. Bilal, Gul Dogan Ocak and Ugur Alp Yalcinkaya, 'The Rise of Interest-Free Banking System: Sukuk' (2017) 16 *GSI Articletter* 21, 22.

[3] ibid.

[4] 'Bangladesh Government Investment Sukuk Guidelines, 2020' <https://mof.gov.bd/sites/default/files/files/mof.portal.gov.bd/publications/c7d1ed02_1f5c_4a42_947f_36adace8c33a/Shariah%20SUKUK%20Guidline.pdf> accessed 19 May 2022.

[5] Raj J. Thomas, 'Islamic Banking and Finance - Regulatory Regimes in Malaysia and Singapore' (2011) 29 *Singapore Law Review* 165, 165.

A comparative assessment with Malaysian regulations would reflect priority areas of reformation for a conducive legislative and regulatory framework on *Sukuk* in Bangladesh. This research paper will facilitate to generate and develop a vibrant legislative and regulatory framework governing *Sukuk* or Islamic bonds in Bangladesh.

2. Context of Interest-Free Financial System and the Fundamental Features of Islamic Bond (*Sukuk*)

Due to the prohibition of interest in Islamic Law and principles, the continuous expansion of interest-free banking system has also expanded the emergence of alternative investment tool, which is known as "interest-free bond application".[6] At present, *Sukuk* are considered as the most visible Islamic finance product for raising external financing in Islamic banking and finance industry.

The term *Sukuk* is plural for *sakk*, which denotes a financial instrument or a certificate demonstrating an ownership interest in *shariah* compatible assets or business activities with the right to the profits and liquidation proceeds produced from such assets or business activities.[7] It is also argued that contemporary term "check" has its origin in the word `*sakk*'. Imam Malik ibn Anas, a famous Islamic jurist, described in his famous treaties "*the al –Muwatta"* that the use of *sakk* as a state obligation for the partial payment to soldiers and government servant by the Muslim societies and government.[8]

The emergence and the development of growing expansion of interest-free bond application in the context of interest-free banking system can be found its origin back in 7th century when the first *Sukuk* was issued by the Great Mosque of Damascus, known as Umayyad Mosque in Damascus.[9] Malaysia is considered as the world's largest originator of *Sukuk,* which first supported *Sukuk* as substantial source of financing as alternative to bonds in 1990.[10] Currently, a number of Islamic countries, for example Malaysia and Bahrain have taken initiatives to build Islamic capital markets through issuance of *Sukuk* because of its operating model in Sariah -compliant way.[11]

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6 Bilal (n 2) 22.

7 Hossam Abdullah and Riza Ismail, 'Sukuk under Development' (2008) 28 *International Financial Law Review* 72, 72.

8 Zamir Iqbal and Abbas Mirakhor (eds), *Economic Development and Islamic Finance* (World Bank Group 2013) 258 <https://ebookcentral.proquest.com/lib/unimelb/detail.action?docID=1463586> accessed 2 February 2021.

9 Bilal (n 2) 24.

10 'Malaysian Sukuk: A Superior Alternative to Traditional Bonds' (*The Malaysian Reserve*, 11 December 2018) <https://themalaysianreserve.com/2018/12/11/malaysian-sukuk-a-superior-alternative-to-traditional-bonds/> accessed 14 April 2022.

11 Hossein G Askari, Zamir Iqbal and Abbas Mirakhor, *Challenges in Economic and Financial Policy*

Sukuk are considered as methods for raising funds. *Sukuk* are often compared with conventional bonds as they are being used as fund rising instruments.[12] *Sukuk* is considered a source of long-term financing in the construction of infrastructure and implementation of development projects. The Accounting and Auditing Organization of Islamic Financial Institute (AAOIFI) describes *Sukuk* as

> Certificates of equal value representing undivided shares in ownership of tangible assets, usufructs and services or (in the ownership of) the assets of particular projects or special investment activity, however, this is true after receipt of the value of the *Sukuk*, the closing of the subscription and the employment of funds received for the purpose for which the *Sukuk* were issued[13]

2.1 Salient Aeatures of Sukuk

The first and foremost feature of *Sukuk* is that it has no fixed interest. As *Sukuk* is the securitized form of financial certificate system developed to guarantee that the profit will be derived from a commercial activity, partnership, or ownership.[14] The returns to *Sukuk* holders are dependent on the profits or cash flow generated by the assets or investment financed utilizing *Sukuk* proceeds. The management of the *Sukuk* asset and it's proceed is entrusted with a trustee. Generally, large projects are implemented by raising money through *Sukuk*. The issuer of the *Sukuk* identifies existing assets to sell to the investors through a special-purpose vehicle (SPV).

The Islamic bond (*Sukuk*) offers unique opportunity to its investors, i.e. investors become the owner of the large scale projects along with commensurate cash flows and risk undertaken by *Sukuk*, whereas no other bond could offer a share of an asset or ownership of the assets of particular project or special investment activity. Additionally, if the *Sukuk* of undertaken project or investment activity fails, there is an opportunity to return the money to the investors by selling the assets of the project. It is to be mentioned that S*ukuk* are issued to finance the acquisition of new assets, *Sukuk* holders have a right to claim only on the revenues created by the new assets.[15] Besides, S*ukuk* can be traded at par, premium, or discounted values and can be listed in the capital market which is also assessable by specialist rating agencies and financial experts. *Sukuk* is considered a source of long-term financing in the construction of infrastructure and implementation of development projects.[16]

Formulation: An Islamic Perspective (Palgrave Macmillan 2014) 98 <https://go.openathens.net/redirector/unimelb.edu.au?url=http%3A%2F%2Fdx.doi.org%2F10.1057%2F9781137381996> accessed 2 February 2021.

[12] Iqbal and Mirakhor (n 8) 258.

[13] AAOIFI. 'Shari'ah Standard no 1: Trading in Currencies' <http://aaoifi.com/ss-1-trading-in-currencies/?lang=en> accessed 17 February 2021.

[14] Bilal (n 2) 25.

[15] Iqbal and Mirakhor (n 8) 259.

[16] Elizabeth Meager, 'Unlocking Sukuk' (2017) 36 *International Financial Law Review* 22, 23.

In fact, *Sukuk* is not the name of a specific financial agreement rather, the structuring of *Sukuk* determines its nature. Its structure is built under a specific contract of *Shariah*. These infrastructures are mainly divided into two parts - asset-based and asset-backed. Lease-based *Sukuk* are usually asset-based. And the rest are asset-backed.[17] The primary features of *Sukuk* are three, namely:

a. It is related to a special project;
b. It is backed by specific assets which is called 'underlying asset';
c. *Sukuk* holders basically generate profit from the underlying asset.

2.2 Mechanism of Sukuk

The mechanism of *Sukuk* is quite similar to the process of securitization. Securitization is the process of packaging a pool of assets like mortgages, auto loans, accounts receivables, or home equity loans into tradable securities that can be sold to investors of *Sukuk*. *Sukuk* are participation certificates against a single asset or a pool of assets.[18] The *Sukuk* is an asset-based security where the major credit risk is that of the originator who is required to pay the *Sukuk* holder depending on the underlying asset's performance. A conventional bond does not give any proprietary right in an underlying asset but rather just a contractual claim against the issuer.

Sukuk investors are often unaware of their risks. By definition, the *Sukuk* holder is the owner of the asset, not the creditor of the asset. A *Sukuk* is designed to escape the Islamic injunction on interest payments. Operation of *Sukuk* manages this by paying *Sukuk* holders with the cash flows produced by specific assets, which are put into a special-purpose vehicle (SPV) as part of the contract. Many financiers assume that the bonds were asset-backed, providing them a claim on the assets in the event of a default. But, in reality, most *Sukuk* are asset-based, holding investors title of the cashflows but not of the underlying assets themselves.[19] Generally the following parties are involved in a *Sukuk* agreement:

Subscribers: The *Sukuk* holders or the investors who invest in *Sukuk* instrument are subscribers.

Originator: Whenever any government or private entity or financial institution requires capital, it identifies the assets and transfers the same to a Special Purpose Vehicle(SPV). This issuing agency is called the originator.

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[17] ibid.

[18] Zamir Iqbal and Abbas Mirakhor, *An Introduction to Islamic Finance: Theory and Practice* (John Wiley & Sons, Incorporated 2011) 184 <http://ebookcentral.proquest.com/lib/unimelb/detail.action?docID=693367> accessed 2 February 2021.

[19] 'Sukuk It Up' [2010] *The Economist* (Online, 15 April 2010) <https://www.economist.com/finance-and-economics/2010/04/15/sukuk-it-up> accessed 2 February 2021.

Special Purpose Vehicle (SPV): An SPV is a separate entity which is formed particularly for the securitization process. SPV is the purchaser of the asset from the originator.

Credit enhancers: The originator arranges different forms of credit enhancement tools to be provided in order to reduce the overall perceived risk of the *Sukuk* instrument. This can take the form of a third-party guarantee- from a solvent Islamic financial institute or a sovereign.

Trustee: This indicates the party which is engaged in the protection of the interests of the *Sukuk* holders, overseeing the activities of the SPV.

Shariah Board: This board is responsible to provide any opinion and advice on *Shariah* issues regarding the operation of *Sukuk* instrument.

Obligor: Obligor is responsible for periodic lease payment to the *Sukuk* holders. It holds the *Sukuk* property on lease from the trustee on behalf of the *Sukuk* holders. The obligor also makes the closing interest payment and redeems the bond by refunding the principal amount to the bond holders.

2.3 The Most Commonly Used Sukuk Types

In the Islamic financial market, Mudaraba (profit sharing), Musharaka (profit-loss sharing), Murabaha (profit-selling), Ishtisna (product-making), Karj Hasan (good credit), Salam (advance purchase) and Ijara (lease) *Sukuk* are prevalent.

2.4 Bond vs. Sukuk

Although the objective of issuance of *Sukuk* is the same as conventional bond, but there are significant distinctive features of *Sukuk* as an Islamic bond. Conventional bonds are a means of raising funds based on interest payment. *Sukuk*, on the other hand, is an Islamic means of raising interest-free funds. There are difference between conventional bonds and Islamic *Sukuk* bonds. A bond is a contract executed between a lender and a borrower. It specifies the amount of the loan, the repayment period and the interest rate. It is not *Shariah*-compliant as it contains interest, speculation, etc. And *Sukuk* is an investment certificate that guarantees ownership of underlying assets. Usually, *Sukuk* holders get periodic payments from the income generated by the underlying assets.

3. Prospects of *Sukuk* in Islamic Financial Market of Bangladesh

Islamic financing is governed by *Shariah*-based regulation, so Muslim investors have access to financial services through investment in *Shariah*-compliant instruments. An essential goal for Islamic finance is to uphold high moral values according to *Shariah*, work for equality in the distribution of wealth in society, and to serve life, tradition, and intellect. Interest (*riba*), gambling (*maisir*), and

uncertainty (*gharar*) are prohibited by *Shariah* law. Due to these high standards, the Islamic finance sector's growth rate appears to be significant and accelerated.[20]

Developing countries can use *Sukuk* to raise development financing. For instance, governments can use *Sukuk* to finance the construction of roads, railway, ports, sanitation etc. The government of Bangladesh has decided to release *Sukuk* to meet the cost of various development projects, like schools, water treatment projects etc. Through the floating of *Sukuk*, a new safe investment tool with *Shariah* compatibility is being introduced in the domestic financial market.[21]

The introduction of the *Sukuk* would reduce the government's debt dependency on conventional banks. The pressure on conventional banks to finance the government will also be reduced. Opportunities will be created for Islamic banks to invest their idle money to help Bangladesh Bank implement the monetary policy. Bangladesh Bank says that from now on, in addition to the existing treasury bills and bonds and savings certificates, this *Shariah*-compliant Islamic bond *Sukuk* will also be a new source of government funding, which will be spent on development activities.[22] To meet the budget deficit, the government could only take loans from conventional banks. But the government could not take any loan from the Islamic banks due to lack of *Shariah*-compliant instruments. *Sukuk* has opened significant opportunities to take loans from Islamic banks which will ultimately reduce government's reliance on conventional banks. Besides, it will also decrease the cost of paying interest on the loan from a traditional banking channel.

The significant benefits and advantages of *Sukuk* can be summarized as follows :

a. Investment Opportunity for the Islamic Banks: *Sukuk* will create opportunities for Islamic banks to invest their idle money. This will also increase their profitability. In addition, it will be easier to maintain the statutory liquidity ratio (SLR) with the Central Bank.[23] *Shariah*-based banks and financial institutions have more than 45 per cent of the excess liquidity

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[20] Theodore Karasik, Frederic Wehrey and Steven Strom, 'Islamic Finance in a Global Context: Opportunities and Challenges Symposium: Islamic Business and Commercial Law' (2006) 7 *Chicago Journal of International Law* 379, 380.

[21] The Financial Express, 'Investment Sukuk: A Bangladesh Perspective' (*The Financial Express*) <https://today.thefinancialexpress.com.bd/27th-anniversary-issue-2/investment-sukuk-a-bangladesh-perspective-1606037593> accessed 17 February 2021.

[22] Zamir Uddin, 'Sukuk Era Begins' *The Daily Star* (Online, 29 December 2020) <https://www.thedailystar.net/business/news/sukuk-era-begins-2018825> accessed 17 February 2021.

[23] Zamir Iqbal and others, *The Stability of Islamic Finance: Creating a Resilient Financial Environment for a Secure Future* (John Wiley & Sons 2010) 46. <http://ebookcentral.proquest.com/lib/unimelb/detail.action?docID=822431> accessed 2 February 2021.

in the country's banking sector. Whereas, conventional banks have the opportunity to invest in a variety of instruments for liquidity management, but *Shariah*-based banks and financial institutions have not. As a result, most of their liquidity remains unused. Through the *Sukuk* issue, the liquidity of these banks and financial institutions can be spent on various development projects of the government and creating alternative investment opportunities for *Shariah*-compliant institutions as well as using the *Sukuk* as an SLR.[24]

b. Regulatory Management Benefits of Bangladesh Bank*:* Bangladesh Bank as the central bank has been able to implement its repo and reverse repo activities with conventional banks but the regulator was facing difficulties to do so with Islamic banks. As a result, the central bank had to rely on conventional banks to implement monetary policy. In the wake of issuance of '*Sukuk*' bond, Bangladesh Bank will be able to complete such activities with Islamic Banks as central regulatory bank of the country.

c. Potentials of greater Investment by Muslim community : Muslim community want *Shariah*-compliant instruments for investment instead of interest-based product as per guidance of Islamic *Shariah* and principles. *Sukuk* is an interest-free Islamic bond and its risk/profit sharing feature is compatible with Islamic principles of economic and financial transactions. Due to its features and characteristics, it is expected that Muslim community would be more interested for greater investment in *Sukuk* .

As mentioned above, there are many opportunities for *Sukuk* bond issue in Bangladesh. However, the biggest opportunity in this case may be that the issue is to be listed on the stock market. Because by being listed, an investor can withdraw the investment whenever he needs money by selling the instrument. According to the Finance Department of Bangladesh government, the share of *Shariah*-compliant banks in the entire banking system is about 25 percent. However, there is no *Shariah*-compliant instrument to finance the government's deficit by the Islamic banks. As a result, on the one hand, financial institutions are deprived of the opportunity to invest in a more secure sector. On the other hand, the government cannot use the funds of Islamic financial institutions to finance

[24] Express (n 21).an Islamic equivalent of bonds, is a certificate representing ownership in tangible assets or the assets of particular project or special investment activity. As opposed to conventional bonds, which merely confer ownership of a debt, Sukuk grants the investor a share of an asset, along with commensurate cash flows and risk.Thus, the primary condition of issuance of Sukuk is the existence of assets on the part of the issuer which may be the government corporate entity, banking and financial institutions or any entity which wants to mobilse financial resources. Identification of suitable assets is the first and arguably the most integral step in the process of issuing Sukuk certificates.These authors have made an attempt to describe the mechanics of Sukuk, their structure with particular focus on regulatory framework for sukuk issuance in Bangladesh.Definition: Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI).

its deficit. The finance department says the government's interest expenditure will also be reduced if deficit financing is done through *sukuk*.[25]

4. Challenges and Limitations of *Sukuk* Market

Sukuk market has significant potentials to thrive in the immediate Islamic financial market of Bangladesh, however, the market here is in its just beginning phase. *Sukuk* has raised a variety of practical and legal challenges pertaining to the governing structure that designed to regulate it. The most prominent challenges of them are as follows:

4.1 Limitation as to Operational Strategy

The first challenge is our overall lack of understanding of *Sukuk* and the lack of technical strategy capabilities. The deficits are not from the conceptual stage, but from the operational stage. The problem is that any kind of product in the Islamic financial system is developed following the conventional product. As a result we become imitators. It can be called mimicking industry.[26] For example, Islamic banking products are made by imitating traditional banking loan products. They are, of course, products of Islamic banking, but the structures they follow often do not achieve the larger goals of *Shariah*.

4.2 Insufficient Bond Issue

The *Sukuk* market has insufficiency in terms of frequent and high-quality sovereign issue. The Absence of adequate and high-quality sovereign issue is causing failure to play its important role for the development of all capital markets. Due to this failure of role play, *Sukuk* is becoming unable to build a benchmark yield curve for the market. That is why, it becomes difficult for other issuers and investors to assess the Islamic bond market confidently.[27]

4.3 Limited Viability for Small Scale and Short-term Fund Raising

Sukuk is usually connected to a specific real asset, rather than to a pool of assets like securitization. This model can be viable for sovereign or multinational borrowers who have large scale assets to securitize, but poses hardship for institutions that want to raise capital on a smaller scale. Furthermore, *Sukuk* issued against *salam* or *murabahah* contracts cannot be traded in secondary markets. The majority of Islamic Banks hold a large portion of assets that can be securitized, but so far no Islamic commercial bank can issue *Sukuk*, mainly due to the lack of large-scale assets or the holding of short term *salam* or *murabahah*- based assets. Islamic

[25] 'Sukuk Era Begins' (n 22).

[26] Abdul Karim Aldohni, 'A Compatibility Analysis of Islamic Financial Disputes: English International Law and Islamic Law' (2019) 14 *Journal of Comparative Law* 218, 220.

[27] Iqbal and Mirakhor (n 18) 198.

banks can utilize the securitization process to take the assets off their balance sheets in order to improve the liquidity of their current portfolios. The challenge is to develop *Sukuk* based on pools of heterogeneous assets with varying tenure and various credit qualities.[28]

4.4 Conformity with International Interest Rate Benchmark

A notable criticism relating to the Islamic bond *Sukuk* is that its floating rate are usually closely connected with the global interest rate benchmark such as the London Inter Bank Offer Rate (LIBOR). That's why, when it comes to pricing, it competes directly with the conventional bonds in the level of relative spreads. Conventional borrowers think that there is no inherent reduced cost advantage from tapping into *Sukuk* market as because terms of *Sukuk* are mostly derived from competitive pricing level of conventional bond market.[29] In reality, they consider conventional bond market are more liquid and cheaper than *Sukuk* bond. Therefore, borrowers need to formulate a long-term and strategic approach about the various ways of reducing the overall funding cost by tapping into Islamic markets, rather than focusing on a single transaction.

4.5 Lack of Appropriate Legislative and Regulatory Framework

Despite there is a good demand for Islamic product Sukuk, Bangladesh still lacks appropriate legislative and regulatory framework to reasonably meet the expected level of issuance and trading of *sukuk*. Bangladesh has adopted regulation to accommodate needs of Islamic bond *sukuk* within its domestic market structure, however, style of operation and execution of *sukuk* as envisaged in the regulation is not efficient enough to motivate the players in the market. It has raised important technical and regulatory issues which are creating obstacles to the smooth issuance and trading of the *sukuk* bond. For example, the only *sukuk* bond floated in Bangladesh is ijarah *sukuk* which requires the owners of operating assets to execute a leasing transaction. While government of Bangladesh and their related public sector bodies are generally the owner of operating assets, some domestic laws and regulations in relevant sectors have prohibitory provisions which prevent public sector bodies to pledge or lease assets required to structure the transaction.[30]

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[28] ibid.

[29] Hossein Askari, Zamir Iqbal and Abbas Mirakhor, *Globalization and Islamic Finance: Convergence, Prospects and Challenges* (John Wiley & Sons, Incorporated 2009) 30. <http://ebookcentral.proquest.com/lib/unimelb/detail.action?docID=822430> accessed 2 February 2021.

[30] Mohammad Kabir Hasan and Mufti Abdullah Masum, 'Comments on Sukuk Prospectus' (7 January 2021) <https://bonikbarta.net/home/news_description/252410/> accessed 14 April 2022.

4.6 Lack of Credibility in Market Structure and Practices

Due to difficult circumstances and practices of market abuse surrounding capital market, i.e., price manipulation, front running, insider trading, blank selling, Bangladesh do not have a good reputation among foreign investors. Foreign investors and borrowers feel themselves vulnerable to market abuse and less confident about the credibility of the trading market of *Sukuk* bond.[31]

4.7 High Cost of Sukuk Process

Since *Sukuk* is based on collateralized cash flows, its funding should be relatively cheaper. However, there are certain factors which in reality increase the cost of *Sukuk* process. The issue of bond *Sukuk* often encounters a competitive disadvantage and hardship in cost-effective terms.[32] For example, all kind investors of *Sukuk* have the tendency to hold *Sukuk* till maturity due to deficiency of quality bond issue in *Sukuk* market. This results in low level activity in stock market and almost no secondary market in most *Sukuk* issues which eventually reduces liquidity and increases transaction cost of *Sukuk* by the way of high bid-ask spreads. Besides, there are some intermediation cost of *Sukuk* process which happen specifically when conventional banks co-lead with Islamic bank by taking a larger share of fees. It should be mentioned that a conventional investment bank generally not intend to invest its time and effort to promote small-scale and short-tenured *Sukuk* in the local market. It appears that *Sukuk* process cost includes cost of financing itself, cost of time for management and organization, and the necessary documentation thereof. The provision of administrative and human capabilities for the issuance of *Sukuk* also create a huge financial burden. Additionally, monitoring cost of *Sukuk* process is also high. In the absence of specific legal legislation governing detailed structure process of *Sukuk*, the high cost of putting into *Sukuk* bond in the market is creating real obstacle for Islamic banks to enter into the area of *Sukuk* market as efficient issuer.[33]

4.8 Small-size Islamic Banks

The small size of Islamic banks and its short-term financing activities generally constitutes hardship to advance its development in compliance with *Shariah*. Besides, there are lack of experienced human resources regarding the mechanism of Islamic financing to ensure harmonization of *Sukuk* bond in compliance with *Shariah*.[34]

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[31] Iqbal and Mirakhor (n 18) 203.

[32] ibid 198.

[33] Khalid Ibrahim Talahma, 'Islamic Bonds (Sukuk): Opportunities and Challenges' (2015) 15 *Asper Review of International Business and Trade Law* 391, 420.

[34] ibid 419.

4.9 High Monitoring Cost

It is to be mentioned that *Sukuk* process has not been yet got rid of the necessity of monitoring cost to select agents with required competence and credentials. With a view to obtain a contract on favourable terms, borrowers of *Sukuk* market sometimes exaggerate their competence and ability during the application process. The cost reduction of monitoring system about *Sukuk* process generally results in adverse selection and wrong choice of borrowers. In order to avoid adverse selection, investors required to play crucial role in terms of monitoring the selection process of borrowers to ensure actual performance on behalf of borrowers as per required terms and manners. Investment bank must exercise due diligence and provide a transparent execution of *Sukuk* deal.

4.10 Problem of Complexities as to Structure

The problem of sophistication within the structure of *Sukuk* is one of the prominent challenges to the promotional activities of this market. The necessity of these *Sukuk* bonds to be in compliance with principles of *Shariah* and with market structured practices has created specifically sensitive and complex set of cash flows and prospectus even for a simple type of *Sukuk*. Due to being a highly complex structured product, it becomes challenging to assess its market value and in the event of default, the unwinding process becomes complex as well. The problem of complexities as to *Sukuk* structure is creating hindrances for spontaneous participation of both investors and issuers.[35] The lack of universal interpretations and uniformity of standards as *Sukuk* structure across different jurisdictions are creating further challenges for the aspired growth of *Sukuk* market.[36] The structures that are regarded as acceptable in one domestic market might have the possibility of not getting equal acceptability in other jurisdictions due to the divergence in interpretations and conflicts of different Fatwa standards. In this regard, the most illustrious example of this divergence in interpretations and standards is the difference between structures that are accepted as tradable in Malaysia and those that can be traded in most Golf countries. This type of absence of universal uniformity is restricting the depth of the market for any specific *Sukuk* issue.[37]

5. Loopholes in the Existing Legal Framework of *Sukuk*

On 23 December 2020 Bangladesh Bank published the first ever prospectus to raise Tk 8,000 crore through the issuance of the *Sukuk* to implement a safe water supply project under the 'Bangladesh Government Investment *Sukuk* Guidelines, 2020' (BGISG). The following part discusses some loopholes of the BGISG in the light of the published prospectus under the following heading:

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[35] Iqbal and Mirakhor (n 18) 199.

[36] Talahma (n 33) 418.

[37] Iqbal and Mirakhor (n 18) 198.

5.1 Lack of Transparency in Shariah Advisory Committee

Rules of procedure of the *Shariah* advisory committee is not mentioned in the guideline. The guideline proposes that the constitution of the *Shariah* Advisory committee and its tenure is determined by Bangladesh Bank.[38] As per the mandate of the guideline, Bangladesh Bank can also work as a SPV. So, the *Shariah* Advisory Committee might not act independently under the umbrella of central bank.

5.2 Mandatory Advice from Shariah Board:

The purpose of forming a *Shariah* Board is to ensure *Shariah* compliance of *Sukuk*. And for this, it is essential to take the advice of the *Shariah* Board. But the issue of this obligation to take advice from the *Shariah* board is missing in the published guidelines. Moreover, when and how the advice may be taken is not stipulated in the guideline. Rather, rule 15 states that any reorganization, change or termination of *Sukuk* must be carried out with the proper approval of the Trustee, the *Shariah* Advisory Committee and the Originator. But terms and conditions of *Sukuk* can also be changed for *Shariah* purposes. So, it is not desirable that *Shariah* compliance is dependent on the opinion of others.

5.3 Lack of Certainty as to the Disposal of Principal Amount

According to rule 10(3) of the guideline, the profit of each *Sukuk* will be paid on the terms described in the prospectus and the purchase price of *Sukuk* will be payable on maturity. *Sukuk* is not a bond. Unlike bonds, the principal amount cannot be guaranteed by the originator at the outset. Therefore, the matter should be clarified in the guideline. The return of principal amount is also mentioned in the rule 12(3)(4). Rule 13(7) states that 'at the expiration of the term, the *Sukuk* assets shall be transferred from the SPV to the originator in the price and manner specified in the prospectus'. One of the recognized principles of *Sukuk* instrument is that no security or assurance of principal amount can be provided for *Sukuk* holders. They will only get the real value of the underlying asset at the end of the tenure. It can be more or less than its face value. But the policy adopted in the guideline is that the originator will receive *Sukuk* assets at a price stated in the prospectus, not according to the real value at the time of termination. It implies that the regulation is guaranteeing the original capital to be paid to the *Sukuk* holders. So, if the project suffers a loss, the originator will be obliged to refund the predetermined value as stated in the prospectus.

Therefore, this feature resembles to the traditional bond. AAOIFI *Shariah* Standard no. 17 clearly states that "It is not permissible for the issuer to undertake

[38] Bangladesh Government Investment Sukuk Guidelines, 2020 ss 3,4.

to purchase the *Sukuk* at their nominal value".[39] The Bangladesh guideline adopted the AAOIFI *Shariah* Standard as guiding principles.[40] Therefore this feature is contradictory with *Shariah* principles. There must be a risk-gain relationship between the *Sukuk* holder and the issuer. If the profit goes down then the income of the *Sukuk* holder will come down. Then *Sukuk* holders will get less return. But asset-based *Sukuk* depends on the guarantor's capacity. If the government itself guarantees a return on government projects, it turns into interest. However, the government can provide third party guarantee for the financing of private sector projects.

5.4 Conflict of Interest

It appears from the prospectus issued by Bangladesh bank that the officers of the debt management department of Bangladesh Bank are simultaneously issuers and trustees. One of the notable features of *Sukuk* is that it is operated through trust. The role of the trustee is to protect the interest of the *Sukuk* holders. Debt management department will perform the regulatory role other than the role of trustee. But 50 percent of the trustees are is held by the issuer.[41] Not only is that, the chairman of *Shariah* Board, which is a more important position is also an official of debt department. Overlapping appointments like this can create a clear 'conflict of interest'.[42] It is doubtful how far it will be possible for the trustees and the *Shariah* Board to act independently. Similarly, the issuer and the SPV are identical. It also does not go with the international standard of *Sukuk* infrastructure.

5.5 Certainty as to the Determination of Sukuk Asset

In the recently issued prospectus *Sukuk* asset has been described as "Ownership of existing and future asset including usufruct under the project "Safe Water Supply to the Whole Country" of Government."[43] It is not clear from the prospectus that what are the nature and feature of the asset. There is no direction in the regulation as to how to determine the *Sukuk* asset and what are the criterion of those assets are.[44] It is essential to decide on the asset of the *Sukuk* as the price of *Sukuk* is dependent on it. In addition, the future asset is also shown here as an underlying asset, which was not clarified in the prospectus. The process of asset acquisition is not at all transparent in the official *Sukuk* prospectus. It is a basic condition for a lease agreement that the leased assets must be specified and not forbidden under

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[39] 'Accounting and Auditing Organization for Islamic Financial Institutions' (n 13) ss 17, 5/2/2.

[40] Bangladesh Government Investment Sukuk Guidelines, 2020 ss 2(18), 3(e).

[41] 'Prospectus: The Offer of Ijarah Sukuk' <https://www.bb.org.bd/mediaroom/notice/sukuk_prospectus.pdf> accessed 14 February 2021.

[42] Hasan and Masum (n 30).

[43] 'Prospectus: The Offer of Ijarah Sukuk' (n 41).

[44] Hasan and Masum (n 30).

the *Shariah*[45]. We can make a list of what assets we can use for *Sukuk* and what we cannot. We can monetize existing assets to issue *Sukuk* or use future assets. *Sukuk* assets must be transferred to the SPV at a fair value or a value reasonably close thereto. If there is no actual sell contract between the SPV and the originator, it will not be *Shariah* compliant instrument.

5.6 Necessity of Credit Rating of Sukuk is Absent in the Regulation

Credit rating is essential for the effective functioning of the *Sukuk* market. But the guideline does not provide any provision for credit rating of the *Sukuk*.

5.7 Prospectus is Not Detailed

A detailed outline of the proposed *Sukuk* infrastructure must be discussed in the *Sukuk* prospectus. Investors always take their investment decisions on the basis of the information stated in the prospectus. But the guideline does not provide any specific stipulation regarding the content of the prospectus. As for example, rule 13(3) of Bangladeshi *Sukuk* guideline states that the *Sukuk* assets acquired by the *Sukuk* sale proceeds will be used in the manner described in the prospectus. But unfortunately, the prospectus did not outline in detail about this matter. Standard form of the prospectus must be included in the guideline.

5.8 Absence of Approval Process by Shariah Advisory Committee

Since *Sukuk* is a *Shariah* compatible instrument, every aspect of the instrument should be endorsed by the *Shariah* advisory committee. The regulation of Bangladesh also mandates this fact.[46] But the process of approval and the timeframe are not mentioned in the regulation. Clear cut and simplified approval process of *Shariah* advisory committee is necessary for the smooth operation of the *Sukuk*.

5.9 All other Regulatory Approvals and Compliance with Relevant Laws and Guidelines

Tax planning and legal analysis of tax implications, registration of the instrument remain crucial for *Sukuk*.[47] Law of taxation, Company law and Trust laws need to be tailored in such a way to ensure the development of Islamic finance infrastructure, proper valuation of *Sukuk* assets and proper discipline. An issuer and its adviser must ensure that the issue, offer or invitation to subscribe or purchase *Sukuk* has

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[45] AAOIFI (n 13) ss 9, 3/1.

[46] Bangladesh Government Investment Sukuk Guidelines, 2020 s 3.

[47] Ayman H Abdel-Khaleq and Christipher F Richardson, 'New Horizons for Islamic Securities: Emerging Trends in Sukuk Offerings Symposium: Islamic Business and Commercial Law' (2006) 7 *Chicago Journal of International Law* 409, 418.

complied all the relevant financial guidelines of Bangladesh Bank, relevant laws like company act, income tax act. There is no such provision in the guideline to meet the requirements of other laws of the land. But this must be expressly mentioned in the regulation.

5.10 Lack of Coordination Among the Regulators

Sukuk is a capital market instrument. But Bangladesh Securities and Exchange Commission (BSEC) is not at all involved in any issues of the existing *Sukuk*. BSEC, Ministry of finance and Bangladesh Bank must act jointly to device the effective mechanism of *Sukuk* in Bangladesh. All the experts of concern departments have to work together.

5.11 Absence of Islamic Financing Law

Islamic banks are being considered with procedural importance in the overall economic infrastructure of Bangladesh. But there is no specific Islamic banking or financing law yet, it is being managed or regulated through various regulations and circulars of Bangladesh Bank. Since we have no exhaustive law regarding Islamic finance, *Sukuk* holders might be deprived from any effective and efficacious remedy in case of any default or manipulation.

5.12 Amendment of the Terms of Condition of the Sukuk

During the lifetime of the *Sukuk*, sometimes it is necessary to amend or reconstruct the terms and conditions of the *Sukuk* instrument. Art 15 of the *Sukuk* guideline of Bangladesh allows the amendment, reconstruction and termination of the *Sukuk* with the prior approval of the trustee, Shariah advisory committee, and originator. But the amendment procedure and the criterion of an amendment has not been mentioned in the guideline.

5.13 Lack of Trading Facility of Sukuk in the Capital Market

Sukuk may be traded in the capital market with certain limitations imposed by the securities laws. In Bangladesh, the securities market has considerable scope for expansion and attract foreign investment. *Sukuk* can be used as a fund diversification instrument to support the securities market and boost allocation of funds to the government and private enterprises. Bangladesh has recently introduced Alternative Trading Board (ATB) which will create opportunities for institutions to invest in unlisted companies, bonds, debentures, *Sukuk*, open-end mutual funds, and alternative investment funds subject to the prescribed conditions. But the government is yet to formulate detailed policies and rules to enable ATB to function in handling the trading of *Sukuk.*[48]

[48] 'Alternative Trading Board Needs Clear Policies, Guidelines' (*The Business Standard*, 28 July 2020) <http://tbsnews.net/economy/stock/alternative-trading-board-boost-investments-smes-speakers-112711> accessed 17 February 2021."plainCitation":"'Alternative Trading Board Needs Clear Policies, Guidelines' (The Business Standard, 28 July 2020).

5.14 Absence of Dispute Resolution Mechanism

The *Sukuk* guideline does not provide for any dispute resolution mechanism in case of any default of the Islamic bond *Sukuk.* Hence, recourse to the protection of the investors is absent in the existing guideline.

6. Recommendations

After issuing the first *Sukuk* the Bangladesh government can start doing homework on the basis of its experience. Bangladesh should develop a well responsive regulatory and supervisory framework for *Sukuk* which will fine tune the existing rules to facilitate its development. In other words, for banking purposes *Sukuk* need to be regulated in such a way where the product can fit nicely into prevalent type of conventional banking transactions. To develop a locally relevant regulatory regime this research paper focuses on the regulatory structure of *sukuk* in Malaysia. Malaysia is the global leader in *Sukuk* market with its comprehensive *Sukuk* regulations, policies and best practice guidelines. Malaysian experience can be the perfect fit for Bangladesh to develop a sophisticated system to regulate *Sukuk* bond in Bangladesh. Taking into account the Malaysian practices and experiences relating to Islamic product *Sukuk* the possible action of Bangladesh to promote market structure, legislative and regulatory framework pertaining to *Sukuk* are analyzed as follows:

6.1 Credit Rating of Sukuk Issue must be Mandatory

Credit rating is essential for the effective functioning of the *Sukuk* market. Credit rating is an important process because the rating alerts the investors to the bond's quality and stability. High credit rating gives assurance to the investors about the safety of the *Sukuk* and minimum risk of default. Malaysian legislation requires that all *Sukuk* must be rated by a rating agency.[49] Chapter 9 of the Malaysian Guideline on *Sukuk* deals with rating requirement and articulates detail provision on appointment of credit rating agency. A *Sukuk* with high rating can attract a large group of investors. But we should keep it in mind that we must not ignore the core *Shariah* ingredients to satisfy the credit rating agencies. So, the Bangladesh guideline must make credit rating mandatory for *Sukuk* issuance.

6.2 Detailed Amendment Procedure

Amendment, reconstruction and termination procedure must be explicitly ascertained to secure clarity and consistency. Principal terms and conditions must not be allowed to alter because these alterations might change the nature of the instrument.[50] Malaysian guideline provides specific rules as to the revision of

[49] 'Guidelines on Sukuk(Malaysia) 2014' s 9.01 <http://www.shariahlaw.com/files/web_syariah/guidelines/19_SC_sukukGuidelines_140828.pdf> accessed 19 May 2022.

[50] ibid 17.01, 17.02.

profit rate and maturity date. Any change to the *Sukuk* asset must be done on business perspective considering the interest of the *Sukuk* holders.

6.3 Independent Shariah Advisory Committee

Sukuk is totally a *Shariah* instrument. So, emphasis should be given to the observance of *Shariah*. But, it seems that the Bangladesh guideline lacks *Shariah* compatibility in some aspects. The guideline only provides for *Shariah* advisory committee, but it does not provide for "*Shariah* Supervisory Committee." There is a small difference between 'advisory' and 'supervisory' committee regarding their privileges and status. Advisory committee can only provide advice regarding the issuance *Sukuk* and Islamic securities.[51] But they cannot supervise the activities of the *Sukuk* issuers, originators or the SPVs. So, there is no national supervisory authority regarding the compliance of *Shariah* guidelines. Again, the Courts of Bangladesh are not bound to follow the instruction of *Shariah* Council. But *Shariah* compliance issue cannot be compromised in any way. In 1997, Bank Negara Malaysia constituted The *Shariah* Advisory Council on Islamic finance (SAC) to ascertain *Shariah* law for the purpose of Islamic financial business in Malaysia. Rulings issued by the SAC has binding force in Court and Arbitration proceedings.[52] The independence of *Shariah* advisory committee is essential to ensure compliance with different issues of *Shariah* regarding *Sukuk*. In order to ensure transparency and independence, Bangladesh Bank must not be vested with the responsibility of forming *Shariah* Advisory Board, since they can also be the SPV. The government should have a separate and independent National *Shariah* Supervisory Board like Malaysia, who will be responsible for the formation of *Shariah* supervisory board for the government *Sukuk* consisting of the country's wise scholars. Moreover, its infrastructural control will also be under that National *Shariah* Board. No government agency will be directly involved in it.

6.4 Making a Pool of Shariah Advisors:

The person with necessary qualification and experience of banking sector need to be appointed in the *Shariah* board in order to effectively tackle practical issues thrown up the operation of Islamic banking and finance sector of *Sukuk*. Guidelines on *Sukuk* 2014 specify that Malaysia has pool of *Shariah* advisers registered according to the *Shariah* advisers Guidelines. There are provision on the appointment of *Shariah* advisors in chapter 5, which provides clarity on the role of *Shariah* advisors about the *Sukuk.* Following the instance of Malaysia, Bangladesh can also formulate a guideline to make a pool of registered *Shariah* advisers. *Shariah* advisers must be capable of religious audit taking into account Islamic legal precepts and principles to ensure that *Sukuk* is not violating the same.

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[51] Bangladesh Government Investment Sukuk Guidelines, 2020 s 2(17), 3.

[52] 'Overview | Shariah Advisory Council' <https://www.sacbnm.org/?page_id=3351> accessed 17 February 2021.

6.5 Greater Disclosure of Material Information

To gain the investors' confidence, it is necessary to deal with the default criterion of *Sukuk* in a clear and transparent manner. Asset-based *Sukuk* prospectus provides limited disclosures in respect of the underlying assets. Bangladeshi Guideline does not provide any specific provision for disclosure, due diligence and clarity with respect to information about the rights of investors and the underlying asset in case of default. Malaysian guideline categorically identifies the material information to be disclosed.[53] The originators of *Sukuk* need to specify the material information in the prospectus so that investors can make an informed choice on what is being offered and what they are buying.[54]

6.6 Human Resource Development for Sukuk

Sukuk industry also requires professionals who have the necessary know-how and understanding regarding *Sukuk* instruments. Human resource development in Islamic finance remains one of the vital challenges faced by the *Sukuk* market.[55] The training and development of professionals are essential in modelling the future of a state-of-the-art *Sukuk* market. Islamic scholars and academics must be involved in formulating the *Sukuk* framework. A bunch of new and enterprising talented experts need to be created or evaluated, who are well versed in Islamic customs and laws, have a detailed idea of other conventional financing, and apply merit in a useful coordination. Having an Islamic background does not mean that they have specialize knowledge in Islamic finance jurisprudence. We need to increase the capacity of our policy makers, judges, legislators. Those who are involved in Islamic banking they must increase their capacity.

6.7 Sukuk Must be Included in the Monetary Policy

Malaysia is keen to develop their Islamic capital market, but their policy making at macroeconomic level remains conventional. Still the government is dependent on debt-based instrument to execute monetary policy. To introduce Islamic Capital Market, the government must accommodate risk sharing instruments like *Sukuk* in their monetary policy.[56] Bangladesh must also create enabling legislation to allow *Sukuk* to be traded in the capital market. While formulating monetary policy the central bank can into consideration the prospect of *Sukuk* in the economy of Bangladesh.

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[53] 'Guidelines on Sukuk(Malaysia) 2014' (n 49) ch 16.

[54] Fara Mohammad, 'Greater Disclosure Required in the Sukuk Industry' (2010) 25 *Journal of International Banking and Financial Law* 258, 2.

[55] Younes Soualhi, 'Bridging Islamic Juristic Differences in Contemporary Islamic Finance' (2012) 26 *Arab Law Quarterly* 313, 325.

[56] Askari, Iqbal and Mirakhor (n 11) 99.

6.8 Awareness Activities for Sukuk

This is natural that people are reluctant to invest in an instruments which are not widely circulated and those which are not familiar to him. Misconceptions, misunderstandings, and misinformation related to Islamic finance need to be eliminated through awareness and dissemination of accurate information. Bangladesh Bank, Issue managers and stock exchanges can arrange road shows to publicize information about *Sukuk.*

6.9 Dispute Resolution Mechanism

A Dedicated commercial court is essential to deal with legal disputes pertaining to Islamic banking and finance. Bangladesh needs to establish a highly organized and detailed dispute resolution forum to facilitate easy and accessible resolution of disputes relating to Islamic banking and finance. Rule 4(3)(d) of Bangladeshi *Sukuk* guideline empowers the trustees to follow the laws of the land to settle any dispute. Guideline does not provide any dispute resolution mechanism if there is a dispute among the parties to the *Sukuk*. Since *Sukuk* is a *Shariah* product all the conventional court are not well equipped to deal with the disputes involved with *Sukuk*. In 2003 Malaysia has established a dedicated Court within the monetary jurisdiction of the High Court to deal with all the Islamic Finance related matters.[57] Apart from the traditional court based litigation system Malaysia has introduced Alternative Dispute Resolution(ADR) to resolve financial disputes. Malaysia has formed a scheme named Financial Ombudsman Scheme(FOS) under the authority of Islamic Financial Services Act, 2013. The FOS is considered as a ground breaking formula for Malaysia in handling the disputes between the Islamic financial service providers and their customers. Bangladesh can also introduce alternative dispute resolution mechanism like mediation, arbitration to settle the financial disputes more effectively.

6.10 Law Review Committee

Bangladesh bank can set up a law review committee to look at other jurisdictions and experience to effectively integrate *Shariah* principles into domestic banking and financial laws and regulations. Bangladesh Bank must engage Ministry of Law, Ministry of Finance, National Board of Revenue, Securities and Exchange Commission, Law Commission, and prominent *Shariah* scholars to formulate a comprehensive legal framework of Islamic banking and finance in Bangladesh.

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[57] Mohammad Zawawi Salleh and Mohammad Johan Lee, 'Thirty-Five Years of the Malaysian Judiciary Adjudicating Islamic Finance Matters' (2020) 32 (Special Issue) *Singapore-Academy-of-Law-Journal* 41, 383.

6.11 Standardization of Legal Framework

Bangladesh is a common law country. *Shariah* law is also applicable in personal rights. Introducing a new product like *Sukuk* might be difficult and costly because of the diversity in the existing legal system and multifarious compliance requirements. Coordinated efforts are needed to adopt a standardized and harmonized legal framework regarding Islamic banking and financing.[58]

7. Conclusion

As illustrated in the above mentioned sections, it is evident that Bangladesh still lags behind to adopt a comprehensive governing mechanism relating to effective and efficient operational management of *Sukuk*. In order to accommodate all segment of possible investors who might seek to engage with the Islamic bonds framework, Bangladesh needs to undertake a comprehensive review of its legal framework to introduce "locally relevant financing system" for *Sukuk* bond taking into account the existing conditions of capital market features, tax policies and the principles of Islamic financing system in order to narrow down *Shariah* differences, stabilize the market and increase the confidence upon *Sukuk* bond. It needs to undertake coordinated and conducive initiatives to standardize its legal systems with the aim of removing vagueness, potential flaws, defects and conflicting visions regarding the transaction status and operational framework of *Sukuk*.

The extent of Islamic finance in Bangladesh is about 25 percent of the total banking sector and its annual growth rate is about 14 percent.[59] In addition, compared to the conventional banking sector, the rate of return on equity is higher in Islamic finance and the amount of defaulted loans is also comparatively less. It indicates the immediate operational market of *Sukuk* certainly looks promising. Therefore, Bangladesh should devise a detailed, stage-by-stage description of operational and management of *Sukuk* transaction which would ultimately strengthen newly introduced Islamic bond to make significant contribution to the sustainable economic growth.

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[58] Iqbal and Mirakhor (n 18) 203.

[59] Express (n 21).an Islamic equivalent of bonds, is a certificate representing ownership in tangible assets or the assets of particular project or special investment activity. As opposed to conventional bonds, which merely confer ownership of a debt, Sukuk grants the investor a share of an asset, along with commensurate cash flows and risk.Thus, the primary condition of issuance of Sukuk is the existence of assets on the part of the issuer which may be the government corporate entity, banking and financial institutions or any entity which wants to mobilse financial resources. Identification of suitable assets is the first and arguably the most integral step in the process of issuing Sukuk certificates.These authors have made an attempt to describe the mechanics of Sukuk, their structure with particular focus on regulatory framework for sukuk issuance in Bangladesh. Definition: Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI).

The sustainable growth of Islamic banking and finance largely depends on the easy accessibility for the users and wider acceptance of potential investors and issuers. Although Bangladesh regulatory regime of *Sukuk* has embraced the fundamental aspects of Malaysian regulatory regime of *Sukuk,* it lacks some clarity and certainty about the appointment of supervisory committee, standardized application forms, prospectus and process of *Sukuk*. The formations and roles of the trustee to protect the interest of *Sukuk* holders are also not following the best practices of other jurisdictions like Malaysia. In this regard, the next immediate step should be to develop a specific, intelligible, and technical regulatory framework of *Sukuk* transactions to reduce complexities of *Sukuk* structure, process and its management thereof.

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Corr v IBC Vehicles Ltd [2008] UKHL 13, [2008] 1 AC 884.

R (Roberts) v Parole Board [2004] EWCA Civ 1031, [2005] QB 410.

Page v Smith [1996] AC 155 (HL).

When pinpointing, give paragraph numbers in square brackets at the end of the citation. If the judgment has no paragraph numbers, provide the page number pinpoint after the court.

Callery v Gray [2001] EWCA Civ 1117, [2001] 1
WLR 2112 [42], [45].

Bunt v Tilley [2006] EWHC 407 (QB), [2006] 3
All ER 336 [1]-[37].

R v Leeds County Court, ex p Morris [1990] QB
523 (QB) 530-31.

If citing a particular judge:

Arscott v The Coal Authority [2004] EWCA Civ 892, [2005] Env LR 6 [27] (Laws LJ).

Statutes and statutory instruments

Act of Supremacy 1558.

Human Rights Act 1998, s 15(1)(b).

Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004, SI 2004/3166.

EU legislation and cases

Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1, art 5.

Case C-176/03 *Commission v Council* [2005] ECR I-7879, paras 47-48.

European Court of Human Rights

Omojudi v UK (2009) 51 EHRR 10.

Osman v UK ECHR 1998-VIII 3124.

Balogh v Hungary App no 47940/99 (ECHR, 20 July 2004).

Simpson v UK (1989) 64 DR 188.

Secondary Sources

Books

Give the author's name in the same form as in the publication, except in bibliographies, where you should give only the surname followed by the initial(s). Give relevant information about editions, translators and so forth before the publisher, and give page numbers at the end of the citation, after the brackets.

> Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985) 268.
>
> Gareth Jones, *Goff and Jones: The Law of Restitution* (1st supp, 7th edn, Sweet & Maxwell 2009).
>
> K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998).

Contributions to edited books

> Francis Rose, 'The Evolution of the Species' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006).

Encyclopedias

> *Halsbury's Laws* (5th edn, 2010) vol 57, para 53.

Journal articles

> Paul Craig, 'Theory, "Pure Theory" and Values in Public Law' (2005) 12(5) *Public Law* 440. (adopted preferred form)

When pinpointing, put a comma between the first page of the article and the page pinpoint.

> JAG Griffith, 'The Common Law and the Political Constitution' (2001) 117 LQR 42, 64.

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Online journals

> Graham Greenleaf, 'The Global Development of Free Access to Legal Information' (2010) 1(1) EJLT <http://ejlt.org//article/view/17> accessed 27 July 2010.

Command papers and Law Commission Reports

Department for International Development, *Eliminating World Poverty: Building our Common Future* (White Paper, Cm 7656, 2009) ch 5.

Law Commission, *Reforming Bribery* (Law Com No 313, 2008) paras 3.12-3.17.

Websites and blogs

Sarah Cole, 'Virtual Friend Fires Employee' (*Naked Law*, 1 May 2009) <www.nakedlaw.om/2009/05/index.html> accessed 19 November 2009.

Newspaper articles

Jane Croft, 'Supreme Court Warns on Quality' *Financial Times* (London, 1 July 2010) 3.

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